NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Wournell*, 2023 NSCA 53

Date: 20230727
Docket: CAC 515011
Registry: Halifax

Between:

Cale Wournell

Appellant

v.

His Majesty the King

Respondent

Judge:	The Honourable Justice Anne S. Derrick
Appeal Heard:	June 1, 2023, in Halifax, Nova Scotia
Subject:	Sentencing. Considerations for a conditional sentence. *R. v. Proulx*, 2000 SCC 5. Use of Impact of Race and Culture Assessments (IRCAs) in sentencing African Nova Scotian offenders. *R. v. Anderson*, 2021 NSCA 62. Background and systemic factors. Constrained circumstances and the principle of proportionality. Principles of sentencing. Implied waiver of solicitor-client privilege.
Summary:	The appellant, an African Nova Scotian, received a jail sentence and probation for firearms charges to which he had pleaded guilty. The sentencing judge, without considering *Proulx*, and focusing his analysis on denunciation and specific and general deterrence, sentenced the appellant to two years' less a day in a provincial correctional facility. The judge failed to apply, let alone mention this Court's decision in *Anderson*. He had specific information about the appellant in the form of an IRCA and pre-sentence report that was relevant

to his obligation to determine an individualized sentence for this racialized offender.

Issues: (1) Did the sentencing judge err in principle by rejecting a conditional sentence order without considering all the criteria in *Proulx*?
(2) Did the sentencing judge's failure to meaningfully consider the appellant's background and circumstances in relation to the systemic factors of racism and marginalization amount to an error of law?
(3) Did a statement by the appellant in his affidavit filed to support his fresh evidence motion constitute an implied waiver of solicitor-client privilege opening the door to a limited cross-examination by the respondent of sentencing counsel?

Result: Appeal allowed. The sentencing judge erred by rejecting a conditional sentence order without considering all the criteria in *Proulx*. There was no engagement by the judge with any of the principles in *Anderson.* There was nothing in the judge's reasons to indicate he went beyond his awareness of the information to applying it in the course of discharging the delicate task of contextualized sentencing. This constituted an error of law. An updated IRCA was filed by the appellant as fresh evidence. There was no implied waiver by the appellant in his affidavit supporting his fresh evidence motion. A fresh sentencing of the appellant resulted in the imposition of a conditional sentence of four months, followed by twelve months' probation. Credit was given for time spent in jail and on very stringent pre-sentencing release conditions.

NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Wournell*, 2023 NSCA 53

Date: 20270727
Docket: CAC 515011
Registry: Halifax

Between:

Cale Wournell

Appellant

v.

His Majesty the King

Respondent

Judges:	Farrar, Fichaud, Derrick, JJ.A.
Appeal Heard:	May 16 and June 1, 2023, in Halifax, Nova Scotia
Written Release	July 27, 2023
Held:	Appeal allowed, per reasons for judgment of Derrick, J.A.; Farrar and Fichaud, JJ.A. concurring
Counsel:	Brandon P. Rolle and Lee V. Seshagiri, for the appellant Glenn A. Hubbard, for the respondent

Reasons for judgment:

Introduction

[1] On April 25, 2022 Cale Wournell received a jail sentence and probation for firearms charges to which he had pleaded guilty. He appealed his sentence, arguing the judge did not properly consider whether a conditional sentence was appropriate, failed to follow the guidance of this Court in *R. v. Anderson*[1] and made only passing note of an Impact of Race and Culture Assessment (IRCA). He asks this Court to allow his appeal and impose a Conditional Sentence Order of 12 to 18 months, less credit for the time he was incarcerated.

[2] I agree the sentencing judge erred in law and principle. As a consequence, Mr. Wournell's sentence must be re-visited. For the reasons that follow I would allow the appeal, set aside the sentence he received and, having applied credits for time served under strict release conditions and in jail, impose a Conditional Sentence Order of 4 months followed by 12 months' probation.

[3] Before addressing the merits of this appeal, I will set out those aspects of the case that will contextualize both the sentence and a motion the respondent brought to be permitted to question Michelle James, the lawyer who represented the appellant at sentencing. The panel dismissed the motion. In due course, I will explain the rationale for the motion and why it was unsuccessful.

The Offences

[4] On December 27, 2019, the appellant pulled over at the side of the road after a tense encounter with another vehicle. The occupants of the other vehicle held the view the appellant had cut them off. They parked behind the appellant and a passenger from the aggrieved car got out. He approached the appellant's vehicle on the passenger side and witnessed the appellant place what appeared to be a black handgun on his dashboard. The passenger promptly turned back and called 911.

[5] The appellant drove off with the complainants following him. They witnessed him drive behind a gas station where he was located by police. A search of the appellant's vehicle turned up a loaded magazine with ammunition for a .22 calibre firearm. No firearms were found in the car but subsequently, with the assistance of a canine unit, police seized a sawed off .22 calibre rifle and a black

[1] 2021 NSCA 62. [*Anderson*]

Airsoft BB gun that had been deposited nearby. It was the Airsoft the appellant had displayed earlier by the side of the road.

[6] CCTV footage obtained by police captured the appellant going behind the service station building and disposing of the guns.

[7] The appellant was charged with uttering threats and a number of firearms offences. The Crown proceeded by indictment. The appellant pleaded not guilty and obtained a trial date in Provincial Court. On the day of trial, he entered guilty pleas to three of the charges:

- That he had unlawful possession of an Airsoft gun for a purpose dangerous to the public peace or for the purpose of committing an offence, contrary to s. 88(1) of the *Criminal Code*.[2]

- That he possessed a prohibited firearm, the .22 calibre sawed off rifle, together with readily accessible ammunition capable of being discharged from the rifle, without being a holder of an authorization or license or registration certificate for the firearm, contrary to s. 95(1) of the *Criminal Code*.

- That he was an occupant of a motor vehicle in which he knew there was a firearm, the .22 calibre rifle, contrary to s. 94(1) of the *Criminal Code*.

[8] In separate proceedings sometime after his sentencing for the offences, the appellant pleaded guilty to breaching his release conditions on four occasions between February and July 2021. On December 16, 2022 he received an eighteen month conditional discharge.

The Position of Crown and Defence at Sentencing

[9] The sentencing hearing on April 25, 2022 was contested. The Crown sought 2 to 2.5 years in custody and ancillary orders for weapons prohibition, weapons forfeiture and DNA. These ancillary orders were imposed and are not being appealed.

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[2] For the purposes of s. 88(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, the Airsoft (a .177 calibre BB air pistol) is a "weapon". Within the meaning of s. 84(3)(d) of the *Code* it is deemed not to be a firearm. (Exhibit 1 in this appeal, Forensic Science and Identification Services Laboratory Report, p. 1).

[10] Ms. James on the appellant's behalf submitted the appropriate sentence was 12 to 18 months' imprisonment in the community under a Conditional Sentence Order (CSO). She noted the appellant's maladaptive coping mechanisms and the fact it was the complainants who had been confrontational.

[11] Invited by the judge to speak before he was sentenced, the appellant took responsibility for his actions and was remorseful. He expressed the hope he would not be separated from his family.

The Judge's Sentencing Decision

[12] The sentencing judge, Judge Michael Sherar of the Provincial Court of Nova Scotia, had before him an IRCA dated December 9, 2021 and a presentence report dated October 12, 2021. He imposed sentence in an oral decision immediately following the submissions of the Crown and defence. He ordered the appellant to serve a jail sentence of two years less a day in a Provincial institution, to be followed by 12 months' probation with conditions.

[13] The sentencing judge's reasons acknowledged many of the appellant's personal characteristics. He noted the appellant:

- Is African Nova Scotian (ANS).
- Identifies as "bi-racial and bi-sexual".
- Was 26 years old.
- Has an acquired traumatic brain injury as a result of a motor vehicle accident when he was an adolescent.
- Had experienced "significant residential instability" growing up.
- Completed Grade eight.[3]
- Had no criminal record.

