CITATION: *R. v. Chaloner*, 2018 ONCJ 577
St. Catharines
DATE: 2018.05.14

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

BRADLEY CHALONER

Before Justice Fergus ODonnell
Reasons for sentence delivered on 14 May, 2018

Ms. S. Sheehan and Mr. H. Limheng ..... for the Crown
Mr. V. Singh and Mr. B. Chase ..... for the defendant, Bradley Chaloner

Fergus ODonnell, J.:

1. On 9 November, 2015 Bradley Chaloner went to a home on Regional Road 69 in Lincoln, Ontario and kicked in the front door. He went to the master bedroom and stole jewellery. When a neighbour confronted him, Mr. Chaloner removed his vehicle licence plates before driving off. He caused $2,100 in damage to the home and took about $3,000 worth of jewellery.

2. A week later, Mr. Chaloner drove the same vehicle, un-plated, to a home on Fourth Avenue in St. Catharines, kicked in the door and went to the master bedroom, where he rummaged through the homeowners' jewellery. When Mr. Chaloner came out of the house, he was confronted by the homeowner and told to leave and drop the items he had stolen, which he did. He had done $1,000 in damage to the door and frame that day.

3. These were, as it happens, much better outcomes for both the resident and Mr. Chaloner than another break-and-entry a decade earlier.

4. Unsurprisingly, the Niagara Regional Police Street Crime Unit was interested in these break-and-enters. For reasons that will become clear, they were also interested in Mr. Chaloner. On 8 December, 2015, the police followed

Mr. Chaloner to a residence on Victoria Avenue in Jordan. At that residence, Mr. Chaloner again kicked in the door. He left with a large screen television, an X-box and a locked safe. He returned to St. Catharines, where he went to a lot on Rykert Street, forced open the safe and dumped its contents. The police arrested him, retrieving all the stolen items from that day including the contents of the safe, which included important documents. The police also found various tools in Mr. Chaloner's car, which included screwdrivers, a pry-bar and a hammer.

5. At the time of these offences, Mr. Chaloner was on two probation orders, one from a sentence imposed in 2013 for assault causing bodily harm and the other from a break-and-enter conviction in 2015. Every probation order requires an offender to keep the peace and be of good behaviour. Breaking into people's homes is an obvious breach of that condition. Mr. Chaloner committed these offences within about five months of being released from his most recent sentence.

6. On 5 April, 2017, Mr. Chaloner pleaded guilty to two counts of break-and-enter and one count of fail to comply, with all of the facts read in for sentencing. The maximum sentence for breaking into a person’s home is life imprisonment. The Crown proceeded by indictment on the failure to comply charge, which attracts a maximum sentence of four years imprisonment.

7. Mr. Chaloner was thirty-five years old at the time of these offences. There are a few words that could describe Mr. Chaloner's criminal record, but "abysmal" would probably be spot-on. Mr. Singh's choice, "horrendous", is equally apt.

8. Mr. Chaloner's involvement with the criminal justice system began when he was twelve years old and continued, effectively unbroken, up to these offences, which are now about two-and-a-half years ago. To the extent that there are material gaps in the chronology of his convictions, they are explained away by the length of some of the sentences he was serving. Including the present convictions, his convictions as a youth and as an adult now exceed fifty. In terms of volume, breaches of court orders and break-and-enters are the most common; he has eight or nine convictions for each of those. His most serious offences and longest sentences are possession of a loaded restricted or prohibited firearm in 2003 and manslaughter in 2006. When pre-sentence custody is factored in, he received the equivalent of a twenty-nine month sentence for the gun and around seven years for the manslaughter. The manslaughter involved Mr. Chaloner killing a homeowner while fleeing a break-and-enter, delivering one fatal blow as he did so.

9. The balance of Mr. Chaloner's record includes a variety of assaults causing bodily harm (one while serving his manslaughter sentence), escapes, driving offences, property offences and even involvement in a riot at the Niagara Detention Centre.

10. Mr. Chaloner's pre-sentence report shows that he is the elder of two brothers, with a thirteen-year gap between them. He described his upbringing as dysfunctional, noting that at different times he lived with family members other than his parents and in about eleven foster homes. His brother was made a Crown ward. Family and Children's Services were involved with Mr. Chaloner's family from when he was eight years old until he "aged out" at sixteen. Their records cite issues such as "caregiver substance abuse, neglect, lack of supervision and structure, poor hygiene and unstable housing." His parents were drug users and both have criminal records. He now has limited contact with them. His father did not attend Mr. Chaloner's baptism last year and his mother limits her contact with him, believing that it is too late for her to change her ways despite Mr. Chaloner's admonition that it is never too late.

11. Mr. Chaloner told the author of the pre-sentence report that he began drinking when he was twelve, but that alcohol has never been a problem for him. Twelve, however, was also when he started experimenting with drugs, starting with marijuana and rapidly escalating into cocaine, crack cocaine and heroin. He used drugs to comfort himself. He was still using crack cocaine at the time of the most recent offences. He was committing the offences to support his addiction. He described himself as "institutionalized" in light of his many periods of incarceration.

