KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 108**

Date: **2025 07 23**
File No.: CRM-RG-00416-2024
Judicial Centre: Regina

BETWEEN:

HARSHARAN SINGH JOSAN

APPELLANT

- and -

HIS MAJESTY THE KING

CROWN/RESPONDENT

Counsel:

Linh Pham	for the appellant
Patrick Malone	for the Crown/respondent

DECISION — ROBERTSON J.
July 23, 2025

Contents **Paras.**

I. INTRODUCTION

[1] This decision addresses an appeal against sentence following a plea of guilty to a charge of wilfully causing unnecessary pain to a dog by hitting it, contrary to ss. 445.1(1)(a) of the *Criminal Code*, RSC 1985, c C-46. For the reasons which follow, the appeal is dismissed.

II. BACKGROUND

Charge

[2] On July 19, 2023, the offender, Harsharan Singh Josan, was charged by Information that on or about July 17, 2023, at or near Regina, Saskatchewan, he did wilfully cause unnecessary pain to a dog by hitting it, contrary to ss. 445.1(1)(a) of the *Criminal Code*. The Information originally cited s. 446 of the *Criminal Code*, but was later corrected by amendment. The offender was released on an undertaking to appear in Provincial Court on September 7, 2023.

Provincial Court Appearances

[3] On September 7, 2023, Mr. Pham appeared as lawyer for the offender and waived reading of the charge. The charge was adjourned by consent to be spoken to on October 10, 2023.

[4] On October 10, 2023, Mr. Pham appeared for the offender. The charge was adjourned by consent to be spoken to on October 18, 2023, and again for the same reason to October 30, 2023, and then to November 28, 2023.

[5] On November 28, 2023, Mr. Pham appeared for the offender. The defence was awaiting additional disclosure. The charge was adjourned by consent to be spoken to on December 14, 2023, and from then adjourned again for the same reason to January 11, 2024; to February 1, 2024; to March 5, 2024; and to April 8, 2024, for plea.

[6] On April 8, 2024, Mr. Pham appeared for the offender. There was outstanding disclosure. The charge was adjourned by consent to May 1, 2024, to be spoken to and to allow defence counsel to have discussions with the accused.

[7] On May 1, 2024, Mr. Pham appeared for the offender. The charge was adjourned by consent to May 28, 2024, to set dates for trial.

[8] On May 28, 2024, Mr. Pham appeared for the offender. The charge was adjourned by consent to November 4, 2024, for trial.

Sentencing in Provincial Court

[9] On November 4, 2024, the Crown and defence appeared for trial. The offender, represented by Mr. Pham, pled guilty. The presiding judge heard sentencing submissions.

[10] The Crown proposed a 6-month conditional sentence order followed by 12 months' probation, 30 hours of community service, restitution by payment of $1,994 to the Regina Humane Society for treatment and care of the dog, and an order prohibiting the offender from possessing an animal for five years (Guilty Plea and Sentence Transcript (4 November 2024), T5-T6 [Transcript]).

[11] The defence proposed a 15 to 18-month conditional discharge with similar conditions to those sought by the Crown, except for 80 hours of community service, and a prohibition order from possessing an animal for one year (Transcript, T25).

[12] The judge imposed: a suspended sentence of 12 months with probation conditions; 30 hours of community service; restitution by payment of $1,994 to the Regina Humane Society within 12 months; a victim surcharge payment of $100 within 30 days; and an order under ss. 447.1(1) of the *Criminal Code* prohibiting the offender from possessing an animal for two years (Transcript, T31-T32).

Appeal to the Court of King's Bench

[13] On December 3, 2024, the offender filed an appeal against sentence. The grounds of appeal listed are reproduced below:

Grounds of Appeal

1. The learned trial judge erred in sentencing the Appellant to an excessive sentence, in light of the circumstances of the offence and the offender;

2. The learned trial judge erred by failing to comply with s. 726 of the Criminal Code, resulting in unfairness to the Accused and/or constituting a miscarriage of justice, which led to a demonstrably unfit sentence;

3. The learned trial judge committed an error in principle by placing too much weight on certain sentencing principles, while failing to give adequate weight to other sentencing principles, resulting in an unfit sentence;

4. The learned trial judge committed an error in principle by imposing a sentence that [is] disproportionate to the gravity of the offence and the degree of responsibility of the offender, resulting in an unfit sentence;

5. The learned trial judge committed an error in principle by failing to fully consider all available sentence options, resulting in an unfit sentence; and

6. Such further grounds as counsel may advise and this Honourable Court may allow.

[14] On June 10, 2025, Robertson J. heard the appeal. He reserved his decision.

III. THE LAW

[15] In this part, I will review: the relevant provisions of the *Criminal Code*; principles governing sentence appeals; the public policy behind the animal cruelty provisions of the *Criminal Code*; and sentencing decisions from across Canada. This part concludes with a summary of sentencing principles for animal cruelty offences.

The *Criminal Code*

[16] The *Criminal Code* in ss. 445.1(1)(a) makes it an offence to wilfully cause

unnecessary pain, suffering or injury to an animal.

> **Causing unnecessary suffering**
>
> **445.1(1)** Every one commits an offence who
>
> > **(a)** wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird;
> >
> > …
>
> **Punishment**
>
> **(2)** Every one who commits an offence under subsection (1) is guilty of
>
> > **(a)** an indictable offence and liable to imprisonment for a term of not more than five years; or
> >
> > **(b)** an offence punishable on summary conviction and liable to a fine of not more than $10,000 or to imprisonment for a term of not more than two years less a day, or to both.

[17] Section 447.1 of the *Criminal Code* authorizes the court in sentencing to make an order prohibiting the accused from possessing an animal for any period and to order the accused to pay an animal care organization the reasonable cost of caring for the animal which was the subject of the offence:

> **Order of prohibition or restitution**
>
> **447.1(1)** The court may, in addition to any other sentence that it may impose under subsection 445(2), 445.1(2), 446(2) or 447(2),
>
> > **(a)** make an order prohibiting the accused from owning, having the custody or control of or residing in the same premises as an animal or a bird during any period that the court considers appropriate but, in the case of a second or subsequent offence, for a minimum of five years; and
> >
> > **(b)** on application of the Attorney General or on its own motion, order that the accused pay to a person or an

> organization that has taken care of an animal or a bird as a result of the commission of the offence the reasonable costs that the person or organization incurred in respect of the animal or bird, if the costs are readily ascertainable.
>
> **Breach of order**
>
> **(2)** Every one who contravenes an order made under paragraph (1)(a) is guilty of an offence punishable on summary conviction.
>
> **Application**
>
> **(3)** Sections 740 to 741.2 apply, with any modifications that the circumstances require, to orders made under paragraph (1)(b).

[18] Subsection 813(a)(ii) of the *Criminal Code* allows a defendant to appeal to a summary conviction appeal court against sentence imposed in Provincial Court. Subsection 822(6) authorizes the appeal court to dismiss the appeal or allow the appeal and vary the sentence:

> **Appeal against sentence**
>
> **822(6)** Where an appeal is taken under subsection (4) against sentence, the appeal court shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against and may, on such evidence, if any, as it thinks fit to require or receive, by order,
>
> **(a)** dismiss the appeal, or
>
> **(b)** vary the sentence within the limits prescribed by law for the offence of which the defendant was convicted,
>
> and in making any order under paragraph (b), the appeal court may take into account any time spent in custody by the defendant as a result of the offence.

Sentence Appeals

[19] An appellate court may only interfere with a sentence if there has been an

error in principle that had an impact on sentence or if the sentence is demonstrably unfit: *R v Lacasse*, 2015 SCC 64 at para 11, [2015] 3 SCR 1089. The review of alleged errors in principle is described in *R v Friesen*, 2020 SCC 9 at para 26, [2020] 1 SCR 424:

> [26] As this Court confirmed in *Lacasse*, an appellate court can only intervene to vary a sentence if (1) the sentence is demonstrably unfit (para. 41), or (2) the sentencing judge made an error in principle that had an impact on the sentence (para. 44). Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. The weighing or balancing of factors can form an error in principle "[o]nly if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably" (*R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, cited in *Lacasse*, at para. 49). …

[20] In *R v Parranto*, 2021 SCC 46 at paras 29-30, [2021] 3 SCR 366, Brown and Martin JJ. writing for the Supreme Court of Canada stated that, "appellate courts cannot interfere with sentencing decisions lightly":

> (4) Basis for Appellate Intervention
>
> [29] It is trite law that appellate courts cannot interfere with sentencing decisions lightly (see *R. v. Suter*, 2018 SCC 34, [2018] 2 S.C.R. 496, at para. 23, citing *Shropshire* [*R v Shropshire*, [1995] 4 SCR 227], at para. 48; *R. v. L.F.W.*, 2000 SCC 6, [2000] 1 S.C.R. 132, at para. 25; *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at para. 14; *Nasogaluak* [*R v Nasogaluak*, 2010 SCC 6], at para. 46; *Lacasse* [*R v Lacasse*, 2015 SCC 64], at para. 39; and *Friesen* [*R v Friesen*, 2020 SCC 9], at para. 25). Sentencing judges are to be afforded wide latitude, and their decisions are entitled to a high level of deference on appeal (*Lacasse*, at para. 11). It remains the case that, where a judge deviates from a sentencing range or starting point, no matter the degree of deviation, this does not in itself justify appellate intervention.
>
> [30] It bears emphasizing that the sentencing judge's discretion includes the choice of a sentencing range or of a category within a range, and that this exercise of discretion

> cannot in itself constitute a reviewable error (*Lacasse*, at para. 51). It is an error of law for an appellate court to intervene merely on the ground that it would have placed the offence in a different range or category. Unless a sentence is demonstrably unfit or the sentencing judge made an error in principle that impacts the sentence, an appellate court must not vary the sentence on appeal (paras. 11 and 67). The focus of the demonstrable unfitness inquiry is on whether the sentence is proportionate, not whether the sentencing judge applied the correct starting point, sentencing range or category within a range (*Lacasse*, at paras. 51 and 53; *Friesen*, at para. 162).

