Most Negative Treatment: Distinguished
Most Recent Distinguished: R. v. Lugela | 2021 ABPC 274, 2021 CarswellAlta 2665, 177 W.C.B. (2d) 183, [2022] A.W.L.D. 818, [2022] A.W.L.D. 819, [2022] A.W.L.D. 820 | (Alta. Prov. Ct., Oct 27, 2021)

2012 ABPC 167
Alberta Provincial Court

R. v. Tschetter

2012 CarswellAlta 1062, 2012 ABPC 167, [2012] A.W.L.D. 4734, [2012] A.W.L.D. 4735, 103 W.C.B. (2d) 282

Her Majesty the Queen and Nathan Benjamin Tschetter and William James Tschetter

J.N. LeGrandeur Prov. J.

Heard: April 4-26, 2012
Judgment: June 6, 2012
Docket: Lethbridge 111126470P1, 111126504P1, 111184818P1

Counsel: L. Weich, for Crown
M. Pollard, for Defence

Subject: Natural Resources; Public; Criminal
Related Abridgment Classifications
Natural resources
I Fish and wildlife
I.5 Offences
I.5.e Illegal sale of fish or wildlife
Natural resources
I Fish and wildlife
I.5 Offences
I.5.o Sentencing
I.5.o.i Fines
Headnote
Natural resources --- Fish and wildlife — Offences — Illegal sale of fish or wildlife
Accused was sentenced to $12,405 in fines and surcharges after pleading guilty to three counts of **trafficking** of s.62 of Alberta's Wildlife Act with co-accused being fined $27,220 after pleading guilty to six counts of **trafficking** and careless storage of firearm — Court took into account in not imposing jail sentence that both accused were members of Hutterite colony where all members would pledge together ensure that legal obligations would be met — Court noted that accused were not engaged in sophisticated operation but were intentionally risk taking that increased their moral culpability — Accused were arrested after undercover operation with accused engaged in purpose to increase spending money — Court noted that accused were not dealing with trophy parts from big game animals but **trafficking** in eagle and birds of prey parts must be seen as more serious given nature of items and potential threat to ongoing viability of such birds.
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Table of Authorities

Cases considered by *J.N. LeGrandeur Prov. J.*:

R. v. Arbuthnot (2009), 245 Man. R. (2d) 244, 466 W.A.C. 244, 248 C.C.C. (3d) 219, [2010] 3 W.W.R. 447, 2009 CarswellMan 497, 2009 MBCA 106 (Man. C.A.) — considered

R. v. B. (T.L.) (2007), 218 C.C.C. (3d) 11, 409 A.R. 40, 2007 ABCA 61, 2007 CarswellAlta 194, 70 Alta. L.R. (4th) 1, 402 W.A.C. 40 (Alta. C.A.) — considered

R. v. Brady (1998), 15 C.R. (5th) 110, 1998 ABCA 7, 1998 CarswellAlta 31, 59 Alta. L.R. (3d) 133, 121 C.C.C. (3d) 504, 209 A.R. 321, 160 W.A.C. 321, [1998] 7 W.W.R. 272 (Alta. C.A.) — referred to

R. v. Cardinal (2009), 46 C.E.L.R. (3d) 146, 470 A.R. 57, 2009 ABPC 296, 2009 CarswellAlta 1559, [2009] 4 C.N.L.R. 276 (Alta. Prov. Ct.) — referred to

R. v. Cromwell (2005), 238 N.S.R. (2d) 17, 757 A.P.R. 17, 23 M.V.R. (5th) 39, 2005 NSCA 137, 2005 CarswellNS 460, 202 C.C.C. (3d) 310 (N.S. C.A.) — considered

R. v. Haines (1975), 1975 CarswellOnt 10, 29 C.R.N.S. 239 (Ont. C.A.) — referred to

R. v. Hamilton (2004), 72 O.R. (3d) 1, 186 C.C.C. (3d) 129, 241 D.L.R. (4th) 490, 189 O.A.C. 90, 2004 CarswellOnt 3214, 22 C.R. (6th) 1 (Ont. C.A.) — considered

R. v. Johnas (1982), 1982 CarswellAlta 299, 32 C.R. (3d) 1, 2 C.C.C. (3d) 490, 41 A.R. 183, 1982 ABCA 331 (Alta. C.A.) — considered

R. v. Lamouche (1998), 236 A.R. 69, 1998 CarswellAlta 1215 (Alta. Prov. Ct.) — referred to

R. v. Lamouche (2000), 2000 ABQB 461, 2000 CarswellAlta 707, 267 A.R. 347, 86 Alta. L.R. (3d) 330 (Alta. Q.B.) — referred to

R. v. M. (C.A.) (1996), 46 C.R. (4th) 269, 194 N.R. 321, 105 C.C.C. (3d) 327, 73 B.C.A.C. 81, 120 W.A.C. 81, [1996] 1 S.C.R. 500, 1996 CarswellBC 1000, 1996 CarswellBC 1000F (S.C.C.) — referred to

R. c. M. (L.) (2008), 2008 CarswellQue 4417, 2008 CarswellQue 4418, (sub nom. *R. v. L.M.)* 374 N.R. 351, (sub nom. *R. v. M. (L.))* 293 D.L.R. (4th) 1, (sub nom. *R. v. L.M.)* [2008] 2 S.C.R. 163, (sub nom. *R. v. M. (L.))* 231 C.C.C. (3d) 310, 2008 SCC 31, 56 C.R. (6th) 278 (S.C.C.) — considered

R. v. Moosemay (2005), 2005 ABPC 346, 2005 CarswellAlta 1837 (Alta. Prov. Ct.) — referred to

R. v. Potts (2010), 492 A.R. 180, 2010 ABPC 194, 2010 CarswellAlta 1072 (Alta. Prov. Ct.) — considered

R. v. Priest (1996), 1996 CarswellOnt 3588, 110 C.C.C. (3d) 289, 93 O.A.C. 163, 30 O.R. (3d) 538, 1 C.R. (5th) 275 (Ont. C.A.) — considered

R. v. Proulx (2000), 2000 SCC 5, 2000 CarswellMan 32, 2000 CarswellMan 33, [2000] 4 W.W.R. 21, 49 M.V.R. (3d) 163, 30 C.R. (5th) 1, 182 D.L.R. (4th) 1, 249 N.R. 201, 140 C.C.C. (3d) 449, [2000] 1 S.C.R. 61, 142 Man. R. (2d) 161, 212 W.A.C. 161 (S.C.C.) — considered

R. v. Topp (2011), 2011 CarswellOnt 9422, 2011 CarswellOnt 9423, 2011 SCC 43, 272 C.C.C. (3d) 417, 336 D.L.R. (4th) 432, 86 C.R. (6th) 271, 421 N.R. 95, 283 O.A.C. 1, [2011] 3 S.C.R. 119 (S.C.C.) — referred to

R. v. Wozny (2010), 267 C.C.C. (3d) 308, 262 Man. R. (2d) 75, 507 W.A.C. 75, 2010 MBCA 115, 2010 CarswellMan 757, [2011] 2 W.W.R. 630 (Man. C.A.) — followed

Reference re s. 94(2) of the Motor Vehicle Act (British Columbia) (1985), 1985 CarswellBC 398, [1986] D.L.Q. 90, 1985 CarswellBC 816, [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536, 63 N.R. 266, 69 B.C.L.R. 145, 23 C.C.C. (3d) 289, 18 C.R.R. 30, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 48 C.R. (3d) 289 (S.C.C.) — referred to

