PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Power*, 2016 NSPC 30

Date: 2016/02/12
Docket: 2749266, 2749267, 2780149, 2780152
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Tyler Mark Orland Power

Judge:	The Honourable Judge Theodore K. Tax, J.P.C.
Heard:	January 18, 2016 and February 1, 2016, in Dartmouth, Nova Scotia
Decision	February 12, 2016
Charge:	Sections 355(a), 88(1), 267(b) and 145(3) of the Criminal Code of Canada
Counsel:	William Mathers, for the Crown David Curry, for the Defence

By the Court:

INTRODUCTION:

[1] Mr. Tyler Power has pled guilty to a charge of an assault which caused bodily harm to Mr. Garret Ward, on July 8, 2014 in Dartmouth, Nova Scotia, contrary to section 267(b) of the **Criminal Code**. In terms of that assault causing bodily harm charge, Mr. Power was co-accused with 2 other young men, namely Mr. Tyere Brushett and Mr. Kyle Gannon. At the time of that incident, Mr. Power was subject to a Recognizance which contained a curfew condition, and he has also pled guilty to breaching that condition which was ordered on June 30, 2014, which is an offence contrary to section 145(3) of the **Criminal Code**. The Crown proceeded by way of Summary Conviction on both of those charges.

[2] In addition, Mr. Power has also pled guilty to unlawfully having possession of the property of Todd Norman, of a total value exceeding $5000, knowing that it was obtained by the commission in Canada of an indictable offence, to wit, theft contrary to section 355(a) of the **Criminal Code** on June 30, 2014, in Lower Sackville, Nova Scotia. Mr. Power also pled guilty to the offence of unlawfully having possession of a weapon, to wit, bear spray, knowing that he was not the holder of a licence to possess that substance, for a purpose dangerous to the public

peace, contrary to section 88(1) of the **Criminal Code**, The Crown proceeded by Indictment on both of these charges.

[3] The issue for the Court to determine is a fit and proper sentence in all of the circumstances of the offences and of this particular offender. In terms of Mr. Power's case, in addition to a careful consideration of all of the other sentencing principles set out in sections 718, 718.1 and 718.2 of the **Criminal Code**, in this case, since Mr. Power is an Aboriginal offender and the Court has the benefit of a Gladue Report, the Court is required to pay particular attention to the circumstances of Aboriginal offenders and to consider all available sanctions other than imprisonment that are reasonable in the circumstances [s. 718.2(e) **Code**].

POSITIONS OF THE PARTIES:

[4] The Crown Attorney submits that specific and general deterrence as well as denunciation of the unlawful conduct must be the Court's primary focus in the determination of a fit and appropriate sentence. However, the Crown Attorney also acknowledges that Mr. Power is a youthful offender, the Court should also consider his rehabilitation and in particular, given the fact that Mr. Power is an Aboriginal offender, the Court should also take into account section 718.2(e) of the **Code** and consider all other available sanctions other than imprisonment that are

reasonable in the circumstances. Having considered all of the Gladue factors that are present in this case, the Crown Attorney recommends that Mr. Power be ordered to serve a jail sentence in the range of six to eight months for the two offences which Mr. Power committed on June 30, 2014 and a range of six to eight months consecutive for the assault causing bodily harm and the breach of recognizance which he committed on July 8, 2014. Pre-sentence custody should be credited on a one to one basis since Mr. Power's bail was revoked on an application under section 524(4) of the **Code**. The Crown Attorney also recommends that, following the period of imprisonment, Mr. Power should be subject to a period of two years on terms of probation. The Crown also seeks a DNA order for the assault causing bodily harm offence and a section 110 **Criminal Code** firearms prohibition order for 10 years.

[5] Defence Counsel did not take issue with the Crown's position regarding the primary purposes of this sentencing focusing on deterrence and denunciation of Mr. Power's unlawful conduct, in particular, with respect to the offence of assault causing bodily harm. However, Defence Counsel also submits that the Court should place equal emphasis on the sentencing principle of restraint and given the fact that Mr. Power is an Aboriginal offender and there are several Gladue factors present in this case, the Court is required to take those factors into consideration by

virtue of section 718.2(e) of the **Code**. It is the position of the Defence that a just and appropriate sanction would be a total sentence for all offences of five months imprisonment, less the 80 days of pre-sentence custody that has accrued to Mr. Power based upon a one to one credit [as at January 18, 2016] followed by two years on terms of probation. Defence Counsel also submits that the Court consider the imposition of a Conditional Sentence Order in order to allow Mr. Power to serve his sentence in the community, followed by a lengthy period of probation. The Defence has no objection to the ancillary orders sought by the Crown.