[21] In *R v R.C.M.*, 2024 SKCA 6 at para 83, Kalmakoff J.A. for the Court of Appeal discussed whether a sentence may be demonstrably unfit as a ground of appeal:

> [83] A sentence may be demonstrably unfit even if a judge has made no error in principle in imposing it. However, the threshold for appellate intervention based on demonstrable unfitness is high. To reach that threshold, the sentence must be clearly or manifestly excessive or inadequate, or one that represents a substantial and marked departure from what would be a proportionate sentence ([references omitted]). An appellate court cannot find a sentence to be demonstrably unfit just because it would have arrived at a different number than the sentencing judge did ([reference omitted]).

Public Policy

[22] Legislation is an expression of public policy. In a democracy, legislation reflects the will of the people.

[23] The *Criminal Code* was amended in 2008 to introduce new offences involving harm to animals, including ss. 445.1 and 447.1 reproduced above, and again in 2019 to increase penalties for those offences: s. 445.1 was amended in 2019; s. 447.1 was amended in 2018.

[24] Before the 2008 amendments, the maximum sentence for causing unnecessary suffering to an animal was six months' custody. In 2008, Parliament passed *An Act to amend the Criminal Code (cruelty to animals)*, SC 2008, c 12. The

amendments increased the maximum penalty for animal cruelty offences when the Crown proceeds by summary conviction to 18 months' imprisonment, and to 5 years imprisonment when proceeding by indictment. In 2019, Bill C-75 increased the maximum penalty for all summary conviction offences to two years less one day custody, including the penalty section for s. 445.1 of the *Criminal Code*.

[25] These legislative changes reflect Parliament's, and therefore Canadian society's, increased concern with the treatment of animals, especially domestic animals which live alongside humans. The public policy is explained in a legislative summary by Robin MacKay, *Bill C-50: An Act to Amend the Criminal Code in respect to cruelty to animals: Legislative Summary*, (Law and Government Division, August 2005), online: Library of Parliament (Canada) <https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/381LS509E> (16 July 2025) at 2-4:

> 1. The *Criminal Code*
>
> The current cruelty to animals sections in the *Criminal Code* were originally enacted in 1892, with minor revisions in the 1950s. Sections 444 to 447 of the *Criminal Code* deal with the mistreatment of animals. …
>
> Offences against animals fall into two categories: intentional and malicious hurting or killing of an animal either generally or in specific ways that are deemed to be cruel; and neglect in the provision of necessary food, water, shelter or care. In either case, the animal suffers needlessly and so both types of offences are illegal.
>
> …
>
> The current anti-cruelty provisions are based on a blending of two separate principles: that animals should be protected from injury or death because of their status as property to their owners; and that animals should be protected from unnecessary cruelty in their own right because they have the capacity to suffer. …

…

2. The Impetus for Change

> Despite a series of amendments over the years, the offences relating to cruelty to animals have not changed significantly since the first *Criminal Code* was codified in 1892. In response to the dissatisfaction with the provisions expressed by many groups and individuals, in September 1998 the Department of Justice published a consultation paper entitled *Crimes Against Animals*. One of the reasons for the department's action was "mounting scientific evidence of a link between animal abuse and domestic violence and violence against people generally."
>
> The consultation paper pointed out, however, that the *Criminal Code* sees animals, at least in part, as property, and offences against them are largely treated as property offences. Because of the emphasis on property, the paper said that critics have pointed out that the courts are inclined to look for a direct harm to human interests, rather than looking at the harm to the animal; the result is quite lenient sentences in many cases. According to the consultation paper, however, a modernized animal abuse law could both make it easier to prosecute animal abuse and send a message to those involved in the criminal justice system that crimes against animals should be treated more seriously. It could function as a more effective deterrent to morally reprehensible behaviour. This behaviour, the paper affirmed, threatens not only the welfare of animals, but also the moral and physical welfare of society at large, since intentional cruelty can be an indicator of the potential for increasing violence and dangerousness.
>
> [Footnotes omitted]

[26] Although Bill C-50 did not proceed beyond first reading, a later version resulted in the 2008 amendments.

[27] In *Reece v Edmonton (City)*, 2011 ABCA 238 at paras 54-56, 335 DLR (4th) 600 [*Reece*], Chief Justice Fraser in dissent explained the changing legal paradigms which informed animal welfare legislation:

> **B. Changing Legal Paradigms – The Animal Welfare Model Replaces an Exploitive One**
>
> [54] Society's treatment of animals today bears no relationship to what was tolerated, indeed widely accepted, centuries ago. The past 250 years have seen a significant evolution in the law relating to animals, though admittedly not as far as many might consider warranted. We have moved from a highly exploitive era in which humans had the right to do with animals as they saw fit to the present where some protection is accorded under laws based on an animal welfare model.
>
> [55] Previously, animals were regarded as unthinking, unfeeling and of no value beyond that assigned to them by humans. As property, they had no rights and no protection even from extreme abuse. It was not until the end of the 18th century that laws began to appear in common law countries preventing cruelty against animals. This was followed later by other animal welfare legislation which went further than simply prohibiting overt cruelty. The concept underlying animal welfare legislation is based on the utilitarian principle that "humans should avoid imposing suffering on animals unless the result of doing so create[s] greater pleasure for society than the pain it impose[s] on the animals in question".
>
> [56] This animal welfare model continues to be the norm in Canada today. The federal government, under its criminal law power, has prohibited deliberate cruelty to animals. This law, which dates back even before Canada's first *Criminal Code*, is now so ingrained in our society that it is considered a rule of civilization. But how society treats animals goes far beyond simply prohibiting the most egregious forms of abuse. Recognizing that humane treatment of animals calls for more, provincial governments in Alberta and elsewhere have adopted laws extending varying degrees of protection to animals. A number, including Alberta's, combine prohibitions preventing harm to animals with affirmative duties of care to the animals to whom the protection extends. Not all provinces have gone this far. But Alberta has.
>
> [Footnotes omitted]

[28] Courts of Appeal have read the 2008 amendments as calling for increased sentences for persons who commit animal cruelty offences. In *R v Wright*, 2014 ONCA 675 at para 1 [*Wright*], the Ontario Court of Appeal stated the 2008 amendments "signal

an added determination by Parliament to deter and punish those who would engage in acts of cruelty to animals". In *R v Alcorn*, 2015 ABCA 182 at para 40, 323 CCC (3d) 444 [*Alcorn*], the Alberta Court of Appeal Court stated the 2008 amendments were understood to "reflect the recognition that the prior sentence range for such conduct was wholly inadequate". In *R v Reykdal*, 2020 NBCA 13 at para 40 [*Reykdal*], the New Brunswick Court of Appeal cited and quoted from *R v Florence*, 2018 ONCJ 872 [*Florence 2018*], which the Court of Appeal said was "particularly useful for its review of relevant case law." Within that quote, the Court in *Florence 2018* stated, "there is [a] pattern emerging to reflect an increasing periods of incarceration in these types of offences since the 2008 amendment."

[29] In *R v Chen*, 2021 ABCA 382 [*Chen*], the Alberta Court of Appeal reviewed the history of the animal cruelty provisions and at para. 21, wrote that the "views of society with respect to animal cruelty and the harms caused by this conduct must continue to evolve". The Court endorsed the comments of Fraser C.J.A. in her dissent in *Reece* at para 162 that "a civilized society should show reasonable regard for vulnerable animals".

[30] In *R v Nichols*, 2025 MBPC 37 at para 22 [*Nichols*], Hewitt-Michta P.C.J. referred to Parliament's amendments in 2008 and 2019 as signalling an increased recognition of the serious nature of offences involving harm to animals:

> [22] Parliament amended the animal cruelty section of the *Criminal Code of Canada* in 2008 and again in 2019. Those amendments twice increased the maximum available sentences for both summary and indictable offences; increased the maximum length of prohibition orders as well as implementing mandatory prohibition periods for second and subsequent offences; and made restitution orders a sentencing option. The amendments reflect the progression of societal views about the wrongfulness and harmfulness of animal cruelty including an increased recognition of the serious nature of such offences and need for improved protection of animals.

