NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Cope*, 2024 NSCA 59

Date: 20240614
Docket: CAC 521672
Registry: Halifax

Between:

Harry Arthur Cope

Appellant

v.

His Majesty the King

Respondent

and

Aboriginal Legal Services

Intervenor

Judge:	The Honourable Justice Anne S. Derrick
Appeal Heard:	February 13, 2024, in Halifax, Nova Scotia
Subject:	Sentencing. Aggravated Assault. Sentencing of Indigenous offenders. Unavailability of a conditional sentence order (CSO) on the basis of *R. v. Fice*, 2005 SCC 32. Sentencing circles. Application of *R. v. Gladue*, [1999] 1 S.C.R. 688 and *R. v. Ipeelee*, 2012 SCC 13. Whether the sentencing judge under-emphasized the appellant's severe mental illness and addictions at the time of the offences in imposing a five-year penitentiary sentence, just below the upper end of the *R. v. Tourville*, 2011 ONSC 1677 categories for aggravated assault.
Summary:	The Indigenous appellant, who was on remand, pleaded guilty to the aggravated assault of his intimate partner, who is also Indigenous. He had a significant criminal record and a history of serious mental illness. He sought a sentence that consisted of remand credit plus a two years less a day CSO, followed by probation in order to obtain community-based, culturally-informed supportive housing and services. His Sentencing

Circle recommended he serve no more time in custody and be supervised in the community while accessing services and supports. The Crown sought a penitentiary sentence of five to six years. The sentencing judge took *Gladue* and *Ipeelee* into account and reviewed the appellant's circumstances as an Indigenous person of Mi'kmaq ancestry. She concluded the appellant's incarceration was required to protect the public. The appellant was sentenced to five years' in prison for the aggravated assault and eight months' incarceration for breaches of Release Orders. A remand credit of 18 months was applied to the sentence for aggravated assault.

Issues:

The sentencing judge erred in law by failing to apply Gladue principles in a meaningful way so as to have an impact on the sentence, as required under section 718.2(e) of the Criminal Code.

The sentencing judge erred in law and principle by placing minimal weight on the Indigenous Sentencing Circle and subsequent sentencing recommendations.

The sentencing judge erred in law by overemphasizing denunciation and deterrence by relying on sections 718.04 and 718.201 and underemphasizing section 718.2(e) of the Criminal Code.

The sentencing judge erred in law and principle, with a resultant impact on sentence, by: placing minimal weight on the state of the offender's mental health at the time of the offences.

Result:

Appeal allowed; Scanlan, J.A. dissenting. In the view of the majority, an error in principle was committed. The sentencing judge underemphasized the appellant's mental illness and drug abuse and their connection to his *Gladue* factors. As a consequence of these factors, the proportionality analysis required a more direct engagement with the principle of restraint. *Tourville* had more influence on the sentence imposed and produced a disproportionate sentence for this Indigenous offender. The majority and the dissent agree the sentence the appellant had proposed in the court below was not one that the judge could have imposed even had she been

inclined to. The combination of 18 months' remand credit and a CSO of two years less a day for a total sentence conflicted with *Fice*. The majority and the dissent have differing views on how sentencing circles should be conducted. The majority offers guidance to sentencing judges on addressing sentencing circle recommendations in reasons.

In the view of the dissent: 1)The majority has simply reweighed the same evidence the sentencing judge considered and supplanted their view on sentencing. This offends the principle of deference as set out in *R. v. Lacasse*, 2015 SCC 64. 2) The majority fails to properly factor the need to protect vulnerable victims in accord with the provisions of s. 718.04 and s. 718.201 of the *Code.* 3) The majority condones a sentencing circle process that offends the requirement of open court processes when a judge is involved in a sentencing (*CBC v Named Person*, 2024 SCC 21*)* 4). The standard of review related to a response to sentencing circle recommendations is adequacy of reasons.

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Intervenor

Judges:	Bourgeois, Scanlan, Derrick, JJ.A.
Appeal Heard:	February 13, 2024, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Derrick, J.A.; Bourgeois, J.A., concurring; and Scanlan, J.A., dissenting.
Counsel:	Sarah M. White, for the appellant Erica Koresawa, for the respondent Jonathan Rudin and Emily R. Hill, for the intervenor

Reasons for judgment:

Introduction

[1] The appellant is Indigenous. On February 16, 2023, he was sentenced by Judge Christine Driscoll of the Provincial Court of Nova Scotia to a penitentiary term of five years for the aggravated assault of an intimate partner, who is also Indigenous, and eight months for breaches of the no-contact conditions of a Release Order.

[2] The appellant sought a Conditional Sentence Order ("CSO") to enable him "to secure a treatment facility in [his] Indigenous community followed by long term secure housing with culturally relevant supports". This was aligned with the recommendations of a Sentencing Circle for a non-custodial disposition.

[3] For reasons specific to this appeal, a CSO was not an available sentencing option. This did not register on anyone's radar at the time. I will address this later in these reasons.

[4] The Crown recommended a penitentiary sentence. The sentencing judge determined this was appropriate. She emphasized protection of the public, finding the appellant to be a danger to the community. Consequently she rejected the community-based sentence he had proposed.

[5] The appellant says the sentencing judge made legal errors by: failing to apply *Gladue*[1] principles in a meaningful way; placing minimal weight on the recommendations of the Sentencing Circle; overemphasizing denunciation and deterrence, and underestimating the restraint provisions of the *Criminal Code* that specifically apply to Indigenous offenders; and failing to place adequate weight on the mental illness he was experiencing when he committed the offences. He seeks a new sentence of time served and "a period of residual probation with conditions that encourage rehabilitation".[2]

[6] As these reasons explain, I agree the sentencing judge erred by not sufficiently accounting for the appellant's serious mental health and addictions issues at the time of the offences. I find these factors, viewed in the context of the

[1] *R. v. Gladue*, [1999] 1 S.C.R. 688 [*Gladue*].
[2] Appellant's Factum, at para. 106.

appellant's *Gladue* factors, were underemphasized, which constituted an error in principle. The principle of restraint should have had more resonance in this case.

[7] That said, the complex inter-relationship of factors relevant to appellant's sentencing presented the judge with a very challenging task. In allowing this appeal, we do not fail to recognize that.

[8] I would grant leave to appeal sentence and allow the appeal, varying the sentence as I indicate in paragraphs 164 and 165.

[9] Before embarking upon my reasons, I should note that my colleague, Justice Scanlan, has authored a strong dissent. It includes his views on the open court principle and sentencing circles, and a discussion about sufficiency of reasons. The parties to the appeal, in submissions about the Sentencing Circle's recommendations, did not identify the open court principle as an issue. Neither have I. As for a sufficiency of reasons issue, I will be addressing the judge's treatment of the Sentencing Circle's recommendations, but not through a sufficiency of reasons analysis.

The Facts of the Offences

[10] The aggravated assault was horrendous. On June 27, 2021 the appellant brutally attacked Brittany Sack, his common law partner. The appellant was sentenced on the basis of an agreed statement of facts which stated:

> [7] On June 27, 2021, Halifax Regional Police were dispatched to 5506 Cunard Street in Halifax, Nova Scotia in response to an injured person. Upon arrival on scene, police officers found Ms. Brittany Sack (the victim) lying on the ground, she was conscious, but she had severe injuries to the left side of her face. Her left face, left eye and lips were swollen and covered in blood. She was upset and crying and she pointed southbound on Gottingen Street, advising police that it was her boyfriend, Harry Cope (the Appellant), who had assaulted her and that he had left the scene in that direction.
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> [8] Police located Mr. Cope further down Gottingen Street shortly after, and he was arrested. He was highly agitated, verbally combative and resistant while being cuffed. He was not cooperative with police. He was intoxicated and visibly swaying. While in the back of the police vehicle, Mr. Cope stated several times that he "smashed her in the face" and that she hit him, so he hit her back.
>
> [9] Ms. Sack was assessed by Emergency Health Services and was brought to the emergency department at the QEII hospital. The following injuries were confirmed in a CT scan:

> a. Medial left orbital wall blow out fracture with slight medialization of the rectus muscle
>
> b. Subcutaneous hematoma to the right of the sternum
>
> c. Possible non-displaced buckle fracture of the sternum
>
> d. Significant swelling of the left eye.

[11] The assault was captured on video and witnessed by passers-by.

[12] The appellant was arrested on June 27 shortly after the assault. On July 2, 2021, after a contested bail hearing, he was released on conditions that included having no contact with Ms. Sack. The agreed statement of facts documented he breached this condition under his initial, and then subsequent, Release Orders:

> *Breach of Release Order (contact with Brittany Sack) July 5, 2021*
>
> [11] After the assault, Mr. Cope was subject to a Release Order dated July 2, 2021 and was not to have contact with Ms. Sack. At this time, Mr. Cope had no other pending criminal charges. Shortly after he was released, Mr. Cope breached his release order on July 5, 2021, by sending text messages to Ms. Sack via his father's cell phone. Officers attended Mr. Cope's residence and he was arrested for breaching the conditions of his release order. He was remanded on July 5, 2021 again at the CNSCF.
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> *Breach of a Release Order (contact with Brittany Sack) x2 August 11, 2021*
>
> [12] On July 14, 2021, Mr. Cope was granted release from custody. The originating release order was revoked and a new release order was issued with stricter conditions. Mr. Cope was not to have any contact with Ms. Sack, except through a lawyer, and he was not to be within 50 meters of her home, place of employment, or place of education.
>
> [13] On August 11, 2021, Indian Brook RCMP were asked to do a wellness check on Mr. Cope after a community member reported that Mr. Cope was on a cocaine binge and they were concerned for his safety. The address provided was (*redacted*) – this was not a valid address. RCMP who were familiar with Mr. Cope knew that Ms. Sack resided at (*redacted*) and they attended her residence to inquire about Mr. Cope. Ms. Sack allowed RCMP to enter her apartment. They located Mr. Cope in a bedroom closet. He was arrested and charged with two counts of breaching his release order. He was remanded on this date (August 11, 2021) and has been in continuous custody since this time.

[13] The appellant has been in custody continuously since August 11, 2021.

The Sentencing Judge's Decision

[14] The factors the sentencing judge had to calibrate for a proportionate sentence presented her with a difficult task. At the start of her oral reasons the judge indicated she had read and considered everything she had before her: a *Gladue* report; the report (recommendations) of the Sentencing Circle held on October 28, 2022; briefs filed by the Crown and defence; articles from 2017 and 2019 by Professor Lisa Kerr[3] and from 2012, an article by Professors David Milward and Debra Parkes;[4] and letters of support from Corey Arsenault, the social worker at the CNSCF and Alicia McIntyre, Mi'kmaw Native Friendship Center, Intensive Case Manager - Corrections. The judge had been provided with the appellant's criminal record and information about his "significant mental illness…set out in the exhibits to this matter and a report from the East Coast Forensic Hospital".[5]

[15] The exhibits referred to by the sentencing judge were two reports from the East Coast Forensic Hospital ("ECFH"), dated September 17, 2021 and October 12, 2021, respectively. I will discuss these reports and other information about the appellant's mental health later in these reasons.

[16] The sentencing judge reviewed the harrowing facts of the aggravated assault and the injuries sustained by Ms. Sack. She noted the requirement to consider the purpose and principles of sentencing found in s. 718 of the *Criminal Code* and specifically reviewed the fundamental purpose of sentencing and its main objectives—denunciation, deterrence, separation of offenders from society where necessary, rehabilitation, reparations for harm to victims or the community, and the promotion of responsibility in offenders and acknowledgement of harm.

[17] The sentencing judge noted Parliament's direction in s. 718.04 to sentencing courts dealing with an offence involving abuse of an Indigenous female to give "primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence". She recognized the principle of proportionality—that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. She reviewed the principles of sentencing under s. 718.2 and the additional consideration under s. 718.201 that a

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[3] Kerr, Lisa, "Sentencing Ashley Smith: How Prison Conditions Relate to the Aims of Punishment" (2017) 32:2 Canadian Journal of Law and Society/Revue Canadienne Droit et Société 187 at page 198 (*Excerpt Only*) and Kerr, Lisa, "How the Prison in a Black Box in Punishment Theory" (2019) 69 U.Toronto L.J. 85 at 2 (*Excerpt Only*).
[4] David Milward & Debra Parkes, "Gladue: Beyond Myth and Towards Implementation in Manitoba" (2012) 35:1 Man LJ 84.
[5] Decision at page 165.

court imposing a sentence in respect of an offence involving the abuse of an intimate partner "shall consider the increased vulnerability of female persons who are victims" with special attention to the circumstances of Indigenous female victims. She identified the principle of parity—that a sentence should be similar to sentences for similarly-situated offenders—and the principle of totality that consecutive sentences should not be unduly long or harsh.[6]

[18] The judge acknowledged the principle of restraint, that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances.[7] And she recited s. 718.2(e) which states:

> …all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[19] The parties were far apart in their recommendations for sentence. The Crown was seeking a sentence of five or six years for the aggravated assault and the application of the appellant's remand time to the sentence for the breach offences. The appellant's original position on sentence was that a sentence of federal incarceration, i.e., a penitentiary sentence, was appropriate for the aggravated assault.

[20] By the time of the appellant's sentencing on February 16, 2023 the defence was recommending a CSO. A CSO would enable the appellant to participate as an inpatient at the Mi'kmaw Lodge. The Mi'kmaw Legal Support Network (MLSN) had created a plan involving wrap around services. After completing two rounds of the Lodge's programming, the appellant could then transition to a supportive housing placement at the Diamond Bailey Healing Centre.

[21] On the basis of these community resources and services, the defence urged the judge to take the appellant's remand time into account and impose a CSO of two years less a day[8] followed by probation.

[22] The judge applied the remand credit in fixing sentences for the breach offences and arriving at a go-forward sentence for the aggravated assault. As I will

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[6] *Criminal Code*, ss. 718.2(b) and (c).
[7] *Criminal Code*, s. 718.2(d).
[8] The maximum duration for a CSO under the *Criminal Code*, s. 742.1.

explain shortly, the role the remand credit[9] played in relation to the sentencing for the aggravated assault eliminated a CSO as an option for the judge in the appellant's case.[10]

[23] As she worked her way through her reasons, the sentencing judge acknowledged the direction from the Supreme Court of Canada in *R. v. Ipeelee*[11] that *Gladue* factors must be considered in sentencing of Indigenous offenders, including for serious offences. She understood *Ipeelee* laid out imperatives, referencing a portion of paragraph 87 from that decision:

> [87] The sentencing judge has a statutory duty, imposed by s. 718.2(e) of the *Criminal Code*, to consider the unique circumstances of Aboriginal offenders. Failure to apply *Gladue* in any case involving an Aboriginal offender runs afoul of this statutory obligation…

[24] The judge took account of Ms. Sack being Indigenous and very vulnerable, noting that she struggled with a drug addiction, had endured the death of a child, and was the victim of intimate partner violence. She held that while it is not inevitable that the sentence for offences against a vulnerable victim such as Ms. Sack has to be a custodial one, "it really depends on the circumstances of each case".

[25] The judge gave an overview of the appellant's circumstances as an Indigenous person of Mi'kmaq ancestry. She acknowledged he will have "suffered as a result of colonization, inter-generational trauma and systemic racism". She noted he had experienced poverty, racism and abuse. The judge pointed to the appellant's chaotic, traumatic childhood. His father was a violent alcoholic. Subsequent partners of his mother abused alcohol, and one relationship was also violent. The appellant was introduced to drugs by his father at age 10. This set into motion an addiction to drugs, and crime related to it.

[26] The sentencing judge took into account the appellant's prior criminal record which she described as "troubling". The record is lengthy, spanning 16 years from 2001 to 2017 with convictions for significant violence, weapons, and breaching court orders. Given his history, the judge had concerns about the appellant's ability to abide by conditions. She viewed the appellant as having demonstrated an

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[9] The sentencing judge applied 18 months' remand credit to the sentence for aggravated assault.
[10] *R. v. West*, 2021 NSCA 80 at para. 18.
[11] 2012 SCC 13 at paras. 84-86 [*Ipeelee*].

inability to manage his mental health and substance abuse issues, and therefore, his dangerousness.

[27] The judge considered the mitigating and aggravating circumstances. She noted the appellant had pleaded guilty, was remorseful, was currently treating his mental health issues, and wanted to live a better life. She found it aggravating that the aggravated assault was perpetrated against an Indigenous victim who was an intimate partner. These are statutorily aggravating factors under the *Criminal Code*.

[28] The judge observed:

> Mr. Cope when clean and treating his mental health is an employable, productive person, and when using, he is a danger to society. I have to consider both sides of that.

[29] She acknowledged the challenges for the appellant and the positive supports he enjoyed:

> Mr. Cope is an individual dealing with the complex layers of mental health, addictions and a troubled upbringing. He still has an impressive support group with both his family, community and professionals. The program recommended by Ms. White certainly sounds positive. He is remorseful and takes responsibility.

[30] Nonetheless, the sentencing judge was not persuaded the appellant should receive a community-based sentence. She rejected the suitability of a CSO for the appellant on the basis of community endangerment and the sentence being incompatible with the fundamental purpose and principles of sentencing.[12] She found:

> Ultimately, protecting society calls for a federal sentence for Mr. Cope. I can't say that he is not a danger to society. An appropriate sentence for this offence where it involves…intimate partner violence on an Indigenous woman, with his record, would be at the top of the range in the third category of *Tourville*.[13] Because of his identified *Gladue* factors, his mental health issues and his major addictions issues, his moral culpability is less than someone without those factors.

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[12] Under *Criminal Code*, s. 742.1(a) to order a CSO a court has to be "satisfied that 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".
[13] 2011 ONSC 1677 [*Tourville*].