12. Mr. Chaloner's schooling consisted of completing grade eight in the community and doing his entire high school education in the penitentiary, obtaining his O.S.S.D. in 2012.

13. Mr. Chaloner has been in a common-law relationship since he was twenty. He and his wife have a twelve-year-old daughter together and his wife has an eighteen-year-old son. Mr. Chaloner's wife has stuck with him through his prison sentences despite a single domestic assault conviction related to her and a period of separation.

14. Perhaps surprisingly given the length and breadth of his criminal record, Mr. Chaloner was granted bail on 24 December, 2015. It was apparently the first time he had been granted bail in two decades. His younger brother was his surety and Mr. Chaloner was subject to home confinement with limited exceptions for work and counselling or while in the company of his surety or one other person.

15. Mr. Chaloner knew a man named Gary Bergman and told him about his history and also that he was "sick and tired of the way things were going". One day, Mr. Bergman took Mr. Chaloner to hear a reformed offender speak. As it happens, Mr. Bergman also had previous experience as an institutional chaplain and he recommended that Mr. Chaloner seek the support of Mr. Bergman's church because in his experience many people find great support in such communities. Mr. Chaloner started attending New Hope Church Niagara about two years ago. He attends regularly with his wife and their children. He also attends a men’s support group and shares his story. A recording of his narrative,

which I have watched, has become one of the church's most viewed internet postings. He helps clean the church. His stepson, whose video-narrative I have also watched, has followed him into baptism and speaks of the positive influence Mr. Chaloner has been to him. Even his father-in-law, who entirely understandably did not historically have a favourable view of his daughter's partner, now speaks glowingly of him.

16. Mr. Chaloner has kept himself busy since his release. He has found work. He has paid $500 to his lawyer towards restitution. His employers speak highly of him. He appears to have been drug-free over a long period. I was provided with a very comprehensive volume of supporting materials from his employers, members of his support group, his doctor, his daughter, stepson, wife, mother and father-in-law. The materials uniformly reflect a metamorphosis on Mr. Chaloner's part.

17. When one considers its scientific meaning, metamorphosis is a very big word. It is not a word that should be used lightly in a context like this. It is, however, the right word here.

18. The author of the pre-sentence report describes Mr. Chaloner's prognosis as guarded. This is unsurprising given Mr. Chaloner's very long and very troubling history, as well as the fact that the pre-sentence report was drafted about a year ago, when Mr. Chaloner had had less time to prove his *bona fides*. The author, however, gives full credit for the changes narrated by Mr. Chaloner and confirmed by those around him. The author also notes that during Mr. Chaloner's most recent period of probation supervision, he undertook a number of programmes that had not even been required under the terms of the order.

19. Mr. Limheng for the Crown seeks a sentence of between two and four years in the penitentiary in light of all of the circumstances, which include the seriousness of the offences as residential break-and-enters, the fact the offences were committed while on probation and Mr. Chaloner's extremely serious, prolonged and recent criminal record for similar and other offences. This position, he says, gives appropriate credit to Mr. Chaloner's guilty plea while still giving appropriate recognition to the positive steps Mr. Chaloner has clearly taken since his release.

20. By stark contrast, Mr. Singh asks that I grant Mr. Chaloner credit for a short period of pre-release custody with a longer credit for time spent on bail, that I suspend the passage of sentence on the break-and-enter charges (which are not eligible for conditional sentences) and that I impose a robust conditional sentence on the failure to comply charge. There should, he says, also be the maximum period of probation.

21. Although imposing sentence is in one sense a routine activity for judges, sentencing is one of the most complex and nuanced processes that takes place in a courtroom. Unlike arithmetic, there is no single, "correct" answer. The broad parameters are defined by Parliament, such as the maximum sentence available,

which is life imprisonment for breaking into a person's home. In some cases, there is a mandatory minimum sentence established by Parliament: drink-driving, firearms, sexual offences involving children and child pornography are examples of offences attracting mandatory minimum sentences. Objectives and principles of sentencing are also established by Parliament in the *Criminal Code*. The *Criminal Code* also provides forms of sentence such as imprisonment, conditional sentences (i.e. "house arrest"), probation and the like and defines generally when each of those mechanisms is available. The Supreme Court and courts of appeal provide guidance for trial judges on sentencing principles and courts of appeal have historically set ranges of sentence for various types of offences. Those ranges may shift with time and there can be discussion about the extent to which such ranges are binding or, alternatively, the legitimate scope for trial judges to treat a particular case as falling outside the general parameters established by appellate courts.

22. As of 1996, one of the general sentencing options in the *Criminal Code* is the conditional sentence. Not to be confused with a conditional discharge, the conditional sentence is formally known as "serving the sentence in the community" and is more colloquially known as "house arrest" or "home confinement". When introduced, eligibility for a conditional sentence was constrained by only four limitations, namely:
    - The sentence to be imposed had to be less than two years.
    - Serving the sentence in the community would have to be consonant with community safety and with the principles of sentencing.
    - There was no mandatory minimum sentence of imprisonment for the offence.
    - The maximum available sentence for the offence could not be fourteen years or life.