[31] The community's concern with the treatment of animals, especially domestic animals, is not new. Generations of children (and adults) have read *Black Beauty* (Anna Sewell, *Black Beauty* (London: Jarrold & Sons Ltd., 1877)), and *Beautiful Joe* (Margaret Marshall Saunders, *Beautiful Joe: The Autobiography of a Dog* (London: Jarrold & Sons Ltd., 1893)). These classics of literature raised public consciousness of the suffering of domestic animals from cruel and callous treatment by humans. *The Plague Dogs* (Richard Adams, *The Plague Dogs* (London, England: Allen Lane, 1977)) is a more modern example, equally worthy. These memorable stories, written from the view of the animal, are both heartbreaking and heartwarming.

Animal Cruelty Sentencing Cases

[32] Sentencing decisions from before the 2008 amendments to the *Criminal Code* are of limited relevance. Because there are few reported Saskatchewan decisions, counsel referred to and I read sentencing decisions from other jurisdictions. The following decisions include those referred to by the parties.

Alberta

[33] In *Alcorn,* the Alberta Court of Appeal upheld a sentence of 20 months' incarceration followed by 3 years' probation for killing a cat by slitting its throat as part of a sexual ritual, contrary to ss. 145.1(1)(a) of the *Criminal Code*. In dismissing the offender's sentence appeal, the Court of Appeal at paras. 39-41 referred to Chief Justice Fraser's dissent in *Reece*:

> [39] The sentence for animal cruelty is substantial. It has a long period of probation associated with it. The strictures of the probation order are intrusive, but they are also subject to amendment upon motion to the Provincial Court: see s 732.2(3) and (4) of the *Criminal Code*. We are not persuaded that they should be adjusted here. To the extent that they may promote further treatment of the appellant they are in both his and society's best interests: *R v Maier*, 2015 ABCA 59; *R v Mathieu*,

> 2008 SCC 21 at para 20, [2008] 1 SCR 723; *R v Knott*, 2012 SCC 42 at paras 41 to 44, [2012] 2 SCR 470.
>
> [40] As for the twenty-month prison term for animal cruelty, the *Criminal Code* was amended on April 17, 2008 to reflect the recognition that the prior sentence range for such conduct was wholly inadequate. A collation of cases has been provided to us by counsel for the appellant and counsel for the Crown. Some of those refer to earlier cases which in turn were governed by the *Code* maximum prior to 2008. The Crown submits that sentences appear to be rising. We do not have enough information to say whether that is so.
>
> [41] That said, it is clear that the sentence imposed on the appellant is amongst the higher sentences imposed for animal cruelty offences in the group of cases given to us. That is not to say that the group therefore establishes a range, let alone a cap. The case law has not revealed an overall policy strategy for animal cruelty cases as yet. But it is pertinent to note what was said by Fraser CJA dissenting in *Reece and Zoocheck v Edmonton*, 2011 ABCA 238, 335 DLR (4th) 600, 513 AR 199 at para 162, leave denied (2012) [2011] SCCA No. 447 (QL): "a civilized society should show reasonable regard for vulnerable animals". Sentient animals are not objects.
>
> [42] The sentences that should be imposed upon the appellant for animal cruelty and assault are those that were imposed by the trial judge - specifically, 3 months' imprisonment for the assault, and 20 months' imprisonment, consecutive, for the animal cruelty charge. As to that latter charge, the appellant's motive of self-gratification, the sadism inherent in his methodology and the degree of pre-meditation and planning involved call for a denunciatory and deterrent sentence. This offence entailed much more than the destruction of property. By enacting s 445.1 of the *Criminal Code*, which allows the Crown to proceed by indictment and imposes a maximum sentence of 5 years' imprisonment, Parliament recognized, and intended that courts also recognize, that cruelty to animals is incompatible with civilized society: see, generally, Peter Sankoff, Vaughan Black & Katie Sykes eds, *Canadian Perspectives on Animals and the Animals and the Law* (Irwin Law, 2015).

[34] In *R v Huston*, 2021 ABPC 108, the offender, while on his balcony, killed his pet cat with repeated blows from a bat. Neighbours called police. The 65-year-old offender had no criminal record and was remorseful. The Court imposed a 12-month

conditional sentence order followed by 18 months' probation and a 3-year prohibition order.

[35] *Chen* is the leading authority for sentencing after conviction under ss. 445.1(a) of the *Criminal Code*. In *Chen*, the offender had subjected a puppy to a prolonged beating, causing injuries. The offender had no prior criminal record, pled guilty, and expressed remorse.

[36] The Court of Appeal reversed the lower Appeal Court's sentence of a one-year conditional sentence order followed by two years' probation and restored the trial judge's sentence of 90 days imprisonment to be served intermittently. The Court, at para. 49, stayed the imprisonment portion of the sentence, given the delay and rehabilitation efforts, while noting that whether the 90-day sentence was adequate was not before the Court of Appeal.

[37] The Court recognized animal cruelty as a crime of violence, stating at para. 31 of *Chen* that the focus of the inquiry on sentencing must begin with the gravity of the offence, being the suffering of the animal as victim of the offence:

> [31] The gravamen of the offence is wilfully causing unnecessary pain, suffering or injury to an animal. The *mens rea* of the offence requires wilful causation or, if an owner, wilful permission. Thus, the focus of the inquiry must begin with the gravity of the offence - the nature and extent of the pain, suffering or injury caused to the animal, the victim of the offence.

[38] The Court stated at paras. 35-36 that youthful first-time offenders were not entitled to the most lenient sentences, in particular a conditional sentence order. The Court went on at paras. 37-40 of *Chen* to set out primary principles of sentencing in animal cruelty cases:

> [35] It is not a principle of sentencing that youthful first-time offenders who commit violent offences will receive the most

lenient of sentences. Crimes of violence are, rightly, treated differently from property offences. An aggressive attack on an animal intended to wilfully cause unnecessary pain, suffering or injury is properly characterized as violent. In the circumstances of this case, there is no doubt that the respondent committed a violent offence against his puppy. The sentencing judge described it as a brutal and lengthy assault. The circumstances here render a CSO disproportionate to the gravity of the offence.

[36] I add that, even where violence is not involved, it does not follow that a CSO will be the appropriate disposition for a youthful offender: see e.g. *R v Field*, 2011 ABCA 48, where a period of incarceration was imposed on a youthful offender convicted of dangerous driving causing bodily harm. The offence of animal cruelty does not encompass only physical violence. Its focus is on the pain or suffering experienced by the animal. Not every contravention of the animal cruelty provisions will be a crime of physical violence; crimes of neglect, depending on the circumstances, can be equally serious and sufficiently grievous to diminish, or eliminate, the likelihood of a CSO.

Primary principles of sentencing in animal cruelty cases

[37] The fundamental and overarching principle of sentencing is proportionality: s 718.1. The sentence must be proportionate to the gravity of the offence and the moral blameworthiness or degree of culpability of the offender. The sentencing judge directed his mind to both these considerations in his assessment of whether a CSO [Conditional Sentence Order] was an appropriate sentence in the circumstances of this case. As noted above, he characterized the assault as brutal and prolonged, and leading to serious injury. He also noted the respondent refused to stop the abuse despite being confronted by a neighbour, and that the abuse only stopped when the police arrived. His conclusion that there was a high degree of moral blameworthiness was entirely reasonable on this record.

[38] The Crown urges us to consider denunciation and deterrence as the paramount considerations when sentencing for animal cruelty cases. Denunciation encompasses society's demonstration of its disapproval of the act in question. Theoretically, it reflects a set of commonly held values. As has already been discussed, society's understanding of animal protection as an important value has increased; I repeat the observation of this court in *Alcorn*, that "cruelty to animals is

> incompatible with civilized society": para 42. Denunciation is clearly an applicable principle when sentencing for such conduct.
>
> [39] The purpose of deterrence is to discourage the offender and others in the community from committing the offence. Animals feel pain and suffer; they are not merely property and deserve protection under the criminal law. All animals not living in the wild, including companion animals, livestock, and animals in industrialized production settings, are under the complete dominion of human caretakers and are highly vulnerable to mistreatment and exploitation at the hands of those caretakers. They are at the mercy of those who are expected to care for them and, unlike some other victims of crime, are incapable of communicating their suffering. Sentences for animal cruelty must reflect these realities, and the primary focus must be on deterrence and denunciation.
>
> [40] While deterrence and denunciation are the primary sentencing principles, other sentencing principles are also engaged. The amendments to the animal cruelty provisions in the *Criminal Code* do not speak only of punishment, but also protection for the animal victim. The intervenor, Animal Justice, urges a nuanced approach to sentencing, with consideration of specific deterrence including conditions that will reduce the potential for repeat offending and ensure the offender is not in a position to harm animals, rehabilitation to help the offender understand the impact of his or her actions, and reparations to acknowledge harm and ensure care is available for the animal victim. These will all be relevant considerations in sentencing for animal cruelty offences, depending on the circumstances. For example, greater consideration should be paid to prohibition orders to ensure the offender is no longer in a position to harm animals, and reparations to ensure provision of short and long-term veterinary care for the animal. Section 447.1(1)(a) permits an order prohibiting the offender from owning or residing with an animal. In circumstances where there is a reasonable risk of future harm to the animal, or any animal, an appropriate order should be made to prevent such harm.