[31] As the judge noted, aggravated assault is an indictable offence carrying a maximum penalty of 14 years in prison. The *Tourville* case to which she referred was referenced by both Crown and defence. It describes the “third category” of aggravated assault cases:

> [30] At the high end of the range are cases where four to six years imprisonment have been imposed. These cases generally involve recidivists, with serious prior criminal records, or they involve "unprovoked" or "premeditated" assaults with no suggestion of any elements of consent or self-defence. [*citations omitted*]

[32] The judge concluded a sentence of five years for the aggravated assault and eight months in total for the breaches was proportionate to the gravity of the appellant’s offending and his moral culpability. As I will discuss, persuaded by submissions from defence counsel, she applied a substantial remand credit to reduce the appellant’s go-forward sentence.

The Issues in this Appeal

[33] The appellant lists the following issues in his factum:

1. The sentencing judge erred in law by failing to apply Gladue principles in a meaningful way so as to have an impact on the sentence, as required under section 718.2(e) of the Criminal Code.

2. The sentencing judge erred in law and principle by placing minimal weight on the Indigenous Sentencing Circle and subsequent sentencing recommendations.

3. The sentencing judge erred in law by overemphasizing denunciation and deterrence by relying on sections 718.04 and 718.201 and underemphasizing section 718.2(e) of the Criminal Code.

4. The sentencing judge erred in law and principle, with a resultant impact on sentence, by: placing minimal weight on the state of the offender’s mental health at the time of the offences.

[34] The appellant’s original position on his *Gladue* factors was that they should provide for a reduction in the length of his incarceration. His counsel had described this as “a practical way to address *Gladue* factors”.

[35] The appellant's arguments about the sentencing judge's underemphasis of *Gladue* and s. 718.2(e) and overemphasis of denunciation and deterrence are aimed at her rejection of a CSO as the appropriate sentence. The appellant says denying him a CSO amounted to an error. In simplified terms, the appellant says the sentence he proposed was the proportionate sentence that should have been ordered, had the judge applied *Gladue* appropriately, and adopted a more moderate approach to denunciation and deterrence.

[36] The sentence as proposed by the appellant—a CSO—was not a sentence the judge could have ordered. The judge cannot be found to have erred where the sentence she rejected was not an available option.

[37] In the context of imposing a penitentiary sentence, the judge considered the *Gladue* factors. She found because of the "*Gladue* factors, his mental health issues and his major addictions issues" his moral culpability for the aggravated assault of Ms. Sack was "less than someone without those factors". While I have concluded the sentencing judge failed to adequately account for those factors, an error in principle, their proper application in this case could not have resulted in a CSO.

[38] There are three main issues I will discuss in these reasons: (1) the effect of the appellant's submissions concerning his presentence custody or remand[14] credit and the availability of a CSO; (2) the Sentencing Circle and its recommendations; and (3) the inter-relationship of the appellant's mental health, his drug abuse, and *Gladue* factors, and the principle of restraint in sentencing Indigenous offenders.

Standard of Review in Sentence Appeals

[39] Sentencing is "a highly individualized exercise" involving "a variety of factors that are difficult to define with precision". "…[e]verything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case".[15] In its analysis, a sentencing court must properly apply the legal principles that govern sentencing. Appellate intervention is justified only where (1) the sentence is demonstrably unfit; or (2) the sentence was

[14] I will use these terms – presentence custody and remand – interchangeably.
[15] *R. v. Lacasse*, 2015 SCC 64, at para. 58 [*Lacasse*].

impacted by an error in principle.[16] It can be the type of sentence or its length that is impacted by an error in principle.

[40] Errors in principle also include "an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor".[17] On appeal, deference is to be accorded to how a sentencing judge weighed or balanced the relevant factors in determining a proportionate sentence.

[41] Proportionality is the fundamental principle of sentencing, "intimately tied to the fundamental purpose of sentencing – the maintenance of a just, peaceful and safe society through the imposition of just sanctions".[18] The principle of proportionality,

> … ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system…
>
> Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.[19]

[42] The broad discretion owed to a sentencing judge's assessment of what constitutes a proportionate sentence in a particular case is not unfettered. Where a judge's exercise of discretion in the weighing and balancing of a relevant factor was unreasonable, this amounts to an error in principle.[20]

[43] An error in principle requires an appellate court to:

> [27] …perform its own sentencing analysis to determine a fit sentence…It will apply the principles of sentencing afresh to the facts, without deference to the existing sentence, even if that sentence falls within the applicable range. Thus, where an appellate court has found that an error in principle had an impact on the sentence, that is a sufficient basis for it to intervene and determine a fit sentence.

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[16] *R. v. Friesen,* 2020 SCC 9 at para. 26 [*Friesen*]. See also: *Lacasse* at para. 43.
[17] *Friesen* at para. 26.
[18] *Ipeelee* note 12 at para. 37.
[19] *Ipeelee* note 12 at paras. 37 and 38.
[20] *Lacasse* note 15 at para. 49.

> It is not a further precondition to appellate intervention that the existing sentence is demonstrably unfit or falls outside the range of sentences imposed in the past.[21]

Issue #1 – Remand Credit and the Availability of a CSO

[44] Although not flagged as an issue at his sentencing, the appellant's proposed structuring of his sentence eliminated a CSO as an available disposition. As I explain, the Supreme Court of Canada decision in *R. v. Fice*[22] created an insurmountable obstacle.

[45] The constituent parts of the appellant's proposed sentence were: 26 months of presentence custody credit plus the CSO of two years less a day plus two years of probation, a total of six years and two months (74 months).

[46] This was a sentence the judge could not impose. To qualify for a CSO, the appellant's sentence could not have exceeded two years less a day.[23] The adding in of the appellant's remand credit produced a proposed sentence that conflicted with *Fice*. As the respondent pointed out on appeal, *Fice* was fatal to the appellant's argument for a CSO.

[47] The Supreme Court was explicit in *Fice* that an offender's remand credit may limit access to a CSO:

> [17] …the conditional sentence net should…not be stretched to include an offender for whom a penitentiary term would be appropriate were it not for his or her time spent in pre-sentence custody.

[48] At the sentencing hearing, the appellant's counsel indicated the appellant wanted the judge to apply to his "entire sentence" a remand credit for all the time he had spent in presentence custody since August 2021. The sentencing judge was persuaded to do so. She applied a 1.5 to 1 calculation[24] for the time the appellant had spent in presentence custody and arrived at a total of 26 months' credit. She

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[21] *Friesen* note 16 at para. 27.
[22] 2005 SCC 32 [*Fice*].
[23] *Criminal Code*, s. 742.1: "If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposes under section 742.3, if…" [certain criteria are met].
[24] *Criminal Code* s. 719(3) and (3.1): "In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody". s. 719(3.1): "Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody".

first applied a portion of this credit to the sentences for the three breach charges and the remaining 18 months' credit to the sentence for aggravated assault.

[49] *Fice* established that "the time spent in pre-sentence custody is part of the total punishment imposed…"[25] Given *Fice*, the appellant's request for his pre-sentence custody to be applied to his "entire sentence" eliminated the option of a CSO even had the sentencing judge viewed it as an appropriate disposition.

Issue #2 – The Sentencing Circle and Its Recommendations

[50] A Sentencing Circle proceeded on October 28, 2022, in advance of the appellant's sentencing hearing in Provincial Court. It was held at the Millbrook Community Hall. The appellant is a registered Band member of the Millbrook First Nation community. The victim's home community was also identified as Millbrook. In accordance with its procedures, the Mi'kmaw Legal Support Network (MLSN) did an in-depth examination to determine if this was an appropriate case for a sentencing circle.[26]

[51] The victim, Ms. Sack, had been made aware of the Sentencing Circle but did not attend. She did not attend the appellant's sentencing hearing in Provincial Court and did not file a Victim Impact Statement. However, Crown counsel noted in her submissions at the appellant's sentencing hearing that the Victims Services officer who had attended the Sentencing Circle "highlighted the feelings of breach of trust, of betrayal".[27] Crown counsel described this as "really germane to the violence that occurred within this domestic relationship".

[52] The appellant's factum helpfully describes the circle process, which followed the MLSN "Guidelines for Mi'kmaq Justice Sentencing Circles":[28]

> [28] A sentencing circle was requested by Mr. Cope. The Crown raised no objection to the sentencing circle, and no objections were raised by the sentencing judge. The Crown confirmed they would contact the Mi'kmaw Legal Support Network (MLSN) to ensure that they had all the information they would need to "properly complete [the] sentencing circle." The matter was then referred to MLSN to confirm eligibility and how to move forward. When a matter is referred

[25] *Fice* note 22 at para. 18.
[26] There are five components to the MLSN sentencing circle process: referral; eligibility investigation; circle preparation; circle proceedings; and sentencing.
[27] The respondent makes the point in their factum at paragraph 78 that we cannot assume the victim support worker necessarily provided *this* victim's perspective as opposed to *a* victim's perspective, given the nature of the offence.
[28] Appellant's Factum Tab 3.

for a sentencing circle, MLSN follows a detailed sentencing circle workplan before a final determination is made to convene a circle. A circle is not ordered by the court, it is referred for consideration to MLSN.

[29] Both the crown and the judge were invited to participate in the sentencing circle. There was a significant amount of back and forth between the court, crown and defence counsel as well as MLSN in order to schedule the sentencing circle, the email correspondence were made part of the Court record at the request of the Crown. The circle was confirmed for October 28, 2022. The sentencing judge, being new in her role, expressed some hesitation about how the process of the sentencing circle would unfold during a status update on September 14, 2022. During this same appearance, Mr. Cope expressed a willingness to be sentenced completely in the circle, which is not unusual, however the judge indicated a preference to return for a sentencing hearing after the sentencing circle.

[30] The circle was led by Ms. Mindy Gallant Zwicker, the Customary Law Caseworker with MSLN. In advance of the sentencing circle, Ms. Gallant-Zwicker sent out the Sentencing Circle Guidelines which described generally the procedure for the sentencing circle for Mr. Cope to the Court, Crown and Defence.

[31] The sentencing circle lasted approximately four hours. The in-Court sentencing hearing took less than 2 hours. 12 people participated in the sentencing circle…

[32] The circle began with a traditional smudging. All parties in the circle participated in the smudge. The Customary Law Caseworker then explained the procedure for the circle in detail. No objections were raised to the circle procedure at any stage and all those who attended participated. During the sentencing circle, the crown attorney shared the facts of the case, including the photographs of Ms. Sack's injuries. All those who were participating in the circle were intimately familiar with the facts of this offence and the serious impacts that it had on the victim and community.

[33] A report was prepared and provided to the Court with detailed recommendations from the solutions which came from the circle. All participants understood that Mr. Cope had been remanded for over a year and that little to no rehabilitative work was being done within the correctional system. The Crown acknowledged in the circle that they would still be seeking a lengthy period of incarceration for Mr. Cope in the range of 5-6 years.

[34] Mr. Cope felt that he had accumulated a significant amount of remand and was hoping for a sentence closer to that of time served. Mr. Cope suggested 3 years time served, but this was not an accurate day to day calculation of his remand time. All participants acknowledged the reality of Mr. Cope's day to day life in custody – that of sitting in his cell, withdrawn, with little access to any culturally relevant programming. The CNSCF later confirmed that culturally relevant programming was simply not available to Mr. Cope. Those who

> participated in the circle did not feel that further incarceration was necessary for Mr. Cope: specifically, the primary recommendation was that "[t]he community did not feel more incarceration will help Harry at this time and in consideration to Harry's physical and mental wellbeing to reflect on alternatives…" The sentencing circle recommendations were provided to the sentencing judge…

[53] The record includes a single page "Guidelines for Mi'kmaq Justice/Sentencing Circles". It condenses the description of the Circle process found in the MLSN Sentencing Circle Protocol.[29]

[54] The Sentencing Circle produced a report for the judge entitled "Community-Based Recommendations" (Recommendations). It provided a description of the purpose of the Sentencing Circle:

> The Sentencing Circle is an opportunity to involve the community and victim(s) in the formal sentencing process. The Circle process promotes offender responsibility and acknowledges the harm done to the victim(s) and the community. It gives all those affected by the crime a role in making considerations to the courts in determining a sentence that is meaningful and promotes healing.
>
> The Mi'kmaw Legal Support Network's (MLSN) Sentencing Circle takes into consideration the special circumstances associated with Aboriginal persons. The process is respectful of, and rooted in Mi'kmaq traditions and philosophies regarding the interconnectedness of all things. In a culturally appropriate manner, the Circle addresses the impact an offender's actions have had on other individuals, families, communities, and between Nations. The Circle process addresses underlying issues that may have caused the harmful act(s) and focuses on re-building relationships, promoting healthy outcomes, and the social wellbeing of the Mi'kmaq and Aboriginal people.

The Recommendations of the Circle

[55] At the Sentencing Circle, the appellant raised the significant amount of presentence custody he had accrued and expressed the hope for a sentence close to that of time served.

[56] The Sentencing Circle's recommendations adopted the suggestion by the appellant that three years should represent the extent of his incarceration,[30] to be

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[29] The MLSN Sentencing Circle Protocol (October 2021) is attached to the appellant's factum as Tab 3. It contains "Guidelines for Mi'kmaq Justice Sentencing Circles".

[30] Three years was a miscalculation: with credit, the appellant's remand time at sentencing was 26 months.

followed by three years under some form of supervision in the community, accessing services and resources.

[57] The Sentencing Circle indicated its recommendations "were carefully deliberated to provide Mr. Cope with a holistic approach to address the harm that was committed". The sentencing judge was asked to consider the nine recommendations "as an appropriate sentencing recommendation" for the appellant:

1. The community did not feel more incarceration will help Harry at this time and in consideration to Harry's physical and mental wellbeing to reflect on alternatives such as:
2. To access outreach services provided by the Mi'kmaw Family Health Centre in the Men's Outreach Program. The Services would include completing the Journey of the Two Wolves – 10 sessions with Dan Walsh;[31] and
3. To access outreach services provided by the Mi'kmaw Native Friendship Center. The services would include completing the Seven Sparks Justice Program with Scott Lekas; and
4. To access outreach services provided by the Mi'kmaw Native Friendship Center with Monique Fong Howe[32]; and
5. To access outreach services provided by the Mi'kmaw Native Friendship Center. These Services would include education and employment support with the Intensive Case Manager – Corrections, Alicia McIntyre[33]; and
6. To access Cocaine Anonymous; and
7. To access outreach 7th Step Society; and
8. To consider 3 years' time served, 3 years parole/community service; and
9. To consider a Community Mental Health order (stay on meds or be diverted to hospital) that is also attached to Alicia McIntyre.[34]

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[31] The Circle described the nature of each session in an attached Appendix.

[32] The Circle attached a description by Ms. Fong Howe, the Cultural Support Worker for the Mi'kmaw Native Friendship Centre's housing program.

[33] The Circle attached a description of the Criminal Justice Housing Project, developed to support urban Indigenous community members who have been criminalized, and reduce the rate of recidivism by providing housing and wrap-around supports.

[34] The appellant's counsel indicated in her submissions at the sentencing hearing that she had inquired with a psychiatrist at the ECFH about a Community Treatment Order (CTO) for the appellant and was advised it would not be available for him. (CTO's are authorized under s. 47 of Nova Scotia's *Involuntary Psychiatric Treatment Act*, 2005 S.N.S., c. 43, as amended)

[58] The appellant's *Gladue* Report, which I will review in a later section of these reasons, made similar recommendations for the types of community-based services he should access.

The Judge's Reasons and the Circle's Recommendations

[59] The judge did not discuss the Sentencing Circle recommendations in her decision. She made an isolated comment only, noting that, "Mr. Cope's community doesn't recommend any further jail time". She acknowledged the value of culturally focused programming and its rehabilitative potential for the appellant in the context of parole:

> My decision will go to the Parole Board. My hope is that as part of the parole, they will be aware of the programs that Ms. White mentioned…The Mi'kmaw Lodge In-patient Wellness Program and, as well, I believe it was called the Diamond Bailey Centre, which was the supportive housing centre with services for people who live there.

Reflecting Sentencing Circle Recommendations in Reasons for Sentence

[60] This appeal provides the opportunity for guidance from this Court on how courts, sentencing Indigenous offenders, should address recommendations from sentencing circles. Appellate courts have a role "in developing the law and providing guidance" to first-instance courts.[35]

[61] First of all, it is within the discretion of a sentencing judge to not accept a sentencing circle's recommendations. Absent an error of law or principle, the exercise of such discretion is owed deference on appeal.

[62] An example of displaced deference is found in *R. v. Jacko*, where the Ontario Court of Appeal concluded the sentencing judge had made various errors, including in relation to the treatment of recommendations by a sentencing circle:

> [81] Third, in my view, the trial judge failed to give sufficient weight to the nature of the community in which these offences were committed and the views of that community (as reflected in the recommendation of the sentencing circle)

[35] *Friesen* note 16 at para. 34.

> about the nature of the punishment best suited to respond to the community's needs and notions of justice.[36]

[63] Even in circumstances where a judge determines they are unable or disinclined to follow the recommendations of a sentencing circle, a benefit is obtained by an explanation of the judge's reasons. Reasons "concentrate the judicial mind",[37] offer transparency, and make the judge's rationale discernible. Importantly, reasons show respect for the circle process and the time, effort, and expertise of the Indigenous and non-Indigenous participants.

[64] Although there are few reported cases in Nova Scotia involving sentencing circles,[38] under the auspices of the MLSN, sentencing circles are a legitimate aspect of the sentencing process for an Indigenous offender in the province. The significance of sentencing circles has been recognized, including by the Nova Scotia Public Prosecution Service in its 2018 policy document, "Fair Treatment of Indigenous Peoples in Criminal Prosecutions in Nova Scotia". The policy identifies the participation of Crown counsel in a sentencing circle if one is requested by the Indigenous offender.

[65] Appropriate application of the Supreme Court of Canada's direction in *Gladue* and *Ipeelee* requires sentencing judges to recognize the unique factors that govern sentencing Indigenous offenders. As *Gladue* concluded, the conventional sentencing concepts embedded in our current criminal justice system "have frequently not responded to the needs, experiences and perspectives" of Indigenous people or Indigenous communities.[39] Sentencing circles can play a role in the reconciliation required to address Indigenous alienation from the criminal justice system.