Statutes considered:

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

Pt. XXIII — referred to

s. 86(1) — considered

s. 718 — considered

s. 718(1) — considered

s. 718(2) — considered

s. 734(2) — considered

Motor Vehicle Act, R.S.B.C. 1979, c. 288

s. 94(2) — referred to

Provincial Offences Procedure Act, R.S.A. 2000, c. P-34

Generally — referred to

s. 7(2) — considered

Wildlife Act, R.S.A. 2000, c. W-10

Generally — referred to

s. 62(1) — referred to

s. 62(2) — referred to

s. 90 — considered

s. 96 — considered

s. 97(a) — considered

s. 101(1) — considered

Regulations considered:

Wildlife Act, R.S.A. 2000, c. W-10

Wildlife Regulation, Alta. Reg. 143/97

Generally — referred to

***J.N. LeGrandeur Prov. J.*:**

Nature of the Proceedings

1 The defendant Nathan Tschetter has entered guilty pleas to three counts of **trafficking** of wildlife contrary to s.62(1) of the *Wildlife Act*, RSA 2000, Chapter W-10, as amended. The offender was originally charged with five counts of **trafficking**, however Count 1 was amended to include Count 3, which was withdrawn and Count 4 was amended to include Count 5 with Count 5 being withdrawn. The amended Counts 1 and 4 to which the offender has pled guilty allegedly **trafficking** in mule and white-tailed deer parts on the 10th day of March and the 15th day of April of 2011 respectively. Count 2 alleges **trafficking** in eagle parts which occurred on the 10th day of March, 2011.

2 William Tschetter entered guilty pleas to six counts of **trafficking** in wildlife contrary to s.62(1) of the *Wildlife Act*, *supra* and one count of possession of wildlife for purposes of **trafficking** specifically birds of prey, contrary to s.62(2) of the *Wildlife Act*, *supra*. William Tschetter was originally charged with ten counts under the *Wildlife Act*, however, the Crown withdrew Counts 2, 3 and 8. The allegations contained in those counts were essentially melded into the other counts to which he pled guilty.

3 William Tschetter also entered a guilty plea to careless storage of a firearm contrary to s.86(1) of the *Criminal Code of Canada* which occurred on the 22nd day of September, 2011.

Facts

4 On February 10th, 2011 Alberta Fish and Wildlife received a complaint about someone advertising on eBay the sale of an antlered mule deer skull and two talons from a bird of prey. An undercover officer contacted the individual who had posted the items on eBay and determined that individual had posted the items on behalf of the accused, Nathan Tschetter, as he did not have an eBay account. The undercover officer made contact with Nathan by telephone, email and texting and discussed sale and purchase of wildlife items. On March 10th, the undercover officer attended the Hutterite colony where Nathan resided and purchased from him one antlered mule deer skull and two white-tailed deer antlered skulls, and four bald eagle talons. These were all sold to the undercover agent by Nathan Tschetter for the sum of $380.00. Nathan spoke about hunting and being able to obtain more animals and eagle artifacts. During the course of discussion it became clear that he knew that his actions were illegal.

5 Nathan Tschetter introduced the undercover agent to William Tschetter. They went to William's bedroom in the colony and discussed the purchase of animal parts. An agreement was made for the sale and purchase of bald eagle feathers and talons. In William's room, four firearms were leaning up against the wall, not stored in a safe manner. William spoke about buying and selling items including eagle parts from a reserve member and his own illegal hunting and killing of animals. William also knew that his actions in **trafficking** in wildlife were illegal.

6 On April 15th, 2011, the undercover officer attended at the Riverside Hutterite Colony and purchased from Nathan Tschetter one mule deer antlered skull and two white-tail deer antler and skull caps for a total price of $150.00. The undercover officer then spoke with William Tschetter and discussed further dealings. William took the officer to a shed on the colony and showed him the head of a mule deer with cape and antlers which he purchased for $100.00 plus another $20.00 being the cost of a case of beer.

7 After April 15th, 2011 there were no further dealings between the undercover officer and Nathan. Any dealings thereafter were only between the undercover officer and William Tschetter and a third party. The undercover officer and William Tschetter continued to communicate concerning purchase of wildlife parts and on June 28th, 2011 the officer arrived at the Riverside Colony hoping to meet the individual from a nearby reserve that was to some extent supplying William with wildlife parts including birds of prey. A discussion was had about the officer purchasing more artifacts including bald eagle feathers and talons and the wildlife officer made a down payment of $500.00 toward a large purchase in the future. He also purchased on that day an antlered moose skull and white-tail deer skull plate.

8 On September 12th, further discussions were had and between September 12th and September 21st the undercover officer met with William Tschetter and over the course of that time purchased four white-tailed deer heads, one antlered moose skull and six antlered white-tail deer skulls at a total cost of $450.00. William Tschetter also then introduced the undercover officer to the individual on the reserve from which he had obtained many eagle artifacts and discussion was had about the sale and purchase of upwards of $35,000.00 worth of eagle artifacts.

9 On September 21st, pursuant to a search warrant the room of William Tschetter at the Riverside Hutterite Colony was searched, at which time four rifles, ammunition and eagle artifacts made up from five different bald eagles and two different hawks were seized.

Joint Submission

Nathan

10 Crown and Defence joined in submitting the following disposition with respect to Nathan Tschetter and William Tschetter respectively.

11 The totality of fines suggested pursuant to the joint submission of counsel with respect to the three counts to which Nathan Tschetter pled guilty is $21,000.00 plus a victim fine surcharge of $3,150.00 plus an order pursuant to s.96 of the *Wildlife Act*

imposing a fine of $530.00 being the sum paid to Nathan Tschetter to acquire animal parts. Further, he is to be prohibited pursuant to s.97(a) of the *Wildlife Act* from possessing any bird of prey or any part thereof for ten years and pursuant to s.101(1) of the *Wildlife Act* he is to be prohibited from acquiring a hunting license for a period of three years with respect to each count to which he has pled guilty which prohibition periods are consecutive one to the other, therefore resulting in a prohibition of nine years.

William

12 With respect to William Tschetter, the total fines for **trafficking** and possession for purposes of **trafficking** submitted pursuant to the joint submission is $55,000.00. Added to this is a victim fine surcharge of $8,400.00 and a further fine pursuant to s.96 of the *Wildlife Act* of $1,495.00 being the sum equal to funds paid to William Tschetter to acquire animal parts. He is to be prohibited pursuant to s.97(a) of the *Wildlife Act* from possessing birds of prey or any parts thereof for life and prohibited pursuant to s.101(1) of the *Wildlife Act* from holding a hunting license for a period of three years with respect to each count to which he has pled guilty which periods of prohibition are consecutive one to the other resulting in a total prohibition of twenty one years.

13 Section 90 of the *Wildlife Act* provides:

> 90 Notwithstanding anything in this Act, a fine imposed on a conviction for an offence involving more than one animal may, and in the case of big game or an endangered animal shall, be computed in respect of each animal as though each animal had been the subject of a separate count, in which case the fine imposed shall be the sum payable as a result of that computation.