[39] The Alberta Court of Appeal at paras. 41-46 of *Chen* discussed aggravating and mitigating factors, making the following points:

- Recovery from injury is not mitigating; failure to recover may be

aggravating (para. 42);

- Ordinary animal behaviour, such as defecation indoors, is not mitigating any more than behaviour of a child would be in sentencing for child abuse (para. 43);

- Abuse of an animal motivated by a desire to assert control or exact revenge on another person will be aggravating (para. 44);

- Abuse of an animal by its owner or guardian, who is a position of trust, is aggravating (para. 45); and

- Different cultural norms about treatment of animals will not diminish moral culpability of the offender (para. 46).

[40] In *R v Ehbrecht*, 2022 ABPC 141 [*Ehbrecht*], the offender pled guilty to five counts of animal cruelty contrary to ss. 445.1(1)(a) of the *Criminal Code*. The offender had injured five kittens so severely that three had to be euthanized. The Court imposed a sentence of 12 months' custody followed by 3 years' probation and a lifetime prohibition on owning or caring for animals. The Court rejected the defence proposal of a conditional sentence order, stating at para. 5 "a conditional sentence order would not give adequate effect to the principles of denunciation and general deterrence and would not be consonant with the directions from the Alberta Court of Appeal in *R v Chen*, 2021 ABCA 382".

[41] In *R v Reid*, 2022 ABPC 148, the 25-year-old offender with no prior criminal record was found guilty after trial of wilful neglect of an animal under ss. 446(1) of the *Criminal Code*. The offender's dog was seized by animal protection officers. It was severely malnourished and had severe and chronic dermatitis (skin rash). The trial judge sentenced the offender in *R v Reid*, 2022 ABPC 254, to a conditional sentence order of 6 months followed by 12 months' probation and an order

under s. 447.1 prohibiting possession of an animal for 15 years.

[42] In *R v Purvis*, 2023 ABPC 29 [*Purvis*], the offender pled guilty to arson contrary to s. 434, one count of killing a cat under ss. 445.1(1)(a), and four counts of causing unnecessary pain to four cats contrary to ss. 445.1(1)(a) of the *Criminal Code*. The 56-year-old offender, who had a lengthy criminal record including for violent offences, had set fire to his home. One of the four house cats died in the fire. The Court imposed a sentence of 18 months' imprisonment on each of the 3 charges, with the sentences to run concurrently, followed by 2 years' probation. The Court also made a 15-year prohibition order against possessing an animal.

[43] In *R v Kirkby*, 2023 ABCJ 171 [*Kirkby*], the offender pled guilty to killing a cat, contrary to ss. 445.1(1)(a) of the *Criminal Code*. The 27-year-old offender had grabbed his cat when it was making strange noises and hissed. The offender then hit the cat's head against the wall about six times. The cat immediately convulsed and died. The offender had several neurological diagnoses, including foetal alcohol spectrum disorder. The Court imposed a suspended sentence with probation for two years and a 10-year prohibition order. In rejecting the defence request for a conditional sentence order, Anderson J. wrote at paras. 31-36:

> **Conclusion**
>
> [31] The main question that I have wrestled with is whether a suspended sentence and probation is the most appropriate sentence or whether a Conditional Sentence Order (CSO) is more appropriate.
>
> [32] If a probationary sentence is sufficient, then a CSO is not available. Jail must only be imposed when no other sanctions are considered reasonable, "paying particular attention to the circumstances of Aboriginal offenders" (s. 718.2 (e) *Criminal Code*).
>
> [33] I have concluded that a suspended sentence with probation, for a period of 2 years, is reasonable and is the

> appropriate sentence. I find it appropriate because, first and foremost, it is proportionate to the gravity of the offence and the moral blameworthiness of the offender. Further, it is at least as good a vehicle for rehabilitation and probably better than a CSO. Lastly, in these circumstances I am not satisfied that a CSO would have any greater deterrent value than a suspended sentence.
>
> [34] Apart from the notional stigma of a CSO being a jail sentence, the deterrent value from a CSO usually lies in (a) the conditions restricting liberty such as house arrest and curfew (which can be extremely onerous for the young person who thrives on being out socializing with friends, for example) and (b) the threat that if conditions are breached, the order can be collapsed and the person can be required to serve the remainder of the sentence in a jail.
>
> [35] I am not satisfied that a condition requiring Mr. Kirkby to spend more time isolating in his apartment would, from his perspective, be an unwelcome change but I am satisfied that it would neither be rehabilitative nor, given his circumstances, healthy.
>
> [36] Regarding the potential consequences of a breach, the potential consequences of breaching probation when sentence is suspended can be every bit as serious as breaching a CSO and the potential consequences do not diminish the closer one gets to the end of the order. With a CSO, the worse case scenario for breaching is limited to jail for the time remaining on the order. When sentence is suspended, not only can a person be charged with the offence of breaching the probation order; one can be brought back before the Court and sentenced to anything that could have been imposed initially. The Sword of Damocles can be at least as sharp when sentence is suspended than it is under a CSO.

[44] In *R v Trithart*, 2023 ABCJ 197 [*Trithart*], the offender pled guilty to one count of animal cruelty contrary to ss. 445.1(1)(a) of the *Criminal Code*. The offender had no criminal record and was remorseful. Three of the offender's four dogs died after a fire at the offender's house while he was away. The fourth dog was euthanized at a veterinary clinic, which identified issues of neglect with all four dogs. The Court imposed a sentence of a six-month conditional sentence order followed by 18 months'

probation. There was no prohibition order.

[45] In *R v Van Hoepen*, 2024 ABCJ 79, the offender pled guilty to wilfully injuring a dog contrary to ss. 445.1(1)(a) of the *Criminal Code*. The offender was observed dragging a dog towards a concrete barrier and slamming it against the barrier and then punching the dog several times in the head. The dog yelped when struck. The offender then entered a condominium building and kicked the dog, fracturing its ribs. The dog ran away. The offender was 25 years old at the time of the offence and had no criminal record. The Court imposed a 6-month conditional sentence order followed by 12 months' probation, a 10-year prohibition order, and a victim surcharge of $100.

British Columbia

[46] In *R v Aleck*, 2021 BCPC 75, the court found the offender guilty after trial of causing unnecessary suffering to a kitten, contrary to ss. 445.1(1)(a) of the *Criminal Code*. The offender killed his kitten by striking it with a metal pole referred to as a "selfie stick". The 39-year-old offender had a dated criminal record, was remorseful, and had *Gladue* (*R v Gladue*, [1999] 1 SCR 688) factors, as explained in a comprehensive Pre-Sentence Report. The Court in *R v Aleck*, 2021 BCPC 170, imposed a 16-month suspended sentence with probation conditions

[47] In *R v Mathes*, 2016 BCPC 386 [*Mathes*], the offender pled guilty to causing unnecessary injury to an animal, contrary to ss. 445.1(1)(a) of the *Criminal Code*. The offender killed his dog by striking it repeatedly with a four-by-four piece of lumber after the dog bit his six-year-old daughter's face and later attacked him. The chihuahua dog weighed under ten pounds, was known to be aggressive, and had been with the family for about one month. The 41-year-old offender had no criminal record and was remorseful. The Crown was not opposed to a conditional discharge. The Court imposed a sentence of a conditional discharge after 12 months and a 1-year prohibition order.

[48] In *R v Zhu*, 2022 BCPC 153 [*Zhu*], the offender pled guilty to a single count of animal cruelty contrary to ss. 445.1(1) of the *Criminal Code*. The offender was observed in his backyard kicking a kitten and swinging it by its tail against concrete. Police were called. The kitten was taken to an animal emergency clinic. The kitten was too severely injured to be treated and was euthanized. The 22-year-old offender had no criminal record. The offender said he was feeling isolated and frustrated with the kitten urinating and defecating in the house, and biting and scratching him. The offender was sentenced to four months imprisonment, a 25-year prohibition order, and a victim surcharge of $100.

[49] In *R v Willard*, 2023 BCPC 264 [*Willard*], the offender pled guilty to charges of possession of a weapon for a purpose dangerous to the public peace, assault, and wilfully and without lawful excuse killing a dog. The offender was drinking with his common law wife and a friend in their home. They were all intoxicated. A disagreement led to a commotion which spilled out into the yard. The offender grabbed the family dog and stabbed it 14 times with his knife. The dog died from its injuries. Police were called and the offender was arrested. The offender had a criminal record for violence. On the animal cruelty charge, the offender was sentenced to 12 months' jail followed by 18 months' probation, and a 10-year prohibition order.