[3] The original IRCA and the presentence report conflict on this: the presentence report said the appellant did not complete Grade 8. As I discuss later in these reasons, the appellant says the presentence report is accurate.

- Was unemployed but had the means to "finance a home and a vehicle".[4]
- Was in a polyamorous relationship.
- Had a pregnant partner.
- Had had prior substance abuse issues and although sober for a year, was experiencing some slippage due to his current situation.

[14] Certain other experiences of the appellant described in the IRCA and the PSR were not mentioned in the judge's sentencing reasons. I will return to these later.

[15] The judge's description of the appellant having sustained his brain injury in adolescence was incorrect. As noted in the pre-sentence report, the car accident occurred when the appellant was 13 months old.

[16] In his reasons the judge indicated he had read the presentence report and the IRCA:

> I've had the benefit of reading a presentence report and fairly in depth Impacts [*sic*] of Race and Culture Assessment produced by employees of the Peoples Counselling Clinic which has provided me with the background not only about Mr. Wournell but the community in which he is a part and has emphasised to the court the prevalence and imbalance of incarceration on the part of African Nova Scotians in the criminal justice system.

[17] The judge immediately focused on denunciation and general and specific deterrence, stating:

> Just specifically, even knowing that information, we have to fashion a fit and proper sentence for the correction of Mr. Wournell to deter him from committing further criminal activity, but also to deter others in similar circumstances, and that requires a form of denunciation…

[18] The judge observed that the appellant had displayed the Airsoft pistol in an intimidating fashion but not the sawed-off .22 calibre rifle which had been lying out of sight in the trunk. Although he did not explicitly describe any factors as either aggravating or mitigating, the judge commented on the appellant pleading

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[4] The sentencing judge referred to the presentence report indicating the appellant had "an inheritance". The presentence report states the appellant had received "an injury settlement for the car crash he was involved in when he was 13 months old". It noted that the appellant reported he had also received an inheritance.

guilty and admitting responsibility for all three offences and, "most importantly" having no criminal record.

[19] The judge focused his approach to a fit sentence for the appellant on the nature of the offences, being neither committed "in a true criminal context" such as use in the drug trade nor falling into the category of "a regulatory licencing problem".[5] When discussing this latter category of offence, the judge noted evidence that the appellant had taken courses to permit him to lawfully possess licenced firearms but had been unable to pay the required fee due to a lack of funds. As the judge observed, this partial step toward licencing was immaterial: even full compliance with the relevant regulations would never have afforded the appellant the right to possess the sawed-off .22 calibre rifle, a prohibited weapon.

[20] The sentencing judge tracked the Crown's submissions in concluding that the appellant's most serious offence—possession of the prohibited weapon, the .22 calibre sawed-off rifle—attracted a sentence of two years' incarceration. It was the Crown's position the governing range was imprisonment of two years' less a day to three years.

[21] The judge did not accept the Crown's submission that incarceration of 2 to 2.5 years was the appropriate sentence. However, in crafting his reasons, the judge made no mention of this Court's decision in *Anderson*. He referred only to Mr. Anderson's sentencing in the Provincial Court:

> In *R. v. Anderson* referred to by the – both parties, the – this court as represented by the Chief Judge imposed a period of two years less a day[6] on someone of similar circumstances to Mr. Wournell similarly. Significantly we have possession of a restricted – sorry, prohibited firearm, given allowance for the participation of Mr. Wournell in accepting responsibility that he purports that he possessed the firearm for hunting purposes[7], he acknowledges it was in his possession and regrets his participation and what happened, and he has, as I've indicated, a pretty troubled background and he's a first offender before this court, I believe taking into consideration the principles of sentencing and note the particular circumstances of Mr. Wournell, he be incarcerated for – he still ought

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[5] The sentencing judge was referencing the categories for s. 95(1) offences, discussed in *R. v. Nur*, 2015 SCC 15 at para. 82, that were first articulated by Doherty, J.A. in *R. v. Charles*, 2013 ONCA 681.

[6] Judge Sherar was referencing *R. v. Anderson*, 2020 NSPC 10. Although he did not expressly mention that Mr. Anderson's sentence of two years' less a day was imposed as a conditional sentence order pursuant to s. 742.1 of the *Criminal Code*, there can be no question he was aware of that fact.

[7] This was stated by the appellant in his presentence report interview.

> to be incarcerated for a global period of two years less a day to be served in the Provincial institution followed by one year of probation…

[22] The judge also did not refer to *R. v. Proulx*[8] in sentencing the appellant, a youthful first time offender, to imprisonment in a correctional institution.

Issues in the Appeal

[23] In an Amended Notice of Appeal, the appellant raises the following issues:

1. The Learned Trial Judge erred in principle by rejecting a conditional sentencing order without considering all of the criteria set out in *R. v. Proulx*.

2. The Learned Trial Judge erred in law by failing to meaningfully consider the Appellant's background and circumstances in relation to the systemic factors of racism and marginalization, contrary to the direction [of this Court] in *R. v. Anderson*.

[24] The appellant says if the appeal is allowed, he should be sentenced afresh. Citing *R. v. Palmer*[9], he argues that, in the interests of justice, fresh evidence should be admitted for the purpose of determining a fit sentence. He submits a conditional sentence order is the fit and appropriate sentence, less credit for time already served.

The Respondent Crown's Implied Waiver Motion

[25] It is appropriate at this juncture to discuss the respondent's motion for an order that in the context of his fresh evidence application, the appellant had impliedly waived solicitor-client privilege, opening the door to the respondent being able to cross-examine the lawyer who acted for him when he was sentenced. The respondent was interested in evidence that could be used to argue the appellant's narration of his personal circumstances was unreliable.

[26] The starting point for explaining the motion is the appellant's bail hearing in this Court and the affidavit he filed in his fresh evidence motion for this appeal.

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[8] 2000 SCC 5. [*Proulx*]
[9] [1980] 1 S.C.R. 759, at p. 759.

[27] On February 16, 2023 the appellant, who had been in custody since his sentencing on April 25, 2022, was released pending his appeal. The appellant's mother and grandmother testified at the contested hearing as prospective sureties. Aspects of their evidence conflicted with information in the reports that had been filed for the appellant's sentencing, notably the December 9, 2021 IRCA prepared by an IRCA assessor, Jay Jarvis.

[28] In a February 28, 2023 affidavit the appellant sought to correct information in the December IRCA. He said he had not had the opportunity to review the IRCA prior to his sentencing. This galvanized the respondent's interest in cross-examining Ms. James. The respondent said statements by Ms. James both before and during the sentencing hearing on April 25th threw the appellant's claim into question. In the respondent's submission the appellant had impliedly waived solicitor-client privilege by stating he had not reviewed the December IRCA.

[29] The appellant vigorously opposed the motion, arguing there had been no implied waiver. He said communications with Ms. James were not germane to the core issues on appeal.

[30] After hearing oral submissions from the parties on May 16th, the panel unanimously agreed the respondent was pursuing an irrelevant line of inquiry.

The Respondent's Rationale for the Motion

[31] The respondent's argument in support of questioning Ms. James about whether she had reviewed the original IRCA with the appellant amounted to this: if the original IRCA is unreliable, a frailty that could have been addressed by the appellant following a review of its contents with Ms. James, then any error committed by the sentencing judge in not affording it sufficient emphasis will have been harmless.

[32] In the respondent's submission, questioning Ms. James about whether she had reviewed the IRCA with the appellant would provide ballast to its argument. In the run-up to the sentencing, Ms. James had sought an adjournment of an earlier sentencing date in order to go over the IRCA with the appellant. Due to illness she had had to cancel an appointment to meet with the appellant for this purpose.

[33] The respondent wanted to question Ms. James about whether the review had ultimately occurred.

[34] The respondent also said procedural fairness was in play: there was a disadvantage to the Crown if it was not permitted to conduct a limited inquiry of Ms. James on the issue of whether the appellant had in fact reviewed the IRCA before the sentencing.