14 Pursuant to that provision, the Crown breaks down the $21,000.00 and $55,000.00 respective fines submitted to be imposed on each offender as follows:

> **William Tschetter**
>
> Count 1 This offence involves four bald eagle talons, two fans, three eagle feathers and one golden eagle feather. These items come from nine different eagles and the Crown attributes a fine of $1,000.00 to each eagle part for a total fine of $9,000.00 with respect to this count.
>
> Count 4 This involves one mule deer head to which the Crown attributes a fine of $1,500.00.
>
> Count 5 This involves one moose head to which the Crown again attributes a fine of $1,500.00.
>
> Count 6 This involves one white-tail deer head to which the Crown again attributes a fine of $1,500.00.
>
> Count 7 This offence involves one fan made from bald eagle feathers, one hat from bald eagle feathers and two bustles from bald eagle feathers. These items include feathers from fifteen different bald eagles. The Crown attributes a fine of $1,000.00 with respect to each animal for a total fine of $15,000.00 for this offence.
>
> Count 9 This offence involves **trafficking** in one moose head, ten deer skulls and two deer heads with antlers. Attributing a fine of $1,500.00 per animal, leads to a total fine of $19,500.00 for this count.
>
> Count 10 This offence involves possession for the purpose of **trafficking** of parts from five different eagles and two hawks. The Crown attributes a fine of $1,000.00 per bird for a total of a $7,000.00 fine with respect to this offence.
>
> **Nathan Tschetter**
>
> Count 1 This offence involves two mule deer, skulls and two white-tail deer skulls. The Crown attributes a fine of $2,500.00 per animal for a total of $10,000.00 with respect to this offence.
>
> Count 2 This offence involves bald eagle parts from one bald eagle specifically, two talons and one fan. The Crown attributes a fine of $3,500.00 for this offence.

> Count 4 This offence involves one antler mule dear skull, two white-tail deer antler skull caps. The Crown attributes a fine of $2,500.00 dollars per animal involved in the offence for a total of $7,500.00.

15 The fine amounts per animal attributed by the Crown to the offences for each of the offenders is different. For example, with respect to William Tschetter, each eagle part from a different eagle caught in any individual offence to which William Tschetter pled guilty, was attributed a fine of $1,000.00 by the Crown, whereas in the case of Nathan Tschetter in the one count in which the offence involved an eagle part, the Crown attributed a fine of $3,500.00. The fines for William Tschetter with respect to deer or moose parts were $1,500.00 per animal involved in the offence whereas with respect to Nathan Tschetter, it was $2,500.00 per animal with respect to each offence. It is the Crown's submission that because of the volume of animal and bird parts which make up the offences involving William Tschetter, the Crown came to those amounts mindful of the totality principle of sentencing. The Crown asserts that in the end, despite attributing lesser fine amounts per animal with respect to William Tschetter's offences, the total amount of those fines appropriately addresses sentencing principles, primarily denunciation and deterrence. On the other hand, the Crown submits that to have used those same amounts as the basis for imposition of fines with respect to Nathan Tschetter would have resulted in an inadequate disposition with respect to serving denunciation and deterrence so in order to achieve appropriate denunciation and deterrence that the fines were somewhat higher per animal.

16 The Crown alleges in support of the joint submission that the aggravating factors include the items sold, the volume, period of time over which they were sold, the fact the offender knew it was illegal to do so and that their actions were for profit, the items were not for the purpose of acquiring sustenance.

Sentencing Principles

17 Part XX111 of the *Criminal Code* applies to sentencing procedures under the *Wildlife Act*: *R. v. Lamouche* (2000), 267 A.R. 347 (Alta. Q.B.); see also *R. v. Moosemay*, 2005 ABPC 346 (Alta. Prov. Ct.).

18 The fundamental purpose of sentencing and the relevant sentencing objectives are set out in s.718 of the *Criminal Code*:

> The fundamental purpose of sentencing is 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:
>
> a. to denounce unlawful conduct;
>
> b. to deter the offender and other persons from committing crimes;
>
> c. to separate offenders from society, where necessary;
>
> d. to assist in rehabilitating offenders;
>
> e. to provide reparation for harm done to victims or to the community; and
>
> f. to promote a sense of responsibility to offenders, and acknowledgement of harm done to the victims and to the community.

19 The fundamental principle of sentencing, indeed one that has been given constitutional status, is set out in s.718(1) of the *Criminal Code*:

> A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

20 The Canadian Philosophy of Sentencing is primarily desserts-based as opposed to utilitarian based. The fundamental principle of sentencing set out in the *Criminal Code* is proportionality, the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Indeed, this is the only mandatory principle of sentencing. The other principles set out in s.718(2) are not mandatory and are assigned no respective weights. It is mandatory however that each sentence must meet the fundamental and overarching sentencing principles of proportionality (*R. v. Brady* (1998), 121 C.C.C.

(3d) 504 (Alta. C.A.) and 517. It is important to note that not only is the proportionality principle codified in the *Criminal Code*, it is also attained the status of a principle of fundamental justice (see *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)* (1985), 23 C.C.C. (3d) 289 (S.C.C.)). The purpose of sentencing as set out in the *Criminal Code* is to impose "just sanctions". A "just sanction" is one that is deserved. A fit sentence in that context is one that is commensurate with the gravity of the offence and the moral blameworthiness of the offender (*R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 (S.C.C.)). In *R. v. Proulx*, [2000] 1 S.C.R. 61 (S.C.C.), Chief Justice Lamer repeated that principle stating:

> Proportionality requires an examination of the specific circumstances of both the offender and the offence so that the punishment fits the crime. Disparity in sentencing for similar offences is a natural consequence of the fact the sentence must fit not only the offence, but also the offender.

21 The *Criminal Code* also provides that a sentence imposed should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. It is to be noted that proportionality is the only mandatory principle of sentencing. The other sentencing principles, of which similar sentences for similar crimes is one, are factors to be taken into consideration but are not mandatory and have no specific weight in the sentencing process. (See *R. v. Brady* (1998), 121 C.C.C. (3d) 504 (Alta. C.A.) at p.517).

22 In *R. v. B. (T.L.)*, 2007 ABCA 61 (Alta. C.A.), Fraser, C.J.A., in paragraph 17, describes the process as follows:

> ...What is appropriate or reasonable in the circumstances must of course be considered in the context of all relevant considerations. That will include not only the personal circumstances of the offender and the degree of responsibility of the offender for the offence, but also the gravity of the offence itself, and in that context the circumstance of the community in which the offence occurs.

23 Each sentencing is an individual process whereby the Court seeks to impose a sentence that addresses the two elements of proportionality, that is the circumstances of the offence and the circumstances of the offender and thereby reach a sentence that fits not only the offence but also the offender. The sentencing judge must fashion a disposition from among the limited options available which take both sides of the proportionality inquiry into account (See: *R. v. Hamilton*, [2004] O.J. No. 3252 (Ont. C.A.) at para. 93). This proportionality is achieved by a "complex calculus" that is informed by the normative principles set out in the *Criminal Code* in s.718 and s.718.2 (See *R. c. M. (L.)*, [2008] S.C.J. No. 31 (S.C.C.) at paras. 17, 21, 22).

24 In *R. c. M. (L.)*, the majority of the Supreme Court of Canada, at paragraph 22, adopted the following commentary on the sentencing process:

> [TRANSLATION] [The] objectives of denunciation, deterrence, separation from society, rehabilitation, reparations and retribution are all quite general, and there is no precise standard that can be applied to rank them. At first, this is desirable, since the sentencing process is fundamentally an individualized one in that sentences will necessarily vary from one offender to another in light of the particular emphasis that will be placed on one or the other of the objectives in order to arrive at the appropriate sentence, having regard to all the circumstances, in each case. [*Dadour* at p.17]

25 In *Hamilton* the Court emphasized at paragraph 93 that:

> The sentencing judge must fashion a disposition from among the limited options available which take both sides of the proportionality inquiry into account.