[66] As evidenced in the approach taken by the appellant's Sentencing Circle,

> [77] …the circumstances of aboriginal offenders are markedly different from those of other offenders, being characterized by unique systemic and background factors. Further, an aboriginal offender's community will frequently understand

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[36] The offenders in *R. v. Jacko*, 2010 ONCA 452 had participated in a violent home invasion. On appeal, the Court of Appeal substituted a CSO for Mr. Jacko's original four-year penitentiary term. His co-accused, Mr. Manitowabi, by contrast, was found to have been neither persistent or consistent in his rehabilitative efforts. Although his penitentiary sentence was set aside, he was sentenced to incarceration of two years less a day in a provincial correctional institution.
[37] *R. v. Gaudet*, 2021 PECA 15 at para. 12.
[38] *R. v. Brooks*, 2008 NSPC 58 and *R. v. Gloade*, 2019 NSPC 55.
[39] *Gladue* note 1 at para. 73.

> the nature of a just sanction in a manner significantly different from that of many non-aboriginal communities…[40]

[67] Community played a central role in the appellant's Sentencing Circle. *Gladue* explicitly addresses the centrality of community:

> [80] As with all sentencing decisions, the sentencing of aboriginal offenders must proceed on an individual (or a case-by-case) basis: For this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the *Criminal Code*? What understanding of criminal sanctions is held by the community? What is the nature of the relationship between the offender and his or her community? What combination of systemic or background factors contributed to this particular offender coming before the courts for this particular offence? How has the offender who is being sentenced been affected by, for example, substance abuse in the community, or poverty, or overt racism, or family or community breakdown? Would imprisonment effectively serve to deter or denounce crime in a sense that would be significant to the offender and community, or are crime prevention and other goals better achieved through healing? What sentencing options present themselves in these circumstances?

[68] The MLSN Sentencing Circle Guidelines reference the significant impact of community engagement in the sentencing circle process:

> The positive impact on the community as byproduct of its participation cannot be overlooked. The return to traditional communal practice, the responsibility of the community in committing to the process, the empowering experiences afforded various community members, and the community-led rehabilitation of accuseds, all serve to heal and empower the Indigenous community.

[69] Both the appellant and the Intervenor emphasized the significance of recognizing the contribution made by a sentencing circle to the sentencing process. This can be reflected by sentencing judges describing the recommendations made by a sentencing circle and explaining why they have or have not adopted them as the disposition for "this offence, committed by this offender, harming this victim, in this community". This serves to enhance public confidence in the judicial system, particularly for Indigenous communities, especially where an Indigenous community, through a circle, has been engaged in the sentencing process.

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[40] *Gladue* note 1.

[70] Expressly addressing the sentencing recommendations demonstrates respect, one of the core Indigenous teachings,[41] toward the community that produced them. Sentencing reasons provide the opportunity to acknowledge the time-consuming effort committed by circle participants, and the Indigenous culture which fostered the process. This engages the process of reconciliation by recognizing the role and contribution of the community and its values.[42] It represents a more faithful adherence to *Gladue* and *Ipeelee* and the principles espoused in those decisions, and ensures the judge is focused on the broad range of factors that must inform the sentencing of Indigenous offenders.

[71] The sentencing judge in this case did not have the benefit of guidance from this Court in relation to the recommendations of a sentencing circle. A busy Provincial Court judge, she was dealing with a complex, challenging sentencing. As noted in *R. v. Parranto*:

> [16] Busy sentencing judges face a challenging task; the *Code* often provides for a wide range of possible sentences and the factual circumstances of each case vary infinitely.[43]

[72] Sentencing circle recommendations should be carefully considered and addressed in sentencing. As in *Jacko*, there may be a basis for appellate intervention where the sentencing judge has erred by giving either too much or too little weight to the recommendations and where that error has had an impact on the sentence.[44] Reasons that discuss why sentencing circle recommendations have, or have not, been accepted will ensure effective appellate review.

[73] The judge here, faced with sentencing the appellant for an offence of egregious violence against a highly vulnerable victim, had to consider a significant amount of material and the unbridgeable distance between the positions of the parties. I agree with the respondent it can be inferred she did not accept the recommendations of the Sentencing Circle because of her significant concerns the appellant would not be compliant with conditions. For future reference, sentencing judges should be sufficiently explicit in their reasons for not adopting the

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[41] Truth and Reconciliation Commission of Canada: "Honouring the Truth, Reconciling for the Future", Summary of the Final Report of the Truth and Reconciliation Commission of Canada, at p. 270: The values of respect, courage, love, truth, humility, honesty and wisdom are known by many Indigenous peoples as the "Seven Sacred Teachings".
[42] *R. v. Barton*, 2019 SCC 33 at para. 199: "In short, when it comes to truth and reconciliation from a criminal justice system perspective, much-needed work remains to be done".
[43] R. v. *Parranto,* 2021 SCC 46 [*Parranto*].
[44] *R. v. E.O.*, 2019 YKCA 9 at para. 61, citing *Jacko*.

recommendations of a sentencing circle: affording only the opportunity for inferences to be drawn may attract appellate intervention.

Issue #3 – The Appellant's Mental Health and Addictions and the Principle of Restraint

[74] Individualization is central to the proportionality analysis.[45] Just as our understanding of the seriousness of offences changes, as reflected in the decisions in *R. v. Friesen* and *R. v. Parranto*, so too has our understanding of moral blameworthiness through the guidance of *R. v. Gladue* and *R. v. Ipeelee*. And "[t]o the extent that *Gladue* will lead to different sanctions for Aboriginal offenders, those sanctions will be justified based on their unique circumstances—circumstances which are rationally related to the sentencing process".[46]

[75] The Supreme Court has told us the sentencing process, despite its limitations, is "an appropriate forum for addressing Aboriginal overrepresentation in Canada's prisons".[47] The Court intended for sentencing approaches to change for Indigenous offenders:

> …sentencing judges can endeavour to reduce crime rates in Aboriginal communities by imposing sentences that effectively deter criminality and rehabilitate offenders. These are codified objectives of sentencing. **To the extent that current sentencing practices do not further these objectives, those practices must change so as to meet the needs of Aboriginal offenders and their communities.** As Professors Rudin and Roach ask, "[if an innovative sentence] can serve to actually assist a person in taking responsibility for his or her actions and lead to a reduction in the probability of subsequent re-offending, why should such a sentence be precluded just because other people who commit the same offence go to jail?" (J. Rudin and K. Roach, "Broken Promises: A Response to Stenning and Roberts' 'Empty Promises'" (2002), 65 Sask. L. Rev. 3, at p. 20).[48]
>
> [*emphasis added*]

[76] We are told by *Ipeelee* that s. 718.2(e) is a remedial provision that "does more than affirm existing principles of sentencing". It was,

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[45] *Parranto* note 43 at para. 12.
[46] *Ipeelee* note 12 at para. 79.
[47] *Ipeelee* at para. 70.
[48] *Ipeelee* at para. 66.

> …designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing (*Gladue*, at para. 93)…it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders.[49]

[77] The emphasis in *Gladue* and *Ipeelee*, and their recognition of the ongoing crisis of Indigenous overrepresentation, has to find expression in sentencing decisions or the Supreme Court's direction on the issue is rendered meaningless.

[78] The analysis of how the appellant's mental health and addictions and the principle of restraint were accounted for in his sentence had to be conducted in accordance with the principles that govern the sentencing of Indigenous offenders. I have concluded the sentencing judge's reduction of the appellant's penitentiary sentence to just below the upper end of the *Tourville* categories fell short of the individualized application of his mitigating circumstances and the objectives laid out by the Supreme Court of Canada.

[79] The appellant's mental illness and *Gladue* factors appear to have been the reason the judge did not place him at the very top of the *Tourville* third-category range of six years. Nevertheless, *Tourville* had more influence on the sentence the appellant received than these significant mitigating factors. This is where the error in principle lies: the underemphasizing of the appellant's mental illness and drug abuse and their connection to his *Gladue* factors. As a consequence of these factors, the proportionality analysis required a more direct engagement with the principle of restraint. Here, the sentencing judge's compass was the *Tourville* case. I find its influence resulted in a sentence that was not reasonable and proportionate.

[80] Just as undue emphasis given to a mitigating factor can constitute error,[50] so can too little emphasis. I have concluded in this case that the sentencing judge committed an error in principle which led to the imposition of a longer and disproportionate period of incarceration.

[81] In discharging their "fundamental duty", sentencing judges "are required to pay particular attention to the circumstances of Indigenous offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case".[51] In the appellant's case his circumstances included a severe mental illness, significant

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[49] *Ipeelee* at para. 59.
[50] *R. v. Suter*, 2018 SCC 34 at para. 77.
[51] *Ipeelee* note 12 at para. 75

drug addiction, a lack of culturally-focused treatment and support, and the overarching *Gladue* factors, all of which, in combination, impacted his moral culpability and the proportionality calculus.

[82] In sentencing the appellant to a five year penitentiary term (which netted out by application of his remand credit to 42 months going forward) the sentencing judge did not take into account the effect of imprisonment on him as an Indigenous person. We know from the information provided to the judge by Corey Arsenault, in the *Gladue* Report (Dale Syliboy's comments), and the submissions of counsel, that the appellant, an Indigenous person with a severe mental illness, struggled while incarcerated. Achieving proportionality requires that the effect of a carceral sentence on an offender, and its disproportionate impact, is to be taken into account on sentencing.[52] This impact was not recognized in the appellant's sentence although it is understood that "offenders with mental disorders are particularly affected by imprisonment".[53] The principle of restraint should have been brought to bear in light of this.

[83] The principles of restraint and rehabilitation required less reliance being placed on the categories in *Tourville.* Underemphasis and omission constituted error in principle. Deference to the sentencing judge's sentence of five years for the aggravated assault is displaced.

[84] The failure to accord sufficient weight to the uniquely interrelated factors of mental illness and serious substance abuse in an Indigenous offender and the sentencing objective of restorative justice can amount to an error in principle.[54] In this case the weighting of these factors was insufficient with the focus primarily on where the appellant fell within the *Tourville* categories. The *Tourville* categories were not informed by, and do not reflect, an application of the principles developed by *Gladue* and *Ipeelee*. Restorative justice sentencing objectives needed to play a more pronounced role in the appellant's sentence. Restorative justice and the culturally informed resources that could support it in the appellant's case were emphasized by both the *Gladue* Report and the Sentencing Circle.

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[52] *R. v. Hills*, 2023 SCC 2 at para. 135.
[53] *R. v. Bertrand Marchand* 2023 SCC 26 at para. 151 [*Bertrand Marchand*].
[54] *Jacko* note 36 at para. 70.

[85] My analysis has been informed by the principles that govern the sentencing of Indigenous offenders, and the reality of their grossly disproportionate representation in Canadian prisons.

Sentencing Indigenous Offenders - Principles

[86] Section 718.2(e) of the *Criminal Code*, enacted in 1996, reflected Parliament's recognition that Indigenous offenders were disproportionately represented in the Canadian prison population. It is focused on the principle of restraint in sentencing:

> A court that imposes a sentence shall also take into consideration the following principles ... all available sanctions other than imprisonment that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[87] In *Gladue*, the Supreme Court of Canada explained how a purposive application of s. 718.2(e) is intended to contribute to tackling the problem of Canada's disproportionate incarceration of Indigenous people:

> [64] …The provision may properly be seen as Parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process.
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> [65] It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system. The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders. There are many aspects of this sad situation which cannot be addressed in these reasons. **What can and must be addressed, though, is the limited role that sentencing judges will play in remedying injustice against aboriginal peoples in Canada. Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail or whether other sentencing options may be employed, which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.**

[*emphasis added*]

[88] *Gladue* established the framework for the determination of a fit and proper sentence for Indigenous offenders, requiring that judges must examine:

> (a) The unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and
>
> (b) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection.[55]

[89] The sentencing of Indigenous offenders is to be approached differently "because the circumstances of Aboriginal people are unique and call for a special approach".[56] Due to "[s]ocial and economic deprivation with a lack of opportunities and limited options for positive development", an Indigenous offender's "constrained circumstances may diminish their moral culpability".[57]

[90] The *Gladue* analysis must be undertaken irrespective of the seriousness of the offence.[58] While a sentencing judge has the option of reducing an Indigenous offender's sentence below the "typical range" in order to give effect to s. 718.2(e),[59] the provision does not guarantee that Indigenous offenders will not be sentenced to prison.[60]

[91] However, whereas "the principles of denunciation and deterrence are generally…reflected in ranges",[61] judges must take into account other relevant sentencing objectives such as rehabilitation and restraint in determining a proportionate sentence for an Indigenous offender.

Overrepresentation of Indigenous People in Prison

[92] The appellant's incarceration adds to the statistics of Indigenous overrepresentation in prison. Not s. 718.2(e), nor *Gladue*, nor *Ipeelee*, have turned

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[55] *Gladue* note 1 at para. 66.
[56] *R. v. Kakekagamick*, (2006) 81 O.R. (3d) 664, 40 C.R. (6th) 383 at para. 39 (Ont. C.A.).
[57] *Ipeelee* note 12 at para. 73.
[58] *Gladue* note 1 at para. 79.
[59] *R. v. Sharma*, 2022 SCC 39 at para. 79 [*Sharma*].
[60] *Sharma* at para. 81; *Gladue* at para. 88; *Ipeelee* note 12 at para. 71.
[61] *Parranto* note 43 at para. 45.

this grim reality around. Indeed, we were told by the Intervenor the situation has worsened with increasing numbers of Indigenous people locked up.

[93] In her reasons in *R. v. Sharma* for dissenting in the result, Karakatsanis, J. said the following:

> [114] …Like residential schools before it, this overincarceration is an ongoing source of intergenerational harm to families and communities. It is a striking sign of the discrimination that Indigenous peoples experience in "all parts of the criminal justice system" (*Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165, at para. 57). And it remains a poignant obstacle to realizing the constitutional imperative of reconciliation.[62]

[94] The Intervenor's factum refers to the over-representation index Statistics Canada has developed for a "more nuanced understanding of mass incarceration figures".[63] The over-representation index for Nova Scotia in 2020/2021 was 1.9, meaning an Indigenous person in Nova Scotia is twice as likely to be in custody as a non-Indigenous person. Alarmingly, the figure had increased over the previous year.

[95] The Supreme Court of Canada has taken judicial notice of Canada's history of colonialism and the role that history has played in the disproportionate rates of incarceration for Indigenous peoples.[64] Twenty-five years ago in *Gladue*, the Supreme Court lamented what they termed a crisis:

> [64] These findings [of overrepresentation] cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling [*sic*] out aboriginal offenders for distinct sentencing treatment in s. 718.2(e), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process.

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[62] *Sharma* note 59 at para. 114.
[63] Intervenor's Factum, at para. 8.
[64] *Sharma* note 59 at para. 55; *Ipeelee* note 12 at para. 60.

[96] By the time *Ipeelee* was decided, the Court plainly regarded "crisis" as no longer an adequate descriptor.[65]

[97] Section 718.2(e) is not a mechanism for "a race-based discount on sentencing" nor is it intended to remedy disproportionate overrepresentation of Indigenous offenders "by artificially reducing incarceration rates":

> [75] …Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case. This has, and continues to be, the fundamental duty of a sentencing judge. *Gladue* is entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them. *Gladue* affirms this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process. Section 718.2(e) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples. Neglecting this duty would not be faithful to the core requirement of the sentencing process.[66]

[98] The Supreme Court's direction that sentences are to be crafted "in a manner that is meaningful" to Indigenous people draws into the analysis the dissonance between current sentencing values and principles, and Indigenous values and principles. As *Gladue* observed, the "traditional sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing" held by Indigenous offenders and their communities.[67] We were told by *Gladue*:

> [73] …What is important to recognize is that, for many if not most aboriginal offenders, the current concepts of sentencing are inappropriate because they have frequently not responded to the needs, experiences, and perspectives of aboriginal people or aboriginal communities.[68]

[99] *Gladue* recognized that community-based sanctions are a "common underlying principle" in Indigenous conceptions of sentencing.[69] As I noted in my review of the recommendations from the appellant's Sentencing Circle, this focus

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[65] *Ipeelee* at para. 62.
[66] *Ipeelee*.
[67] *Gladue* note 1 at para. 70.
[68] *Gladue* at para. 74.
[69] *Gladue* at para. 74.

on community-based consequences, accountability, and restorative principles, was evidenced in this case.

[100] Not only do established sentencing principles fall out of alignment with traditional Indigenous approaches to criminal offending, even within the current criminal justice system the effectiveness of an incarceration/deterrence approach is questioned. Doubts have long resonated about incarceration as a deterrent.[70] Almost twenty-five years ago in *R. v. Proulx*, the Supreme Court of Canada observed: "The empirical evidence suggests that the deterrent effect of incarceration is uncertain".[71] More recently, the Court again noted "longstanding doubts" about whether incarceration is an effective tool of deterrence.[72]

[101] *Gladue* emphasized these concerns in the context of sentencing Indigenous offenders:

> [57] Thus, it may be seen that although imprisonment is intended to serve the traditional sentencing goals of separation, deterrence, denunciation, and rehabilitation, there is widespread consensus that imprisonment has not been successful in achieving some of these goals. Overincarceration is a long-standing problem that has been many times publicly acknowledged but never addressed in a systematic manner by Parliament.

[102] The alternatives to incarceration for Indigenous offenders have been emphasized by the 2012 Truth and Reconciliation Commission of Canada and the National Inquiry into Missing and Murdered Indigenous Women and Girls. The Truth and Reconciliation Commission's Call to Action #31 stated:

> We call upon the federal, provincial, and territorial governments to provide sufficient and stable funding to implement and evaluate community sanctions that will provide realistic alternatives to imprisonment for Aboriginal offenders and respond to the underlying causes of offending.