The Appellant's Response to the Motion

[35] In the appellant's submission the respondent had failed an essential test for piercing solicitor-client privilege – the requirement the information being sought was relevant to the issues in the appeal. He acknowledged the original IRCA contained incorrect information relating to the extent to which he had experienced residential instability as a teenager. He had sought to rectify this inaccuracy by consenting to the respondent tendering the transcript of the testimony of his mother and grandmother from the February 16, 2023 bail hearing and by detailing in his February 28th affidavit, to the best of his ability and recollection, his residences and housing experiences during his adolescence. His affidavit was tendered only to ensure there was accurate information before this Court in the event his appeal succeeded and he was re-sentenced.

[36] The appellant challenged the basis for the respondent's argument there had been an implied waiver. He pointed out he had not referenced any legal opinion, advice or privileged communication in his affidavit. All he had said was that he had not had the opportunity to review the original IRCA before sentencing. As for procedural fairness, there was nothing to prevent the respondent from cross-examining the appellant on his affidavit at the appeal.

Dismissing the Motion - Analysis

[37] Solicitor-client privilege, of fundamental importance to the legal system and society as a whole, "must be as close to absolute as possible to ensure public confidence and retain relevance. As such it will only yield in certain clearly defined circumstances…".[10]

[38] Solicitor-client privilege can be impliedly waived. Disclosure of legal advice to support an argument being relied on has the effect of impliedly waiving the privilege. In *R. v. Campbell*,[11] the Supreme Court of Canada held the RCMP had impliedly waived solicitor-client privilege when they relied on advice from legal

[10] *R. v. McClure*, 2001 SCC 14, at para. 35.
[11] [1999] 1 S.C.R. 565. [*Campbell*]

counsel to counter allegations of illegality. The accused in *Campbell* sought a stay of proceedings, arguing the police had broken the law by conducting a "reverse sting". The Crown refused to disclose legal advice on which police officers claimed to have placed good faith reliance. Justice Binnie held:

> **[70]** …It was sufficient in this case [for a finding of implied waiver] for the RCMP to support its good faith argument by undisclosed advice from legal counsel in circumstances where, as here, the existence or non-existence of the asserted good faith depended on the content of that legal advice. The clear implication sought to be conveyed to the court by the RCMP was that Mr. Leising's advice had assured the RCMP that the proposed reverse sting was legal.

[39] The appellant's statement in his affidavit did not indicate any reliance on legal advice by Ms. James.

[40] A finding of implied waiver of solicitor-client privilege requires more than the statement made by the appellant in his affidavit. Implied waiver is found where there is a connection between the statement and an issue an appellant is seeking to prove on appeal. What the appellant said falls far short of what entitled the Crown to explore solicitor-client discussions in *R. v. Marriott*,[12] for example. In that case, Aaron Marriott, by way of an appeal, was seeking to repudiate a joint sentencing submission for a fifteen year sentence for attempted murder. On appeal he took issue with the agreed statement of facts tendered at his sentencing and stated, in a fresh evidence affidavit, that he "was never shown the agreed statement of facts that formed part of the Crown's brief".[13] It was the Crown's position that any disagreement with the facts presented to the sentencing judge constituted an argument Mr. Marriott's guilty plea to attempted murder was not fully informed.

[41] Justice Fichaud writing for this Court held the Crown should be able to question Mr. Marriott's former lawyer, Kevin Burke, about discussions with his client that culminated in the joint submission on sentence:

> **[32]** …Clearly there is no express waiver of solicitor client privilege. But Mr. Marriott seeks to repudiate a joint submission based on his allegations of what transpired between Mr. Marriott and Mr. Burke. The maintenance of solicitor client privilege would mean that Mr. Marriott's own evidence would monopolize any fact-finding on these allegations. In my view, Mr. Marriott's position on the appeal impliedly waives solicitor client privilege to the limited extent that is necessary to allow the Crown to explore and this Court, if Mr. Burke's evidence is

[12] 2013 NSCA 12. [*Marriott*]
[13] *Ibid* at para. 25.

> offered, to make reliable findings, respecting those pivotal facts that Mr. Marriott has placed in issue.

[42] Justice Fichaud referred to this Court's decision in *R. v. Hobbs*[14] where Mr. Hobbs on appeal against his conviction said he had instructed his trial counsel to advance an argument that had not been made. He was found to have impliedly waived solicitor-client privilege in relation to that issue. Justice Fichaud's reasons in *Marriott* quote from *Hobbs*:

> **[34]** …Justice Saunders said:
>
> > **[14]** A client who puts in issue the advice received from his or her solicitor risks being found to have waived the privilege with respect to those communications.

[43] The appellant's statement in para. 36 of his affidavit is not comparable to the allegations in *Marriott* and *Hobbs* that led to a finding by this Court of implied waiver. In *Marriott*, Justice Fichaud noted that many of the assertions Mr. Marriott relied on to justify his repudiation of the joint submission were "differ markedly from the statements made by Mr. Burke, on Mr. Marriott's behalf and in Mr. Marriott's presence" at the sentencing hearing.[15] He concluded his analysis by finding:

> **[41]** Mr. Marriott's position on the appeal enlists facts - i.e. the contents, timing and interpretation of communications - between Mr. Marriott and Mr. Burke. He has placed those facts in issue. According to the authorities I have cited earlier, this impliedly waives solicitor client privilege respecting those facts.[16]

[44] The appellant did not impliedly waive solicitor-client privilege over his conversations with Ms. James. Unlike Mr. Marriott he did not seek to repudiate his guilty plea. He did not criticize Ms. James' representation of him or, like Mr. Hobbs, allege ineffective assistance of counsel. In contrast to the implied waiver found in *Campbell*, he did not indicate reliance on Ms. James' advice. The respondent did not establish how Ms. James' testimony about discussions with the appellant would be relevant to issues in this appeal. The appellant's statement in his affidavit did not open the door to even a limited questioning of Ms. James.

[45] The respondent also failed to establish that a finding of no implied waiver created procedural unfairness. The respondent had the option (which was

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[14] 2009 NSCA 90.
[15] *Supra* note 12, at para. 39.
[16] *Ibid*, at para. 41.

exercised) to cross-examine the appellant under oath about the errors in the IRCA that he corrected in his affidavit.

[46] It is for these reasons we dismissed the respondent's motion.

The Sentence Appeal

[47] Following his bail hearing on February 16, 2023 the appellant was granted leave to appeal and released on house arrest conditions with a GPS ankle bracelet.

Materials Filed for the Sentence Appeal

[48] As I will discuss below, the sentencing judge made consequential errors in principle in sentencing the appellant. This necessitates sentencing him afresh. That exercise will involve sorting through the evidence we have before us: the PSR and the December 9, 2021 IRCA; the testimony of the appellant's mother and grandmother at the bail hearing; an updated IRCA dated January 13, 2023 authored by Lana MacLean, an IRCA assessor; and the affidavit of Desiree Jones of the African Nova Scotian Justice Institute attaching a letter from the Community Coordinator for the Nova Scotia Brotherhood.[17] Also in the mix are the appellant's statements in his affidavit and the evidence the appellant gave at the appeal hearing under cross-examination by the respondent.

[49] But first, it is necessary to discuss the lens through which the judge's sentencing decision must be examined.

Standard of Review

[50] The standard of review for sentence appeals is firmly established.

[51] Sentencing decisions are accorded a high degree of deference in appellate review. Intervention is warranted only if (1) the sentencing judge committed an error in principle that impacted the sentence or, (2) the sentence is demonstrably unfit. Errors in principle include "an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor".[18]

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[17] According to its letterhead, the Nova Scotia Brotherhood is a community organization that targets "Health & Wellness with African Nova Scotian Men".

[18] *R. v. Friesen*, 2020 SCC 9, at para. 26; *R. v. Lacasse*, 2015 SCC 64, at para. 11.