26 The purpose of sentencing as set out in the *Criminal Code* is to impose "just sanctions". A "just sanction" is one that is deserved. A fit sentence in that context is one that is commensurate with the gravity of the offence and the moral blameworthiness of the offender. (*R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 (S.C.C.)) In *R. v. Proulx*, [2000] 1 S.C.R. 61 (S.C.C.), Chief Justice Lamer repeated that principle stating:

> Proportionality requires an examination of the specific circumstances of both the offender and the offence so that the punishment fits the crime. Disparity in sentencing for similar offences is a natural consequence of the fact the sentence must fit not only the offence but also the offender.

27 Proportionality insures that an individual is not sacrificed "for sake of the common good". (*R. v. Priest* (1996), 110 C.C.C. (3d) 289 (Ont. C.A.), at 298)

28 A fit sentence is one that falls within the appropriate range. Fixing the range requires consideration of the principles of sentencing. A range is not that which is represented by the minimum/maximum possibilities for any particular offence, but is that fixed by the context of the offence, the manner in which it was committed and circumstance of the offender. Bateman, J.A. discusses the issue of fixation of range of sentence in *R. v. Cromwell* (2005), 202 C.C.C. (3d) 310 (N.S. C.A.) at paras. 22-26, culminating in the following statement:

> In my opinion the range is not the minimum to maximum possibilities for the offence, but is narrowed by the context of the offence committed and the circumstances of the offender. ...The sentence is imposed upon similar offenders for similar offences committed in similar circumstances... (per MacEachern, CJBC in *R. v. Mafi* (2000), 142 CCC (3d) 449 (CA)). The actual punishment may vary on a continuum taking into account aggravating and mitigating factors, the remedial focus required for the particular offender and the need to protect the public. This variation creates the range.

29 In *R. v. Johnas* (1982), 2 C.C.C. (3d) 490 (Alta. C.A.), the Alberta Court of Appeal discussed the process to be employed in reaching a fit sentence. At paragraph 31 the Court states:

> We do think that judicial reasoning to a fit sentence for any offence must start with a norm for the type of offence involved. That norm is arrived at by comparison to other cases, by experience, by the seriousness of the offence and by the prevalence. Having determined that norm the Court will look at the factors of mitigation and aggravation. Specific cases are not be treated as precedents. Each is a unique mixture of aggravating and mitigating factors. In that sense we can not avoid disparity of sentence. As Lord Justice Lane said in *Bibi v.R.* (1980), 71 Crim. APP. R 360, at 361:
>
> > We are not aiming at uniforming of sentence; that would be impossible. We are aiming at uniformity of approach.

30 Where the Court is called upon to sentence individuals involved in multiple offences, as is the case with respect to both offenders in this case it is not a matter of simply finding a fit sentence for the first offence and then applying that sentence with some adjustment up or down for each offence that follows. It is not a matter of applying a mathematical calculation or formula. (Clayton C. Ruby et al, *Sentencing*, 7th ed. Lexis Nexis, para.2.68)

31 The Court of Appeal in *Johnas*, *supra* commencing at paragraph 25, discusses the Court's obligation when it comes to sentencing an offender for multiple offences:

> 25 It must be recognized to, that multiple offences are in a category of their own. The robber is an offender who frequently commits multiple offences, forcing the trial judge to make the delicate balance between ensuring that none of the offences is "free" while also observing the totality principle in sentencing. To achieve that balance between these two disparate factors is a difficult task which is, at best, a compromise.
>
> . . .
>
> 26 If all offences after the first one are punished by sentences which are concurrent to the first, it will soon be observed by offenders that once one offence has been committed, there is nothing to deter them from subsequence offences. Never the less, the totality principle requires the trial judge who has correctly applied the rules relating to concurrent and consecutive sentences and who has arrived at the appropriate sentence for each separate offence, then to look back to ensure that the totality of the consecutive sentences is not excessive for this offender, an individual, even giving some weight to the additional offences. Where the total projected sentence is excessive the individual sentence must then be adjusted below

> the figure which would be appropriate for each offence taken in isolation so that the total sentence is proper. The authorities in this respect were recently reviewed in this court in *R. v. Fait* (1982), 37 A.R. 273.
>
> 27 On occasion, the simplest method of expressing the proper total sentence may be to make concurrent sentences which would properly be consecutive. Where that course is adopted however, the trial judge should be careful to state that the consecutive sentence is appropriate to each separate offence would produce an inappropriate total sentence and that he has deviated from the principles applicable to consecutive sentences because the total sentence would be excessive.

32 The totality principle must be considered by the Court whether the multiple sentences imposed are imprisonment or are dealt with by way of fines, (Ruby et al, *Sentencing*, supra at para.2.57), which is the disposition suggested by Crown and Defence in the matters before this Court at this time. Paragraph 11.8 of Ruby et al, *Sentencing*, supra describes how to deal with such circumstances as follows:

> The fine must be sufficiently substantial to warn others that illegal activities will not be tolerated, and the amount of the fine will take into consideration the seriousness of the offence and ordinary sentencing principles. On the other hand, where a number of similar offences are charged and dealt with by fines, although concurrent penalties are not possible in the case of fines, the fines ought to be adjusted so that the total punishment for all similar offences is not in excess of the maximum penalty for any one of the offences, and the total amount is not beyond the means of the offender.

33 With respect to both the offenders before this Court, counsel have presented joint submissions as to the fines payable for each offence and the cumulative value of those fines with respect to each offender.

34 This Court is bound to follow a joint submission as to disposition made by counsel, provided that it is a true joint submission, that is there is a *quid pro quo*, unless it is outside the appropriate range for the offence and therefore unfit or otherwise offends the proper administration of justice. In this case, I do not follow the joint submission for the reasons expressed hereinafter.

35 Given the multiplicity of offences for each offender in this case the Court must consider whether the fine sought with respect to each offence for each offender in the circumstances is within the range and then consider whether cumulatively the total fine and financial obligation with respect to each offender is just and appropriate. As noted herein before in circumstances involving multiple offences the fact that the fines suggested for each individual offence may be within the range of sentence for each offence does not automatically translate into a just and appropriate sentence when looked at cumulatively.

36 The decision of the Manitoba Court of Appeal in *R. v. Wozny*, [2010] M.J. No. 384, 267 C.C.C. (3d) 308 (Man. C.A.), provides a very thorough discussion of the sentencing principles related to sentencing an individual for multiple offences. Although the case before this Court is not one involving a sentence of imprisonment, other than on default, it seems to me that the sentencing principles described in *Wozny* may be adapted to the imposition of fines for multiple offences. The general basic rule when dealing with multiple offences is set out at paragraph 46 of the *Wozny* judgment:

> 46 While this is often not a simple decision to decide, the general rule is that if the offences are sufficiently inter-related to form part of one single, continuous criminal transaction, a concurrent sentence is called for. However, if the offences are separate and distinct, then a consecutive sentence is to be imposed. Many of the aforementioned cases (*Grant*, *Golden*, *Draper*, and *Maroti*) make this clear. ...