[103] The need for culturally relevant alternatives was more recently echoed by the National Inquiry into Missing and Murdered Indigenous Women and Girls. The Inquiry's Calls for Justice, 5.11 urges:

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[70] *R. v. Nur*, 2015 SCC 15 at para. 113.
[71] 2000 SCC 5 at para. 107
[72] *R. v. Hills* note 52 at para. 137.

> …all governments to increase accessibility to meaningful and culturally appropriate justice practices by expanding restorative justice programs and Indigenous Peoples' courts.

[104] The Inquiry Report also spotlights the challenges that a lack of community resources poses to the objective of reducing the over-incarceration of Indigenous people:

> *Gladue* reports have limited value when the infrastructure and resources for alternatives to incarceration, such as community-based rehabilitation and healing-focused services, are not available in the community to support sentencing options.[73]

[105] It must be noted that the appellant had previously been sentenced to periods of incarceration in both provincial and federal penal institutions, which, given his continued offending, achieved only the sentencing objective of separation from society.[74]

[106] There is nothing to indicate the appellant's previous sentences included a culturally informed, community-based component. It is unknown the extent to which treatment, that included community-based programming and intervention designed in accordance with the appellant's cultural needs, may have fostered stability and successful, sustained rehabilitation and the protection of any intimate partners and the public. The sentencing judge did find that when the appellant is drug-free and undertaking treatment for his mental health, he is an "employable, productive person", in other words, pro-social and posing no danger in the community.

[107] The interconnection between the appellant's serious mental illness and substance abuse and his *Gladue* factors raises additional considerations relevant to proportionality. In the assessment of moral blameworthiness, "…the presence of addiction or mental health problems in an Indigenous individual must be viewed through the lens of the residual effects of residential schools and intergenerational trauma".[75] This aspect of the proportionality analysis was missing in the sentencing judge's analysis.

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[73] National Inquiry into Missing and Murdered Indigenous Women and Girls, Final Report "Reclaiming Power and Place", Findings: Right to Justice, p. 719.
[74] *Criminal Code*, s. 718(c).
[75] *R. v. Daniels*, 2023 MBCA 86 at para. 14.

[108] As his *Gladue* Report indicates, the residential school experience is a factor in the appellant's immediate family. Intergenerational trauma in Indigenous communities and families has been recognized by the Supreme Court as informing the "disturbing" fact that Indigenous people are "greatly overrepresented in prisons".[76]

[109] Added to which, the appellant has struggled, as an Indigenous person, with a mental disorder in the absence of intensive services and supports that are culturally appropriate. This too is relevant to assessing the appellant's moral blameworthiness and why it has been challenging for him to manage his addictions and mental illness.

The Vulnerability of Indigenous Women Victims

[110] The vulnerability of the appellant's victim was properly taken into account as a significant factor in his sentencing but it did not displace the principle of restraint.

[111] Crown counsel in her written submissions for the sentencing hearing referred the judge to the inclusion by Parliament of ss. 718.04 and 718.201 in the *Criminal Code*. These provisions focus on Indigenous women victims and, where the offence involves intimate partner violence, direct judges to "give primary consideration to the objectives of denunciation and deterrence" (s. 718.04) and to consider "the increased vulnerability of Aboriginal female victims" (s. 718.201).

[112] Although the sentencing judge did not specifically cite the *Code* provisions, she identified "intimate partner violence on an Indigenous woman" as aggravating, which she likely would have done in any event. (Intimate partner violence is statutorily aggravating under s. 718.2(a)(ii) of the *Criminal Code* and the common law has treated the victimization of Indigenous women as aggravating.[77])

[113] Sections 718.04 and 718.201 of the *Criminal Code* were enacted by Parliament in June 2019 [78] in response to the findings of the National Inquiry into Missing and Murdered Indigenous Women and Girls ("MMIWG").

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[76] *R. v. Boutilier*, 2017 SCC 64 at para. 108 (per Karakatsanis, J. dissenting in part but not on this point.)
[77] See, for example the comments in *R. v. Kolola*, 2021 NUCA 11 at para. 34.
[78] Bill C-75, Royal Assent June 21. 2019. See also: House of Commons Debates, Hansard, June 17, 2019, the Honourable David Lametti (Minister of Justice and Attorney General of Canada).

[114] In its "Calls for Justice", the MMIWG Inquiry called upon the federal, provincial and territorial governments to:

> 5.17 …thoroughly evaluate the impacts of *Gladue* principles and section 718.2(e) of the *Criminal Cod*e on sentencing equity as it relates to violence against Indigenous women, girls, and 2SLGBTQQIA people.
>
> 5.18 …consider violence against Indigenous women, girls, and 2SLGBTQQIA people as an aggravating factor at sentencing, and to amend the *Criminal Code* accordingly, with the passage and enactment of Bill S-215.

[115] The Manitoba Court of Appeal in its 2022 decision in *R. v. Bunn* discussed the history of the *Criminal Code* amendments and what appellate courts have had to say about them. *Bunn* held:

> [110] In summary, section 718.04 mandates sentencing courts to give primary consideration to the objectives of denunciation and deterrence in circumstances where the victim is vulnerable because of personal circumstances -- including because the person is Aboriginal and female. **It is not intended to diminish *Gladue* principles.** The application of *Gladue* principles will not necessarily result in a lesser sentence, but they may, depending on the circumstances. Nonetheless, the principles of denunciation and deterrence often mandate a harsher sentence in the interest of the protection of the public.[79]
>
> [*emphasis added*]

[116] Sentencing courts are directed by the provisions to take into account the particular vulnerability of Indigenous women and girls to offences involving violence.[80] The sentencing judge here would have erred had she not done so. She was required to give effect to the appellant's *Gladue* factors and craft a sentence that reflected Ms. Sack's vulnerability as an Indigenous woman and an intimate partner of the appellant. In cases of serious violence, this will be challenging for any sentencing judge.

[117] The Intervenor noted s. 718.01 of the *Criminal Code* contains a similar "primary consideration to denunciation and deterrence" for sentencing offences involving abuse of children. Notwithstanding, the Supreme Court of Canada in *Friesen* has emphasized that the principles from *Gladue* must be applied "even in

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[79] 2022 MBCA 34.

[80] In addition to *R. v. Bunn*, see for example: *R. v. Merasty*, 2023 SKCA 33 at para. 35; *R. v. Wawatie*, 2021 ONCA 609 at paras. 6-8; *R. v. Wood*, 2022 MBCA 46.

extremely grave cases of sexual violence against children".[81] Referencing *Ipeelee*, the Court in *Friesen* held:

> [92] …The systemic and background factors that have played a role in bringing the Indigenous person before the court may have a mitigating effect on moral blameworthiness. Similarly, a different or alternative sanction might be more effective in achieving sentencing objectives in a particular Indigenous community.
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> [*citations omitted*]

[118] *Friesen* reiterates the fundamental, organizing principle of proportionality in sentencing.[82]

[119] While ss. 718.04 and 718.201 do not negate or dilute the application of s. 718.2(e), or the imperatives in *Gladue* and *Ipeelee*, they contribute to the challenges judges confront when endeavouring to balance what the Intervenor has called:

> …two aspects of the ongoing legacy of colonialism in the Canadian criminal justice system: the mass incarceration of Indigenous people and the failure to protect Indigenous women and girls from violence.[83]

[120] Notwithstanding ss. 718.04 and 718.201, the sentencing principles of restraint and rehabilitation must not be marginalized. In the individualization of an Indigenous offender's sentence, it is necessary to account for their role. The objectives of denunciation and deterrence, foregrounded in the appellant's sentence, did not displace the application of:

> [123] … all the principles mandated by ss. 718.1 and 718.2 to craft a sentence that "furthers the overall objectives of sentencing" (*Ipeelee*, at para. 51). Deference to Parliament's objectives is not unlimited; to ensure respect for human dignity, the door to rehabilitation must remain open (*Bissonnette*, at paras. 46 and 85; *Hills*, at paras. 140-41; *Nasogaluak*, at para. 43).[84]

[121] As I said earlier, the appellant's sentence was more significantly influenced by the *Tourville* categories than by the principles from *Gladue* and *Ipeelee*. This overshadowed the appellant's *Gladue* factors and their interplay with his severe mental illness and substance abuse at the time of the offence. The appellant's

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[81] *Friesen* note 16 at para. 92.
[82] *Friesen* at para. 104.
[83] Intervenor's factum at para. 81.
[84] *Bertrand Marchand* note 53 at para. 123.

Gladue report is relevant to an understanding of his chronically unstable mental health and its etiology.

The Appellant's *Gladue* Report

[122] The *Gladue* Report was prepared before the Sentencing Circle was conducted. It contained a history of the appellant's community, Millbrook First Nation, and described the experiences of his parents and grandparents. The appellant's maternal grandfather and great-aunt spent time in the Shubenacadie Residential School, taken there by the Indian Agent. The Report documents the breakdown of the appellant's parents' relationship. His father was a violent alcoholic. The appellant was three years old when his mother left to escape the violence. She indicated she had to try and protect the appellant from his father. Not long after, the appellant's father abducted him. His mother did not get him back for six months. She eventually obtained sole custody through proceedings in Family Court.

[123] The appellant indicated positive memories of his mother's next partner, an Indigenous man, who engaged in pro-social activities with him and his mother. Alcohol was in abundance as the appellant's mother and her partner "liked to drink". That relationship broke down and when the appellant was nine years old, his mother started a new relationship. The new partner was violent and volatile.

[124] The *Gladue* Report documented the appellant's experiences of being bullied at school and in the Millbrook community. Some of the children verbally abused him for not being "brown enough to be an Indian". The Report observed how such abuse will undermine an Indigenous child's sense of identity and belonging.

[125] The appellant also struggled with learning disabilities and lost interest in school. His strengths were in art, music and drama. In high school he was using cannabis on a daily basis. He achieved a Grade 10 education before leaving school.

[126] The appellant's prescription drug abuse began early, following his father introducing him to Dilaudid, as the sentencing judge noted in her reasons. The appellant tipped into drug abuse and addiction. He resorted to crime to support his dependency on prescription pills and street drugs. His criminal activity led to time incarcerated in the Shelburne Youth Centre, the Waterville Youth Centre, the CNSCF, and the Springhill, Dorchester and Atlantic Institution penitentiaries. The appellant told the author of the *Gladue* Report:

> I kept picking up new charges because of my addictions. There are years of my life, I can't recall because I did a lot of drugs – smoked weed, took pills, crack, heroin.

[127] The appellant has suffered the tragic deaths of peers: when he was 16 a cousin was killed in a car crash and five years later, a childhood friend died in a highway accident. He told the author of the *Gladue* Report many of his friends have died over the years from suspected drug overdoses, suicide and murder. The appellant's mother said he has never dealt with the deaths he experienced in his life.

[128] The appellant described, in the *Gladue* Report, his disconnection from his Mi'kmaq culture and how it might have saved him from going "down the path I have". He would engage with cultural practices at Millbrook but was still using drugs and getting into conflict with the law. He was given an ultimatum—stop using or stop attending the sweat lodges. His drug abuse continued.

[129] In 2011 when the appellant was 26 years old, he and Brittany Sack had a baby boy. Their serious drug addictions meant they were unable to care for him. He is currently in the care of the appellant's maternal grandmother. The appellant fathered a daughter with another partner in 2015.

[130] The *Gladue* Report indicates that in the period of 2011 to 2014, the appellant was serving federal sentences for assault and other offences. Dale Sylliboy, a Millbrook First Nation Elder, who had conducted cultural ceremonies in which the appellant had participated, described this period of imprisonment:

> Harry had a real hard time on the inside last time, he kept getting himself into trouble, like he didn't fit in – he suffered greatly on the inside, let's hope he don't go in there again – treatment is what the man needs.

[131] From approximately 2016 to 2020, the appellant was under the supervision of the East Coast Forensic Hospital (ECFH). I will discuss this in more detail when reviewing the appellant's psychiatric history. The *Gladue* Report noted that during a period when he had left the ECFH and was living in the community, the appellant was clean and sober, employed, and functioning well.

[132] A friend who had acted as a community support for the appellant was interviewed for the *Gladue* Report and stated:

> He does really well with native programs as he loves to embrace the teachings about the people and the Mi'kmaw history. He is quite spiritual. I think a native based addictions program would benefit him and help keep him directed.

[133] The appellant has worked successfully in the drywall trade when not incarcerated. A former employer described him as an excellent worker, able to work long days, reliable, and skilled.

[134] In June 2020, the appellant stopped his psychotropic medications and was once again consuming illicit drugs. He and Ms. Sack had resumed their on-again-off-again relationship. The appellant's life was in a state of upheaval and instability.

[135] The *Gladue* Report noted the appellant's awareness of his responsibility to make changes in his life:

> Harry accepts full responsibility for his actions and plans on continuing to make a positive change in his life, a part of which is addressing his mental health, and addiction issues, as well as bereavement issues he faces because of the life experiences he has had. Harry explained the circumstances of his actions and noted he was under the influence of drugs at the time because that is what he turns to in an attempt to hide the pain of the loss he's experienced in his life. In regard to the offence before the courts, Harry stated he is remorseful of the offence and harm he has caused Brittany.

[136] The Report concluded with recommendations and identified "the adverse effects of the toxic social environment and poor socio-economic conditions that continue to impact the lives of Aboriginal people since the time of colonization".

[137] I am not listing the recommendations from the Report as they shared similar themes with those from the Sentencing Circle, and identified similar types of resources.

[138] As reflected in a psychiatric assessment from the ECFH post-dating the *Gladue* report, it is evident the appellant's impoverished, alcohol and drug affected home environments, his exposure to violence and tragedy, and intergenerational trauma, impacted his mental health.

The Appellant's Significant Psychiatric History

[139] In the course of the appellant's remand during the fall of 2021 it became clear he had a serious mental illness.

[140] As of September 10, 2021, the appellant, who had been remanded for a fitness to stand trial and Not Criminally Responsible due to Mental Disorder (NCR-MD) assessment was engaging in bizarre behaviours. In a letter to the court on September 17, 2021, Dr. Scott Theriault, a forensic psychiatrist at the East Coast Forensic Hospital advised:

> …Mr. Cope, at this time, remains acutely unwell with a psychiatric illness, schizoaffective disorder. Given Mr. Cope's current presentation, it is unlikely, in my opinion, that he would be currently fit to stand trial. However, it is likely that with the reintroduction of medications which we have instituted, that Mr. Cope's mental status will settle within a reasonable timeframe. Hence, with respect, I am requesting the court to extend Mr. Cope's Assessment Order for a further 30 days. If Mr. Cope's mental state stabilizes, as I would anticipate, then I will endeavour to have the report to the court at the earliest opportunity.

[141] Dr. Theriault concluded the appellant did not meet the criteria for an NCR-MD finding.[85] His October 12, 2021 report provided a diagnosis for the appellant: schizoaffective disorder and a concurrent diagnosis of substance abuse disorder "set in the context of an individual with antisocial personality traits".

[142] Dr. Theriault's report detailed the appellant's history of family and social instability and criminal offending:

- A highly chaotic upbringing, characterized by alcohol and drug abuse by his parents, lack of parental supervision, community violence and personal trauma, including relatives who died of lethal overdoses.

- Substance use by age 10 or 11, including daily drinking and cannabis consumption.

[85] The s.672.11 *Criminal Code* assessment for fitness and NCR-MD was in relation to robbery and assault charges in relation to a violent confrontation between the appellant and his father on August 6, 2021. It does not appear that the appellant was assessed for NCR-MD in relation to the June 27, 2021 aggravated assault on Ms. Sack. (On May 27, 2022 the appellant was acquitted on the robbery charge. The assault charge was withdrawn.)

- Conflict with the law as a youth. Incarceration in the Shelburne Youth Facility and the Waterville Youth Centre. Difficulties in school and eventual expulsion.

- Significant hard drug abuse as an adult.

- Extensive involvement as an adult in criminal activity with convictions for personal violence and weapons-related offences, resisting arrest, failures to comply with release orders, mischief, etc. Incarceration in both provincial and federal institutions.

- No formal employment training. No driver's licence.

[143] Dr. Theriault's report also detailed the appellant's long-standing mental health issues:

- For many years, prescribed major and minor tranquilizers by his family doctor.

- In July 2007 a mental health assessment after reporting suicidal ideation. The appellant was prescribed Olanzapine, an anti-psychotic, although his diagnosis was not clear.

- In September 2007 while serving a nine-month provincial sentence, the appellant was seen by Offender Health Services. He reported "stress" and feelings of "paranoia" and gave a history of fluctuating moods, from paranoid ideation to suicidal ideation. The discharge summary queried psychosis and bipolar disorder although no formal diagnosis was made. During that incarceration he was treated with Olanzapine.

- Assessed by the ECFH in September 2011 for fitness and NCR-MD related to an assault charge. Found fit and not exempt from criminal responsibility. A notation was made on the report by the assessing forensic psychiatrist of unreliable and outright dishonest reporting of factual information.

[144] As documented by Dr. Theriault the appellant was acutely mentally ill while on remand at the CNSCF in 2016. He was transferred to the Mentally Ill Offender Unit (MIOU) at the facility as he was in a "floridly psychotic state, and preoccupied with persecutory, sexual and grandiose themes". For several days he had to be confined to the locked "therapeutic quiet" room where his aggressively

disordered behaviour continued. Thought to be experiencing a manic episode, he was treated with antipsychotic medication and a mood stabilizer, and his condition eventually settled. He had a further admission to the MIOU for a three month period from late September 2016 to the end of that year. Adjustments were made to his medications and he was discharged on a mood stabilizer (Lithium), an antipsychotic (Olanzapine), and a long-acting sedative (Valium).