CIRCUMSTANCES OF THE OFFENCES:

[6] During the evening of June 26, 2014, a 2011 Chevrolet Silverado truck was stolen in the area of Lower Sackville, Nova Scotia. The owner of the vehicle discovered that the truck was missing the next morning and reported the theft of his vehicle to the police. On June 30, 2014, police officers saw a truck matching the description provided by the owner and when they ran the licence plate of the vehicle that they had seen, they confirmed that it was the stolen vehicle. The police officer stopped the vehicle, which was being driven by Mr. Tyler Power with two female passengers. Mr. Power was arrested for possession of the stolen vehicle of a value exceeding $5000 contrary to section 355(a) of the **Criminal Code** and when the police officers did a search of the truck, they located a can of bear spray and a

plastic bag with a run of motor vehicle inspection stickers. As a result, Mr. Power was also arrested for the offence of having a weapon dangerous to the public peace contrary to section 88(1) of the **Criminal Code**.

[7] With respect to the charges on July 8, 2014, for which Mr. Power has pled guilty, the parties filed an Agreed Statement of Facts pursuant to section 655 of the **Criminal Code** as Exhibit 1 during the sentencing hearing. As a result of the charges which arose on June 30, 2014, Mr. Power was released under the terms of a Recognizance on June 30, 2014 which included a curfew condition requiring him to remain in his residence from 10 PM to 6 AM the following day, seven days per week with only an exception for medical emergencies or medical appointments. Mr. Power acknowledges the fact that, on July 8, 2014, he was under the terms of that Recognizance and on that date, he remained outside his residence past the curfew time of 10 PM. He acknowledges that he was in breach of his Recognizance (para. 4 - Exhibit 1).

[8] With respect to the charge of the assault causing bodily harm to Mr. Garrett Ward, the Court has the Agreed Statement of Facts signed by the Crown Attorney, Defence Counsel and Mr. Power, which was filed as Exhibit 1 during the sentencing hearing on January 18, 2016. In addition, during the sentencing hearing, the Crown Attorney filed as an exhibit and played the CD recording of a Metro

Transit security video of the assault of Mr. Garrett Ward which was committed by Mr. Power and two other co-accused, at about 9:21 PM on July 8, 2014 at the Dartmouth Metro Transit bus terminal [Exhibit 2]. The agreed facts confirm that a fight broke out between one of Mr. Power's female friends and an unknown female who was at the Dartmouth Metro Transit bus terminal. Although not in the agreed facts, from my review of Exhibit 2 (the video evidence), I find that a second female friend of Mr. Power or one of the other two co-accused intervened in the fight which was initially a one-on-one altercation. Shortly thereafter, the unknown female was knocked to the ground and went into a fetal position while one of Mr. Power's female friends continued to kick at the unknown female. Mr. Garrett Ward, a bus driver who was just outside his parked bus on the other side of the terminal, obviously saw the fight between the females and he immediately ran over to them in an attempt to break up their fight.

[9] Mr. Power and the other two co-accused who had been a short distance away from their female friends when the fight between the females started, began to move towards the altercation between the females. As Mr. Ward reached the fight between the females, he pulled Mr. Power's female friend away from the unknown female who was lying on the ground in a fetal position. At approximately 9:20 PM, I find that the Metro Transit security video [Exhibit 2] clearly demonstrates that

Mr. Power raced forward with Mr. Gannon and they each punched Mr. Ward in the area of his face, which knocked Mr. Ward to the ground. Once Mr. Ward was down on the ground, Mr. Power remained on top of him and punched him two or three more times. Moments later, I find that the second co-accused [Mr. Brushett] intervened by forcefully kicking Mr. Ward in the head while he lay motionless on the ground.

[10] Then, Mr. Power casually walked away from the victim who was lying on the pavement motionless and unconscious, but he returned to the area near where Mr. Ward was lying on the pavement approximately five minutes later. Mr. Power remained in the vicinity of Mr. Ward for approximately one minute, until he walked away from the bus terminal as the first police officer arrived on scene. At about 9:29 PM, the Emergency Health Services ambulance arrived to attend to Mr. Ward.