37 The difficult question is of course whether the offences are so inter-connected and inter-related in time and nature as to be seen as one ongoing transaction such that a concurrent sentence or combination of concurrent and consecutive sentences may be imposed (see: para.47, *Wozny*). In *R. v. Arbuthnot*, 2009 MBCA 106 (Man. C.A.), Chartier J.A. at para.22 thereof quoted with approval D.A. Thomas in his text, *Principles of Sentencing* 2nd Ed. (London: Heinemann Educational Books Ltd., 1979) at p.54 as to what a "single transaction" may be:

> The concept of "single transaction" may be held to cover a sequence of events involving the repetition of the same behaviour towards the same victim, such as a series of sexual offences with the same partner, a number of frauds with the same

> victim or several purgered statements made in the course of the same trial, provided the offences are committed within a relatively short space of time ...

38 Clayton Ruby et al, in the text, *Sentencing*, 7th ed., supra, at para.14.12 comments on the issue as follows:

> Ultimately, the tests are very flexible, and it becomes a fact specific inquiry whether the connection between the two offences is sufficiently or insufficiently close to merit, either consecutive or concurrent sentences.

39 In *Arbuthnot*, Chartier J.A. applied this concept to the facts before him stating at para.24:

> In my view, in light of the fact that there were a series of similar, continuous and reoccurring offences with the same gravamen within a sustained and relatively short period of time, the accused's offending conduct with respect to the robbery offences can be viewed as sufficiently interconnected to form a single criminal transaction or a crime spree and thereby attract concurrent sentences.

40 With respect to the approach the Court should follow when imposing a concurrent, consecutive or combination concurrent, consecutive sentence, is described by MacInnes, J.A. in *Wozny* at paras. 56, 57, 58, 59 and 60:

> 56 Whether imposing a concurrent sentence, a consecutive sentence or a combination of both, the principle of proportionality must be considered. In respect of a concurrent sentence, proportionality, along with all of the other sentencing objectives and principles set out in s.718 to 718.2 of the Code, except for the principle of totality, must be taken into account at the outset of the consideration of the duration or term of the concurrent sentence. In a particular sense, the proportionality principle necessitates an examination of the gravity of the offence, the harm done as a result of the accused's degree of guilt or moral blameworthiness with respect to the offence(s) committed for the purpose of ensuring that the sentence imposed is in line with the accused's moral culpability and not greater than that. In so doing, as Lamer C.J.C. stated in M(CA), the assessment of an accused's moral culpability in any particular case requires that due regard be given to "the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct" (at para.80).
>
> 57 The very same analytical process is followed by the sentencing judge in a consecutive sentence scenario, that is, the principle of proportionality, along with all of the other principles of sentencing, but for totality, are considered at the outset in determining what a fit and proper term of sentence is for each of the offences being sentenced.
>
> 58 It is only then, as the final step of the sentencing exercise where consecutive sentences are involved (and not at all regarding concurrent sentences), that the totality principle comes into play. Application of the totality principle does not require reapplication of the sentencing principles (including proportionality) undertaken at the outset of the analytical process to determine term or duration of the sentence.
>
> 59 Rather, the totality principle requires that a "last look" be taken to ensure that the total or cumulative sentence is a fit sentence in that it does not exceed the overall culpability of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct" (see M(CA), at para.80).
>
> 60 In addition, the intended total or cumulative sentence may offend the totality principle if it is substantially above the maximum sentence available for that type of crime or if its effect is a "crushing sentence", that is, a sentence not in keeping with the offender's record and future prospects.

41 The totality principle does not apply when imposing a concurrent sentence, only with respect to consecutive sentences, (*Wozny*, para.62). In *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 (S.C.C.)), at para. 42, Lamer CJC quotes Clayton Ruby's treatise on Sentencing, 4th Ed. (Butterworth, 1994) at pp.45 and 46:

> The purpose is to ensure that a series of sentences is each properly imposed in relation to the offence to which it relates, as an aggregate is "just and appropriate". The cumulative sentence may offend the totality principle if the aggregate sentence

> is substantially above the normal level of a sentence for the most serious of the individual sentences involved, or if its effect is to impose upon the offender a "crushing sentence" not in keeping with his record and prospects.

42 It is also important to note that in any event of whether a concurrent sentence is imposed or a consecutive one, the Court is obliged in any either situation to impose a sentence for each offence. MacInnes, J.A. in *Wozny* at para.63 states:

> It is essential to remember that a sentence must be imposed for each offence. Failure to do so may amount to a reversible error. In so doing, it may be that an order to comply with the proportionality principle in the case of a concurrent sentence or with the totality principle in the case of a consecutive sentence, a sentence which would ordinarily be ascribed to an individual offence will have to be adjusted.

43 In the circumstance of imposing fines as the sentencing disposition, it seems to me that the same principles may be applied, although they must be adapted somewhat when it comes to the concept of concurrency.

44 If the offences or any group of them, when considered in the circumstances of the case may be said to be part of one ongoing transaction, the Court should look at the group of offences making up the single transaction, consider what the total fine should be that would properly address the gravity of the actions involved in that transaction, the harm done, the accused's moral blameworthiness and of course having regard to the principle of proportionality and the circumstances of the accused, his past and his prospects. Once the fine for that transaction is arrived at and it has been tested in the context of proportionality with respect to the group of offences that make up that transaction, then the Court should attribute a portion of the overall quantum to each of the offences that make up part of the single overall transaction, having regard to the particulars relative to each offence as they make up part of the whole transaction.

45 Once the Court has established a prospective fine for all transactions before it having regard to the nature of the offence and appropriate sentencing principles, the Court it must then test the aggregate of the fines against the principle of totality so as to make sure that the cumulative amount of the fines does not exceed the accused's moral culpability or result in a fine that could be seen as "crushing" having regard to the accused's record and prospects.

Sentencing Analysis

46 Both offenders are before this Court as a result of interaction with an individual undercover officer over a period of time in 2011. Insofar as Nathan Tschetter is concerned, that period ran from March 10th, 2011 through April 15th, 2011. As to William Tschetter, it ran from March 10th, 2011 until September 21st, 2011, although there was a gap of no interaction between the undercover officer and he from June 28th, 2011 until September 12th, 2011.

47 With respect to both offenders, the individual officer proceeded to develop an ongoing relationship with them by creating an environment that contemplated continued buying from both, although more so with respect to William Tschetter.

48 Essentially after the first transaction with both offenders on March 10th, 2011, charges could have been laid and likely successfully prosecuted given the evidence available. Demonstrating that the accused **trafficked** on more than one occasion provides evidence that the nature of the **trafficking** was more than a one-off, but once that is demonstrated repeated transactions of a similar nature involving the same parties do not through such repetition in my view increase the offenders moral culpability.

49 In this case, I believe Wildlife quite properly was interested in getting information on who was supplying the offenders, in particular William, with animal parts, particularly eagle and birds of prey parts, which information did not become available to them until the September 12th, 2011 transaction, after which a search warrant was obtained and executed and charges were quickly laid.

50 In the context of the offences before this Court with respect to each offender, although arguably they could be considered as a series of offences over the course of a single transaction given that they were all perpetrated under an undercover operation,

it is my view that with respect to Nathan Tschetter the offences dated March 10th, 2011, being Counts 1 and 2 should be seen as a single transaction for sentencing purposes and Count 4 dated April 15th, 2011 as a single transaction.

51 With respect to William Tschetter, Count 1 dated March 10th, 2011 should be seen as a single transaction, as should Count 4 dated April 15th, 2011 and Counts 5, 6 and 7 dated June 28th, 2011 should be seen as a single transaction. Counts 9 and 10, although occurring very close together deal with difference offences, so I view them each as a single transaction.