[145] Dr. Theriault's October 12, 2021 report included the following summary of the appellant's mental health issues:

> IN SUMMARY, the picture over the years with Mr. Cope from a mental health perspective appears to be somewhat mixed. While he seems to have been presenting repeatedly for assessment (either at the emergency department or at various mental health services) from age 19, and there are recurrent themes that would suggest psychosis (fear for personal safety, or the safety of his family, spiritual themes, "voices" "paranoia", telepathic communication, being ill-treated by various agencies, concerns for his safety at the hands of various factions while in the correctional centre and while on the Reserve, etc.) Mr. Cope does not appear to even have been formally diagnosed with this condition until recently. It is possible that the confounding effect of polysubstance abuse and antisociality clouded the clinical picture hitherto now.

[146] In April 2017 the appellant was found NCR-MD in relation to charges of assault, mischief and uttering threats. He was followed by the ECFH until he was granted an Absolute Discharge in June 2020 by the *Criminal Code* Review Board (CCRB). The Order notes the decision was not unanimous. For about six months prior to his discharge, the appellant had been maintained in the community. He had gone absent without leave from the ECFH after being assaulted by another patient. By the time the appellant was located the Province was grappling with the COVID-19 pandemic and the hospital decided to follow him on an outpatient basis.[86]

[147] After his discharge by the CCRB the appellant relapsed into heavy substance abuse, a problem that had been relatively well controlled during his time in the ECFH. In the Spring of 2021 the appellant was admitted to a detox program and reported regular consumption of alcohol, crack cocaine, Dilaudid and benzodiazepines. He was not taking his psychotropic medications. The aggravated assault on Ms. Sack occurred in June 2021.

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[86] This was the period during which he was doing well in the community, as noted in the *Gladue* Report.

[148] When remanded to the CNSCF in August 2021 following the revocation of his bail, the appellant was seen on several occasions by both nursing and psychiatric staff. At the time of admission, he reported daily use of crack cocaine. He was exhibiting bizarre behaviours and instability. He agreed to start diazepam and a long-acting anti-psychotic along with Lithium. Dr. Theriault noted in his report that by September 8, 2021 the appellant's affect was still labile, manic and disorganized.

[149] Dr. Theriault assessed the appellant on September 14, 2021 and concluded he was showing evidence of "a mixed affective mood state".[87] He was housed in the therapeutic quiet room until, over the following few days, he settled enough to be removed. He was still exhibiting disordered behaviour and tangential speech when Dr. Theriault re-interviewed him on September 17, 2021.

[150] Dr. Theriault made the following observations after meeting with the appellant again on October 8, 2021:

> Over the ensuing weeks, there has been a general improvement in Mr. Cope's presentation. When interviewed by me on October 8, there had been a substantial improvement in his presentation. He no longer had the flamboyant eccentric garb that he had been wearing previously. His affect was stabilized and if anything appeared to be somewhat blunted. He no longer showed the disorganized pattern of speech that was present earlier on in his stay and there was no evidence of grandiosity or persecutory beliefs…

[151] On October 21, 2021, the appellant was admitted to the ECFH under a s. 672.11 *Criminal Code* assessment order in relation to the aggravated assault of Ms. Sack on June 27, 2021. Dr. Risk Kronfli, a forensic psychiatrist at the ECFH, found the appellant fit to stand trial and not exempt from criminal responsibility. In his report of November 5, 2021, he noted the appellant's diagnosis as "schizoaffective disorder, bipolar type, in addition to a serious substance use disorder to multiple serious street drugs and some overuse of prescription medication…in the context of some antisocial personality traits". He indicated the appellant was "much more settled and stable" than he had been at his admission in October.

[152] Dr. Kronfli noted no changes to the appellant's medication that included a long-acting intramuscular injectable anti-psychotic with additional doses of Olanzapine orally and diazepam to reduce anxiety. He concluded his report by

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[87] Dr. Theriault's October 12, 2021 report, at page 6.

stating that the appellant required “regular follow-up with mental health services, as he did in the past”. He said it was “imperative” that the appellant not use any street drugs and not abuse his prescription medications.

[153] The appellant was again remanded to the ECFH under an Assessment Order on January 14, 2022 as a result of him showing distress during a court appearance on January 13.

[154] Dr. Theriault conducted the assessment, noting in a January 24, 2022 report that the appellant’s schizoaffective disorder was in partial remission, due to being maintained on his psychiatric medications, and his substance abuse disorder was “in sustained remission in a controlled environment”.

The Appellant’s Mental Health and Addictions as Factors in the Sentencing Hearing

[155] The sentencing judge recognized the challenges the appellant had confronted in his life included a “significant mental illness”. She noted this was detailed in the exhibits and “a report from the East Coast Forensic Hospital”. She referred to the 2017 finding of NCR-MD and the appellant leaving the hospital in late 2019 after being assaulted. She noted that after his discharge by the CCRB he did not follow a plan for maintaining his mental health in the community and relapsed into drug addiction.

[156] As I noted, the appellant had lived without incident in the community from December 2019 until he relapsed some six or more months later.

[157] In her brief of January 11, 2023, prepared for the appellant’s sentencing, Ms. White said the appellant’s “drug use and mental health challenges are significant and major contributing factors to this offence”.

[158] A letter dated January 16, 2023 and addressed to the judge was also submitted for the sentencing hearing. A social worker at the CNSCF, Corey Arsenault, advised that the appellant was housed in the Transition Dayroom (TDR), “a living unit reserved for people in custody who suffer from chronic and persistent mental health issues, brain injuries and/or developmental disabilities”. In detailing the programming offered to the appellant, in which he did not participate, Mr. Arsenault observed the appellant was “always pleasant and respectful to staff and peers” but had been staying in his cell and was withdrawn.

[159] Mr. Arsenault noted the appellant had asked for programming that was "culturally responsive" to his Indigenous identity. The appellant identified unmet spiritual needs and a "deeply meaningful connection" with the Mi'kmaw Native Friendship Centre in Halifax.

[160] The appellant testified at his sentencing hearing. When asked about the state of his mental health in the summer of 2021, he responded: "Not well". On cross-examination he confirmed his diagnosis of schizoaffective disorder, the prescriptions he had been given to manage it—the extended-release antipsychotic and Lithium—and the fact that in the summer of 2021 he had been not been taking his medications. He acknowledged he had been using street drugs, including cocaine.

[161] The judge observed the appellant's mental health "was not in a good place" in the summer of 2021 when he committed his offences.

[162] As I have discussed, with due respect to the sentencing judge, the appellant's mental health was much worse than her reasons describe. He committed the aggravated assault of Ms. Sack and the breaches of the no-contact provisions of his Release Order while in a profoundly dysregulated state. This was a function of his acute mental illness, previously stabilized with prescription antipsychotics, and his resort to hard street drugs. In the summer of 2021, the appellant was very seriously mentally ill. Notwithstanding the severity of his mental illness at the time of the offences, the judge, imposing five years in prison for the aggravated assault, placed him just below the top of the *Tourville* range of four to six years. As I indicated earlier, I have concluded the underemphasis of the connection between the appellant's mental illness, his drug abuse, and his *Gladue* factors, produced a sentence that was disproportionate to his moral culpability.

Re-Sentencing the Appellant

[163] Although the judge's *Proulx* analysis was abbreviated,[88] as I discussed earlier, a CSO was not an available sentencing option for the appellant. We were advised at the appeal hearing the intensive community-based services and supports

[88] *R. v. R.B.W.*, 2023 NSCA 58 at para. 53 for the framework for applying *Proulx*.

put forward at the sentencing hearing were no longer available. A community-based sentence would require a new work-up.

[164] As a CSO was not available, a proportionate sentence would have been a shorter period of incarceration followed by robust community supervision. I would vary the appellant's sentence for the aggravated assault from five years to three years, less the remand credit of 18 months. The new sentence takes effect from the date of the original sentence and therefore the appellant's go-forward sentence would have been 18 months. I note that the appellant, having served 16 months of the 18 months' go-forward sentence, has a further two months' incarceration to serve. Upon his release from custody, the appellant will serve two years of probation[89] on conditions to be imposed by the original sentencing judge.

[165] The sentences for the breaches shall remain the same as originally ordered. Those sentences have now been served. The ancillary orders were not appealed.

[166] To the fullest extent possible, the appellant's probation conditions should be informed by the recommendations of the Sentencing Circle and the *Gladue* Report for culturally-appropriate services and supports that will contribute to his successful rehabilitation and reintegration into society.

Responding to Justice Scanlan's Reasons

[167] I have had the opportunity to read the reasons of my colleague, Justice Scanlan. I want to note that I disagree with his views that the confidentiality of sentencing circles is in conflict with the open court principle. His emphasis on the open court principle does not take into account the considerations about circle confidentiality and its purpose in this community-based process.

[168] The MLSN Sentencing Circle Guidelines explain the benefits of a confidential process:

> The MLSN acknowledges that the decision to record circle proceedings, the extent of the record, and the method of recording, rests with the Judge and must be in keeping with the openness presumed of most court proceedings.
>
> However, confidentiality is critical to the efficacy of community sentencing circles and if maintained, it promotes more frank and open discussion. The MLSN

[89] *R. v. Mathieu*, 2008 SCC 21 at para. 19; *R. v. Goeujon*, 2006 BCCA 261 at para. 53.

> maintains that, in some instances, public access and verbatim recording will inhibit circle participation.

[169] The confidentiality that governs the MLSN sentencing circle process is intended to ensure that "Every participant has an opportunity to share their thoughts, reactions and experiences". The MLSN Guidelines recommend appropriate measures being taken by the court "to protect the confidentiality of the circle participants when personal and sensitive information is revealed in the circle process". Confidentiality and recording should be addressed "at the intake and preparatory stages of the circle and discussed openly between the Court and community". According to the MLSN Guidelines, the risk of compromising the process is significant:

> Generally, courtrooms are open to the public for observation and transparency. Again, in the case of sentencing circles, public attendance may inhibit the degree of participation and personal disclosure. Consequently, the effectiveness of the process may potentially be compromised. Due to the sacred stories that may be shared in the circle and the honour of the confidentiality of the circle process, the MLSN maintains the process by invitation. It is recommended that public attendance be determined on a case-by-case basis.

[170] The Guidelines indicate the judge decides "what form of recording is necessary to fulfill the requirements of the justice system".

[171] We were informed at the appeal hearing that, due to an oversight, the appellant's Sentencing Circle was not recorded. It was the sentencing judge's first sentencing circle and the recording equipment was inadvertently left behind.

[172] I do not agree that conducting sentencing circles, such as the appellant's, off the record poses any risk to public confidence in the sentencing process, or fosters suspicion, or infringes the open court principle, assertions advanced by my colleague. I note that the Circle here produced a report, tendered at the sentencing hearing, and available to the public. Transparency is also served by judicial reasons including a discussion of a sentencing circle's recommendations.

[173] It is my respectful view (1) the courts should not be directing how Indigenous justice practices are conducted;[90] and (2) the Guidelines for Sentencing Circles developed by MLSN are compatible with the needs of sentencing courts participating in, and taking account of, circle processes and recommendations. The

[90] I note the respondent's view, expressed in paragraph 63 of their factum: "…directions on how circles are conducted…is best left in the hands of the participants".

ultimate decision to record or not rests with the sentencing judge who is best positioned to make a final determination once the necessary consultations with the community have been undertaken. The current approach to the confidentiality of sentencing circles adopted by MLSN in order to support candid discussions in a safe and supportive environment should be respected.

[174] Different considerations in relation to recording the circle will apply where the offender is to be sentenced in the circle, which, at the judge's direction, did not occur in the appellant's case. The appellant was sentenced in open court proceedings that any member of the public is entitled to attend.

Disposition

[175] I would allow the appeal and vary the appellant's sentence for aggravated assault as I have indicated in paragraphs 164-165.

[176] I want to thank all counsel in this difficult case for their thoughtful and informative written and oral submissions.

Derrick, J.A.

Concurred in:

Bourgeois, J.A.

Dissenting Reasons:

Introduction:

[177] I am convinced our justice system has not done enough to protect the most vulnerable within Indigenous communities. The Missing and Murdered Indigenous Women's Inquiry ("MMIWG") questioned whether Indigenous women and girls were being well served by our justice system and afforded the protection they so much need.

[178] Parliament has amended the *Criminal Code* in an attempt to better recognize the vulnerability of Indigenous women and intimate partners. In this case the sentencing judge recognized the impact of the past on Indigenous offenders, taking into account what has come to be known as the *Gladue* and *Ipeelee* factors, as well as the appellant's reduced moral culpability due to his mental health and addictions problems. After weighing all those factors, she imposed what she considered to be a proper sentence of five years for a vicious assault inflicted by the appellant upon his Indigenous intimate partner. The judge was convinced that sentence was necessary to protect the victim and the community.

[179] I agree.

[180] The majority reasons reweigh those same factors and have decided to substitute three years plus probation for the five-year sentence saying the judge erred in principle. This change fails to give the sentencing judge's decision the deference it should be accorded by law. I see no error in principle.

[181] The majority decision fails to give sufficient weight to the statutory amendments directed at protecting Indigenous intimate partners. Those provisions are interrelated to other sentencing considerations, and it is wrong for an appeal court to reweigh those factors to simply come up with a different sentence.

[182] In this decision I will also discuss the issue of sentencing circles and the role they can play. I will also discuss the way they are conducted.

[183] It is for the Indigenous communities to decide upon how a sentencing circle is conducted. Having said that, I am satisfied that once a sentencing judge gets directly involved in a sentencing circle that process changes and becomes part of the judicial process. Sentencing circles can have a profound impact on the sentence imposed on an offender. The proceedings must be recorded and open to the public if there is judicial participation.

[184] Indigenous communities are shackled by the criminal laws which are substantially created, policed and judged by non-Indigenous persons. When the laws are not working for any segment of Indigenous communities, and they cry out for help we should all listen. For many years now we have focused on Indigenous offenders and the fact they are overrepresented in our prisons. In doing so, few have focused on how our system of justice has worked for the communities at large or the most vulnerable in those communities. If we were to ask for a grade from

Indigenous communities or the most vulnerable in those communities, in terms of protection, I dare say we would fail.

[185] The sentencing judge here imposed a sentence that, at least on a temporary basis would afford protection to the victim and the community. I am satisfied that in reducing that sentence from five years to three years plus probation, the majority has not afforded the deference due to the trial judge. The trial judge had rejected a conditional sentence that would have the appellant serve a two-year sentence under virtual house arrest. She was not satisfied that sentence would protect the community. The majority now says to release the appellant on probation, which will in fact have even less effective control of the appellant. The appellant had breached the earlier release provisions three times even before being sentenced.

[186] This is an appeal of a sentence imposed on the appellant on February 16, 2023. He was sentenced to a penitentiary term of five years for aggravated assault plus 8 months for two breaches of release orders. Both the appellant and the victim are Indigenous, and the victim was the appellant's intimate partner. The appellant now seeks a sentence of time served plus probation.

[187] A Sentencing Circle was convened as part of the sentencing process. The appellant sought, and the Circle recommended a Conditional Sentence Order ("CSO"). The appellant argues the sentencing judge failed to properly apply the *Gladue* factors, overemphasized denunciation and deterrence and did not properly consider the restraint provisions of the *Criminal Code* related to Indigenous offenders. Finally, the appellant argues the judge did not give sufficient weight to the appellant's reduced moral culpability related to his mental health and drug addiction.

Background

The offence

[188] My colleague recites the facts as agreed upon by the Crown and the appellant. I will not repeat them here but add to that a more detailed description of what can be viewed in a video captured from local surveillance cameras in the area. I do so because it provides context to the words 'vicious beating'. The video recording, Exhibit 3, in the court below, documented a vicious, prolonged beating of the victim by the appellant. The record does not suggest the Sentencing Circle reviewed the video but it was before the sentencing judge.

[189] The recording captures the altercation between Mr. Cope and Ms. Sack beginning at approximately 19:40 of the CCTV footage and concludes with both individuals running out of view of the camera at approximately 22:33. Based on the manner of their movements both individuals appear to be intoxicated. There is no audio included.

[190] It begins with Ms. Sack punching Mr. Cope. The CCTV footage has relatively low resolution making some parts of the visual field difficult to see in fine detail.

[191] During the encounter, Mr. Cope forces Ms. Sack to the ground five times. At approximately 19:51, Mr. Cope forces Ms. Sack to the ground and both of their bodies are mostly off camera. We see Ms. Sack's legs and she appears to be struggling. It was not possible to determine whether she was punched during this period.

[192] Mr. Cope appears to kick Ms. Sack twice. In the first instance, which occurs around 21:00, it is possible he kicks her twice, but difficult to tell due to the quality of the video. **Ms. Sack appears to be on the ground, not moving and Mr. Cope appears to kick at or near her head. She is on the ground not moving for 20-30 seconds.** He kicks her a second time after she stood up.

[193] Mr. Cope can be seen to punch Ms. Sack what appears to be 20 times. In the first instance, he punches her five times, he then punches her an additional two times before the 20-30 seconds **when she is on the ground not moving.** After she stands up, he punches her the remaining 14 times.

[194] This must be considered in the context of Mr. Cope having beaten a different victim on an earlier occasion; jumping on that victim while he was on the ground, breaking ribs, and kicking that victim in the head causing a brain bleed.

[195] Clearly Mr. Cope knows how to inflict serious injury on persons he chooses to assault. The medial left orbital wall blow-out fracture and possible displaced buckle fracture of Ms. Sack's sternum are further evidence of that.

[196] Provincial Court Judge Christine Driscoll participated in a Sentencing Circle prior to sentencing. That was not recorded nor was it open to the public. Confidentiality agreements were in place preventing those who participated from disclosing what occurred. The victim did not participate in the Sentencing Circle, nor did she want to provide a statement to the police after the incident or submit a

victim impact statement. Although there is no indication the video was viewed by those in the Sentencing Circle, the judge had the video of the assault. There were also photographs of the scene and the victim's injuries. By any standard, this was a vicious assault the appellant inflicted upon his intimate partner.