[11] Mr. Power acknowledges that Mr. Ward was beaten into unconsciousness by himself, Mr. Brushett and Mr. Gannon [para. 13 of Exhibit 1]. The assault of Mr. Ward by the three co-accused was of a relatively brief duration, but it is acknowledged by Mr. Power that when paramedics of Emergency Health Services arrived at the bus terminal a few minutes later, they found Mr. Ward laying on the ground, unconscious, bleeding from his nose and mouth [para.14 of Exhibit 1]. In

addition, Mr. Power acknowledges that, in committing the assault of Mr. Ward, he did not act in his own self-defence, nor did he act in defence of anyone else.

VICTIM IMPACT STATEMENT:

[12] In an e-mail from Mr. Garrett Ward, dated June 14, 2015 [Exhibit 3], he said that he was off work for 48 days before he returned to full-time duty due to the injuries that he sustained during the assault on July 8, 2014. Mr. Ward stated that, after he recovered from his physical injuries, he began suffering dizziness, emotional breakdowns and inability to concentrate. Since suffering a concussion as a result of the assault, he has followed his physician's advice in terms of the therapy for a concussion, but he has not returned to being "100% myself" and his doctor has told him that a relapse may occur down the road. Because he does not know what his attackers look like and they know what he looks like, Mr. Ward still has fears about what might happen if they were to get on a bus that he was driving.

CIRCUMSTANCES OF THE OFFENDER:

[13] Mr. Tyler Power is currently 19 years old, with the date of birth of February 24, 1996. Mr. Power is Mi'kmaq Métis and a member of the Eastern Woodland Métis Nation of Nova Scotia.

[14] Although neither the Crown Attorney nor Defence Counsel requested that a pre-sentence report be prepared by Probation Services, there was a request for the preparation of a Gladue Report [filed as Exhibit 5, as redacted by the agreement of counsel] which outlined all of the circumstances of the offender.

[15] Mr. Power's Aboriginal ancestry comes from his father, Mark Power, whose family grew up in Jeddore, a rural community just outside the Halifax Regional Municipality on the eastern shore of Nova Scotia. Mr. Power's mother, Elisha Helpard is of Scottish ancestry and she grew up in Dartmouth, Nova Scotia. Mr. Power's mother was 18 years old when she was abducted from her family home by a pimp and taken to Ottawa where, for about six months, she was raped, threatened and continuously drugged. She managed to escape from her abductors and return home to Nova Scotia. Mr. Tyler Power is the only child born to Mark Power and Elisha Helpard. Shortly after Mr. Power was born in Dartmouth, the family moved to Burnaby, British Columbia.

[16] After living in British Columbia for a couple of years, the family moved back to Dartmouth and according to Mr. Power's mother, his father became increasingly aggressive towards Tyler and abusive to her, which resulted in the couple separating. Mr. Power's parents battled for his custody for about six years as his father claimed that his mother was subject to "erratic" behavior, alcohol and

drug abuse. Although it is not clear whether his parents shared custody or Mr. Power's father obtained custody, the author of the Gladue Report confirms that Tyler Power spent the majority of his youth with his father.

[17] According to the Gladue Report, Mr. Power's biological father and a step-father who was in a long-term relationship with his mother were both involved in and were ultimately convicted of **Control Drugs and Substances Act** offences. When Mr. Power was in junior high school, the author of the report indicates that Mr. Power stopped taking his ADHD medication which had been prescribed in grade three and started to smoke "weed" and aspired to live a "gangster lifestyle." During this time, Mr. Power also stated that his mother became physically aggressive with him and he often stayed in his room to stay out of his mother's way. As a result of this and other incidents, Child Protection Services became involved and Mr. Tyler Power was placed with his mother's brother for a period of time. Once his mother successfully completed drug rehabilitation, Mr. Power returned to his mother's residence, and he says that she has been sober since that time. Mr. Power stated that his mother is now living with a common law partner, with whom she recently had a baby girl.

[18] When he was 16 years old, Mr. Power was living with his mother, but began to rebel against her and became aggressive towards her. In addition, his attendance

at school and schoolwork began to suffer, with Mr. Power starting to bully other students. Instead of moving forward with his education, his mother was unable to enforce his attendance at school and he became involved in the drug subculture with a group of friends who were apparently stealing his mother's jewelry and money. In addition, Mr. Power continued to show aggression towards his mother until the situation became unbearable, so he moved back in with his father. However, that relationship ended one evening when his father, his father's girlfriend and Mr. Power were drinking together and argued over his father's use of drugs. The verbal altercation escalated to the point where Mr. Power's father punched him in the face, causing him to fall to the floor. As a result, when Mr. Power was 17 years old, he returned to live with his mother.