Manitoba

[50] In *Nichols*, the offender pled guilty to wilfully killing 8 kittens and 5 months later, while on a bail order not to possess animals, killing 15 more kittens and 2 rabbits. The 27-year-old offender had no criminal record and was remorseful. At the time of the offences, the offender had mental health difficulties which were exacerbated by methamphetamine use. The court sentenced the offender to a total of 5 years' imprisonment: 30 months for the first incident, reduced to 24 months in consideration of the totality principle, under ss. 445(a); 40 months consecutive on each of two

offences (kittens and rabbits) for the second incident under ss. 445(a), reduced to 36 months with the first offence consecutive and the second offence concurrent; and 3 months under ss. 145(5)(a) consecutive, reduced to concurrent. The Court also imposed a lifetime prohibition.

New Brunswick

[51] In *Reykdal*, the New Brunswick Court of Appeal allowed a Crown appeal against the decision of the summary conviction Appeal Court to set aside the trial judge's prison sentence of four months and substituted a conditional discharge. The offender, who suffered from mental health problems, was a 21-year-old student who killed his girlfriend's cat. He was convicted following trial and sentenced to four months' imprisonment and a five-year prohibition order. The Court of Appeal at para. 41 concluded the original sentence was appropriate:

> [41] Simply stated, a sentence of four months incarceration is neither unfit nor unreasonable in the circumstances of this case.

[52] The Court of Appeal at paras. 1, 28, and 30, referred to society's increased intolerance for such crimes.

> I. Introduction
>
> [1] The senseless and violent killing of a pet is an act of aggression our society has become increasingly less tolerant of, and for good reason. …
>
> …
>
> [28] Both here in New Brunswick and in Canada as a whole, attitudes toward animal cruelty have been evolving, particularly within the last twelve years. Crown counsel has cited *R. v. Kennedy*, 2017 ONSC 817, [2017] O.J. No. 618 (QL), to illustrate this point:
>
> > It is fair to say that our society's shared position with respect to the acceptable way to treat an animal has evolved. This is probably as a result of the decline in the

> proportion of us living in an agricultural context. With most people now living in an urban environment, our contact with animals is generally for companionship rather than utility. Evidently picking up on this attitudinal evolution, Parliament in 2008 saw fit to increase the maximum sentences with respect to offences of this nature. The sentencing judge was right to recognize and act on that change. To do otherwise would be to ignore the will of the legislature. [para. 14]
>
> [30] Clearly, animal cruelty is regarded as a serious issue, and deserving of criminal sanction.

Newfoundland and Labrador

[53] In *R v Drake*, 2023 CanLII 68498 (Nfld PC) [*Drake*], the offender was convicted of unlawfully causing an animal unnecessary suffering by kicking a cat down a flight of stairs contrary to ss. 445.1(1)(a) of the *Criminal Code*. The 42-year-old offender was a single mother of three with a criminal record. She was diagnosed with borderline personality disorder. The Court imposed a sentence of 90 days' imprisonment consecutive to sentences on other offences, probation for 12 months, forfeiture of the cat, a restitution order for the veterinarian invoice of $166.75, and a 5-year prohibition order.

Nova Scotia

[54] In *R v Perrin*, 2012 NSPC 134, the offender pled guilty to killing his girlfriend's cat contrary to ss. 445.1(1)(a) of the *Criminal Code*. The 49-year-old offender was intoxicated at the time of the offence, had an unrelated criminal record, was remorseful, and had good rehabilitative prospects. The Court sentenced him to 30 days' imprisonment followed by 24 months' probation, and a 10-year prohibition order.

Ontario

[55] In *R v Rodgers*, 2012 ONCJ 808, the offender, in the course of an argument with his girlfriend, threw a 12-week-old puppy out the door and down the

stairs. After pushing the girlfriend to the ground, he then chased the puppy, which tried to flee. The offender picked the puppy up and slammed it onto the driveway, killing it. The 25-year-old offender had a criminal record, including for violent offences. The court sentenced the offender to 8 months' incarceration followed by 2 years' probation, including 80 hours of community service, and a 10-year prohibition order.

[56] In *R v Munroe*, 2012 ONSC 4768, the offender was found guilty following a 2009 trial in Provincial Court of: unlawfully killing one dog; unlawfully wounding a second dog contrary to s. 445; and two counts of wilfully causing unnecessary suffering to the same dogs, contrary to s. 445.1 of the *Criminal Code*. The dogs belonged to the offender's girlfriend. The offender was described as a youthful first offender with a good pre-sentence report and strong family support, so a good candidate for rehabilitation. The trial judge imposed a sentence of 12 months' imprisonment, 3 years' probation, a restitution order for $12,964, 150 hours of community service, and a 25-year prohibition order. On appeal, the Appeal Court reduced the prison sentence to six months and the restitution order to $11,197.17. The original sentence otherwise remained intact.

[57] In *Florence 2018*, the offender pled guilty to injuring a dog contrary to ss. 445.1(1)(a) of the *Criminal Code*. The offender, apparently suffering from drug psychosis, stabbed his dog at least three times in the throat area, after threatening his common law spouse by saying he would cut her throat. The offender told a neighbour what he had done. The neighbour called police. The dog was treated and survived. The 46-year-old offender had a dated criminal record. The Court imposed a 6-month term of imprisonment for the animal cruelty offence and a 15-year prohibition order.

[58] In *Wright*, the Ontario Court of Appeal allowed a Crown sentence appeal against a suspended sentence and five-year prohibition order, substituting a sentence of nine months' imprisonment and extended the five-year prohibition order to include

residing with an animal. The offender was convicted of 5 counts of animal cruelty and 1 charge of neglecting an animal for abusing 6 dogs over a period of 17 months while operating a dog training business. The trial judge imposed a suspended sentence and gave the offender 95 days credit for pre-sentence custody and a 5-year prohibition order, which still allowed the offender to reside with an animal since his wife owned a dog. The Court of Appeal at para. 1 referred to "the amendments to the *Criminal Code* in 2008 which signal an added determination by Parliament to deter and punish those who would engage in acts of cruelty to animals" in describing the sentence imposed after trial as "manifestly inadequate." See: Matthew Geigen-Miller, "Denouncing Animal Cruelty", 2014 CanLII Docs 29422.

[59] In *R v Way*, 2016 ONCJ 514 [*Way*], the offender pled guilty to two counts of cruelty to animals under ss. 445.1(1)(a) and 446(1) of the *Criminal Code*. The authorities had seized 107 cats from her home. The judge in subpara. 2(2) described the cats as "living in filth, disease and squalor." All but one of the cats were euthanized. The offender was a non-practicing lawyer and teacher with no criminal record. The Court, at paras. 10-11, distinguished this case from others in that "Ms. Way's crime is one of negligence" and that she loved her cats. The Court granted a conditional discharge with 12 months' probation, including 100 hours of community service. The Court made an order that she not possess more than two animals at any given time.

[60] The Court in *Way* acknowledged that this sentence "could risk sending the wrong message". The court explained at paras. 13-15 that the particular circumstances of the case warranted leniency:

> [13] I reject as harsh and unnecessary the idea of sending Ms. Way to prison for these offences. I also wonder what purpose there could be in a further period of supervision by way of probation; Ms. Way has been subject to a structured bail for about five years now. The option of a fine strikes me as conceptually inappropriate in that it would be seen a putting a price tag on the heads of these cats. Frankly, at this stage of this

> protracted and somewhat unique proceeding none of the usual sentencing options greatly appeals to me at all.
>
> [14] Ms. Way is both a lawyer and a teacher. She has not practiced law in years but the Law Society has documented an express interest in the outcome of this case. Ms. Way's teaching contracts came to an abrupt end expressly as a result of these charges being laid against her. A criminal conviction may very well have serious collateral consequences on her ability to continue in either or both of her chosen professions.
>
> [15] I recognize that applying the discharge provisions could risk sending the wrong message with respect to the gravity of these offences and the need for a message of denunciation. However, a conviction and suspended sentence would not have any significantly greater impact in terms of general deterrence. Therefore, balancing all of the various factors and particular circumstances and of this case I find that it is not clearly contrary to the public interest to apply the discharge provisions of the *Code*.

[61] In *R v Garvin*, 2021 ONCJ 496, the offender pled guilty to two counts of causing pain and suffering to his dog contrary to s. 445.1, uttering threats to kill his dogs contrary to s. 264.1 of the *Criminal Code*, as well as other offences. When police went to the offender's apartment on a wellness check, they found the offender's severely beaten dog on the floor. The 22-year-old had no adult criminal record, but numerous convictions as a youth. He had a long psychiatric history and diagnosis of foetal alcohol spectrum disorder. The Court imposed a sentence of two years' imprisonment on the animal abuse offences: two years consecutive for s. 445.1 (dog found dead); six months concurrent for s. 445.1 (separate incident); and 6 months concurrent for s. 264.1.

[62] In *R v Carr*, 2023 ONCJ 22 [*Carr*], the offender pled guilty to wilfully causing unnecessary suffering to an animal contrary to ss. 445.1(1)(a) of the *Criminal Code*. The offender was intoxicated at the time of the offence. During an argument with his intimate partner, he threw his partner's pet dog off his 11th floor balcony, killing the dog. The 28-year-old offender had 14 prior criminal convictions, including for

assault and weapons charges. The Court imposed a 12-month jail sentence to be served consecutive to other sentences, 3 years' probation and a 25-year prohibition from possessing animals.