[197] After his original arrest the appellant was detained twice for breaching his release conditions, first by contacting the victim via text, once actually having been found hiding in her residence.

[198] The appellant had earlier been prescribed psychotropic medications through the East Coast Forensic Hospital. On August 6, 2021, the appellant was involved in an incident with his father where his father was seriously injured but refused to cooperate with the police or courts in subsequent related criminal proceedings. He was again remanded. On August 20, 2021, he was described as exhibiting bizarre behaviour. He indicated to nursing staff he was willing to start medication after his attending psychiatrist prescribed diazepam, long-acting antipsychotic medication, and lithium. In September a fitness assessment was ordered, and the appellant was found to be acutely unwell and, at that time, unfit to stand trial. A detailed assessment, faxed to the court on October 12, 2021, referenced the appellant's declining mental health in the summer of 2021, saying:

> Mr. Cope's behaviour on the date of the alleged offense, August 6, 2021, may have been the product of both an unstable mood state occasioned by his schizoaffective disorder and concurrent substance use, intoxication or withdrawal. As Mr. Cope's behaviour has responded to the reintroduction of medications, Mr. Cope may be an appropriate candidate for the Mental Health Court Program.

[199] By November 5, 2021, he was found fit to stand trial.

[200] The sentencing judge was aware of the appellant's mental health, and addictions issues at the time of the offence. She had before her all the various medical reports made available to this Court and referenced his reduced moral culpability related thereto. My colleague recites the appellant's medical and addictions history in detail, but that recitation does not make it any more probative. The judge had it, she read it, and said she considered it.

[201] The judge also referenced *Gladue* principles and said those principles, plus reduced moral culpability garnered a reduced sentence for the appellant. With the utmost respect to the majority, to simply expand the explanation of the interplay as

between all those factors and assign a different sentence is not a justification for such a reduction. It is to abandon the legal principle of deference.

[202] Shortly before the scheduled trial date the appellant entered a guilty plea on the aggravated assault charges and eventually, he also pleaded guilty to the breach offences. The appellant spent approximately 26 months in presentence custody.

[203] The appellant, an Indigenous offender, has a support group, some of whom participated in a sentencing circle ("Circle"). The Circle developed a plan they believe offers the appellant his best opportunity to rehabilitate himself.

[204] Rehabilitation, they say, offers the best hope for the appellant to break his cycle of addiction-offence-imprisonment. He has a lengthy criminal record including numerous convictions for violent offences. He suffers from opioid addiction, and mental health challenges.

[205] The appellant's circumstances are not unique in terms of drug addiction and mental health issues. Many Indigenous and non-Indigenous persons have fallen victim to addictions combined with mental health issues which sees them facing criminal charges. The courts are constantly challenged when dealing with offenders who suffer from addictions and mental health issues and for Indigenous offenders courts must also consider the interrelationship with what has come to be known as *Gladue* factors. At the end of the day, courts must still protect the public.

[206] For many years, courts have encouraged Indigenous communities to become stakeholders in judicial processes, providing meaningful input on sentencing, from the Indigenous community perspective. In this case, the community, speaking through the Circle, recommended a sentence that would have the appellant serve his sentence in the community. Offering up a wrap around series of culturally appropriate programs aimed at having the appellant deal with his various issues. This would be done under the umbrella of a Conditional Sentence Order ("CSO").

[207] Historically, our justice system has had an uneven impact on segments of our Canadian population. Indigenous persons are tragically overrepresented in our prison population. This reality is acknowledged in the *Criminal Code* and cases such as *Gladue* and *Ipeelee*, yet the number of Indigenous persons in our prisons continues to grow. Courts are now directed to approach the sentencing of Indigenous offenders in a way that acknowledges the continuing impact of their past, and to impose sentences aimed at seeking alternatives to incarceration where possible. It is incumbent on courts to seek alternatives to carceral sentences if they

can be as, or more, effective than imprisonment. In the search for alternatives, Indigenous communities want a voice.

[208] The Circle proposed a plan that would see the appellant serve his sentence in the community while receiving culturally appropriate treatment for his addiction and mental health. This proposed plan was developed in a Sentencing Circle. The plan was not adopted by the sentencing judge.

[209] I focus generally on the issue of whether the judge erred in not adopting the recommendations of the Circle in this case and whether the judge failed to properly weigh the effects of the appellant's addiction and mental health issues recognizing the interrelationship of *Gladue* factors. This all relates to the issue of the appellant's moral culpability. In my review deference to the decision of the sentencing judge looms large.

[210] My review considers the overall purpose of criminal laws. Were it not for the need and desire to protect victims there would be no need for a *Criminal Code*. Survival of the fittest or anarchy would be the order of the day. Few, if any crimes are without victims. In our criminal law system some victims have been identified as needing more protection than others. Generally, offences involving the most vulnerable in our society have attracted harsher sentences. I refer for example to violent offences or predatory offences involving children, intimate partners, persons who may be disabled. Specifically in this case Indigenous intimate partners and Indigenous women. The list could go on, but the theme is that special consideration in sentencing is often aligned with the vulnerability of a victim. The *Canadian Victims Bill of Rights* S.C. 2015, c. 13, s. 2 recognizes in s. 9: *Every victim has the right to have their security considered by the appropriate authorities in the criminal justice system.*

[211] Parliament has also recognized the vulnerability of Indigenous intimate partners. While *Gladue*, *Ipeelee* and sections of the *Code* focus on the circumstances of the offender, and the overrepresentation of Indigenous offenders in our prisons, Parliament now also recognizes the terrible plight of Indigenous females and other vulnerable persons in Indigenous communities.

[212] The MMIWG inquiry laid bare the fact that our laws are not affording Indigenous girls, women and 2SLGBTQQIA persons, the protection they need and deserve. *Gladue* and *Ipeelee* focus on offenders, insisting courts try and find ways to keep Indigenous offenders out of jail cells. That often comes at the expense of the Indigenous communities and the most vulnerable in those communities. That

too must change. A preferred way to effect such change is to have earlier intervention and effective treatment before offenders reach the criminal justice system.

[213] Failure to protect the most vulnerable serves only to perpetuate the cycle of violence. Violence begets violence, especially if subsequent generations understand violence directed at the most vulnerable is the norm. The sooner the cycle of violence is stopped the sooner communities will heal. One has to ask why is it that the complainant in this case and so many like her, refuse to participate at any stage in the judicial proceedings. If it turns out that lack of participation is related to the judicial process failing to protect, then our system is failing the most vulnerable.

[214] *Gladue,* and its espoused principles are bedrock principles in sentencing Indigenous offenders. Yet the National Inquiry (MMIWG) expressed concern that sentencing as it is currently being carried out, is not resulting in safer communities, or reducing the rate of violence against Indigenous women, girls, and other at-risk vulnerable persons within Indigenous communities.

[215] Sections 5.17 and 5.18 of the Inquiry Report asks the government to evaluate the impact of *Gladue* and section 718.2 (e) of the *Code*, asking it be amended to consider violence against women as an aggravating factor. That change has been made (s. 718.04 and 718.201).

[216] The *Code* amendments related to Indigenous women and intimate partners post date both *Gladue* and *Ipeelee.* The judge in this case considered *Gladue* and *Ipeelee*. She said that had an impact and reduced the sentence the appellant would otherwise have received even though in serious violent offences *Gladue* is said to have a reduced impact.

[217] I agree that the appellant's mental health and addictions issues together with *Gladue* and *Ipeelee* were all in play. For me to then go on and say those combined factors should now be reweighed or accounted for again is to simply to ignore deference owed to the sentencing judge. Other than the lengthy discourse in the majority decision I see no difference between the factors the sentencing judge considered and that of the majority here.

[218] The sentence imposed here was victim focused. *Gladue* and *Ipeelee* and the appellant's reduced moral culpability due to his mental illness were considered and had an impact in reducing the sentence. The judge noted this to be so. However, as

required by ss. 718.04 and 718.201, she also considered the vulnerability of the victim and the immediate danger the offender posed. That was not an error.

[219] One thing that neither I nor my colleagues have is a record of what occurred during the Sentencing Circle. The sentencing judge at the end of the entire sentencing process was not satisfied with the appellant's commitment to treatment. This places me and my colleagues at somewhat of a disadvantage as compared to the sentencing judge. If the appellant and his supporters spoke in support of releasing the appellant into the community, what they said during the circle process and during sentencing submissions did not convince the judge it was safe or appropriate nor was she convinced he was committed to treatment. She witnessed that process yet still rejected the sentencing recommendations as made by the Circle. She concluded that without successful treatment, the appellant would be a danger to the community. Even with that disadvantage the majority is proposing a sentence that in essence, is at best treatment in the community.

[220] The majority here reduces the prison sentence from five to three years plus probation. In *R. v. Potter*, 2020 NSCA 9 at para. 826, this Court explained the role of appellate courts in sentencing appeals is not to determine how many years of prison they would have imposed. They further explained:

> [827] An appellate court is not to take "an interventionist approach" to a sentencing appeal:
>
> > … An appellate court should not be given free rein to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.
>
> [828] This Court recently explained in *R. v. Espinosa Ribadeneira*:
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> > [34] Sentencing involves the exercise of discretion by the sentencing judge. An appellate court should only interfere if the sentence was demonstrably unfit or if it reflected an error in principle, the failure to consider a relevant factor, or the over-emphasis of the appropriate factors. An error of law or an error in principle will only justify appellate intervention if the error had an impact on the sentence. An appellate court is not to interfere with a sentence simply because it would have weighed the relevant factors differently. See *R. v. M. (C.A.),* [1996] 1 S.C.R. 500 at

> para. 90; *R. v. Nasogaluak*, 2010 SCC 6 at para. 46; *R. v. Lacasse*, 2015 SCC 64 at para. 43-44 and para. 49.

[221] In *R. v. Shropshire*, [1995] 4 S.C.R. 227 at para. 47, followed by this Court in *Potter*, the Supreme Court of Canada adopted the reasoning of this Court in *R. v. Pepin* (1990), 98 N.S.R. (2d) 238 at 251 that:

> …in considering whether a sentence should be altered, the test is not whether we would have imposed a different sentence; we must determine if the sentencing judge applied wrong principles or that the sentence is clearly or manifestly excessive.

[222] In *R. v. Phinn*, 2015 NSCA 27, Justices Saunders and Bourgeois provide an overview of the guiding principles on deference in sentence appeals:

> [28] Justice Oland described her role in *R. v. J.J.W.*, 2012 NSCA 96:
>
> [13] The standard of review for sentence appeals is well established. The approach to be taken on appellate review is a deferential one. In *R. v. L.M.*, 2008 SCC 31, LeBel J. writing for the majority stated:
>
> [14] In its past decisions, this Court has established that appellate courts must show great deference in reviewing decisions of trial judges where appeals against sentence are concerned. An appellate court may not vary a sentence simply because it would have ordered a different one. The court must be "convinced it is not fit", that is, "that … the sentence [is] clearly unreasonable" (*R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 46, quoted in *R. v. McDonnell*, [1997] 1 S.C.R. 948, at para. 15). This Court also made the following comment in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 90:
>
> > …absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.
> >
> > (See also, *R. v. W. (G.)*, [1999] 3 S.C.R. 597, at para. 19; A. Manson, *The Law of Sentencing* (2001), at p. 359; and F. Dadour, *De la détermination de la peine: principles et applications* (2007), at p. 298.)
>
> [15] Owing to the profoundly contextual nature of the sentencing process, in which the trier of fact has broad discretion, the standard of review to be applied by an appellate court is one based on deference. The sentencing judge has "served on the front lines of our criminal justice system" and possesses unique qualifications in terms of experience and the ability to assess the submissions of the Crown and the offender (*M. (C.A.)*, at para.

> 91). In sum, in the case at bar, the Court of Appeal was required – for practical reasons, since the trier of fact was in the best position to determine the appropriate sentence for L.M. – to show deference to the sentence imposed by the trial judge.

[14] In *Shropshire* and *M. (C.A.)*, the Supreme Court of Canada held that an appellate court should only vary a sentence if the sentence is "clearly unreasonable" or "demonstrably unfit". In *R. v. W. (G.)*, [1999] 3 S.C.R. 597, Lamer C.J. emphasized at para. 19 that those two standards mean the same thing.

[15] In *R. v. Nasogaluak*, 2010 SCC 6, the Supreme Court affirmed the sentencing principles in Shropshire and *M. (C.A.)*. At para 46, LeBel J. stated:

> [46] Appellate courts grant sentencing judges considerable deference when reviewing the fitness of a sentence. In *M. (C.A.)*, Lamer C.J. cautioned that a sentence could only be interfered with if it was "demonstrably unfit" or if it reflected an error in principle, the failure to consider a relevant factor, or the over-emphasis of a relevant factor (para. 90; see also *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at paras. 14-15; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at paras. 123-126; *R. v McDonnell*, [1997] 1 S.C.R. 948, at paras. 14-17; *R. v. Shropshire*, [1995] 4 S.C.R. 227). As Laskin J.A. explained in *R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, however, this does not mean that appellate courts can interfere with a sentence simply because they would have weighted the relevant factors differently:
>
> > To suggest that a trial judge commits an error in principle because in an appellate court's opinion the trial judge gave too much weight to one relevant factor or not enough weight to another is to abandon deference altogether. The weighing of relevant factors, the balancing process is what the exercise of discretion is all about. To maintain deference to the trial judge's exercise of discretion, the weighing or balancing of relevant factors must be assessed against the reasonableness standard of review. Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should an appellate court interfere with the sentence on the ground the trial judge erred in principle.

[29] The reasons why trial judges enjoy such a wide discretion, and why considerable deference is paid to it on appeal, are well known but bear repeating. Front line judges acquire a vast experience in presiding over criminal trials. They occupy a preferred seat in hearing the evidence and appraising the people and cases that come before them. Just as important is the understanding they acquire, from viewing life "on the ground" in the streets of their communities. The advantages of such personal insight and familiarity -- which are so essential to the act of sentencing -- were underscored by Chief Justice Lamer in *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500 at para. 92:

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

[223] Most recently, in *R. v. Kiley*, 2024 NSCA 29 at para. 11, this Court held that:

> … If leave to appeal sentence is granted, the standard of review requires the Court to show deference to the sentencing judge. Intervention in the sentencing judge's decision is permitted only where it has been established there was an error in principle, or where the sentence imposed is manifestly unfit (*R. v. Chiasson*, 2024 NSCA 11 at para. 66; *R. v. Hann*, 2024 NSCA 19 at para. 50).

[224] The same position was taken in *R. v. R.B.B.*, 2024 NSCA 17 regarding the standard of review to be applied to sentencing decisions:

> [7] In *R. v. Hynes*, 2022 NSCA 51 at paras. 16-20, this Court set out the standard of review on sentence appeals:
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> > [16] Appeal courts are required to defer to lawful sentences imposed by trial judges unless the sentence is demonstrably unfit or they made an error in principle that materially impacted the type or length of the sentence imposed (*R. v. Lacasse*, 2015 SCC 64 at para. 11; *R. v. Parranto*, 2021 SCC 46, at para. 30).
> >
> > [17] Derrick J.A., writing recently for the Court in *R. v. Cromwell*, 2021 NSCA 36, summarized the appropriate standard of review:
> >
> > > [53] Sentencing decisions are accorded a high degree of deference in appellate review. Appellate intervention is warranted if (1) the sentencing judge has committed an error in principle that impacted the sentence or, (2) the sentence is manifestly 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" (*R. v. Friesen*, 2020 SCC 9, at para. 26; *R. v. Espinosa Ribadeneira*, 2019 NSCA 7, at para. 34).

[225] Deference is not a principle which permits a court of appeal to embrace a lenient sentence when it is the sentence the appeal court judge would have imposed, then discard the principle when dealing with one other than what they would have imposed.

[226] The power of an appellate court to substitute a sentence for the one imposed by the trial judge is provided in s. 687 of the *Criminal Code*:

> 687(1) 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,
>
> (a) Vary the sentence within the limits prescribed by law for the offence of which the accused was convicted.
>
> (b) Dismiss the appeal.

[227] As noted in *Lacasse*, 2015 SCC 64 at para. 39, an appeal court may not interfere lightly with a sentence imposed by a trial judge. Only if a sentence is clearly unreasonable is intervention warranted (para. 40). At paras. 48-49, the Court said:

> The reminder given by this Court about showing deference to a trial judge's exercise of discretion is readily understandable. First, the trial judge has the advantage of having observed the witnesses in the course of the trial and having heard the parties' sentencing submissions. Second, the sentencing judge is usually familiar with the circumstances in the district where he or she sits and therefore with the particular needs of the community in which the crime was committed: *R. v. M., (C.A.)*, [1996] 1 S.C.R. 500 at para 91.
>
> …
>
> For the same reasons, an appellate court may not intervene simply because it would have weighed the relevant factors differently. In *Nasogaluak*, LeBel J. referred to *R. v. McKnight,* (1999), 135 C.C.C. (3d) 41(Ont.C.A.), at para. 35, in this regard:
>
> > To suggest that a trial judge commits an error in principle because in an appellate court's opinion the trial judge gave too much weight to one relevant factor or not enough weight to another is to abandon deference altogether. The weighing of relevant factors, the balancing process is what the exercise of discretion is all about. To maintain deference to the trial judge's exercise of discretion, the weighing or balancing of relevant factors must be assessed against the reasonableness standard of review. Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should

> an appellate court interfere with the sentence on the ground the trial judge erred in principle.

[228] At para. 41 of *Lacasse* the Court said:

> Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.

[229] I am not convinced the sentence imposed by the trial judge was unreasonable. The sentencing judge weighed the impact of the appellant's addiction and mental health as well as the *Gladue* factors. She said that resulted in decreased moral culpability impacting the sentence. For this Court to now reweigh that factor is in the words of *R. v. McKnight* (1999), 135 C.C.C. (3d) 41 at para. 35 *"... to abandon deference altogether"*.