23. In response to the creation of the conditional sentence option, the Supreme Court and lower courts built up a body of authority on when conditional sentences would or would not be appropriate, generally requiring sentencing judges to give serious consideration to the conditional sentence option whenever it was available. Since 1996, however, Parliament has chosen to exclude numerous specific offences and categories of offences from eligibility for conditional sentences. The wisdom and consequences of those changes have been the subject of much debate, but that debate is not particularly material here. Even as originally framed, Mr. Chaloner's house-breaking offences never were eligible for a conditional sentence as a home break-and-enter is punishable by life imprisonment. The absence of a conditional sentence option for certain offences, however, does create the peculiar reality that, in theory at least, one could not sentence Mr. Chaloner to a long term of house arrest for the break-and-enters but one could sentence him to a single day in jail and one could even give him a suspended sentence. It is this tension that underlies the positions taken by the Crown and the defence in Mr. Chaloner's case.

24. That tension must be informed by certain other realities. While judges are given substantial latitude when imposing sentence, we are not entirely free actors. The sentences we impose must be responsive to the law as set down by Parliament and the guidance provided by the Court of Appeal and the Supreme Court of Canada. While it is our job to fashion a sentence that is unique to the offender and his or her offences, we cannot twist the law to achieve a result that is not realistically available. For example, as the Court of Appeal observed in *R. v. Bankay,* 2010 ONCA 799, where the trial judge, faced with an offence that was specifically excluded from the conditional sentence regime, crafted a suspended sentence with house arrest as part of the probation order: "It was an error of law to impose a sentence that circumvented Parliament's decision to exclude conditional sentences for this offence".

25. Section 718 of the *Criminal Code* says that, "the fundamental purpose of sentencing is to protect society and to contribute ... to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives".

26. The stated objectives are:
    - Denunciation of criminal conduct and the harm done by such offences.
    - To deter both the specific offender and the general populace from committing offences.
    - Separating offenders from society, "where necessary".
    - Rehabilitating offenders.
    - Providing reparations to individual victims and society.
    - Creating a sense of responsibility on the part of offenders.

27. The sentencing judge must assess and balance the relative weight to be given to each of these objectives in relation to the particular offender and offences before him or her. It is obvious that some of these objectives, for example deterrence and rehabilitation, may not often lead to identical emphases in deciding the final sentence. Because of factors such as those and because every scenario of offender and offences is unique, the determination of a fit sentence is necessarily tailor made and to some extent subjective.

28. Section 718.1 of the *Criminal Code* requires that a sentence, "be proportionate to the gravity of the offence and the degree of responsibility of the offender." This requirement, known as the proportionality principle is a principle of super-ordinate importance in sentencing. The Supreme Court of Canada's decision in *R. v. Proulx,* 2000 SCC 5, commented on the importance of proportionality at some length, as follows:

> 82. This Court has held on a number of occasions that sentencing is an individualized process, in which the trial judge has considerable discretion in fashioning a fit sentence. The rationale behind this approach stems from the principle of proportionality, the fundamental principle of sentencing, which provides that a sentence must be proportional to the

gravity of the offence and the degree of responsibility of the offender. Proportionality requires an examination of the specific circumstances of both the offender and the offence so that the "punishment fits the crime". As a by-product of such an individualized approach, there will be inevitable variation in sentences imposed for particular crimes. In *M. (C.A.)*, *supra*, I stated, at para. 92:

> It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. . . . Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred.

83. My difficulty with the suggestion that the proportionality principle presumptively excludes certain offences from the conditional sentencing regime is that such an approach focuses inordinately on the gravity of the offence and insufficiently on the moral blameworthiness of the offender. This fundamentally misconstrues the nature of the principle. Proportionality requires that full consideration be given to both factors.

The Supreme Court's language in *Proulx* was of general application, not limited to the particular context before the court in that case. "Full consideration" means that in order to impose a fit sentence, in addition to looking at the undoubted seriousness of Mr. Chaloner's offences, no matter what those offences may be, I must also look at his moral blameworthiness. Any consideration of that necessarily factors in the circumstances of his growing up, not to excuse what he has done, but perhaps to mitigate it. Mr. Chaloner's moral blameworthiness cannot be assessed without consideration of his addiction, although his addiction does not absolve him of responsibility. It is well-established in this province that an addict-trafficker, who traffics at a level to support his or her addiction will be sentenced differently than a commercial trafficker or a non-addict trafficker. Logically the same distinction must apply, with necessary modifications, to non-drug offences committed to support an addiction.