[52] In assessing the issue of demonstrable unfitness, appellate review must focus on whether the sentence is proportionate to the gravity of the offence and the degree of the offender's responsibility.[19] Proportionality is the fundamental principle of sentencing.[20]

[53] In the sentencing of an African Nova Scotian (ANS) offender, failure to follow this Court's guidance in *Anderson* may constitute an error of law.[21]

Errors in Principle by the Sentencing Judge

[54] Earlier I described how the judge reasoned through the sentence he imposed on the appellant. His analysis lacked essential components: he rejected the option of a conditional sentence order without applying *Proulx* and he failed to apply, let alone even mention, this Court's decision in *Anderson*. I am satisfied each of these errors had an impact on the sentence the judge imposed on the appellant.

The Failure to Apply Proulx

[55] Gun offences are undeniably serious and "Gun-related crime poses grave danger to Canadians".[22] This does not mean however that a conditional sentence is an unfit sanction for a gun offence. Adherence to the paramount sentencing principle of proportionality can, and is, satisfied by sentences that range from conditional sentence orders pursuant to s. 742.1 of the *Criminal Code* to incarceration of two years' or more in a federal penitentiary.[23] The mandatory minimum sentence for s. 95(1) offences was struck down as unconstitutional by the Supreme Court of Canada in *Nur*. In Bill C-5, proclaimed on November 17, 2022, Parliament expressly removed the mandatory minimum.[24]

[56] The sentencing judge homed in on denunciation and deterrence as the governing principles for the appellant's sentence. He viewed their objectives as only achievable through the appellant's imprisonment in a carceral institution. He did not engage in an assessment of the statutory requirements for a conditional sentence and whether they were met in the circumstances of this case.

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[19] *R. v. Parranto*, 2021 SCC 46, at para. 30.
[20] *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.1.
[21] *Supra*, note 1 at para. 118.
[22] *R. v. Nur*, *supra* note, at para. 1.
[23] *R. v. Anderson*, 2020 NSPC 10, aff'd 2021 NSCA 62.
[24] *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, 1st Sess., 44th Parl., 2021, cl. 4 (assented to 17 November 2022), S.C. 2022, c. 5.

[57] In the context of re-visiting the appellant's sentence I will discuss the analysis required where a conditional sentence is within the sentencing range, as it was here. The constituent elements are found in s. 742.1 of the *Criminal Code*. Relevant to the appellant's sentencing on April 25, 2022, the judge was required to consider whether:

- The appropriate sentence is one of imprisonment of no more than two years' less a day.

- Service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2.

- There is no minimum term of imprisonment.

[58] The provisions of the conditional sentencing regime required the sentencing judge to assess whether the appellant serving his sentence under a CSO would pose an unacceptable risk to the community. The "endangerment of the community" factor consists of two components: (1) the risk of re-offence; and (2) the gravity of the damage should re-offending occur.[25] The judge's failure to address this fundamental question was an error in principle.[26]

[59] The sentencing judge should have addressed the provisions of s. 742.1 and the focus in *Proulx* on:

- Parliament's objective in instituting conditional sentencing as a means for reducing "the problem of overincarceration in Canada".[27] (As the Supreme Court of Canada and Parliament have recognized since *Proulx*, overincarceration, particularly of Indigenous and Black offenders, has become an even more pressing societal issue.[28])

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[25] *Proulx*, *supra* note 8, at para. 69.
[26] *R. v. J.F.W.*, 2004 BCCA 417, at para. 15; *R. v. Elder*, 2002 MBCA 133.
[27] *Proulx*, *supra* note 8, at para. 16. See also: *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 40: "The availability of the conditional sentence of imprisonment, in particular, alters the sentencing landscape in a manner that gives an entirely new meaning to the principle that imprisonment should be resorted to only where no other sentencing option is reasonable in the circumstances. The creation of the conditional sentence suggests, on its face, a desire to lessen the use of incarceration".
[28] *R. v. Ipeelee*, 2012 SCC 13, at para. 62, Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, 1st Sess, 44th Parl. 2021.

- The doubt that has been cast on the effectiveness of incarceration in achieving the goals intended by traditional sentencing principles, including the goals of denunciation and deterrence.[29]

- Parliament's intention, by way of the 1996 amendments to the *Criminal Code* that included conditional sentencing, "to give increased prominence to the principle of restraint in the use of prison as a sanction through the enactment of s. 718.2(d) and (e) which provide, respectively, that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances" and "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders…"[30]

- The ability of a conditional sentence to provide "a significant amount of denunciation" and "…significant deterrence if sufficiently punitive conditions are imposed and the public is made aware of the severity of these sentences".[31]

[60] As is evident from my earlier recital of the judge's decision at paragraphs 12 to 22, he gave no attention to the s. 742.1 provisions or any of the principles that emerged from *Proulx*. He concluded the appellant should be incarcerated for two years' less a day in a provincial institution without any application of *Proulx*. This was an error in principle that impacted the appellant's sentence. I would allow the appeal on this ground alone.

The Failure to Apply Anderson, 2021 NSCA 62

[61] As I previously noted, the sentencing judge did not mention the *Anderson* decision of this Court. It was not enough for him to simply refer to information from the PSR and IRCA about the appellant's circumstances. As *Anderson* states:

> **[123]** In explaining their sentences, judges should make more than passing reference to the background of an African Nova Scotian offender. It may not be enough to simply describe the offender's history in great detail. It should be possible on appeal for the court to determine, based on the record or the judge's reasons, that proper attention was given to the circumstances of the offender. Where this cannot be discerned, appellate intervention may be warranted.

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[29] *Gladue*, *supra* note 27 at para. 57; *Proulx*, at para. 107; *Nur*, *supra* note 5, at para. 113.
[30] *Proulx*, *supra* note 8, at para. 17.
[31] *Ibid*, at paras. 102 and 107.

[62] What is missing from the sentencing judge's reasons is "proper attention" to the appellant's circumstances in the crafting of a proportionate sentence. Guidance from this Court for sentencing an African Nova Scotian[32] offender is found at paragraphs 112 to 124 of *Anderson*. Its application where a conditional sentence option is in play is found in paragraphs 126 to 163. There was specific information made available to the judge about the appellant, a racialized offender, that was relevant to his obligation to determine an individualized sentence. There is nothing in the judge's reasons to indicate he went beyond his awareness of the information to applying it in the course of discharging the delicate task of contextualized sentencing.

[63] There was no engagement by the judge with any of the principles discussed in *Anderson*. The judge did not employ the IRCA to assist in:

- Contextualizing the gravity of the offences and the degree of the appellant's responsibility for them.
- Revealing the existence of mitigating factors or explaining their absence.
- Addressing aggravating factors and offering a deeper explanation for them.
- Informing the principles of sentencing and the weight to be accorded to denunciation and deterrence.
- Identifying rehabilitative and restorative options for the appellant and appropriate opportunities for reparations by the appellant to the victims and the community.
- Strengthening the appellant's engagement with his community.
- Informing the application of the parity principle.[33]

[64] This was an error in principle that impacted the appellant's sentence. It too justifies the appeal being granted.

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[32] In *Anderson*, *supra* note 1, at para. 14, this Court noted the variety of terms used in both iterations of that case and in case law and public discourses to describe offenders of African descent, including African Canadians, African Nova Scotians and Black offenders. The terms are used interchangeably in *Anderson* in addition to the term "racialized offenders".

[33] *Ibid,* at para. 121.

Re-Sentencing the Appellant – The Fresh Evidence

[65] The next issue I will address is whether the fresh evidence should be admitted.

[66] Fresh evidence was tendered by both the appellant and the respondent. Neither party objected to the admission of the fresh evidence. It was the respondent's position the fresh evidence available for consideration by this Court, notably the testimony from the appellant's bail hearing and his affidavit, supported a conclusion that the IRCA the sentencing judge had before him was sufficiently flawed as to be of little value. Therefore, despite any errors the judge might be found to have made, his sentence was unassailable.