52 Accordingly, with respect to each transaction, I will impose a fine that addresses sentencing principles and the circumstances of the offence and offenders that make up the transaction under scrutiny. When the transaction involves more than one offence, I will impose a cumulative fine for all the offences that make up the transaction and then test it with respect to proportionality in the circumstances. I will then test the cumulative total of the fines imposed with respect to all transactions as against the totality principle so as to assure that the aggregate is just and appropriate and not a crushing sentence having regard to the individual and his prospects. (*R. v. Haines* (1975), 29 C.R.N.S. 239 (Ont. C.A.))

53 **Trafficking** in wildlife presents a serious threat to wildlife resources. In its most insidious form it is driven by the prospect of monetary gain. Even for species that are flourishing it posses significant risk to their well-being in the sense that it undermines their future ability to sustain themselves over time. For protected and rare species profits are often greater and therefore the threat of the immediate eradication of the species is concurrently greater.

54 Deterrence, both general and specific as well as denunciation become the primary sentencing focus, although not the only consideration in such cases (*R. v. Lamouche*, [1998] A.J. No. 1437 (Alta. Prov. Ct.), *R. v. Cardinal*, [2009] A.J. No. 1083 (Alta. Prov. Ct.)). Every sentence for such illegal acts must at the very least demonstrate societies abhorrence for such activities and attempt to deter others as well as the accused from continuing similar destructive acts.

55 The maximum penalty for a single count of **trafficking** or possession for purposes of **trafficking** wildlife is a fine of $100,000.00 or imprisonment for not more than two years.

56 In considering what an appropriate fine is, the Court must consider the circumstances of each offence and the circumstances of the offender. Each offence and each offender must be looked at individually. In arriving at an appropriate disposition the Court may consider other cases although specific cases should not be seen as precedents, (*Johnas*, para. 31). There is no precedential sentence for **trafficking** in wildlife in the sense that a specific amount is considered a starting point or required. That would ignore the individual nature of sentencing and individual circumstances of the offender and would be perpetuating uniformity of sentence as opposed to uniformity of approach in sentencing.

57 The Crown provided the Court with a series of sentencing cases involving wildlife **trafficking**, some of which are reported judgments while others are not. Suffice it to say, each case is unique as to the circumstances of the offence and the offender. Many are joint submissions, but few discussed to any degree or demonstrate the specific application of sentencing principles.

58 In *R. v. Potts*, 2010 ABPC 194 (Alta. Prov. Ct.), Redman PCJ discussed sentencing ranges in wildlife matters in this region stating:

> The range of sentences for **trafficking** in wildlife vary greatly. The following is a brief summary of some of the sentences in this area:
>
> 1. *R. v. Soto*, [1996] A.J. No. 826 (Alta.Prov.Ct.)
>
> Fines imposed were between $2,000.00 and $2,500.00 for **trafficking** in wildlife.
>
> 2. *R. v. Moosemay*, [2005] A.J. No. 1699 (Alta.Prov.Ct.)

> The accuseds were convicted of a number of offences under the *Wildlife Act*. Their sentences ranged from $200.00 for unlawfully hunting big game out of season, up to $2,500.00 for **trafficking** in big game. Some of the meat which was linked to the **trafficking** charges was moose.
>
> 3. *R. v. Cardinal*, 2009 ABPC 296 (Alta.Prov.Ct.)
>
> One of the Defendants was sentenced to a period of incarceration of 90 days and the other Defendant who was the son of the first Defendant, and who assisted the first Defendant on one occasion in loading the fish, was fined the sum of $2,300.00 including victim fine surcharge.
>
> 4. *R. v. Ladouceur*, supra
>
> It is my understanding that the background to this overall matter was that Alberta Fish and Wildlife received information about an ongoing illegal fish and wildlife **trafficking** problem in the Lac La Biche and Athabasca areas. An intensive undercover investigation over a two year period resulted in 64 charges under the general Fisheries (Alberta) Regulation and 12 Wildlife charges being laid against 30 individuals and one business. (See *R. v. Hofer*, 2010 ABPC 64)
>
> Between November, 2005 and March, 2007, Mr. Ladouceur sold fish and meat from big game animals to an undercover officer. He ultimately pled guilty to six counts, four of which dealt with the sale of moose meat and received a fine of $6,900.00 with respect to each of the unlawful moose **trafficking** charges.

59 *Potts* had been convicted after trial of eleven counts under the *Wildlife Act*. The Crown sought cumulative total fines of $25,000.00, Judge Redman imposed cumulative fines totalling $13,800.00 inclusive of surcharges. The fines ranged from $1,000.00 per count for shooting and selling deer or elk meat, $2,000.00 per count for guiding without a guide license and $1,000.00 plus surcharge for hunting a bird of prey.

60 Just as is the case in any sentencing matter, whether it be with respect to imposition of a fine or otherwise, there is no one sentence that is right for every circumstance. Although sentences imposed in other wildlife cases for similar offences give some guidance to the Court insofar as range may be concerned, each case must be looked at in its own context having regard to the offender and the offence or offences committed.

Circumstances of the Offenders

61 Both offenders are members of the Riverside Hutterite Colony. Nathan Tschetter was nineteen years of age at the time of committing these offences. William turned nineteen in June of 2011.

62 Neither young man has any criminal record and they have entered guilty pleas in a timely fashion to the offences before the Court and I am satisfied that both are remorseful for their actions and are unlikely to be involved in any such activities again.

63 Both of the offenders live and work on the Riverside Colony and each represents one part of the whole of the colony. Like the other members of the colony, they individually own no property of any significance. All the property of the colony is held for the benefit of the colony as a whole and is owned by the colony as a whole, not the individual members. This view of ownership I believe is founded in the religious conviction of the colony members.

64 These two offenders are essentially impecunious. They work on the colony for the benefit of the colony, not for their individual benefit other than for food, clothing and sustenance.

65 The offences in this case are strictly related to **trafficking** in animal parts, although the Crown alluded in its submissions to comments by William Tschetter to the undercover officer about unlawful hunting, the facts before me do not prove that either of these offenders killed the animals or birds that were used to provide the animal and bird parts to the undercover Wildlife officer.

66 With respect to the eagle and birds of prey part, it appears they were obtained from another individual. There is no clear indication in the evidence before me as to where the big game animal parts came from.

67 Neither of these offenders was sophisticated in conducting this **trafficking**, indeed although both knew it was illegal, I have no doubt they did not understand the seriousness of their actions in a legal context.

68 With respect to the joint submission in this case, it would see Nathan Tschetter liable for fines totalling $24,680.00, and William Tschetter liable for fines totalling $65,895.00. I have no hesitation in concluding that those aggregate fines are in the circumstances having regard to the offence and the offenders, excessive and thereby disproportionate. They are in fact "crushing" in quantum with respect to both offenders, particularly William Tschetter.

69 Although denunciation and deterrence are the primary considerations in imposition of sentences for this type of offence, the two aspects of proportionality, that is, the circumstance of the offence and the circumstance of the offenders still rule. The penalty must fit the offence and the offender and the utilitarian aspect of sentencing demands that the sentence be, if fine or imprisonment, no more than is necessary in the circumstances to denounce and deter. In this case, although the offences are numerous and overall serious, they were arrived at, in my view, without proper consideration of the totality principle that the aggregate of the fines be just and appropriate in the circumstances.

70 As is noted in paragraph 14 of this judgment, the Crown has applied the provisions of s.90 of the *Wildlife Act* in determining the cumulative fine to be imposed with respect to each offence. For each offence, the Crown has attributed a specific amount to each animal part, including individual feathers coming from different eagles or birds of prey. Once the Crown concluded what is appropriate for each animal part, it simply multiplied that figure by the number of animal parts and came up with a mathematical total which does not serve to properly address the totality principle of proportionality.