29. It is natural that over time certain practices or expectations have arisen in relation to different types of offences. For a certain type of offence, general deterrence may be more relevant than for other types of offences. For a certain type of offender, particularly a youthful first offender, for example, especial restraint is called for when considering imprisonment as a tool. Likewise, the length and nature of the appropriate sentence for particular types of offence has come to be categorized. Depending on the jurisdiction involved, the terminology might relate to "tariffs" or "ranges" or "starting points". The objective of any of these approaches is to ensure some reasonable consistency in sentences

imposed, not because consistency is a goal in and of itself, but because consistency ensures that offender A gets generally the same range of sentence for the same type of offence as offender B. The devil, of course, lies in the details because while A and B and their offences may appear superficially comparable, there may be umpteen nuances that differentiate them.

30. Even when the Court of Appeal stresses the importance of sentence ranges in guiding sentencing judges, the court has recognized that ranges may have to give way in appropriate cases. For example, in *R. v. D.(D.),* 2002 CanLII 49415, a case involving the appropriate sentence for sexual crimes against children, the court said:

> [33] Before going further, I wish to emphasize that the ranges which I have identified are not meant to be fixed and inflexible. On the contrary, sentencing is not an exact science and trial judges must retain the flexibility needed to do justice in individual cases. The suggested ranges are merely guidelines designed to assist trial judges in their difficult task of fashioning fit and just sentences in similar cases.

31. The primacy of individual fitness of sentence over predictability and efficiency in sentencing and the recognition the Supreme Court of Canada has given to that preference is canvassed (among other issues) at some length in the judgment of Mr. Justice Green of this court in *R. v. McGill,* 2016 ONCJ 138. Green, J. concludes that an appeal court's approved sentencing range for a particular kind of offence serves to guide a sentencing judge in the exercise of his or her discretion and in the determination of a just, appropriate and individualized sentence, but such a range, "cannot itself determine the result". In other words, in determining the fitness of sentence, individualized proportionality trumps compliance with a sentence range.

32. As Green, J. observes in *McGill*, the notion of "exceptional circumstances" is often the mechanism for, "preserving the continuing authority of the sanctioned range [of sentence] while allowing for more lenient treatment of "exceptional", "rare", "unusual" or "extraordinary" cases that, through such legal characterizations, can be fairly and sympathetically addressed without jeopardizing the sentencing norm for any given class of cases." (at paragraph 69). Green, J. then proceeds in substantial detail to assess the continuing need for a concept as vague and elastic, yet still rather restrictive in application, as "exceptional circumstances" in light of the Supreme Court of Canada's judgment in *R. v. Lacasse,* 2015 SCC 64, a case that focused squarely on the centrality of individualized proportionality in sentencing. By Green, J.'s count (I confess to not having checked), the Supreme Court of Canada referred to the language of “exceptional circumstances” precisely never in *Lacasse's* one-hundred-and-eighty-three paragraphs.

33. I do not propose to delve more deeply into Green, J.'s own one-hundred-and-twenty-one paragraphs of worthwhile analysis relating to these and other sentencing issues, or to presume to replicate that *oeuvre*, other than to note as

Green, J. did with Mr. McGill, that I conclude that whether one follows the route of case-specific, proportionality-focused application of the principles of sentencing, with due regard to sentencing ranges for offences like Mr. Chaloner's, or whether one goes down the path of "exceptional circumstances" justifying a departure from a "range" of sentence as discussed in cases such as *R. v. Voong,* 2015 BCCA 285, one ends up with the same conclusion.

34. The *Criminal Code* addresses the need for restraint in the use of imprisonment on at least two occasions. First, section 718(1)(c), specifically qualifies imprisonment as a means of achieving a safe society by the use of the words "where necessary". Second, section 718.2(e) reinforces the need for restraint with imprisonment by requiring that, "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders..." While this clause ends with a call for particular attention to the circumstances of Aboriginal offenders, who are massively over-represented in Canadian prisons, the principle stated in the *Code* is actually of general application. Imposing a sentence that reflects as much as possible the details of the offender and offence is a central requirement of just sentencing.

Pre-Sentence Custody and Credit for Time on Bail

35. Mr. Chaloner spent seventeen days in custody before being granted release on Christmas Eve, 2015. I do not take the Crown to dispute that he should receive the "usual" credit of 1.5 to 1 for that time, resulting in a credit for twenty-six days of pre-sentence custody. For simplicity's sake, I shall treat that as a month.

36. The Crown and defence do disagree with respect to whether or not Mr. Chaloner should receive credit for his time spent on bail. As of the date of sentencing, Mr. Chaloner has been on bail for 871 days.

37. It has been inescapably clear since at least the Court of Appeal decision in *R. v. Downes,* 2006 CanLII 3957, that it is open to a sentencing judge to grant credit for time spent on stringent bail conditions, especially house arrest, and that a sentencing judge should explain his or her reasons for declining to grant credit. The Court of Appeal granted Mr. Downes five months credit for eighteen months on house arrest, noting that the house arrest did not include exceptions for work or education. The same case recognized that there will be cases where no credit is deserved. An example of a case in which the defendant trivialized the *Downes* principle and sought house-arrest credit when no such request should have been made is *R. v. Ijam,* 2007 ONCA 597, in which MacPherson, J.A. pithily observed that "bail is not jail. Bail is what an accused person desires to stay out of jail." While Mr. Ijam was on bail for thirty-one months, he spent only five weeks on house arrest with the remaining thirty months on a 10 p.m. curfew unless he was with his surety or at work.