[19] When Mr. Power returned to live at his mother's house, his girlfriend, Danielle, also came there to live with him, because she had been kicked out of her family home. Mr. Power's mother agreed to let the young couple stay in her house provided that they attended high school and kept the house clean. However, Mr. Power and his girlfriend were not able to abide by those conditions and apparently, they stole additional jewelry from Mr. Power's mother to support their drug habits. During this time, Danielle became pregnant and gave birth to a son who is now two years old. As a result of Danielle's cocaine usage, Child Protective Services

became involved in the care of their son, and it is expected that he will soon be placed in permanent care. Mr. Power hopes that he can turn his life around so that he would be able to take custody of his young son.

[20] The author of the Gladue Report believes that Mr. Power's mother and her common-law partner are "well-suited" to provide stable guidance to Tyler Power to turn his life around. Mr. Power indicated that he is proud of his mother and her ability to change her life and he wants to be able to follow in her footsteps. In addition, Mr. Power's uncle has indicated that when Mr. Power is released, he has found a job for him, unloading trucks for a food service company and could make $400 per week to pay for his own apartment.

[21] In terms of Mr. Tyler Power's health and lifestyle, as indicated previously, in grade three, he was diagnosed with ADHD and Oppositional Defiant Disorder. Mr. Power stopped taking his medications for ADHD when he was 16 years old. As a result of the untimely death of an uncle and other issues in his life, the Gladue Report also notes that Mr. Power has attempted suicide on three occasions.

[22] According to the information contained in the Gladue Report, Mr. Power stopped going to school at age 16 and, as a result, grade 10 was the last grade that he successfully completed. Mr. Power told the author of the Gladue Report that he

is considering finishing high school through the Flex program, but at the time he was arrested, he was looking for work as a laborer. There was no reference within the report to any specific training that Mr. Power had received, nor did it indicate any references to any employment. However, the Gladue Report did also mention that, a few years ago, Mr. Power's finances had been provided by his involvement in the drug subculture.

[23] In terms of Mr. Power's Corrections History, the Crown Attorney filed a JEIN Bail Report for Mr. Tyler Mark Power which confirms that he has been sentenced for four offences as an adult which arose either on the date of the charge for the assault causing bodily harm to Mr. Ward [July 8, 2014] or subsequent to that date. Mr. Power received 15 days in custody for a breach of Recognizance contrary to section 145(3) of the **Code** on February 9, 2015, which was served on an intermittent basis. The offence date for that charge was February 6, 2015. In addition, on June 15, 2015, he received two days of custody for two charges of possession of the substance contrary to section 4(1) of the **CDSA**, with an offence date of July 8, 2014.

[24] On November 30, 2015, Mr. Power received a consolidated sentence for three separate offences which were committed on June 14, 2015 - a theft under charge contrary to section 334(b) of the **Code**, an assault charge contrary to section

266 of the **Code** and a failure to comply with the Recognizance or undertaking contrary to section 145(3) of the **Code**. The sentences imposed for those three offences committed on June 14, 2015 were: (1) 60 days for the theft under, (2) 120 days for the assault charge and (3) 29 days for the breach of recognizance, which appear to have served by his appearance in court and credit for pre-sentence custody. Mr. Power was also placed on terms of probation for 18 months following his imprisonment.

[25] The Crown Attorney also referred to two Youth Court dispositions for which Mr. Power received a conditional discharge on June 14, 2013 for the offences of failure to attend court contrary to section 145(2)(b) of the **Code** and a charge of a threat to cause death or bodily harm contrary to section 264.1(1)(a) of the **Code**. The offence dates of those Youth Court charges were January 21, 2012 for the threats charge and November 8, 2012 for the failure to attend court.

AGGRAVATING AND MITIGATING CIRCUMSTANCES:

[26] Section 718.2 (a) of the **Code** states that a court, in imposing sentence should increase or decrease the sentence after taking into account any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[27] I find that there are several mitigating factors in this case:

1. Early guilty pleas to all offences were entered by Mr. Power, thereby saving significant court time, which also spared the victims, in particular, Mr. Ward, from having to come to court and relive the trauma of the offence;

2. Mr. Power is a youthful, Aboriginal offender;

3. He had no prior adult or Youth Criminal Justice Act record at the time of these offences;

4. He has expressed his remorse for his behavior;

5. Mr. Power has accepted full responsibility for the offences before the Court; and

6. The redacted Gladue Report contains several systemic and personal Gladue factors for the Court to consider in mitigation of Mr. Power's moral culpability for the offences before the Court.