[67] Furthermore, a fresh sentencing analysis on appeal, following a determination the sentencing judge erred in principle, may conclude with the court choosing a sentence that is the same as that imposed by the judge. In such an event, the court may affirm the original sentence despite the error.[34]

[68] As I will explain further in due course, I would not affirm the sentence. I would re-sentence the appellant to a conditional sentence and account for the time he spent in jail and on strict bail conditions by way of credit. I am not satisfied the sentence under appeal satisfies the purpose and principles of sentencing for a racialized first time offender. I do not find the original IRCA or the other evidence filed in this appeal to be unreliable sources of information about the appellant's circumstances. This evidence enables us to view the offender "through a sharply focused lens".[35] The IRCA evidence as corrected by the appellant "ensures relevant systemic and background factors are integrated in the crafting of a fit sentence, one that is proportionate to the gravity of the offence and the moral culpability of the offender".[36]

[69] An appeal court has a broad scope for accepting fresh evidence in a sentence appeal. Section 687(1) of the *Criminal Code* states:

> Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,

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[34] *R. v. Friesen*, *supra* note 18, at para. 29.
[35] *Anderson*, *supra* note 1, at para. 122.
[36] *Ibid* at para. 114.

> (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
>
> (b) dismiss the appeal.

[70] The "overriding consideration" for receiving fresh evidence is the interests of justice whether the appeal is from conviction or sentence.[37] I find it is in the interests of justice to admit all the fresh evidence filed in this appeal as it is material to the determination of a proportionate sentence, an exercise that has required an assessment of whether the appellant's original sentence should be affirmed or a new sentence substituted. In sentencing afresh, this Court should have access to more complete information about the circumstances of the offender.[38] This in turn is relevant to understanding his offending. Admitting the fresh evidence satisfies the admissibility criterion "relating to the likelihood that the result [in this Court] would be affected".[39]

[71] As the exercise of determining the appropriate sentence in this case must be informed by relevant, credible evidence[40], the next issue to be addressed is what information in the evidence before this Court can be relied upon.

Establishing Background Facts About the Appellant's Circumstances

[72] As I noted previously, the appellant, in his February 28, 2023 affidavit, has corrected or clarified information contained in the original IRCA, the PSR and the updated IRCA. He was cross-examined by the respondent in relation to various aspects of his background and the reports discussing it.

[73] In his affidavit, the appellant provided the following corrections to the updated IRCA prepared by Lana MacLean:

- C.G., his partner since the fall of 2021, does not have a seven-year old son that the appellant has been co-parenting. C.G. had a baby in December 2022, conceived as a result of a sexual assault, with respect to whom the appellant has assumed a parental role. As he stated in his affidavit, the child "…is not my biological child, but I consider him to be my son". The appellant said he recalls telling Ms. MacLean about these circumstances. He does not know why the IRCA is incorrect.

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[37] *R. v. Lévesque*, 2000 SCC 47, at para. 17.
[38] *R. v. Tamoikin*, 2020 NSCA 43, at para. 61.
[39] *R. v. Lévesque, supra* note 37, at para. 32.
[40] *Ibid*, at para. 30.

- The appellant was not sexually abused from the ages of six to nine. He was sexually abused at the age of six. The presentence report accurately indicated: “Mr. Wournell reported he was sexually abused at age 6 and physically abused at age 12”. The appellant said he recalls telling Ms. MacLean that he was sexually abused when he was six years old. He does not know why the IRCA says otherwise.

- The appellant did not overdose on sertraline as a young person, he overdosed on ecstasy. He recalls telling Ms. MacLean this information and does not know why it is stated incorrectly in the IRCA.

- The appellant did not complete Grade 8. He completed Grade 7 and dropped out of school in Grade 8. He said he recalls telling Ms. MacLean this information which is correctly stated in the presentence report: “Mr. Wournell did not finish the eighth grade”. He does not know why the updated IRCA inaccurately reports this detail.

[74] The appellant’s affidavit contains corrections to the original IRCA prepared by Jay Jarvis:

- The motor vehicle accident that left the appellant with a traumatic brain injury occurred when he was thirteen months old, not three years’ old. The appellant recalls telling Mr. Jarvis this. The presentence report stated the correct information as does the updated IRCA. The appellant does not know why the original IRCA is incorrect.

- The original IRCA stated that after an assault by his mother’s boyfriend, the appellant had run away from home and couch-surfed with friends from the ages of thirteen to seventeen. The appellant says in his affidavit that he “did experience residential instability and couch-surfed” as a teenager but was not gone from the family home for the entire period stated in the IRCA. He does not recall telling Mr. Jarvis he couch-surfed continuously through his adolescence. The appellant says in his affidavit there were occasions when he stayed with friends and one occasion when he ran away from home. According to the appellant there were multiple occasions when he stayed with his grandparents.

[75] The appellant indicates in his affidavit that the original IRCA correctly stated he lived for a time with his incarcerated brother’s pregnant girlfriend. He

does not recall exactly how old he was although the IRCA says he was seventeen. The appellant offers additional details about this period and where he was living: for a time with his brother, girlfriend and their newborn in the Windmill Road apartment once the brother was released from jail; often staying with friends; by himself "for a bit"; with his mother and sister when they moved into Windmill Road with him; in Dartmouth with his mother and sister; for a few months with his now ex-partner at her parents' home; and then to the address in Dartmouth which is his current residence. The appellant adds this is what he can recall "about his residential instability growing up" and says due to trauma and drug abuse his recollection of time-frames and the sequence of events "could be inaccurate".

[76] Finally in his affidavit the appellant offers a clarification of a detail in the PSR. He says:

- The presentence report incorrectly indicates his parents split up when he was ten and he had not seen his father since then. The appellant says his parents were separated for a couple of years before he and his mother relocated from Toronto to Nova Scotia. He recalls telling the author of the presentence report this and does not know why the report included the incorrect information.

[77] The appellant testified to being unaware of errors in the original IRCA at the time of his sentencing. He received the IRCA once incarcerated. The PSR had been sent to him in the mail when he was living at home under house arrest, awaiting sentencing.

[78] The respondent filed affidavits from Jay Jarvis and Lana MacLean, the authors of the IRCAs. In their affidavits, Mr. Jarvis and Ms. MacLean each indicated they reviewed their notes from meeting with the appellant and the information contained in the IRCAs they authored was consistent with their notes.

[79] Fundamentally what needs to be extracted from the evidence before us for the purpose of re-sentencing the appellant is an understanding of the social determinants that disproportionately impact African Nova Scotian/African Canadian individuals and their communities, and his background and circumstances in relation to the systemic factors of racism and marginalization.[41] The respondent's cross-examination of the appellant did not neutralize his claims

[41] *Anderson, supra* note 1, at paras. 106 and 118.

that he has experienced abuse, residential instability, racial identity conflict, and poverty.

[80] An explanation for the contradiction between the appellant's recall of his absences from home as an adolescent and his mother's may lie in their historically fraught relationship. There is no doubt the relationship has been strained. The appellant testified to this effect, and had made this same comment when interviewed for the PSR. In the original IRCA, the appellant described the relationship as "volatile".

[81] At the bail hearing the appellant's mother acknowledged there was strain in her relationship with her son:

> There were lots of moments where our relationship was strained, yes. But, I mean, more than moments. I mean, there were lots of times when our relationship was strained, but at the same time, there was a lot of times when we were mother and son, like just trying to navigate through everything that like Cale was going through. And there were a lot of times I was frustrated as a parent, trying to navigate the system. Trying to get Cale help and, and I'm sure Cale was frustrated in that system as well.

[82] The appellant's Acquired Brain Injury (ABI) needs to be taken into account in assessing the evidence before us. The appellant testified his ABI causes processing delay affecting his ability to take in information and formulate a response.

[83] On this final point, Lana MacLean included the following comment in her affidavit:

> …from a trauma informed lens, individuals like the Appellant who have been impacted by trauma in their lives, at times, may not always be sequential or able to recall with consistency small details of their life narratives. The Appellant's account of any alleged errors or omissions of this kind must be taken into context, and his recall and correction should hold more value.

[84] I find the appellant did spend time away from home during his teenage years and even when with his mother there were many relocations and disruptions in housing arrangements.