38. Mr. Chaloner has been on bail for almost twenty-nine months.

39. Mr. Limheng for the Crown is not wrong when he says that Mr. Chaloner's release on bail was one of the best things that has happened to him, although it might be observed that, at least up to the time of his release on bail, the number of good things that happened to Mr. Chaloner was a fairly short list. In saying that I do not mean to eliminate Mr. Chaloner's personal responsibility for his offences by any means. I would, however, pick up on another of Mr. Limheng's apt observations. When discussing the appropriate sentence range, Mr. Limheng urged that I not ignore Mr. Chaloner's criminal record, noting, "what's past is prologue". To the extent that Shakespeare should be taken as suggesting that the future is dictated by the past, the same might be said of the relationship between Mr. Chaloner's lamentable upbringing and its relationship to a life of criminality. In any event, for the past two-and-a-half years it appears that Mr. Chaloner has not allowed his past to dictate his future. To an extent that is truly remarkable for someone with his past, Mr. Chaloner has chosen to reject his familiar and deep-rooted anti-social patterns of the past two decades and to make a better choice. To paraphrase his wife, he has become the man she always wanted him to be. A turnabout of that nature is not something that comes easily. It requires courage, humility, persistence and selflessness. Mr. Chaloner is not the only beneficiary of that dramatic turn-about. So are those in his immediate circle. So are those whom the former Mr. Chaloner would have victimized over the course of the past 871 days.

40. The long and the short of it, and this was true long before the Supreme Court pointed it out recently in *R. v. Antic,* 2017 SCC 27, is that a defendant is entitled to bail unless a justice of the peace has reason to conclude that he will not attend for trial or will commit further offences while on bail or his release is contrary to the public interest. A justice of the peace made that determination on a plan that included restrictions on Mr. Chaloner's freedom for a prolonged period of time. Those restrictions did include exceptions including employment, but neither the existence of those exceptions nor the fact that Mr. Chaloner has an awful record eliminates his entitlement to some credit for his bail restrictions. In all the circumstances, I would allow credit for six months for the bail restrictions, which is about three-quarters of the percentage granted in *Downes*.

41. Accordingly, between the month's credit for pre-sentence custody and the six months credit for time under bail constraints, Mr. Chaloner is entitled to credit for seven months of pre-sentence custody equivalence.

What is the Appropriate Sentence for Mr. Chaloner

42. There should be absolutely no doubt that these are very serious offences. In the course of these reasons I have used the word "home" purposefully and I have purposefully chosen not to use any of its synonyms. Home is a simple word. It resonates. Fancier terms like "residence" or "dwelling house" may be more the stuff of lawyers and courtrooms, but sometimes the use of fancy words clouds the real significance of a place or thing or event. I have never seen a sign on sale in a gift shop with the words, "Dwelling House, Sweet Dwelling House" or

"Residence, Sweet Residence". That is because, "Home, Sweet Home" is much more straightforward and much more evocative. It is important that Mr. Chaloner keep that distinction in mind, because the houses he broke into were not just buildings, they were people's homes, and the things he took were not just material possessions; what he took included each homeowner's sense of security in relation to that place where a person should feel the most secure. That reality is nothing new, but it was expressed directly in a victim impact statement as follows:

> *The break and enter of our home by the defendant has had a lasting, negative impact on our daily lives. Due to the damages from this intrusion, we experienced financial hardship to repair and restore our home. We no longer feel safe and have installed cameras and a security system to help us cope with the persistent unease that this crime has created. Our pets still frantically scatter when a visitor knocks on our door and my wife and I will wake in the night wondering if we hear footsteps in our home. Unfortunately, we see this fear as a permanent change that we are now forced to live with.*

43. To paraphrase that unfortunate reality in words that should resonate with Mr. Chaloner, "whatsoever you do unto my brothers or sisters you do unto me." By that philosophy, which rings true from both a religious and secular perspective, each of those homeowners was Mr. Chaloner's brother or sister.

44. It also goes without saying that Mr. Chaloner's criminal record is truly awful.

45. The seriousness of Mr. Chaloner's offences, including the aggravating factors, such as him being on probation, the recency of his release from custody and his atrocious previous criminal record, make the Crown's position of a sentence of two to four years' imprisonment perfectly understandable. Nobody could suggest that the Crown was stepping outside "the range" in making the submissions the Crown makes. It is clear that in advancing the lower end of its position, the Crown has not ignored the steps Mr. Chaloner has taken towards his rehabilitation.