71 Section 90 of the wildlife Act requires the Court to attribute a fine to each big game animal or endangered species part included in the offence transaction and the cumulative amount of those fines for each animal then represents the total fine payable for that offence. Eagles and birds of prey are not designated as endangered species under Alberta Regulation 143/97 as amended, so it is not necessary to follow that process with respect to those offences which involve bird parts and thereby attribute a fine to each feather from every bird.

72 The application of s.90 to every animal part, including bird parts involve in each offence, as had been presented through the joint submission in this case ends up being a mathematical calculation as opposed to a determination as to what is a fit sentence for the offence given all the circumstances including the individual circumstances of the offender and is accordingly wrong in approach and in my view leads to an excessive overall sentence.

73 Neither William Tschetter nor Nathan Tschetter or their involvement with the undercover officer could be said to be sophisticated. They were intentionally risk taking, particularly William Tschetter, and consequently their moral culpability is more than minimal despite the lack of sophistication. In essence, this was a case of two young men of previous good character looking for a way to make spending money. The amounts that they received for provision of the animal parts is minimal, having regard to the volume thereof involved. The number of offences is ultimately a factor of the undercover operation and the desire of the wildlife officers quite rightly to be put in touch with their supplier. There was some discussion by William Tschetter concerning a larger transaction involving eagle parts, but that is a function of the ongoing undercover operation and not any kind of sophisticated business or other plan on the part of William. Neither of the offenders were dealing with trophy parts from unique big game animals, nothing they sold was in that category, although certainly **trafficking** in the eagle and birds of prey parts must be seen as more serious given the nature of the item, given the potential threat to the ongoing viability of such birds.

William Tschetter

74 Count 1 represents a single transaction where a number of eagle parts, specifically talons and feathers were sold. They came from nine different birds. Given the number of items their significance, the context in which they were sold, that is the unsophisticated nature of the offender's actions, the amount received, the moral culpability of the offender given intentional

risk taking, the fact that the number of offences involved was manifested by the undercover operation and the officer's desire to obtain information with respect to another individual, but also having regard to previous good character and guilty plea, a fine of $4,000.00 would appropriate address denunciation and deterrence in the context of this case.

75 Count 4 again is a single transaction involving one big game animal part, a mule deer head. Given the nature of the animal part and given the range fines for **trafficking** in such a part in this circumstance which I believe to be between $500.00 and $2,000.00, a fine of $1,000.00 adequately addresses denunciation and deterrence having regard to the factors mentioned above.

76 Counts 5, 6 and 7 represent a single transaction within the chain of events and involve two big game animal heads and eagle feathers from fifteen different eagles. Given the nature of the big game items, the fine imposed in Count 4 and the fine imposed in Count 1 with respect to eagle feathers, a total fine of $7,000.00 represented by $1,000.00 for the moose head, $1,000.00 for the white tail deer head and $5,000.00 with respect to the eagle feathers. The cumulative figure of $7,000.00 adequately addresses denunciation and deterrence with respect to these offences having regard to the factors mentioned above.

77 Count 9 involves **trafficking** in thirteen big game animal parts made up of one moose head, ten deer skulls and two deer heads with antlers. Applying a fine of $1,000.00 per item, based on the previous fines for individual animal heads or antlers would result in a total fine of $13,000.00 in this regard. In the context of this particular Count, that is excessive and disproportionate and not necessary to achieve deterrence and denunciation and I would impose the sum of $6,500.00 which breaks down to $500.00 per animal. That is less than the fines imposed aforesaid for individual big game animals but again it is not a mathematical calculation, it is what is fit and appropriate to address sentencing principles, particularly deterrence in the context of the offence and the offenders.

78 Count 10 offence involves possession for purposes of **trafficking** from five different eagles and two hawks. Given the fines imposed aforesaid with respect to **trafficking** in eagle parts and given the number of different birds involved, a fine of $3,000.00 for that transaction satisfies denunciation and deterrence having regard to the circumstances of the offence and offender and the factors mentioned above.

79 The cumulative total of the aforementioned fines is $21,500.00 plus 15% victim fine surcharge of $3,225.00, plus $1,495.00 being the s.96 fine which results in a total fine payable by William Tschetter with respect to the aforementioned offences in the sum of $26,220.00.

Section 86(1) of the Criminal Code - Careless Storage

80 A joint submission was presented by counsel for a fine of $1,000.00 with respect to this particular offence. Although I believe it to be at the upper range, having regard to the circumstances of the offender and his previous good character and the circumstance of the offence, it is not excessive and accordingly a fine of $1,000.00 and in default, fourteen days imprisonment is imposed. No victim fine surcharge is imposed - hardship. The default time of fourteen days will be served consecutive to the default time for the other offences if default occurs.

81 In approaching this cumulative total from the perspective of the totality principle, and assuming for discussion purposes that he realistically is capable of paying this amount within a reasonable period of time; although the aggregate amount is significant, I would no longer describe it as crushing nor excessive in the circumstances. In summary, William Tschetter is therefore liable for payment of the following fines:

Count 1:	$4,000.00 in default 25 days, victim fine surcharge $600.00 in default 4 days
Count 4:	$1,000.00 in default 7 days consecutive, victim fine surcharge $150.00 in default 2 days
Count 5:	$1,000.00 in default 7 days concurrent, victim fine surcharge 150.00 in default 2 days
Count 6:	$1,000.00 in default 7 days concurrent, victim fine surcharge $150.00 in default 2 days
Count 7:	$5,000.00 in default 30 days consecutive, victim fine surcharge $750.00 in default 5 days
Count 9:	$6,500.00 in default 40 days consecutive, victim fine surcharge $900.00 in default 6 days
Count 10:	$3,000.00 in default 20 days consecutive, victim fine surcharge $450.00 in default 3 days

Total:	$21,500.00

Total victim fine surcharge:	$3,225.00 in default 20 days consecutive
Section 96:	$1,495.00 in default 14 days consecutive
Section 86(1) C.C.:	$1,000.00 in default 14 days consecutive
Total:	$27,220.00

All default time is to be consecutive, one to the other, save for Counts 5 and 6 which are concurrent to the other offences and the victim fine surcharge days in default for Counts 5 and 6 are concurrent as well with all other days in default for victim fine surcharge being consecutive.

82 In the event William Tschetter fails to pay the fine aggregate of $27,220.00, he risks imprisonment by default to a maximum of 170 days.

Nathan Tschetter

83 Counts 1 and 2 as alleged against Nathan Tschetter as described in paragraph 14 hereinbefore arise as part of a single transaction that occurred on the 10th day of March, 2011. This transaction included the sale of four big game animal parts, two talons and feathers from one bald eagle. The joint submission provides for a fine of $2,500.00 per big game part on the basis that because Nathan had fewer offences than William, a greater fine per animal part is necessary in order to achieve denunciation and deterrence. Given the range for such offences with respect to William Tschetter, there is no reason to impose disperate sentences for Nathan Tschetter on that basis.

84 The submission for a fine of $3,500.00 with respect to the eagle part, although given the number of parts is somewhat higher proportionately than fines imposed on Nathan Tschetter for similar offences, it is nonetheless within the range applied for offences committed by William Tschetter and therefore the Court does not reject the submission in that regard.