[63] In *R v Chopra*, 2024 ONCJ 51 [*Chopra*], the offender pled guilty to causing unnecessary suffering to his dog contrary to ss. 445.1(1)(a) of the *Criminal Code*. The offender became upset because his six- to seven-month-old dog urinated on the floor. He dragged it to the dog's crate, violently struck the dog's head five times with his hand, and then flipped the crate upside down with the puppy inside. The incident was captured on CCTV video recording. The 38-year -old offender had a dated prior conviction for impaired driving and was remorseful. The Court imposed a 12-month conditional sentence, the first half to be under house arrest and second half with a curfew, followed by 2 years' probation and a 3-year prohibition order.

Saskatchewan

[64] In *R v Gamble*, 2008 SKQB 282, 319 Sask R 236 [*Gamble*], Barclay J. allowed a Crown sentence appeal against an absolute discharge, substituting a discharge conditional on the offender completing six months' probation. The offender pled guilty to unlawfully killing a dog contrary to ss. 445(a) of the *Criminal Code*. The 40-year-old was a single mother. She claimed the dog had previously attacked two other people. She ran it over with her truck and then ran over the injured dog again, saying she did so to put it out of its misery. This offence pre-dated the 2008 amendments.

[65] In *R v Potoreyko*, 2021 SKQB 212 [*Potoreyko QB*], aff'd 2022 SKCA 71 [*Potoreyko CA*], the defence appealed from Provincial Court against conviction and sentence under s. 445.1(1)(a) of the *Criminal Code* and s. 4 of *The Animal Protection Act, 1999*, SS 1999, c A-21.1 (since rep). The offender was an older rancher. The charges related to harm to the offender's cattle from neglect. The offender was found guilty of both charges following trial in Provincial Court. The trial judge imposed fines

of $2,000 for the criminal offence and $5,000 for the provincial offence. The Court made a 10-year prohibition order under s. 447.1 of the *Criminal Code*. The prohibition order effectively ended the offender's life and livelihood as a rancher.

[66] On summary conviction appeal to the then Court of Queen's Bench, the conviction under *The Animal Protection Act, 1999* was stayed because of the rule against multiple convictions under *R v Kienapple*, [1975] 1 SCR 729. The defence appeals against the criminal conviction and sentence were dismissed. In dismissing the sentence appeal, the summary conviction Appeal Court at paras. 78-83 of *Potoreyko QB* referred to Parliament's amendments of the *Criminal Code* in 2008 and 2019:

> [78] In determining a fit sentence, the courts must consider the objectives of denunciation, deterrence and rehabilitation of the offender within a framework of individualized sentencing.
>
> [79] In *R v Campbell Brown*, 2004 ABPC 17 at para 30, Brown P.C.J. stated the public policy behind animal protection legislation:
>
> > **Principles of Criminal Law**
> >
> > [30] The criminal law represents the most important, the fundamental principles of our society. It is a cornerstone of a system based on governing our actions by the rule of law. Our criminal law reflects the civilized, fair and compassionate society Canadians have worked to establish and strive to maintain. A person who breaks the criminal law does not hurt just one business or other person, but everyone.
> >
> > [31] Protection of animals is part of our criminal law because a person's treatment of animals, like the treatment of children, the infirm or other vulnerable parties, is viewed as a barometer of that person's treatment of people. As with all other criminal offences, harming animals amounts to hurting everyone.
>
> [80] In *R v Habermehl*, 2013 ABPC 192 at para 2, 567 AR 373, Fraser P.C.J. commented on Parliament's 2008 decision to increase the penalties for the *Criminal Code* offence and, at para. 5, the main objectives of sentencing:

> [2] In 2008 Parliament increased the penalties for this offence to imprisonment for up to five years if proceeded by indictment and if proceeded by summary conviction procedure to a fine not exceeding $10,000 or imprisonment up to 18 months or both. It is said that in doing so, Parliament gave effect to widespread concerns that the *Criminal Code* provisions concerning cruelty to animals had fallen drastically out of step with current social values and thus restructured the sentences available. The amendments represent a fundamental shift in Parliament's approach to these crimes.
>
> …
>
> [5] The main objectives of sentencing in this case are to deter this Offender as well as others; denunciation of the crime; to assist in rehabilitation; and to promote a sense of responsibility in the Offender and acknowledgment of the harm done to the victim and the community. The sentence must be proportionate to the gravity of the offence and the degree of responsibility of the Offender. In addition an Offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances.

[81] Section 445.1(2)(b) was amended again in 2019 to increase the maximum term of imprisonment from 18 months to not more than 2 years less a day.

[82] These increased penalties reflect Parliament's and society's increased concern with harm to vulnerable creatures. Denunciation and deterrence are, therefore, important considerations in sentencing.

[83] This 2019 amendment was made under *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, SC 2019, c 25, s. 172, which received Royal Assent on June 21, 2019. That was the same date as the decision to convict. Mr. Potoreyko would be entitled to be sentenced on the lower maximum. However, that was academic, since the Crown did not seek and the trial judge did not impose any sentence for imprisonment.

[67] The Court of Appeal for Saskatchewan dismissed a further defence

appeal from the decision of the Court of Queen's Bench in *Potoreyko CA*.

[68] In *R v Zhang*, 2022 SKQB 192, Gabrielson J. dismissed a defence appeal against conviction and sentence for two counts of wilfully and without lawful excuse killing a cat and wounding a cat, contrary to ss. 445.1(1)(a) of the *Criminal Code*. The offender was convicted following trial in Provincial Court and sentenced to a five-month conditional sentence.

Sentencing Principles for Animal Cruelty Offences

[69] Of the 28 sentencing decisions reviewed above: 16 resulted in prison sentences; 2 in suspended sentences; 6 in conditional sentence orders; 3 in conditional discharges; and 1 in a fine. Of particular note are the four decisions of Provincial Courts of Appeal, all of which imposed prison sentences.

[70] The following sentencing principles emerge from the cases reviewed.

[71] Animal cruelty offences are crimes of violence. They are serious offences.

[72] While sentencing remains individualized, the primary focus in sentencing for animal cruelty offences is on deterrence and denunciation. Parliament, in its 2008 and 2019 amendments to the *Criminal Code,* increased penalties for offences involving harm to animals. Canada's Courts have responded with increased emphasis on deterrence and denunciation as primary sentencing objectives. See: *Chen* at paras 37-40; *Purvis* at para 132; *Trithart* at para 18; *Zhu* at paras 31-33; *Willard* at para 24; *Nichols* at para 33; *Drake* at para 29; *Wright* at para 1; *Carr* at paras 42-44; and *Potoreyko QB* at para 82.

[73] Sentencing judges must consider both the harm done to the animal and to society's revulsion against and condemnation of animal cruelty. The focus of the

inquiry must begin with the gravity of the offence – the nature and extent of the pain, suffering, and injury caused to the animal as the victim of the offence. Courts have compared offences against domestic animals with offences against children, since both are vulnerable and rely upon people as their guardians for their care and protection. For those reasons, there is similarly strong public disapproval for offences against children and animals.

[74] While all sentencing options are available, most convictions result in a prison sentence, suspended sentence with probation, or conditional sentence order. Incarceration is appropriate for serious cases of intentional harm, including for first time offenders. The Courts in *Chen* at para 36; *Ehbrecht* at para 5; and *Kirkby* at para 33 rejected requests for conditional sentence orders as not providing sufficient deterrence and denunciation. Conditional discharges are rare, requiring exceptional circumstances.

[75] Aggravating factors include harming animals in the offender's care, since this is a breach of trust, and harming pets of others to exert control or as retribution.

[76] Different cultural norms will not reduce an offender's moral responsibility.

[77] Restitution orders are common, usually payable to the animal protection authority or veterinary clinics which provide care or treatment of the animal-victim.

[78] Prohibition orders are not penalties. Their purpose is to prevent future harm to animals. They are made to ensure the offender is no longer able to harm animals or at least reduce the opportunity to do so.

IV. ISSUES

[79] The issue to be determined is whether the appeal against sentence should

be allowed or dismissed and, if allowed, what sentence should be substituted? In addressing this issue, the following sub-issues arise from the grounds of appeal:

(i) Was the sentence excessive or unfit, in light of the circumstances of the offence and the offender?

(ii) Did the sentencing judge err by failing to hear from the offender before imposing sentence?

(iii) If so, did that result in an unfit sentence?

(iv) Did the sentencing judge err in failing to consider all options available for sentencing?

V. POSITIONS OF THE PARTIES

The Appellant-Offender

[80] The offender had no criminal record. He is now 23 years old with no subsequent charges. This incident was out of character.

[81] While the video recordings may look bad, there was no medical evidence finding injuries to the dog.

[82] The sentencing judge erred in failing to ask the offender if he had anything to say, as required by s. 726 of the *Criminal Code*. As a result, he failed to consider the appellant's remorse as a mitigating factor. This resulted in a miscarriage of justice.