[85] In conclusion on the reliability of the appellant's narrative of his background and the systemic factors that have impacted him, I accept his experiences are woven from the threads of "slavery and racism, the trauma of marginalization and

exclusion, discrimination and injustice [that] are the fabric of the lives of many African Nova Scotian offenders".[42]

Re-Sentencing the Appellant – The Merits

[86] The task of re-sentencing the appellant is governed by specific rules. As set out in *Friesen*, we must apply the principles of sentencing "afresh to the facts, without deference to the existing sentence, even if that sentence falls within the applicable range". We are to defer to the sentencing judge's factual findings and his identification of aggravating and mitigating factors, "to the extent they are not affected by an error in principle".[43]

The Facts of the Offence

[87] The facts recited earlier in these reasons are not in dispute. The judge referred to the incident as one of "road rage" which, according to the presentence report is how the appellant characterized it in his interview. The "rage" was demonstrated by the occupants of the vehicle that pulled in behind the appellant with the passenger of that vehicle approaching the appellant who remained seated in his car. The updated IRCA by Ms. MacLean indicates the appellant described acting on impulse at the side of the road and responding out of fear and "fronting".[44] Ms. MacLean states:

> Mr. Wournell continues to struggle with impulse control. He reports: "I have improved a lot since I have gotten older. There are times that I feel threatened that I do react with thinking about the consequences." Mr. Wournell reports his behaviour choices in the matter for which he had been charged and sentenced is one such incident".

[88] The updated IRCA notes the appellant's "severe acquired brain injury (ABI) continues to impact in his global functioning (frontal lobe injury) – specifically his executive functioning (impulsivity, emotional regulation, sequencing of events)." It documents the appellant's life-long struggle as a result of his ABI. Health records from a psychological assessment in 2003 reported the appellant as having compromised intellectual abilities and severe learning difficulties as well as behavioural issues, common in children with brain injuries, including problems

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[42] *Anderson*, *supra*, note 1, at para. 102.
[43] *Friesen*, *supra* note 18, at paras. 27-28.
[44] Ms. MacLean does not explain "fronting" in the updated IRCA but I take it to mean putting on a front which in this case was an act of intimidation by the appellant to mask his feelings of fear.

with attention, emotional regulation (self-control, low frustration tolerance), impulsivity and peer interaction. It was anticipated the appellant would have "difficulty understanding complex social situations, making good judgment about how to handle situations, and with impulse and anger control".

Aggravating and Mitigating Factors

[89] The sentencing judge identified the appellant's lack of prior criminal record and guilty pleas, obvious mitigating factors. He observed the appellant had had "a pretty troubled background". He noted, as an aggravating factor, the appellant had disposed of the sawed off .22 calibre rifle behind a gas station. Abandoning a prohibited firearm where it can be found by a member of the public poses a heightened danger. It is a more serious feature of the offence of having possessed it.

Individualized Sentencing – the Appellant's Background and Systemic Factors

[90] The three reports—the PSR, the original IRCA and the updated IRCA—all reflect the deprivations experienced by the appellant, a racialized young man. His family was fractured, he grew up in poverty, struggled in school, ultimately acquiring only a limited education, was subject to sexual and physical abuse, lacked a positive Black male role model, endured housing instability and inadequate housing in socio-economically marginalized neighbourhoods, and struggled with his racial identity.

[91] This background, referenced in the PSR and the original IRCA, should have informed the sentencing judge's determination of the range of sentence for the appellant's offences and the considerations to be addressed in relation to a conditional sentence order.[45]

[92] The appellant's conflicted racial identity is described in the original IRCA:

> Throughout different periods of Mr. Wournell's life, he describes his race and how that was perceived by others, as impacting his ability to fit-in to his surroundings. According to Mr. Wournell, during his time in Toronto and in certain communities he lived in in Halifax, he was considered not black enough…because some of his favourite activities were considered "white", and by participating in these activities, Mr. Wournell was considered acting "white".

[45] *Anderson, supra* note 1.

> This left Mr. Wournell feeling marginalized by the black community in Toronto…
>
> While Mr. Wournell was not considered black enough in Toronto, when he and his family moved in with his maternal grandparents in…Dartmouth, he was considered too black…he described feeling alienated from his mother's family and for a long time never considered race as the issue, just thought he was weird and different. It wasn't until he was older and reflected, that he could make sense of things. At a young age as Mr. Wournell is trying to develop a racial identity, he was faced with the paradox of being too black in some environments and not black enough in others. This compounded with being raised by a white mother, would have created impediments to the development of Mr. Wournell's racial identity.
>
> …Furthermore, without paternal family influence, Mr. Wournell's racial identity would have been severely impaired and underdeveloped as it was unbeknownst to him what it meant to grow up as a Black male. A lack of a strong racial identity leaves a person vulnerable to unhealthy influences…Mr Wournell did not receive sufficient support during this stage to assist him in developing a secure racial identity.

[93] In the updated IRCA the appellant spoke of having struggled throughout his life "to find a place of belonging" due to his bi-racial and bisexual identity.

[94] The original IRCA points to how systemic factors impacted the appellant's chances of succeeding in school:

> …He did not feel as though he belonged in school, that it was not the place for him. For a student whose initial school years were not positive, these feelings would have re-triggered those early experiences with Mr. Wournell. When we consider the aforementioned negative effects of instability on child development, it provides some understanding into Mr. Wournell's disengagement from his education. Disengagement from his education is also reflected in the historically documented achievement gap that exists between African Nova Scotian learners and learners of European descent…
>
> Mr. Wournell discussed how he was eventually assigned an Educational Program Assistant (EPA) during his time at Ridgecliff Middle School and things started to turn around. It should be noted that EPAs are assigned to special needs students and those who have behavioural challenges. He recalled how it was not until he met his EPAs…(both African Nova Scotian) that he did not feel dumb. Mr. Wournell said upon reflection he sees the connection with them as visible black role models, something he never had. He spoke fondly of how Mr. D. taught him about black Nova Scotia. As is the experience for many ANS students they are often one of very few in their classes and sometimes in their entire school, with no teachers or support staff who look like them. When you are consistently the only

> one, or one of very few who looks like you, it leaves an individual feeling isolated, marginalized and alone.

[95] The IRCA refers to the golf club assault disrupting the appellant's engagement with his education and the progress he was making in developing "strong cultural relationships". The appellant's experience of being brutally assaulted as a teenager by his mother's boyfriend has profoundly impacted him. The updated IRCA notes: "The social etiology of Black males' lives places them at higher risk to adverse childhood experiences (ACEs). ACEs prevent Black male children from perceiving the world as a safe place".

[96] Evidence about the appellant's ABI and his "adverse childhood experiences" provide the exercise of re-sentencing him with valuable context for his offending.

[97] The updated IRCA provides insights into the appellant's background and the systemic factors that are relevant to the individualized nature of sentencing. It says about the appellant:

> …Mr. Wournell's worldview is impacted by the cultural nuances of growing up as a Bi-racial Black male in Halifax; he also suffers from a traumatic brain injury impacting on his executive functioning (reasoning, impulsivity, poor social skills). Mr, Wournell was raised by his Caucasian mother and his contact with his birth father was limited. The impacts of poverty, community disruptions and seeking out a place of belonging as bi-sexual Black male, given the history of homophobia in the ANS community during his developmental years, may have impacted on his identity development. Overall, Mr. Wournell experienced various forms of emotional, intellectual and physical trauma that have impacted on his overall global functioning.
>
> IRCA is not meant to exonerate the offender or be considered as [a] "get out of jail card" but a resource to provide context and updated/additional information to the Court regarding the psycho-social, social, racial and cultural factors that may have impacted Mr. Wournell's life to-date and may contribute to or influence criminogenic factors.

[98] The appellant's impoverished coping mechanisms and impacted global functioning deficits manifested themselves in his offending. A proportionate sentence, one that reflects the gravity of the appellant's offences and his moral culpability, must take into account the systemic and background factors that have contributed to him coming into conflict with the law.