85 Accordingly, a total fine for Counts 1 and 2 of $7,500.00 is appropriate, broken down as $1,000.00 each for the two mule deer and two white deer parts and $3,500.00 for the eagle parts. Default time for Count 1 is twenty five days and default time for Count 2 is twenty days.

86 Given that they arose from a single transaction, should default in payment of the fines occur, the default time for Counts 1 and 2 shall be served concurrently.

87 Count 4 deals with three big game animal parts, one from a mule deer and two from white tail deer. Accordingly, a total fine of $3,000.00 is imposed, broken down as $1,000.00 per animal part. Default for this offence shall be twenty days imprisonment which shall be consecutive to the default time established for Counts 1 and 2, should default occur.

Victim Fine Surcharge

88 Nathan Tschetter shall also pay a victim fine surcharge with respect to each offence as follows:

Count 1: $600.00 in default 3 days imprisonment

Count 2: $525.00 in default 3 days imprisonment

Count 4: $450.00 in default 3 days imprisonment

Default time for the victim fine surcharges shall be served consecutively to the other offences should default occur.

Section 96 Fine

89 Nathan Tschetter shall pay a fine pursuant to s.96 of the *Wildlife Act* in the sum of $530.00 being an amount equal to the sum paid to him by the undercover officer for the parts described in Counts 1, 2 and 4. In default of payment of the fine, Nathan Tschetter shall serve three days imprisonment which shall be consecutive to all other offences if default occurs.

90 By way of summary, the fines and default times imposed upon Nathan Tschetter with respect to Counts 1, 2 and 4 are as follows:

Count 1:	$4,000.00 default 25 days
Count 2:	$3,500.00 default 20 days concurrent
Count 4:	$3,000.00 default 20 days consecutive

Victim fine surcharge for Count 1:	$600.00 default time 3 days consecutive
Victim fine surcharge for Count 2:	$525.00 default time 3 days consecutive
Victim fine surcharge for Count 4:	$450.00 default time 3 days consecutive
Section 96 offence:	$530.00 default time 3 days consecutive
Total fines:	$12,405.00

91 Nathan Tschetter thus risks imprisonment for a total of 57 days if he fails to pay the fines.

92 In disposing of these matters by way of fines, I am mindful of the provision of s.734(2) Part XX111 of the *Criminal Code* that requires the Court to consider if the offender is able to pay the fine or discharge it pursuant to a fine option program. The offenders in this matter are essentially impecunious in the sense of having any assets or regular income of their own and given that it would seem to run contrary to the basis of their living as part of the colony to work outside the colony in this instance by doing fine option, the question arises whether or not they are capable of paying the fine and if not, whether imposition of a fine is proper. The size of the fines contemplated aforesaid would also tend to illustrate that even with access to a fine option program at the rate of approximately $10.00 per hour, it would likely take William Tschetter years to work off the fine and Nathan Tschetter a substantial period of time as well. This would tend to speak against imposing a fine.

93 The alternative regrettably however is jail, not because the circumstances demand jail, but because the offenders are prima facie incapable of paying or working off the fines given the amounts and their personal circumstances and the constraints of the colony that they live in. Although the purpose behind s.734(2) is to prevent offenders from being fined amounts that they are truly unable to pay and to correspondingly reduce the number of offenders who are incarcerated in default of payment, (*R. v. Topp*, [2011] S.C.J. No. 43 (S.C.C.), para.18), the regrettable consequence of a fine not being suitable is that in the absence of any other suitable disposition, jail becomes the only option and that raises the spectre of people being put in jail because they are paupers or impecunious.

94 Although I cannot in determining the quantity of the fine, consider whether someone else is likely to pay it, I believe I may consider that fact with regard to the issue of whether the fines can and are likely to be paid so as to justify imposing fines as an appropriate sentence. The offenders in this case are individual parts of the whole that is, the Hutterite colony they belong to and they have responsibilities to that colony. The colony also has a reciprocal responsibility to its members and the individual members of the colony are entitled to draw upon the colony for such support as may necessary when as in this case, the communal way of life practised on the colony restricts the offender's ability to personally pay fines. Although the colony does not have a legal responsibility to pay fines, they have a responsibility to support their members if the colony wishes them to continue their communal life. Given those factors, I am satisfied on balance, that the offender's colony will provide support so as to allow them to satisfy legal obligations imposed on them by this Court and thereby satisfy their responsibility to society at large for their actions. I am buoyed in that view by counsel's advice that the fines will be paid. Accordingly, there is no principle reason why fines should not be imposed as a mechanism of sentence in these cases.

Imprisonment in Default of Payment of Fines

95 Neither the *Wildlife Act* nor the *Provincial Offences Procedures Act*, RSA 2000 c.P-34 as amended, require me to impose prison in default of payment of the fines. I may do so but I am not required to do so. The province would of course have other mechanisms by which to enforce fines in most instances ie. civil enforcement, suspension or restriction of licensing privileges. In this case, however given that the offenders have no property or real income that might be attached in enforcement of the fines and that suspension of licenses is likely to have little impact as well, given the circumstances of the offenders; the only real mechanism of enforcement is imprisonment in default of payment of the fines.

96 I have imposed default time with respect to each of the offences having regard to the quantum of the fines, and more importantly, having regard to the totality principle such that if default were to occur in payment that the period of imprisonment would, given the circumstances of and the gravity of the offences and the circumstances of the offender and their moral culpability and having regard to the principles of denunciation and deterrence would then represent a just and appropriate sentence for these individuals.

97 Pursuant to s.7(2) of the *Provincial Offences Procedure Act*, supra, as amended, the maximum period of imprisonment for default in payment of a fine is six months.

Section 97(a) Order

98 Pursuant to the provisions of s.97(a) of the *Wildlife Act*, Nathan Tschetter is prohibited from possessing any bird of prey or any part thereof for a period of ten years.

99 Pursuant to the provisions of s.97(a) of the *Wildlife Act*, William Tschetter is prohibited from possessing any bird of prey or any part thereof for life.

Section 101(1) Order

100 Pursuant to the provisions of s.101(1) of the *Wildlife Act*, Nathan Tschetter is prohibited from acquiring a hunting license for a period of three years with respect to each count to which he pled guilty and which prohibitions are to run consecutively, therefore resulting in a total prohibition of nine years.

101 William Tschetter is prohibited pursuant to s.101(1) of the *Wildlife Act* from holding a hunting license for a period of three years with respect to each count to which he has pled guilty, which periods of prohibition are to run consecutive, one to the other. Given the total of seven counts, the total prohibition is twenty one years.

102 I have noted aforesaid how some of the offence counts with respect to Nathan Tschetter, that is Counts 1 and 2 and William Tschetter, Counts 5, 6 and 7, all arise from the same transaction involving the same parties and occurring at the same time and I believe would better have been expressed as one count. The consequence of not doing it that way is exemplified by the provisions of s.101(1) in that when a single transaction is broken down into a number of offences, even though there is no distinction between them, it results in a greater prohibition order being imposed. Proceeding that way creates a piling on effect which although not really impacting the principle dispositions with respect to the offences, certainly creates some unfairness with respect to the cumulative total of orders required under this particular section. Had Counts 1 and 2 in the Information against Nathan Tschetter been one count, which I have indicated they should properly have been, then the prohibition under s.101(1) would have been six years, not nine years. Had Counts 5, 6 and 7 in the Information against William Tschetter been one count, which again in my view would have been the fairer and more appropriate approach, the prohibitions under s.101(1) against William Tschetter would have been fifteen years instead of twenty one. In the context of each individual before this Court, those are not insignificant differences.