[83] The sentence is demonstrably unfit. The sentencing judge over-emphasized deterrence and under-emphasized rehabilitation. The criminal conviction will affect the appellant's ability to travel.

[84] An appropriate sentence would have been the one recommended by the defence, being a conditional discharge with 15-18 months of probation and 80 hours of community service.

The Respondent-Crown

[85] The sentence imposed was reasonable. There is no basis for appellate interference.

[86] These were offences of violence. An aggravating factor is that the offender was the dog's owner and thus responsible for the care of the animal.

[87] The sentencing judge's failure to comply with s. 726 of the *Criminal Code* is acknowledged, but the real issue is whether the omission affected the sentence. It did not; the sentencing judge asked the defence lawyer about remorse.

[88] The defence's case law references are out of date. Parliament signalled the public's increased disapproval and concern with this offence by increasing available sentences in 2008 and 2019.

[89] There is no right of first offenders to a conditional discharge. Sentencing is individualized. While it was an available sentencing option, there was no error in imposing the suspended sentence.

VI. ANALYSIS

[90] With the preceding background in mind, I will address the grounds of appeal in the order stated in the Notice of Appeal.

(i) Circumstances of the Offence and the Offender

[91] The appellant in ground 1 said the sentence was excessive in light of the circumstances of the offence and the offender.

[92] The circumstances of the offender and offence were fully described by both defence and Crown in their submissions. The Crown entered as evidence (Exhibit P-1) video recordings of the offences, which were played at the sentencing hearing. The offender was apparently aware of the recording at the time of the offence. The first two segments show the offender repeatedly hitting his dog who can be heard yelping in distress. In the first segment, the offender hits the dog with his hand. In the second segment, the offender hits the dog with a cardboard box over or held by his hand. In the third and final segment, the offender approaches and speaks directly to the camera. The offender refers to his beating of the dog as showing what he is capable of in making threatening statements to the viewer. A Victim Impact Statement from the Regina Humane Society was entered as Exhibit P-2.

[93] The sentencing judge described the circumstances of the offence (Transcript, T29-T30). The sentencing judge expressly considered the offender's personal circumstances in deciding against the requested conditional discharge (Transcript, T31, Lines 21-22).

[94] I am satisfied that the sentencing judge considered and gave appropriate weight to the circumstances of the offence and the offender. As discussed further below, I do not find the sentence imposed to be at all excessive.

[95] This ground of appeal is dismissed.

(ii) Failure to Ask Offender if He Had Anything to Say Before Being Sentenced

[96] The appellant in ground 2 stated the sentencing judge erred by failing to comply with s. 726 of the *Criminal Code*.

[97] The *Criminal Code* in s. 726 requires sentencing judges, before determining sentence, to ask the offender if they have anything to say.

> **Offender may speak to sentence**
>
> **726** Before determining the sentence to be imposed, the court shall ask whether the offender, if present, has anything to say.

[98] The sentencing judge overlooked this step (see: Transcript, T29). This was an error, because the use of the word "shall" in s. 726 means the inquiry is mandatory. But the fact of the error is not the end of the analysis. The question is whether the omission affected the sentence such that it cannot stand.

[99] In *R v Senek* (1998), 130 CCC (3d) 473 (Man CA) at para 20 [*Senek*], the Manitoba Court of Appeal dismissed an appeal on the principal ground that the trial judge erred in failing, before passing sentence, to ask the appellant-offender if he had anything to say on his behalf pursuant to s. 726 of the *Criminal Code*. Lyon J.A., writing for the majority at paras. 18-21, held that what occurred was simply a procedural oversight that had no bearing on the sentence:

> [18] In the case at bar, it is worthwhile to note that no objection was made by defence counsel to the trial judge's failure to ask the accused if he had anything to say. Indeed the record discloses that there was no comment or objection before or after sentencing about this oversight on the part of the trial judge. Similarly, on the hearing of the appeal, counsel for the accused admitted that the 9-month sentence was within the appropriate range but should have been a conditional one. The only error the trial judge made was his failure to ask the accused if he had anything to say, a matter that was not raised until the notice of appeal was filed.
>
> [19] In summary, on the hearing of the appeal, no affidavit evidence was submitted on behalf of the accused, nor was there any indication by the accused or his counsel that he had anything to say either to the trial court or to the appellate court beyond what his counsel had said *in extenso* at trial and on appeal. Practice indicates that an accused sometimes wishes to correct the record given by the Crown or to supplement or correct his counsel's submissions. There was no indication of such a desire by the appellant either at trial or on appeal. The appellant was well represented by counsel both at trial and on appeal who, on both occasions, set forth his argument thoroughly and at length.

> In the words of Martland J. in *Lowry* [*R v Lowry*, [1974] SCR 195], counsel's submissions which the appellant had "made on his behalf constituted the accused's best hope for the conditional sentence he sought.
>
> [20] This pure, inadvertent oversight by the trial judge resulted in no disadvantage or unfairness to the accused, nor did the trial judge's error constitute a substantial wrong or miscarriage of justice. In my opinion, it was simply a procedural oversight which had no bearing either on the trial judge's sentence or on our determination of the fitness of that sentence on appeal. At best, this ground of appeal could aptly be described as an afterthought advanced in support of an appeal which otherwise was without merit.
>
> [21] Accordingly, I would dismiss the appeal.

[100] Philp J.A., in a short judgment expressing "complete agreement" with Lyon J.A., commented at paras. 23-26 of *Senek* on the origin and purpose of s. 726 of the *Criminal Code*:

> [23] In my view, s. 726 of the *Criminal Code* should not be interpreted so as to accord to a convicted person the right to address the court personally at his sentencing hearing when his counsel has made a submission on his behalf in mitigation of sentence.
>
> [24] The legislative history of s. 726 suggests that the origins of the provision have long since been obscured and forgotten. Originally, the provision applied only to jury trials. It had no application to offenders who were tried for indictable offences without a jury.
>
> [25] And until the 1953-54 re-enactment of the *Criminal Code,* S.C. 1953-54, c. 51, the provision was directed to whether the accused had "anything to say why sentence should not be passed upon him according to law". The provision had nothing to do with the mitigation of the sentence that was to be passed.
>
> [26] The provision may well be a vestige of the "benefit of clergy" privilege that existed into the 19th century and which "operated greatly to mitigate the extreme rigor of the criminal laws". (See *Black's Law Dictionary* (6th ed. 1990), at pp. 158-59.) The privilege did not mitigate the sentence to be imposed,

> but rather, its application exempted the person claiming the privilege after his conviction from the punishment of death.

[101] *Senek* has been followed by other Courts of Appeal: *R v Haug*, 2002 SKCA 49 at para 2, 219 Sask R 276 [*Haug*]; *R v MacMillan*, 2003 BCCA 372 at para 8, 184 BCAC 239; *R v Legault*, 2005 CanLII 46625 (Ont CA) at para 5; *R v Gavin*, 2009 QCCA 1 at para 22; *R v Gouthro*, 2010 ABCA 188 at para 32, 256 CCC (3d) 432; *R v Travers*, 2019 NSCA 83 at para 18; and *R v Mitchell*, 2020 YKCA 2 at para 34.

[102] In *Haug* at para 2, Tallis J.A. spoke for the Court of Appeal for Saskatchewan in dismissing an appeal on this ground:

> [2] At trial [the appellant] was represented by counsel and following full submissions to the presiding judge, these sentences were imposed. However the record discloses that the trial judge omitted to comply with s. 726 of the *Criminal Code* which reads:
>
> > **726. Offender may speak to sentence** – Before determining the sentence to be imposed, the court shall ask whether the offender, if present, has anything to say.
>
> The appellant contends that the entire proceedings are invalidated and asks this Court to quash the convictions and sentences. We decline to do so. Given the full opportunity to appellant's counsel to address the Court, failure to comply with this provision does not invalidate the sentencing hearing: See for example *R. v. Senek* (1998), 130 C.C.C. (3d) 473 (Man. C.A.) and *R. v. Holub and Kufrin*, 2002 CanLII 44911 (ON CA), [2002] O.J. No. 579 (Q.L.). In the circumstances we would characterize the failure to comply with s. 726 as an inadvertent slip.

[103] *Haug* has been followed by our Court of Appeal in: *R v G.(L.T.)*, 2002 SKCA 101 at para 9, 223 Sask R 157; *R v Ratt*, 2006 SKCA 99 at para 8, 285 Sask R 177; *R v Paddy*, 2011 SKCA 12 at para 53, 366 Sask R 4; and *R v Murphy*, 2019 SKCA 8 at paras 51-55, 374 CCC (3d) 538. *Haug* has been similarly applied by this Court in: *R v Parker*, 2010 SKQB 344 at paras 38-41, 361 Sask R 148; and *R v Trachsel*, 2010 SKQB 288 at para 17, 358 Sask R 252.