[230] In my deferential review, I look at other factors at play in this case. There is an apparent tension between s. 718.2(e), and ss. 718.2(a)(ii) and 718.04 of the *Code.* Perhaps tension is the wrong word. Perhaps it may be better to say, the impact of s. 718.2(e) and *Gladue* may have to be revisited during the sentencing process if the offence involved an intimate-Indigenous partner of the accused. Parliament requires judges consider sections 718.04 and 718.2 (a)(ii) and 718.201 of the *Code* in cases involving Indigenous female intimate partners.

> 718.04 When a court imposes a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances – including because the person is Aboriginal and female – the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.
>
> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
>
> …
>
> (ii) evidence that the offender, in committing the offence, abused the offender's intimate partner or a member of the victim or the offender's family,
>
> …
>
> Shall be deemed to be aggravating circumstances:

> 718.201 A court that imposes a sentence in respect of an offence that involved the abuse of an intimate partner shall consider the increased vulnerability of female persons who are victims, giving particular attention to the circumstances of Aboriginal female victims.

[231] Sections 718.04 and 718.201 were a Parliamentary response to the MMIWG Inquiry which noted the disproportionate victimization of Indigenous women and girls. In the end courts must balance the various factors in a way that holds offenders accountable. Here the judge said she gave effect to the *Gladue* and *Ipeelee* principles, saying but for those cases she would have imposed a longer sentence. It was not for her to ignore ss. 718.04, 718.2 and 718.201. To do so would have been to err. Parliament has made it clear that victimization of Indigenous women, Indigenous intimate partners, can lead to a harsher sentence; one that emphasizes denunciation and deterrence. In *Ipeelee* the Court made it clear that when considering the *Gladue* factors courts had to do more than give lip service to those factors. The impact on sentencing had to be meaningful. Given the treatment of Indigenous women and Indigenous intimate partners, when offences involve serious harm to those vulnerable persons it is time for the amended sections of the *Code* to have meaningful impact as well.

[232] The message in the legislation is that Parliament has listened and agrees that Indigenous women and girl victims need more protection.

[233] I conflate the provisions of ss. 718.04 and 718.201 in saying courts are told to give primary consideration to objectives of denunciation and deterrence considering the increased vulnerability of female Indigenous persons, giving particular attention to the circumstances of Indigenous female victims. I temper this only by saying deterrence is best achieved through rehabilitation where a judge is satisfied it is reasonably possible.

[234] In *R. v. Elson*, 2024 NLCA 6 the Court was dealing with sexual abuse of a 13-year-old Indigenous child. At para. 50 the Court said:

> Further, as stated in *Gladue*, at paragraph 79, where an offence is violent or serious, there will often be no discernable difference between a sentence imposed for an Indigenous offender and a non-Indigenous offender. Mr. Elson's circumstances as Indigenous had to be considered in the context of a serious crime committed against a child who was also Indigenous. (See also *Ipeelee*, at para. 86).

[235] If one were to equate the impacts of *Gladue* factors and the appellants mental health and addiction issues, with credits in terms of reducing sentence,

those factors go on the reduction side of the ledger. Sections 718.04 and 718.201 are on the other side of the ledger. The sentencing judge here assigned those factors a weight she determined as appropriate. I cannot conclude she was clearly unreasonable.

[236] Indigenous women are often vulnerable persons, unable due to their circumstances, to extract themselves from dangerous relationships. The changes to the *Code* are at least implicit recognition that our laws as interpreted and applied thus far, including *Gladue*, have not afforded the most vulnerable Indigenous persons the protections they need and deserve.

[237] I pause to refer to a case decided by the Chief Justice of the Nunavut Court of Justice: *R. v. Mosesee Nakashook*, 2024 NUCJ 07. I do so for a number of reasons: First it is an example of the horrendous abuse Indigenous women face in their communities. Second it is an example of the court sentencing an Indigenous offender who had abused an Indigenous woman. It is current, and finally it is an example of the Court refusing to adopt a joint sentencing recommendation made by Crown and defence counsel. In other words, just as with sentencing circles, at the end of the day it is the judge who had the duty to decide upon the appropriate sentence. In that case the recommendation came to the court in the form of a joint sentencing recommendation from Crown and defence.

[238] *R. v. Mosesee Nakashook*, involved a 50-year-old offender, whose sexual advances to his 39-year-old niece were rebuffed. He attacked her with a large meat cleaver, the type used by butchers or hunters. He scalped the victim, removing her hair and part of her skull bone, inflicted deep wounds to her face and chest, disfiguring her for life. She survived but has a metal plate in her skull.

[239] After his attack the perpetrator confiscated cell phones, confined the victim and two others to a bedroom, intending the victim bleed out and die before they could get help. They escaped; help was summonsed in the form of a taxicab. The victim was taken to the hospital put in a medically induced coma requiring over 100 stiches and a series of blood transfusions.

[240] Mr. Nakashook was charged with attempted murder. The injuries and offence were much more serious than here, however, it does reflect the degree of violence endured by Indigenous women. Cases like that, and the case now before the Court, are but a few that explain the pleas for help and protection made by vulnerable members of Indigenous communities.

[241] Isolated urban and rural communities often mean when offenders are released into those communities the victims have no place to run, no place to hide. They must be protected.

[242] *Gladue* and *Ipeelee*, aimed at reducing the numbers of Indigenous persons incarcerated, rightfully brings attention to the need to reduce the number of Indigenous offenders in prison. While that goal is laudable, in the end due consideration must be given to the need to protect vulnerable victims. As I said above, were it not for the desire to protect victims we would not need a *Criminal Code*.

[243] Imprisonment has an immediate effect of providing a buffer to victims and communities so they may heal in the absence of a person who, if they remain, present a continuing danger. I agree however imprisonment must remain as a last resort if reasonable alternatives are available.

[244] In this case the judge was not satisfied the root cause of the appellant's behaviour would be addressed through a non-custodial sentence. The sentence she imposed gives at least temporal protection to the community and this victim while emphasizing denunciation and deterrence.

[245] The judge considered all available sanctions other than imprisonment but in the final analysis was not satisfied the appellant's prospects for rehabilitation were such that he could be safely released into the community. That decision was within her discretion. The appellant's earlier failed attempts, or lack of commitment to treatment are perhaps the best predictors as to his chances of succeeding in the future. He went AWOL from the East Coast Forensic Hospital. That too speaks to his chance of treatment of his mental health issues. When participating in a sweat lodge the appellant was told he had to chose between the sweat lodge and drugs. He left the sweat lodge and chose drugs. The judge said he is a danger to those around him when his mental health and addictions are not under control.

[246] Clearly the judge had before her the medical information related to the appellant's health circumstances. It is the same information now available to this Court. She said she imposed a lesser sentence than she would have if the mental health situation did not exist. She noted this as her recognition of the appellant's reduced moral culpability. She used words such as the appellant's mental health being "not well" and "not good" at the time of the offence. There was *viva voce* evidence and psychiatric reports were on file. As with other factors that went into sentencing it was for the judge to determine the impact of those factors.

[247] It is not for an appeal court to intervene by reweighing the impact of the appellant's moral culpability related to his mental illness and his drug addiction. I again quote from *Lacasse* at para. 41:

> Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.

[248] The judge said she reduced the sentence due to decreased moral culpability. Absent an error in principle it is not for this court to simply reweigh that factor, and suggests a further reduction is warranted.

Sentencing Circles

[249] A judge may have any number of reasons for not adopting sentencing circle recommendations. Sentencing circle participants may not all be legally trained and may not be familiar with the guidelines a judge must work within when imposing a sentence. Any sentence imposed must respect the legal constraints as imposed by Parliament. For example, in this case a conditional sentence is only available pursuant to s. 742.1 of the *Code* where:

> The court is satisfied that the service of the sentence in the community would not endanger the safety of the community…

[250] The judge here was not satisfied that a CSO would protect the community or that a sentence of less than two years was appropriate. According to the provisions of the *Code* such findings meant a CSO was not a sentence available to the judge.

[251] My colleague references *R. v. Fice*, 2005 SCC 32. There the Supreme Court of Canada dealt with the issue of whether presentence custody affects the availability of a CSO. I agree with my colleague, *Fice* operates to take the option of a CSO off the table in this case.

How should Courts treat Sentencing Circle recommendations?

[252] Of particular concern to me is how a circle is conducted if a judge participates in that process. My colleague also discusses how a sentencing judge must respond to circle recommendations. This case is an opportunity to provide guidance on both of those issues as this is an area of developing law and courts of first instance have little guidance from appeal courts.

[253] Sentencing circle recommendations are like other evidence presented to a sentencing judge. Courts must weigh the recommendations of a circle in the context of the offence, the victim, the community, and the law. As I noted earlier community context is an important part of sentencing. A sentencing circle report gives voice to that context. Few judges or justice participants have direct experience in Indigenous communities, and many would not appreciate the perspective of those communities.

[254] Sentencing circles, although not part of historical indigenous practise, have been a part of the criminal justice system for many years now. Beginning in 1992 with *R. v. Moses*, 71 CCC (3d) 347 (Yukon Territorial Court), the court used a sentencing circle, engaging members of the Indigenous community to assist in sentencing. Since then, sentencing circles have taken many forms, depending on the wishes and agreement of the community and judges involved. As noted in Brian H. Greenspan & Vincenzo Rondinelli eds, *Indigenous People and the Criminal Justice System*, 2ed (Toronto: Emond Montgomery, 2022):

> Page 288 …it is important to emphasize that sentencing circles are not an Indigenous practice; rather, they are a way the court system has chosen to obtain information from members of the Indigenous community. If an Indigenous community or nation were given the ability to design its own justice system, very few would likely say, "What we would like is for the judge to sit with us and listen to what we have to say and then go away and tell us what the sentence will be.

[255] *Moses* involved a 26-year-old Indigenous offender found guilty of assault with a weapon, theft, and breach of probation. He had 43 prior convictions and had spent approximately eight years in custody for various offences. The judge reasoned that *"Somehow the pernicious cycle plaguing the life of Mr. Moses had to be broken before he tragically destroys himself or someone else"* (para. 23). The judge recognized the need to find alternatives to the repeating cycle of arrest, *"…conviction, incarceration, release - pointing to the imprudent-excessive reliance on…"* punishment as the central object in sentencing. What he envisioned was empowerment of communities to *"…share power with the courts-the communities being allowed…"* to resolve many conflicts that would otherwise be processed through the courts (para. 7).

[256] In *Moses* the sentencing circle process was recorded and took place in the courtroom. The physical layout was altered to allow a meeting format instead of a regular courtroom layout to *"…reinforce the objective of the process … to afford*

greater concern to the impact on victims, to shift focus from punishment to rehabilitation, and to meaningfully engage the communities in sharing responsibility for sentencing decisions …" (para. 34).

[257] The courtroom remained open to all, transcripts were made, but the process facilitated the informal exchange of opinions and flow of information. A plan was developed with community commitment to participation. The court imposed a suspended sentence with two years probation. See *Indigenous People and the Criminal Justice System,* page 292.

[258] Sentencing circles have evolved from the in-court circle to other forms. I do not attempt to limit the form a sentencing circle must take. That is for the members of an Indigenous community to decide. I do caution against judges participating in any process that affects a sentence when that process is not recorded, and open to the public, or if the process is subject to confidentiality agreements.

[259] In Mr. Cope's case the victim did not participate in the Circle process. In fact, like many victims, she refused to give a police statement, and chose not to submit a victim impact statement. The record does not allow us to have a clear understanding as to why Ms. Sack refused to participate in the entire judicial process including the circle. That said the prospect of a violent offender being immediately released into a community on a CSO, not in a locked jail, must have a chilling effect on victims of violent crimes.

[260] When victims do participate in circles, care must be taken to ensure they are not re-victimized. As noted in Chapter 8, of *Indigenous People and the Criminal Justice System,* page 298 referencing the Royal Commission on Aboriginal Peoples report *Bridging the Cultural Divide* when discussing the safety of women and children:

> The Commission noted that the seriousness of family violence offences are not always fully appreciated in Indigenous communities, particularly in more remote communities. Elders and other leaders who may be participating in a sentencing circle may have different values than younger people in the community. In addition, some respected members of the community may themselves had been perpetrators of violence and abuse.
>
> …
>
> In the context of sentencing circles, it becomes very important to make sure those who participate, particularly as voices of the community, actually reflect the values the circle is trying to espouse. …

[261] In Chapter 8, page 300 of *Indigenous People and the Criminal Justice System,* referencing cases; (*R. v. Naappaluk,* 20 W.C.B. (2d) 606, *R. v. Gingell*, (1996) 50 C.R. (4th) 326, *R. v. McKay*, 1997 CanLII 24554, and *R. v. WBT*, 1995 CanLII 4059) the authors voiced concerns about the extent to which the circles reflect a true community consensus saying among other things:

> There were further concerns about the way community dynamics may have silenced particular voices, including the victim, and the inability of judges and lawyers who were not from the community to understand how those dynamics were at play.

[262] I pause here to acknowledge the appellant's reference to an excerpt from page 312 of the *Indigenous People and the Criminal Justice System.* That page discusses a process rooted in the Indigenous community with no judges or lawyers:

> The first such option is Indigenous justice programs. These programs are part of a larger set of diversion programs that resolve matters before the court without the need to engage in a sentencing hearing at all because the charges are withdrawn or stayed. There are many such programs in all provinces and territories in Canada, and they focus on Indigenous offenders. One of the hallmarks of these initiative is that access to the programs relies on Crown consent. Thus, the matters are taken out of the system pre-plea. While not strictly part of the sentencing process, these initiatives clearly represent a true alternative to imprisonment as contemplated by section 718.29(e) of the Code and *Gladue.*

[263] That diversion program is not what this court is dealing with here. There are diversion programs in Nova Scotia available in certain situations. I would not envisage such a program having much application in a serious case such as this one.

[264] We have cases where Circle recommendations have had a substantial impact, and it is important for Indigenous and non-Indigenous communities to be able to understand the result. *R. v. Jacko*, 2010 ONCA 452, is an example of a sentencing circle having a substantial impact on sentence. Watt J.A. writing for a unanimous Court of Appeal considered the recommendations of a sentencing circle in spite of "deficiencies" as noted by the sentencing judge. The prosecution, defence counsel, police, **and judge were not involved in the circle**, and the circle had not been made aware of the offender's criminal record. Justice Watt at para. 63 suggested that a lesson from *Gladue* is that an Aboriginal community will often understand the nature of a just sanction in a manner that differs markedly from non-Aboriginal communities saying:

> 81. … In my view, the trial judge failed to give sufficient weight to the nature of the community in which these offences were committed and the views of that community (as reflected in the recommendation of the sentencing circle) about the nature of punishment best suited to respond to the community's needs and notions of justice.

[265] The Appeal Court accepted the recommendation of the circle and imposed a conditional sentence for Mr. Jacko. The Appeal Court relied heavily on the circle recommendation to avoid incarcerating Mr. Jacko.

[266] In the appellant's case the Circle included the appellant, the trial judge, prosecution services counsel and a law student, two members of the Mi'kmaw community identified as "Client support", Mr. Cope's legal counsel, a person identified as "Knowledge Keeper", MNFC Intensive case Manager, Mi'kmaw Legal Support Network's ("MLSN") Customary Law Caseworker, MLSN Victim Support Worker, and MLSN Customary Law Caseworker.

[267] The report from the 12-member Circle referenced it as having "… relevant interests and skills to develop a sentence plan that was inclusive of the needs of the community, offender and victim, assembled … to identify community-based sanctions available as sentencing considerations for Mr. Cope".

[268] There is no record of what was said during the circle process and the report stated:

> With regard to the Sentencing Circle participants are entrusted with the understanding that information shared within the Circle is to be kept private and privileged. …

[269] The Circle considers the circumstances of Indigenous persons from a community perspective. Although sentencing circles are not an Indigenous creation, the process developed in Nova Scotia is intended to be respectful of and rooted in Mi'kmaq traditions and philosophies regarding the interconnectedness of all things. In a culturally appropriate manner, the Circle addresses the impact of an offender's actions relative to other individuals, families, and communities, while being cognizant of underlying issues that may have contributed to the harmful acts. The focus is on re-building relationships, promoting positive healthy outcomes and the wellbeing of the Mi'kmaw and Aboriginal people.

[270] The Circle report detailed the appellant's tragic circumstances; having been introduced to marijuana by his cousin, dilaudid by his father, and now using

opioids as drugs of choice. “Anything to numb his pain” stemming from the death of family members and emotional and physical abuse when young. The report details his earlier attempts at treatment for addictions, and his mental health issues. I need not repeat them here. Suffice it to say the Circle identified addictions and mental health and wellness as the main areas to be addressed in the Circle recommendations. The Circle was acutely aware of the impact of *Gladue* factors affecting Mr. Cope.

[271] The Circle felt a carceral sentence would not benefit Mr. Cope. Instead they suggested outreach services be provided by the Mi’kmaw Family Healing Center in the Men’s Outreach Program including; Completing the Journey of the Two Wolves – 10 sessions with Dan Walsh; Mi’kmaw Native Friendship Center services including the Seven Sparks program with Scott Lakes; access to an outreach program with Monique Fong Howe; Education and employment support with an Intensive Case Manager – Corrections; access to Cocaine Anonymous; 7th Step Society; a “Community Mental Health order” (stay on medications or be diverted to hospital).

[272] A sentencing judge is not bound by the recommendations of a sentencing circle. The judge must consider those recommendations just as they are obliged to consider a *Gladue* report, a presentence report or victim impact statement.

[273] Sentencing circles bring something different, something more, to the table. Indigenous communities and the victims are most affected when crimes are committed in those communities. The sentencing circle process provides an opportunity for an offender to express remorse, apologize to victims or communities. Within the Circle process there is an opportunity for the parties or community to heal; to seek solutions that are acceptable to both victims and the Indigenous communities. When a community makes a recommendation through a sentencing circle, if it is adopted, that community is sharing responsibility for sentencing decisions.