46. The general reasonableness of the Crown's position is not necessarily determinative, however. A wide range of sentences might be seen as generally reasonable for a particular offender and his offences. It is the sentencing judge's task, and within reasonable limits his or her prerogative, to decide where within that range the sentence should fall.

47. Creating a safe society is the core objective of sentencing under the *Criminal Code.* The tools provided allow for achieving that objective through various means. Obviously, locking people up will keep other citizens safe from them, for as long as they are locked up. It may, however, subject other people who are incarcerated to a heightened risk. Imprisonment is, in any event, at best a necessary evil. It comes at a very high cost: first, the annual, per-inmate cost of running the institution, which is staggering; second, the unavailability of those

funds for other risk minimization programmes; and third, the undeniable fact that whatever success incarceration may have with some inmates by, "scaring them straight", prison undoubtedly becomes a school of crime where novices meet hardened offenders they might never have met elsewhere, where they learn skills that are conducive neither to their rehabilitation nor to society's safety and where any anti-social inclinations they may have manifested are more likely to be aggravated than ameliorated.

48. In *R. v. Preston,* 1990 CanLII 576, a five-judge panel of the British Columbia Court of Appeal made the following observations with respect to offences committed by drug addicts, observations that have lost none of their relevance in the intervening three decades:

> It is true that the heroin addict must invariably support his or her addiction with some form of criminal activity. Many studies were referred to by counsel which show a dramatic correlation between drug addiction and high levels of offending. Thus the annual cost to society, in terms of the crimes against property, robberies, prostitution and other such offences, required to keep the estimated 3,200 to 4,200 addicts in this province supplied with heroin, is staggering. In that sense the argument that the opportunity to interrupt the cycle, by a sentence of incarceration during which the addict will not be able to commit crimes against society, has a certain superficial attraction.
>
> However, the protection which society derives from a sentence of imprisonment, imposed upon a heroin addict for the purpose just described, is transitory at best. There is no credible basis for expecting that a term of imprisonment will rehabilitate the addict. Drugs of all sorts are readily available in our prisons and penitentiaries. Only the price varies, in kind and amount, from that which is exacted on the street. When the sentence is served, the addict who re-emerges from custody poses the same threat to society as before, and the whole cycle is ready to be repeated.
>
> The role of incarceration in this cycle not only fails to achieve its ultimate goal which is the protection of society, but it also costs society a great deal of money, which might better be spent elsewhere. Statistics Canada reports that during the 1988/1989 fiscal year the cost of maintaining a prisoner in a custodial facility averaged $46,282.00 in a federal penitentiary and $36,708.00 in a provincial gaol.
>
> The object of the entire criminal justice system, of course, is the protection of society, and I say at once that if incarceration is the only way of protecting society from a particular offender, then transitory and expensive though it may be, that form of protection must be invoked. But where, as in this case, the danger to society results from the potential of the addict to commit offences to support her habit, and it appears to the court that there is a reasonable chance that she may succeed in an attempt to control her addiction, then it becomes necessary to consider the ultimate benefit to society if that chance becomes a reality.

> With respect, that benefit seems obvious. If the chance for rehabilitation becomes a reality, society will be permanently protected from the danger which she otherwise presents in the fashion described above. As well, the cost associated with her frequent incarceration will be avoided.

49. Every criminal case, minor or major passes through the provincial courts. In this and many other courthouses, the vast majority of them, major and minor, go no further. Cases matching Mr. Chaloner's trajectory from severe family dysfunction into minor criminality, substance abuse, addiction and pervasive criminality rooted in that addiction are as common as the sun rising in the east. Many offenders vow that they are going to master their addiction. Promises like that are as common as the sun rising in the east. Given the nature of addiction and the limited community resources available to deal with addiction, it is understandable that few addicts manage to follow through on that promise. Mr. Chaloner's circumstances dramatically surpass those described by the court in *Preston, supra,* where the court observed that, "there is a reasonable chance that [the addict] may succeed in an attempt to control her addiction." By all accounts he has established a meaningful track record of keeping his addiction under control for a prolonged period and of establishing a pattern of pro-social behaviour, reinforced by a network of people in his family and community who have his back. “Remarkable” would be an apt way of describing what Mr. Chaloner has accomplished. “Exceptional” would also be an apt word.

50. The social cost of an addict offender who does not rehabilitate is obvious: more thefts, burglaries, robberies and low-level, self-sustaining trafficking offences, all with their attendant stream of victims, until the offender is caught again and re-incarcerated, released again and presses “replay”. The fiscal cost of that re-incarceration, according to Statistics Canada is staggering: just over $103,000 per year for an inmate in the federal system and just over $74,000 per year in the provincial correctional system (as of 2015/2016). Each of those figures has more than doubled since *Preston, supra.*

51. The British Columbia Court of Appeal in *R. v. Voong,* 2015 BCCA 285, considered a series of drug trafficking sentence appeals in which the issue of "exceptional circumstances" was advanced as a basis for imposing non-custodial sentences. The court made the following observation about the applicability of the doctrine of exceptional circumstances:

> [45] The exceptional circumstances must engage principles of sentencing to a degree sufficient to overcome the application of the main principles of deterrence and denunciation by way of a prison sentence.