[104] The appellant, in his brief of law at para. 37, wrote:

> 37. It is respectfully submitted that in the present case, had the learned sentencing judge permitted the Appellant an opportunity to speak – the Appellant would have been provided an opportunity to express his sincere remorse and explain to the judge what exactly led to the incident in question, as even the judge concluded that what had occurred was out of character …

[105] With respect to the personal circumstances of the offender, the Transcript shows that Mr. Pham, as defence counsel, mentioned these things in his sentencing submissions. Mr. Pham described the offender's personal circumstances, which he said caused stress to the offender (Transcript, T18-T20). Mr. Pham referred to the offender's good character (Transcript, T19, Lines 9, and 18-19) and described this incident as "an out of character incident" (Transcript, T20, Lines 5-6).

[106] The sentencing judge, in his reasons for sentence, acknowledged that the offender was under stress at the time (Transcript, T31, Line 10), was "a person of normally good character", and "this seems to be an out of character action on your part" (Transcript, T31, Lines 15-16).

[107] With respect to remorse, the Transcript shows that Mr. Pham, while not using the word "remorse", alluded to this feeling, saying "He tells me that what had occurred on the date in question he regrets, he's ashamed of." The sentencing judge was alert to the question of remorse, asking Mr. Pham whether the offender was remorseful:

> THE COURT: Okay, I just wanted to check, counsel, first of all, I didn't hear that your man was resource (sic) -- remorseful. Is he?
>
> Mr. Pham: (INDISCERNIBLE) --
>
> THE COURT: Okay. That wasn't all together clear. …
>
> [Transcript, T29, Lines 6-11]

[108] Although Mr. Pham's reply is not recorded, it is reasonable to assume that Mr. Pham said the offender was remorseful. Whatever Mr. Pham's reply, the question of remorse was addressed.

[109] While not diminishing the importance of hearing from an offender or the potential impact of their remarks, I find in this case that the omission did not affect the sentence. The offender's lawyer had effectively conveyed in defence submissions what the lawyer now says the offender would have said. If necessary, I would dismiss this ground under ss. 686(1)(b)(iii) in that no substantial wrong or miscarriage of justice occurred. This was a harmless error.

[110] This ground of appeal is dismissed.

[111] From my reading of the Transcript, this required step was overlooked and missed because of the way things proceeded. At the end of the Crown submissions, the sentencing judge accepted the Crown's offer to play the video recordings one more time. The sentencing judge then asked defence counsel about whether the offender was remorseful. In my experience as a trial judge, it is easy to forget a step when there are intervening events.

[112] Before leaving this issue, I would observe, as I did at the hearing of this appeal, that judges are assisted in carrying out their duties by the lawyers in the courtroom. If a judge overlooks an important step in proceedings, the lawyers are not only entitled, but expected, to raise that to ensure that the proceedings are complete and proper. Most judges appreciate such assistance from lawyers in their role as officers of the Court.

[113] In this case, neither the Crown nor the defence raised any question over the failure of the sentencing judge to ask the offender whether he had anything to say. The defence lawyer, at the end of his submissions, did not say that his client wished to

speak for himself. Nor did he do so when the judge later asked about remorse. If defence counsel knew that his client wished to speak, he should have said so. That would have prompted the sentencing judge to hear from the offender prior to sentencing.

[114] I mention this only to encourage everyone to work together to ensure correct procedure is followed and rights are respected.

(iii) Unfit Sentence

[115] The appellant in ground 3 stated the sentence was unfit because the sentencing judge failed to give adequate weight to competing sentencing principles. The appellant in ground 4 stated that the sentence was unfit because the sentencing judge failed to properly balance the degree of responsibility of the offender with the gravity of the offence.

[116] The reasons for decision are concise and cogent (Transcript, T29-T32). The reasons begin by reviewing the circumstances of the offence and go on to correctly state relevant sentencing principles for this offence, including reference to the 2008 and 2019 amendments to the *Criminal Code* and case law. The reasons then review the circumstances of the offender and whether a conditional discharge would be appropriate. The reasons conclude that the appropriate sentence is probation for 12 months and go on to set out the full sentence and ancillary order.

[117] I do not find any error in these reasons, nor do I find that the sentence was unfit.

[118] This ground of appeal is dismissed.

(iv) Failure to Consider All Sentencing Options

[119] The appellant in ground 5 says the sentencing judge erred “by failing to consider all available sentence options, resulting in an unfit sentence”.

[120] In Danielle Robitaille & Erin Winocur, *Sentencing: Principles and Practice* (Toronto: Emond Professional, 2020) at 138, the authors state "There is a wide range of sentencing options, including discharges, probation, fines, conditional sentences, and incarceration." Judges are presumed to know the law and I am sure the sentencing judge was well aware of all sentencing options.

[121] Further, there is simply nothing to show that the sentencing judge failed to consider all sentencing options. On the contrary, the Crown and defence both set out different sentencing recommendations and gave reasons in support of their recommendations. The sentencing judge, in his reasons, considered both recommendations and came to a reasoned decision on an appropriate sentence.

[122] While not set out explicitly in the grounds of appeal, the appellant's real complaint is that the sentencing judge did not accept his request for a conditional discharge, which would have avoided a criminal conviction. The defence in its sentencing submissions had said that a conviction would "cause significant undue hardship" to the offender:

> Further, there's significant opportunities for him to work in the United States in relation to his music career, if he's so inclined. So there are opportunities for him to work in the United States. The defence submission is that a conviction will cause significant undue hardship to Mr. Josan, who is a youthful offender in the process of starting his life.
>
> [Transcript, T24, Lines 14-18]

[123] I will therefore go on to consider whether a conditional discharge might have been appropriate for this offence. I conclude it was not.

[124] The *Criminal Code* in ss. 730(1) allows a conditional or absolute discharge where:

- the offence has no minimum punishment and the maximum

punishment is less than 14 years or life;

- a discharge would be in the best interests of the accused; and
- a discharge would not be contrary to the public interest.

[125] Subsection 730(3) of the *Criminal Code* deems a discharge not to be a conviction. Subsection 730(4) allows a person bound by a probation order made at the time of a conditional discharge to be convicted and re-sentenced if there is a breach of the probation order.

[126] In *R v Roberts*, 2004 SKCA 153 at paras 7-8, 254 Sask R 174, the Court of Appeal reviewed the test for a conditional discharge:

> [7] Section 730(1) of the *Criminal Code* provides that a discharge may be granted only if that disposition is both in the best interests of the accused and not contrary to the public interest. Section 730(1) reads as follows:
>
> > 730.(1) Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).
>
> [8] In *R. v. Elsharawy* (1997), 119 C.C.C. (3d) 565, at pp. 566-67, the Court of Appeal for Newfoundland commented as follows on the prerequisites to a valid discharge:
>
> > [3] For the Court to exercise its discretion to grant a discharge under s. 730 of the *Criminal Code*, the Court must consider that that type of disposition is: (i) in the best interests of the accused: and (ii) not contrary to the public interest. The first condition presupposes that the accused is a person of good character, usually without

> previous conviction or discharge, that he does not require personal deterrence or rehabilitation and that a criminal conviction may have significant adverse repercussions. The second condition involves a consideration of the principle of general deterrence with attention being paid to the gravity of the offence, its incidence in the community, public attitudes towards it and public confidence in the effective enforcement of the criminal law. See *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450 (B.C.C.A.), and *R. v. Waters* (1990), 54 C.C.C. (3d) 40 (Sask. Q.B.).

[127] The Transcript shows that the sentencing judge turned his mind to the defence request for a conditional discharge and expressly considered the statutory criteria for a discharge. He concluded a discharge was not in the public interest:

> In this case, though having heard the facts, hearding [*sic*] about your personal circumstances I'm not prepared to grant a conditional discharge. While it would be in your best interests I am not persuaded, in this case, it is in the best interests of society.
>
> [Transcript, T31, Lines 21-24]

[128] I agree with the sentencing judge's analysis and conclusion.

[129] In his reasons, the sentencing judge considered *Chopra* (Transcript, T30-T31). Of the decisions reviewed above, *Chopra* seems closest on the facts. The sentence there was 12-month conditional sentence order followed by 2 years' probation.

[130] As stated above under "Sentencing Principles for Animal Cruelty Offences", discharges are rare in reported animal cruelty cases. In the 28 sentencing decisions reviewed above, there were no absolute discharges. Conditional discharges were granted in three cases: *Mathes, Way*, and *Gamble.* These cases are distinguishable on their facts.

[131] In *Mathes*, the Crown was not opposed to the requested conditional discharge. *Mathes* strikes me as an outlier.

[132] *Way* was a case of neglect, not intentional infliction of harm, by a sympathetic offender.

[133] In *Gamble*, the summary conviction appeal court allowed the Crown appeal against sentence of absolute discharge and substituted a conditional discharge. The offence occurred before the 2008 amendments to the *Criminal Code* which increased penalties.

[134] In *Reykdal*, the New Brunswick Court of Appeal overturned the summary conviction appeal court sentence of conditional discharge, restoring the original prison sentence. *Reykdal*, in my view, is the better authority.

[135] I dismiss this ground of appeal.

VII. CONCLUSION

[136] The appeal against sentence is dismissed.

[137] Finally, I thank both counsel for their submissions and assistance.

J.
D.N. ROBERTSON