A Proportionate Sentence

[99] Before a conditional sentence can be imposed, statutory prerequisites must be satisfied and, by a preliminary determination of the appropriate range of available sentences, both a penitentiary sentence and probation have to be eliminated as appropriate dispositions.[46]

[100] As noted earlier in these reasons, the range for the offences to which the appellant pleaded guilty includes a sentence of two years' less a day, which permits the imposition of a conditional sentence subject to an assessment of the community endangerment issue. A conditional sentence can only be imposed where,

> …service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2.[47]

[101] As I noted in paragraph 57 above, the "endangerment of the community" factor must be assessed according to: (1) the risk of re-offence; and (2) the gravity of the damage should re-offending occur.[48] These elements were extensively reviewed in *Proulx* which held that incarceration would be warranted where there is a "real risk" of re-offending and, particularly in the case of violent offenders, where there is even a minimal risk of "very harmful future crime".[49]

[102] *Proulx* sets out a variety of factors relevant to the assessment of whether the offender poses a risk of re-offending. The decidedly individualized nature of sentencing is a critical aspect of the analysis. In the case of African Nova Scotian offenders, these factors should be evaluated in the context of the information contained in the IRCA.[50] And as *Proulx* held, the risk can be mitigated by "the imposition of appropriate conditions" that support rehabilitation and impose a level of supervision to ensure compliance with those conditions.[51]

[103] This Court's decision in *Anderson* addressed the issue of risk in the context of an African Nova Scotian offender:

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[46] *Proulx, supra* note 8, at para. 58.
[47] *Criminal Code, supra* note 2, s. 742.1(a)
[48] *Proulx, supra* note 8, at para. 69.
[49] *Ibid* at paras. 69 and 74.
[50] *Anderson, supra* note 1, at para. 138.
[51] *Proulx, supra* note 8, at para. 72.

> **[140]** Taking account of context will be necessary in relation to the other non-exhaustive factors identified in *Proulx* as possibly relevant: the nature of the offence; the relevant circumstances of the offence, including prior and subsequent incidents; the degree of the offender's participation; the relationship of the offender to the victim; and after-the-fact conduct. *Proulx* references in general terms what an IRCA can supply in rich and contextualized detail: the offender's "profile", including their "occupation, lifestyle, criminal record, family situation, mental state...". As I noted earlier in these reasons, IRCAs supply a broad array of information to assist a sentencing judge's understanding of the racialized offender.
>
> **[141]** As for the degree of harm if there is re-offending, *Proulx* held that "a small risk of very harmful future crime" could be the basis for a judge deciding a conditional sentence is not appropriate. Again, risk may be attenuated by suitable conditions and culturally relevant supports in the community for the African Nova Scotian offender...[52]

[104] As noted earlier, the appellant's compliance with release conditions slipped prior to his sentencing. In December 2022 he pleaded guilty to breaching his conditions on four occasions in 2021, including by violations of his house arrest. There is no clear explanation for the breaches although at the bail hearing the appellant's grandmother implied that friction with a neighbour who has since moved may have contributed. However, it is appropriate to take a broader view of the appellant's capacity to abide by the law: the appellant was 26 years old before he acquired a criminal record. The breaches occurred during a six-month period after the appellant had been on house arrest since late 2019. Otherwise, the appellant observed his conditions. He secured release on conditions pending his appeal and there have been no issues with his compliance .

[105] I am satisfied the appellant's risk of re-offending can be managed in the community under a conditional sentence order. I am also satisfied that, as is statutorily required, a conditional sentence order in this case will serve the fundamental principle of proportionality set out in s. 718.1 of the *Criminal Code*. The gravity of the appellant's offence and his moral culpability for it must be assessed in the context of historic factors and systemic racism. In re-sentencing the appellant we are to "take into account the impact that social and economic deprivation, historical disadvantage, diminished and non-existent opportunities, and restricted options may have had on the offender's moral responsibility".[53]

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[52] *Anderson*, *supra* note 1, citing *Proulx*, *supra* note 8, at paras. 70 and 74.
[53] *Anderson*, *supra* note 1, at para. 146.

[106] The sentencing principles of denunciation and deterrence can also be served by the imposition of a conditional sentence on the appellant. As *Anderson* held: "…a properly crafted conditional sentence with appropriate conditions can achieve the objectives of denunciation and deterrence".[54] In sentencing African Nova Scotian offenders these objectives must be assessed contextually and "cannot be regarded as static principles to be applied rigidly in what is a highly individualized process".[55] And there is the potent consequence of breaching a conditional sentence—the "real threat of incarceration".[56]

[107] The appellant's experience of incarceration was wholly negative. The updated IRCA indicated that being locked up adversely affected his mental health. He struggled with chronic suicidal thoughts and found the carceral environment "overwhelming". It contributed to his "sensory overload" and impacted his ability to sleep. It is reasonable to expect the appellant would not be inclined to risk a return to jail.

[108] The appellant has shown he can abide by strict conditions in the community. Conditions in a conditional sentence order can address issues underlying the appellant's risk factors such as his vulnerability to unhealthy influences, identified in the original IRCA.

[109] As discussed in the IRCAs, the appellant has struggled with racial identity issues and locating a place in the ANS community. A conditional sentence order can support the development of this connection and its value to his rehabilitation. His fresh evidence materials include the affidavit of Desiree Jones, a lawyer at the African Nova Scotian Justice Institute, attaching a letter from Duane Winter, Community Coordinator for the Nova Scotia Brotherhood. Mr. Winter's letter, prepared for the appellant's February 2023 bail application states:

> …we will be providing primary health care services to Cale Wournell upon his release. These services include medical services from our physician, counselling from our wellness navigator and clinical therapist, anger management, peer to peer engagements, addictions and mental health counselling and psychiatry if needed. NSB will also be mentoring Mr. Wournell on a weekly basis to ensure his care is going according to plan.

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[54] *Ibid* at para. 154.
[55] *Ibid* at para. 160.
[56] *Proulx*, *supra* note 8 at para. 21.

[110] As noted in the updated IRCA, the appellant made pro-social connections in the 2SLGBTQA+ community where he is part of the Youth Project[57] which he describes as supporting young people "in their coming out". He says he feels "nurtured" by that community.

[111] It is apparent from her attendance in court and the evidence we have heard that the appellant is also lovingly supported by his maternal grandmother.

[112] A conditional sentence for the appellant ensures we do not lose sight of the sentencing principles of rehabilitation and restraint, particularly in this case of a first time offender. It acknowledges *Proulx*'s observation that Parliament mandated the "expanded use…of restorative principles in sentencing as a result of the general failure of incarceration to rehabilitate offenders and reintegrate them into society".[58] A conditional sentence for the appellant represents a restrained, restorative sanction, one that is responsive to the disproportionate incarceration of African Nova Scotians.

Credit for Restrictive Pre-Trial Release Conditions

[113] The appellant was originally released on December 30, 2019 under conditions that included house arrest with exceptions for: medical appointments or emergencies; court appearances or related appointments; in the presence of a surety once a week for four hours to attend to personal needs; and attendance at the sureties' residence.

[114] The appellant was subject to these conditions, which were renewed on June 24, 2021, until he was sentenced on April 25, 2022.

[115] The appellant's February 16, 2023 release pending appeal included house arrest with exceptions for: work; medical appointments or emergencies; court appearances or related appointments; and four hours a week to attend to personal needs. He was also required to pay for and comply with electronic monitoring.

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[57] The Mission Statement for the Youth Project, which can be found at <www.youthproject.ns.ca/mission-statement/> reads: "Our mission is to make Nova Scotia a safer, healthier, and happier place for lesbian, gay, bisexual and transgender youth through support, education, resource expansion and community development".
[58] *Proulx*, *supra* note 8, at para. 20.

[116] Prior to sentencing on April 25, 2022, the appellant was on conditional release under house arrest for a total of 847 days. He has continued to be on house arrest since his release on bail pending his appeal.