52. The concept of noteworthy rehabilitation making out exceptional circumstances as a legitimate consideration for a sentencing judge is not confined to courts west of the Rockies. In *R. v. D'Souza,* 2015 ONCA 805, the Court of Appeal for Ontario dealt with a case very different from Mr. Chaloner's, although the underlying message remains relevant. D'Souza was a first offender who had

sold a quarter pound of marihuana to an undercover officer. The Crown sought a four-month conditional sentence, the defence sought a conditional discharge and the trial judge imposed a $750 fine. It is a requirement for granting a discharge that a sentence not be contrary to the public interest. In allowing the defence appeal and imposing a conditional discharge, the Court of Appeal stated:

> The appellant has taken remarkable steps to change his way of life, including successful treatment for his addiction to marijuana, substantial volunteer work, part-time employment, and full-time university studies. The trial judge recognized the appellant's progress, but seemed focussed heavily on general deterrence. In the circumstances of this case, we think there was room to recognize that a criminal record for this first time youthful offender was not necessary.

53. While the circumstances and the test in each case are dramatically different, the wisdom of one case is transferable to the other. Indeed, Mr. Chaloner's accomplishments outpace Mr. D'Souza's by at least one order of magnitude.

54. General deterrence is one of the common objectives of sentencing. Quite apart from the tenuous evidence-based foundation for the principle of general deterrence, one must keep in mind that it is but one of the principles of sentencing and it is subsidiary to the "fundamental purpose of sentencing", which is to protect society. Before the events after his release, Mr. Chaloner was a clear and present danger to a safe society. What he has accomplished since then has not only eliminated that very real danger, but has come a substantial distance in the process of converting him into an established force for good in his immediate environment and in the broader community. To impose a sentence of real jail at this time would be to throw the baby out with the bath water. It would implode all of the achievements Mr. Chaloner has made to date and would send a message to him (and other offenders who might be paying attention), that every admonition from every judge that he should deal with his addiction and get out of the life was meaningless and insincere. To impose a sentence of real jail for the sake of general deterrence (or for denunciation) at this point would increase the danger to society and would directly violate the fundamental purpose of sentencing in s. 718.

55. I do not believe that a sentence of real jail is required for specific deterrence. I appreciate that there is no absolute guarantee that Mr. Chaloner will continue to stay the course of the past couple of years, but he has a meaningful track record based on which one can rationally conclude that he will do precisely that. To the extent that specific deterrence may be required, that can be accomplished by means of the conditional sentence and suspended sentence provisions of the *Criminal Code*, without undoing all that Mr. Chaloner has accomplished. The available enforcement mechanisms for breaches of conditional sentences and suspended sentences mean that Mr. Chaloner will continue to operate, for years, with the realization that if he returns to his old ways, all that he has accomplished over the past two years, which was not part of his reality for the past two decades, could come crashing down.

56. Sending Mr. Chaloner back to jail would accomplish nothing for specific deterrence. It would only send him the message that there is no point in him trying. It would undermine the credibility of sentencing courts that routinely call on defendants like Mr. Chaloner to do precisely what Mr. Chaloner has done.

57. The conditional sentence and suspended sentence provisions also provide a means for Mr. Chaloner to rehabilitate and to make reparations to his victims and to the broader society. While his earnings are not great, an employed Mr. Chaloner is not only stable and less likely to return to drugs and criminality, he has the potential to pay towards his victims' losses beyond the up-front payment he has made. Mr. Chaloner in the community can also make reparations to the broader society in the form of community service.

58. I am entirely satisfied that the sentence that, by a substantial margin, is most responsive to the objectives of sentencing and that is most true to the cardinal requirement of proportionality of sentencing is the following:

    a. On the breach of probation charge, I sentence Mr. Chaloner to a conditional sentence of two years less a day. A sentence of that duration is justified in light of Mr. Chaloner's established pattern of disregard for court orders. I am satisfied that a conditional sentence satisfies all of the prerequisites to the imposition of a conditional sentence and is consistent with public safety and the principles of sentencing. Mr. Chaloner will spend the first eight months of the conditional sentence under house arrest and there shall be a curfew for the next eight months, each subject to exceptions that will be discussed. He shall conform to the requirements of the Electronic Supervision Programme for the house arrest and curfew periods of the conditional sentence.

    b. Following the conditional sentence, Mr. Chaloner will be on probation for three years. I have chosen the maximum term of probation because Mr. Chaloner, despite all he has done, remains a work in progress and ongoing supervision, which can be diluted by the probation officer as circumstances dictate, is in both his and society's interests.

    c. Mr. Chaloner's sentences on the break-and-enter counts will be concurrent to each other. The equivalent of seven months of pre-sentence custody will be noted. He will receive a suspended sentence on each count, with probation for three years, to commence after the conclusion of his conditional sentence on the breach of probation charge.[1]