[274] In this case the community through the Circle expressed what it thought would be an acceptable alternative to a carceral sentence. At least some in the Circle, thought a CSO would satisfy the needs of the community, the victim, and the offender.

[275] Sentence circle recommendations cannot ignore principles of sentencing as established by Parliament if they are to be adopted. Section 718 of the *Code* sets out fundamental principles of sentencing:

> The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, 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 and the harm done to victims or to the community that is caused by unlawful conduct;
>
> b) To deter the offender and other persons from committing offences;
>
> c) To separate offenders from society, where necessary;
>
> d) To assist in rehabilitating offenders;
>
> e) To provide reparations for harm done to the victims or to the community; and
>
> f) To promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims or to the community,

[276] Provisions in the *Criminal Code* require courts to pay particular attention to the circumstances of Aboriginal offenders in sentencing:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> > e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[277] That section requires a court to consider the unique systemic background factors that may have played a part in bringing an Indigenous offender into the justice system. Judges may take judicial notice of the broad systemic background factors and give priority to restorative justice. This often results in a sentence that is less than a non-Indigenous counterpart.

[278] Section 722 affords an opportunity for an accused to provide the court with case specific information. This has come to be known as a *Gladue* report.

[279] The judge in this case noted for example the sentence would have been greater but for the *Gladue* factors. The Supreme Court noted in *Ipeelee*, sentencing judges must do more than pay lip service to the impact of the sections I referred to above. They must have a real and meaningful impact on sentencing Indigenous offenders.

[280] Sentencing circles are organized by MLSN within Indigenous communities. I would not prescribe what form they should take. I only say that when a sentencing circle makes recommendations, courts must consider those recommendations. Sentencing circle reports can be the voice of the Indigenous community. They may have a perspective that differs from a broader community, including where an Indigenous community exists within broader urban communities. In smaller or isolated communities, courts may have a limited understanding of life in those communities, the impact of history on those communities and cultures. A sentencing circle report may be the only way members of those communities can be heard.

[281] A sentencing circle is about informing the courts from a community perspective. A sentencing circle can inform as to how the offence impacted the community; the victim; the offender. Inform as to what a community has to offer in terms of rehabilitation and healing. Healing as between the offender and the victim or the offender and the community. Inform as to community tolerance. This perspective is perhaps not available through a presentence report or even a *Gladue* report. Those reports focus on the offender and his background. A sentencing circle report gives the community a voice. A report can express a community commitment to participation and responsibility for a sentence that may be different than what a court may otherwise impose.

[282] In this case the sentencing judge attended the Sentencing Circle. This sentencing circle process was not recorded and therefore no record exists. In *Moses* the proceedings were recorded. If a judge is present a recording of the proceeding is a minimal requirement.

[283] It will be for the participants to decide if there should be recordings in the absence of judges.

[284] That brings me to a second issue related to the openness of court proceedings. In *Moses* the process occurred in open court, but the room was reorganized in a less formal way. There is a risk to public confidence if any part of court proceedings is conducted behind closed doors. I have read both the majority decision and the response to my dissent. Let me be clear; I have no objection to confidential, non-public sentencing circles. That allows for free exchange of comments and sharing of sacred stories. All things referred to by the majority. That process cannot sacrifice the principle of open courts. **If a judge is involved in a**

sentencing circle, like all other court processes, it must conform to the principle of open courts.

[285] Once a judge gets involved in any process that involves a case before the court and that process has the potential to affect the outcome of the proceeding it becomes part of the formal judicial process. A judge cannot sit with a second hat in a circle and say, for this part, I am not a judge. Nor can the judge ignore the fact that process may have a direct impact on the formal proceedings.

[286] It is a basic tenant of our judicial system that judicial proceedings are open to the public. In terms of reconciliation, it is important that the public at large, Indigenous and non-Indigenous be able to understand the reasons for any sentence imposed. That is not possible if the sentence imposed is the result of a process involving a judge behind closed doors. Secrecy engenders suspicion, not trust,

[287] A report and recommendations delivered in open court to a judge is, in my view, a preferred, if not the only option. A judge should not be a part of a process conducted behind closed doors. It is not enough for a judge to say the circle report will be delivered in open court later. For a judge to meet with persons in private, with or without recording, with the public excluded and then to come out of that process and sit in court to receive the report is disingenuous in terms of the open court concept. For many it could be viewed as being akin to Crown and defence counsel attending in chambers, working out a verdict and sentence and then entering the court to argue the case. Simply put, that would not be acceptable in terms of open court. At best there would be suspicion the case had already been decided behind closed doors and the hearing open to the public would be little more than a rubber stamp. That must not be, it would not be acceptable in any other aspect of the criminal law.

[288] In *Canadian Broadcasting Corp. v. Named Person*, 2024 SCC 21 the court discussed the importance of open courts:

> [1] When justice is rendered in secret, without leaving any trace, respect for the rule of law is jeopardized and public confidence in the administration of justice may be shaken. The open court principle allows a society to guard against such risks, which erode the very foundations of democracy. By ensuring the accountability of the judiciary, court openness supports an administration of justice that is impartial, fair and in accordance with the rule of law. It also helps the public gain a better understanding of the justice system and its participants, which can only enhance public confidence in their integrity. Court openness is therefore of paramount importance to our democracy — an importance that is also reflected in the constitutional protection afforded to it in Canada.

…

[28] The open court principle has two aspects: first, the public nature of hearings and court records, and second, the right to report on court proceedings. Under this principle, every person, as a general rule, has the right to access the courts, to attend hearings, to consult court records and to report on their content (see *Sherman*, at paras. 1- 2; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1338- 40; S. Menétrey, "L'évolution des fondements de la publicité des procédures judiciaires internes et son impact sur certaines procédures arbitrales internationales" (2008), 40 *Ottawa L. Rev.* 117, at p. 120, quoting A. Popovici, "Rapport sur le secret et la procédure en droit canadien", in *Travaux de l'Association Henri Capitant*, vol. 25, *Le secret et le droit (Journées Libanaises)* (1974), 735, at p. 742).

[29] Coupled with the existence of free, robust and independent news media, the open court principle performs a number of important social and democratic functions. Among other things, it allows for informed debates and conversations in civil society about the courts and their workings, which helps ensure the accountability of the judiciary. As a result, this principle promotes both judicial independence and an administration of justice that is impartial, fair and in accordance with the rule of law. Open justice also facilitates the public's understanding of the administration of justice and enhances public confidence in the integrity of the justice system and all of its participants (see *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at pp. 183 and 185; *Edmonton Journal*, at pp. 1337-40; *C.B.C. v. N.B.*, at para. 23; *Vancouver Sun (Re)*, at paras. 23-25; *Vancouver Sun*, at para. 32; *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19 ("*C.B.C. v. Canada*"), at para. 28; *Denis v. Côté*, 2019 SCC 44, [2019] 3 S.C.R. 482, at para. 45; Menétrey, at pp. 124-27).

[30] Bailey and Burkell eloquently describe some of the important functions of open and transparent justice, including in maintaining the legitimacy of the justice system:

> The very legitimacy of the legal system depends on "public acceptance of process and outcome," and the open court system promotes this acceptance by ensuring the accountability of the justice system. …
>
> …
>
> It is not just judges who are presumably held to account by the open court principle. The principle is also said to support positive results with respect to other justice system players and functions outside of the courtroom, including police officers and warrants. The openness of trials has been held to be an expression of the judge's confidence that what happens in the courtroom is "beyond reproach." Transparency in the processes of justice is not only thought to act as a "powerful disinfectant" for exposing and remedying abuses; by acting in public view, the courts can demonstrate that fair trials (rather than show trials where conviction is a foregone conclusion) are still happening.

> The open court principle, therefore, can clearly be understood to be a means of assuring the public accountability of the court system and its key actors, particularly judges.
>
> [Footnotes omitted.]
>
> (J. Bailey and J. Burkell, "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" (2016), 48 *Ottawa L. Rev.* 143, at pp. 152-53)

[289] The value of sentencing circles is too important to be undermined by suspicions about a judge doing things out of public view. The recommendations will be just as impactful if a judge hears the report in open court, not having participated in a closed/secret/confidential (whatever you want to call it) process. Here the participants agreed to a confidentiality provision related to the circle process. There was no public announcement inviting participation. Had the recommendation been adopted, anyone not having attended would be hard pressed to explain how the decision to impose a CSO in this case could possibly be justified.

[290] It is worth noting that there is an important educational aspect to an open court process. It provides an opportunity for the members of the community to understand how the courts work and how the process affects them.

[291] Dickson J., as he then was, reminded us of the importance of this when, writing for the majority in *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, he stated at p. 185

> … Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings.

[292] The openness of court proceeding has long been an integral part of the criminal justice system. While sentencing circles can be a part of the restorative justice system allowing for Indigenous communities to have a voice, courts must operate in a way that does not foster suspicion. Covertness fosters suspicion.

[293] The sentencing circle process can, like a presentence report, a *Gladue* report, or any other report that comes before the court, be prepared without judicial participation.

[294] In *Vancouver Sun (Re)*, 2004 SCC 43 concerning a reporter who was denied access to an *in-camera* proceeding, the Supreme Court of Canada emphasized the "open court principle" as a "hallmark of a democratic society" (para. 23). Specifically, the Supreme Court explained:

> [24] The open court principle has long been recognized as a cornerstone of the common law: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General), supra*, at para. 21. The right of public access to the courts is "one of principle … turning, not on convenience, but on necessity": *Scott v. Scott*, [1913] A.C. 417 (U.K. H.L.), *per* Viscount Haldane L.C., at p. 438. "Justice is not a cloistered value": *Ambard v. Attorney-General for Trinidad & Tobago*, [1936] A.C. 322 (Trinidad & Tobago P.C.), *per* Lord Atkin, at p. 335. "[P]ublicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity": J.H. Burton, ed., *Bethamiana or, Select Extracts from the Works of Jeremy Bentham* (1843), p. 115.
>
> [25] Public access to the courts guarantees the integrity of judicial processes by demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law": *Canadian Broadcasting Corp. v. New Brunswick (Attorney General), supra*, at para. 22. Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.
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> …
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> [27] Furthermore, the principle of openness of judicial proceedings extends to the pretrial stage of judicial proceedings because the policy considerations upon which openness is predicated are the same as in the trial stage: *MacIntyre, supra,* at p. 183. Dickson J. found "it difficult to accept the view that a judicial act performed during a trial is open to public scrutiny but a judicial act performed at the pretrial stage remains shrouded in secrecy": *MacIntyre*, at p. 186.

[295] Wood, C.J. also wrote about the concept of the open court principal in *R. v. Verrilli*, 2020 NSCA 64:

> [23] In Canada, the open court principle is essential for public confidence in the courts and the administration of justice. Judicial proceedings are presumed to be open to the public and the media and should only be restricted where the party seeking to do so can provide sufficient justification. This principle was described by the Supreme Court of Canada in *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 …

[296] It is important that Indigenous communities have a voice when it comes to sentencing. If sentencing circles are to thrive, the process must not infringe on the open court concept in which courts operate.

[297] Once the recommendations are on the record, as in *Nakashook,* it is for the court to decide upon the sentence within the confines of the law.

[298] My colleague references what it is that a sentencing judge must say in a decision to avoid appellate intervention. I am satisfied Judges are to respond to such reports as they would to presentence reports or *Gladue* reports. A judge need not be explicit in their reasons for adopting or refusing to adopt the recommendations to avoid appellate intervention.

[299] Here the Circle recommended a CSO. In response to that request the judge said:

> [140] In order to be satisfied that a conditional sentence is appropriate, I have to find that a sentence of less than two years is appropriate, and that serving a sentence in the community would not endanger the community, and would be consistent with the fundamental purpose and principles of sentencing. I am not satisfied any parts of that test are met.
>
> [141] Ultimately, protecting society calls for a federal sentence for Mr. Cope. I can't say that he is not a danger to society.

[300] That passage is a clear response and explanation as to why the CSO recommended by the Circle was not available. While it would have been appropriate to expand upon the circle process and recommendations, failure to expand was not, and should not be fatal, to the sentencing decision.

[301] To go further and elevate failure to respond to the level of critical error, is akin to requiring a perfect decision. That is contrary to the direction given by the Supreme Court of Canada where it is clear they do not require specific incantations to avoid appellate intervention. In this case the judge made it clear a CSO was not available because a sentence of two years or less was not appropriate and that the appellant was a danger to the community. She also considered the impact of all relevant factors including *Gladue, Ipeelee,* his heath and addictions issues. To suggest the lack of a more detailed response to the Sentencing Circle Recommendations alone warrants appellate intervention, creates a new stand-alone ground of appeal, and a standard of review which is not justifiable. The standard should remain 'sufficiency of reasons'.

[302] I need look no further than the recent decision of Justice Bourgeois in *R. v. A.P.L.*, 2024 NSCA 48 for a recent statement of principles related to the sufficiency of reasons:

> [22] There is no shortage of decisions from the Supreme Court of Canada articulating the principles relating to assessing the sufficiency of reasons. Those principles were summarized and re-affirmed in *R. v. G.F.*, 2021 SCC 20:
>
> > [68] The importance of trial reasons should not be understated. It is through reasoned decisions that judges are held accountable to the public, ensuring transparency in the adjudicative process and satisfying both the public and the parties that justice has been done in a particular case . . . However, this Court in *Sheppard* emphasized that, for the purposes of appellate review, **"the duty to give reasons is driven by the circumstances of the case rather than abstract notions of judicial accountability"**: para. 42. On appeal, the issue is whether there is reversible error. What is required are reasons that are sufficient in the context of the case for which they were given.
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> > [69] **This Court has repeatedly and consistently emphasized the importance of a functional and contextual reading of a trial judge's reasons when those reasons are alleged to be insufficient** . . .Appellate courts must not finely parse the trial judge's reasons in a search for error . . . **Their task is much narrower: they must assess whether the reasons, read in context and as a whole, in light of the live issues at trial, explain what the trial judge decided and why they decided that way in a manner that permits effective appellate review**. As McLachlin C.J. put it in *R.E.M.***, "the foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded"**: para. 17. And as Charron J. stated in *Dinardo*, "the inquiry into the sufficiency of the reasons should be directed at whether the reasons respond to the case's live issues": para. 31.
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> > [70] This Court has also emphasized the importance of reviewing the record when assessing the sufficiency of a trial judge's reasons. This is because "bad reasons" are not an independent ground of appeal. **If the trial reasons do not explain the "what" and the "why", but the answers to those questions are clear in the record, there will be no error**: *R.E.M.*, at paras. 38-40; *Sheppard*, at paras. 46 and 55.
> >
> > [Emphasis added, citations omitted]
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> [23] As explained in *G.F.*, an appellate court must assess whether the challenged reasons are both factually and legally sufficient:
>
> > [71] The reasons must be both factually sufficient and legally sufficient. Factual sufficiency is concerned with what the trial judge decided and

> why: *Sheppard*, at para. 55. Factual sufficiency is ordinarily a very low bar, especially with the ability to review the record. Even if the trial judge expresses themselves poorly, an appellate court that understands the "what" and the "why" from the record may explain the factual basis of the finding to the aggrieved party: para. 52. It will be a very rare case where neither the aggrieved party nor the appellate court can understand the factual basis of the trial judge's findings: paras. 50 and 52.
>
> …
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> [74] Legal sufficiency requires that the aggrieved party be able to meaningfully exercise their right of appeal: Sheppard, at paras. 64-66. Lawyers must be able to discern the viability of an appeal and appellate courts must be able to determine whether an error has occurred: paras. 46 and 55. Legal sufficiency is highly context specific and must be assessed in light of the live issues at trial. A trial judge is under no obligation to expound on features of criminal law that are not controversial in the case before them. This stems from the presumption of correct application — the presumption that "the trial judge understands the basic principles of criminal law at issue in the trial": *R.E.M.*, at para. 45. As stated in *R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664, "Trial judges are presumed to know the law with which they work day in and day out": see also *Sheppard*, at para. 54. A functional and contextual reading must keep this presumption in mind. Trial judges are busy. They are not required to demonstrate their knowledge of basic criminal law principles.
>
> [75] Conversely, legal sufficiency may require more where the trial judge is called upon to settle a controversial point of law. In those cases, cursory reasons may obscure potential legal errors and not permit an appellate court to follow the trial judge's chain of reasoning: Sheppard, at para. 40, citing *R. v. McMaster*, [1996] 1 S.C.R. 740, at paras. 25-27. While trial judges do not need to provide detailed maps for well-trod paths, more is required when they are called upon to chart new territory. However, if the legal basis of the decision can nonetheless be discerned from the record, in the context of the live issues at trial, then the reasons will be legally sufficient.
>
> [Emphasis added]

[24] The above principles have been applied consistently by this Court, including recently in *R. v. X.J.*, 2023 NSCA 52; *R. v. Kitch*, 2023 NSCA 33; *R. v. J.M.S.*, 2020 NSCA 71, and *R. v. Preston*, 2022 NSCA 66.

[Emphasis in the original decision of Bourgeois J.A.]

[303] As I said above, a more fulsome explanation as to why the recommendations of the Sentencing Circle would show respect and not leave the community feeling

they have not been heard. The lack thereof is not an independent ground justifying appellate intervention.

Disposition

[304] I would grant leave but dismiss the appeal. The majority would impose a sentence of three years to be followed by probation "with conditions to be composed by the original sentencing judge."

[305] With sentencing there is a degree of ownership. When it goes well, few notice, when it is a disaster, all take notice. This judge has already said she had concern for the safety of the public if the appellant is released into the community, yet this court would direct her to do just that. This Court has the authority to sentence the appellant, including crafting the terms of a Probation Order. I am satisfied that if probation is to be imposed it should be imposed by this Court. The Court has the entire file that was before the court below and in fact has new sentencing submissions that differ from what was originally submitted to the sentencing judge.

Scanlan, J.A.