[117] Strict release conditions may be taken into account in sentencing.[59] This Court has not gone as far as Justice Rosenberg in *R. v. Downes* where he concluded that "time spent under stringent bail conditions especially under house arrest must be taken into account as a relevant mitigating circumstance".[60] In *Knockwood*, Justice Saunders' canvas of various appellate authorities led him to conclude that:

> [33] …the present state of the law to be such that the *impact* of strict release conditions may be considered or "put in the mix", together with all other mitigating factors, in arriving at a fit sentence.

[118] *Knockwood* held that information describing the "substantial hardship" suffered by the offender was required for the sentencing court to take the strict release conditions into account: "…the impact of the particular conditions of release *upon the accused* must be demonstrated in each case".[61]

[119] Since *Knockwood*, sentencing courts in Nova Scotia have either given credit for time spent on stringent pre-sentence release conditions or factored it into the mix of mitigating circumstances.[62]

[120] In *R. v. Campbell*,[63] this Court upheld the sentencing judge's determination that 3.5 months credit was appropriate for the 18 months of strict release conditions the offender had been under.

[121] In crafting the appellant's sentence it is appropriate to take into account the significant restrictions on his liberty as a result of house arrest prior to being sentenced and then jail, time totally slightly more than three years. We do not have information on how the house arrest imparted "substantial hardship" on the appellant but I find it would be unfair to deprive him of the mitigation that should be factored into crafting a proportionate sentence.

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[59] *R. v. Knockwood*, 2009 NSCA 98, at para. 33; *R. v. Alcantara*, 2017 ABCA 56, at para. 52; *R. v. Kristian*, 2017 ABCA 187, at para. 11; *R. v. Nghiem*, 2009 BCCA 170, at para. 16.
[60] [2006] 79 O.R. (3d) 321 at para. 33.
[61] *Knockwood*, *supra* note 59, at para. 34.
[62] *R. v. Kane*, 2022 NSSC 130; *R. v. Simmonds*, 2021 NSSC 54; *R. v. Gibbons*, 2018 NSSC 202.
[63] 2022 NSCA 29.

The Appellant's Sentence

[122] I find the appellant's sentence in the first instance should have been a conditional sentence order of two years' less a day. It is no longer appropriate to impose that sentence given the time he spent incarcerated and on strict house arrest conditions.

[123] The appellant is entitled to a credit of 298 days for the time he spent in jail.[64] I find the extensive period of time he has spent on strict release conditions, including house arrest, justifies a credit of 10 months. These credits taken into account, the appellant shall serve a conditional sentence of 4 months to be followed by 12 months' probation.

[124] Conditional sentence conditions:

1. Keep the peace and be of good behaviour.

2. Appear before the Provincial Court of Nova Scotia when required to do so by it.

3. Report to a supervisor at the correctional services community office at 277 Pleasant Street, Suite 112, Dartmouth, N.S. within two business days and as required and in the manner directed by the supervisor or someone acting in their stead.

4. Remain within the Province of Nova Scotia unless written permission to go outside the province is obtained from the Provincial Court of Nova Scotia or the supervisor; and

5. Notify the Provincial Court or the supervisor in advance of any change of name or address, and promptly notify the Court or the supervisor of any change in employment or occupation.

6. In addition, the appellant shall:

- Reside at 34 Viridian Drive, Dartmouth, Nova Scotia and shall not change his place of residence without the written consent of his supervisor or Order of the Provincial Court of Nova Scotia.

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[64] *R. v. MacIvor*, 2003 NSCA 60, at para. 38.

- For the first two months of the conditional sentence order, the appellant is to remain on the civic lot of 34 Viridian Drive, Dartmouth, Nova Scotia at all times beginning at 6:00 p.m. on the date this decision is released and ending at 11:59 p.m. on the last day of the second month.

7. The appellant's house arrest will be subject to the following exceptions:

(a) When at regularly scheduled employment, which his sentence supervisor knows about, and travelling to and from that employment by direct route.

(b) When dealing with a medical emergency or medical appointment involving the appellant or a member of his household and travelling to and from it by direct route.

(c) When attending a scheduled appointment with his lawyer, his sentence supervisor, and travelling to and from the appointment by direct route.

(d) When attending court at a scheduled appearance or under subpoena and traveling to and from court by direct route.

(e) When attending assessment, counselling or programming approved by his supervisor and traveling to and from by direct route.

(f) When making applications for employment or attending job interviews, Monday to Friday between the hours of 9 a.m. and 5 p.m. and traveling to and from by direct route.

(g) For not more than four hours per week, approved in advance by his sentence supervisor, for the purpose of attending to personal needs.

8. For the remaining two months of the conditional sentence order, the appellant is to remain on the civic lot of 34 Viridian Drive, Dartmouth, Nova Scotia from 10 p.m. until 6 a.m. the following day, seven days a week beginning on the conclusion of the first two months of the conditional sentence order and ending upon the conclusion of the conditional sentence order.

9. The appellant's curfew condition will be subject to the same exceptions that apply to the house arrest condition.

10. The appellant shall present himself at the entrance of his residence should a peace officer and/or his sentence supervisor attend to check on his compliance with the house arrest/curfew conditions.

11. The appellant shall not take or consume alcohol or other intoxicating substances.

12. The appellant shall not take or consume a controlled substance as defined in the *Controlled Drugs and Substances Act*[65] except in accordance with a medical prescription.

13. The appellant shall not have in his possession any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition or explosive substance.

14. The appellant shall attend appropriate culturally and trauma-informed counselling and support as approved by his supervisor, with specific consideration of:

a. Culturally specific addictions and substance abuse counselling;

b. Culturally specific mental health counselling; and

c. Culturally specific education and employment support.

15. The appellant shall attend for assessment, counselling or a program as approved by his supervisor.

16. The appellant shall:

- Participate in and cooperate with any assessment, counselling or program as approved by his supervisor.

[65] S.C. 1996, c.19.

- Have no direct or indirect contact or communication with Robert Cameron and Michael Atkinson except through a lawyer.

- Make reasonable efforts to locate and maintain employment or an education program as approved by his supervisor.

- Connect with the Nova Scotia Brotherhood.

[125] The following are the conditions for the appellant's 12 month probationary period:

1. Keep the peace and be of good behaviour.

2. Appear before the Provincial Court of Nova Scotia when required to do so by it.

3. Report to a supervisor at the correctional services community office at 277 Pleasant Street, Suite 112, Dartmouth, N.S. within two business days of the conclusion of his conditional sentence and as required and in the manner directed by the supervisor or someone acting in their stead.

4. Remain within the Province of Nova Scotia unless written permission to go outside the province is obtained from the Provincial Court of Nova Scotia or the supervisor; and

5. Notify the Provincial Court of Nova Scotia or the supervisor in advance of any change of name or address, and promptly notify the Provincial Court or the supervisor of any change in employment or occupation.

[126] In addition, the appellant shall:

- Reside at 34 Viridian Drive, Dartmouth, Nova Scotia and shall not change his place of residence without the written consent of his probation officer or Order of the Provincial Court of Nova Scotia.

- Not take or consume alcohol or other intoxicating substances.

- Not take or consume a controlled substance as defined in the *Controlled Drugs and Substances Act* except in accordance with a medical prescription.

- Not have in his possession any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition or explosive substance.

- Attend appropriate culturally and trauma informed counselling and support as approved by his probation officer, with specific consideration of:

    a. Culturally specific addictions and substance abuse counselling;

    b. Culturally specific mental health counselling; and

    c. Culturally specific education and employment support.

- Attend for assessment, counselling or a program as approved by his probation officer.

- Participate in and cooperate with any assessment, counselling or program as approved by his probation officer.

- Have no direct or indirect contact or communication with Robert Cameron and Michael Atkinson except through a lawyer.

- Make reasonable efforts to locate and maintain employment or an education program as approved by his probation officer.

Disposition

[127] I would allow the appeal, admit the fresh evidence and re-sentence the appellant as described above.

Derrick, J.A.

Concurred in:

Farrar, J.A.
Fichaud, J.A.