[1] It may appear that there is a certain artificiality to Mr. Chaloner receiving a conditional sentence of imprisonment on the charge of breach of probation and a "lesser" sentence on the house break-ins. Superficially that is true. However, so long as one is not doing an end-run around Parliament, substance is much more important than form. It is preferable that the miscellaneous sentencing tools of the *Criminal Code* be used to fashion a sentence that, in its totality best achieves the sentencing objectives of Parliament. It is also important to recognize that Mr. Chaloner has “used up” credit for the equivalent of seven months of pre-sentence custody towards the break-and-enters and to recognize the

d. <u>The following conditions shall appear on both Mr. Chaloner's conditional sentence order and his probation order</u>:

- He shall report to his supervisor/probation officer today and thereafter as directed.
- He shall live at an address approved of by his supervisor/probation officer and shall not change that address without written approval in advance.
- He shall have no contact or communication with the victims of the three break-and-enters referred to at the time of his guilty plea and shall not be within one hundred metres of 3448 Victoria Avenue, Lincoln, 2287 Regional Road 69, Lincoln or 1630 Fourth Avenue, St. Catharines.
- He shall not associate or communicate directly or indirectly with any person known to him to have a criminal or youth record (other than family members or any incidental contact at any employment, education, counselling or religious setting) unless he has the prior written approval of his supervisor/probation officer.
- He shall not purchase, possess or consume any controlled substances as defined by the *Controlled Drugs and Substances Act* unless he has a valid prescription. He shall notify his supervisor/probation officer within seven days of all prescriptions he obtains for controlled substances.
- He shall attend for assessment and counselling as directed by his supervisor/probation officer including for substance abuse, anger management and anti-criminal thinking and any other area that is ordered by probation.

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seriousness of Mr. Chaloner's breaches as part of his criminal conduct. It is impossible to disentangle the breaches from the break-and-enters. The same conduct underlies both of them. Arguably, the breach is more serious because it adds the element of defiance of a court order. It may also appear perverse that Mr. Chaloner "benefits" from having pleaded to a breach of probation charge because that charge allows for the imposition of a conditional sentence separate from the outcome on the break-ins, whereas a defendant faced only with a substantive offence would have no such flexibility. Again, there is a certain superficial merit in that perspective. However, as *McGill, supra,* shows us, in appropriate circumstances an offender otherwise facing a penitentiary sentencing range may in appropriate circumstances earn a sentence far below that range, even while facing only a single substantive charge. Mr. Chaloner's ultimate jeopardy here is substantially longer than Mr. McGill's, and more looming when it comes to the consequences of any breach of his conditional sentence. It is certainly fair to say that the sentence I impose on Mr. Chaloner today is atypical, as befits his progress, but one would scarcely describe five years of jeopardy as a walk in the park. If Mr. Chaloner breaches his conditional sentence, he risks being ordered to serve the entirety of that sentence in custody rather than in the community, and that after a hearing in which the burden on the Crown is only proof on a balance of probabilities. Although it is now seldom done, while Mr. Chaloner is serving his suspended sentence, rather than proceeding with the usual charge of breach of probation, the Crown has the option of bringing Mr. Chaloner back before the court and asking that he be sentenced on the original offences: *Criminal Code* s. 732.2(5). That provision extends Mr. Chaloner's material jeopardy out to five years from today.

- He shall continue under the care of a physician including treatment for drug dependency and including drug testing as directed by his physician and/or his supervisor/probation officer.
- He shall make reasonable efforts to obtain and maintain appropriate employment and/or education.
- He shall not possess any weapons.
- He shall pay the sum of $75 into court each month to be disbursed to the victims of each of the three break-ins described in these reasons in equal shares until such time as any loss or damage not paid for by insurance has been paid in full. Any dispute over the amounts payable may be brought back before the court.
- He shall sign releases and provide proof of compliance to assist his supervisor/probation officer in monitoring his progress.

59. The following terms shall appear on the conditional sentence order but not on the probation order:

    - He shall comply with all terms of the Electronic Supervision Programme during the house arrest and curfew periods of the conditional sentence.
    - At any time when he is required to be at home, he shall respond in person to a compliance check by the police or his supervisor within five minutes of their arrival.
    - He shall direct his counsel to pay the sum of $500 currently held in trust into court to be disbursed to the victims of each of the three break-ins described in these reasons in equal shares.

60. The following terms shall appear on the probation order but not on the conditional sentence order:

    - During the first eighteen months of probation he shall perform 240 hours of community service at a placement approved of by his probation officer, no more than half of which shall be for or in association with his church.

61. Ancillary orders:

    - Mr. Chaloner shall provide a sample of his DNA for inclusion in the DNA databank on the primary designated offences of break-and-enter.
    - There is a mandatory victim fine surcharge of $600. In order to allow Mr. Chaloner to give priority to paying restitution to his victims, he shall have five years to pay that surcharge.

Delivered: 14 May, 2018