[28] However, I also find that there are several aggravating factors:

1. The assault which caused bodily harm was a vicious and unprovoked attack by Mr. Power to either thwart efforts of Mr. Ward, who was acting solely as a good Samaritan to break up the physical confrontation that he saw between the females in the bus terminal or

to retaliate for Mr. Ward's intervention by pulling one of his female friends back away the unknown female lying in the fetal position on the ground;

2. After the initial "sucker punches" by Mr. Power and Mr. Gannon had knocked Mr. Ward to the ground, Mr. Power continued to punch the victim who was at that point, in all likelihood, unconscious and laying on the ground, motionless and defenseless when he was kicked in the head by Mr. Brushett;

3. As a result of the assault by Mr. Power and the other two co-accused who essentially "swarmed" the victim, Mr. Ward suffered bodily harm which caused him to miss a significant amount of work and he still feels the emotional and physical aspects of that assault;

4. Offences of this nature are unfortunately all too common in this community.

GLADUE PRINCIPLES AND SECTION 718.2(E) CRIMINAL CODE:

[29] The specific wording of section 718.2 (e) of the **Code** that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders," requires a sentencing judge to consider alternatives to the

use of imprisonment as a penal sanction. This sentencing factor is, for all intents and purposes, a principle of restraint. Except in cases in which no other sanction or combination of sanctions is appropriate to the offence(s) and the offender, imprisonment is a penal sanction of last resort: see **R. v. Gladue**, 1999 CanLii 679 (SCC) at para. 36.

[30] The specific reference to Aboriginal offenders in section 718.2 (e) of the **Criminal Code** is meant to alter the method of analysis which sentencing judges must use in determining a fit and appropriate sentence for Aboriginal offenders. Section 718.2(e) is meant to be a remedial provision in recognition of the fact that Aboriginal people are seriously overrepresented in the prison populations across Canada, and in recognition of the reasons for which that overrepresentation occurs: see **R. v. Ipeelee**, 2012 SCC 13 at para. 59 and **Gladue**, *supra*, at para. 93.

[31] The appropriateness of a sentence depends on the particular circumstances of the offence, the offender and the community in which the offender committed the offence. The individualized focus in sentencing decisions creates a disparity among sentences for similar crimes: see **Gladue,** *supra***,** at para. 76. As a result of that individualized focusing in sentencing decisions, Watt J.A. noted in **R. v. Jacko, Cooper and Manitowabi**, 2010 ONCA 452, 2010 Carswell 4032 (Ont. C.A.) at para. 64 that:

> [64] Restorative justice objectives do not trump other sentencing objectives in every case involving Aboriginal offenders. Separation, denunciation and deterrence retain their fundamental relevance for some offenders who commit serious offences. As a general rule, the more serious and violent an offence, the more likely it is that the terms of imprisonment imposed on similarly-circumstanced Aboriginal and non-Aboriginal offenders will not differ significantly, and indeed may be the same. That said, in some instances of serious and violent crime, the length of a sentence of an Aboriginal offender may be less than that imposed on a non-Aboriginal offender: **Gladue** at paras. 79 and 80. Serious crime and the objectives of restorative justice are not incompatibles in the sentencing process-restorative justice objectives may predominate in the sentencing decision for Aboriginal offenders convicted of serious crimes: **R. v Wells**, [2000] 1 SCR 20, at para. 49; **R. v. Whiskeyjack** (2008), 93 OR (3rd) 743 (Ont.C.A.), at para. 29.

[32] More recently, in **Ipeelee**, *supra*, the Supreme Court of Canada stated, at para. 59, that:

> [59] … when sentencing an Aboriginal offender, a judge **must** consider: (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: (**Gladue**, at para. 66).
>
> [Emphasis Added]

[33] In terms of the broad systemic and background factors affecting Aboriginal people generally, the Court made it clear in **Ipeelee**, *supra*, at para. 60, that:

> [60] … courts **must** take judicial notice of such matters as the history of colonialism, displacement and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide and of course, higher levels of incarceration for Aboriginal peoples… these matters on their own, do not necessarily justify a different sentence for Aboriginal people. Rather, they provide the necessary **context** for understanding and evaluating the case-specific information presented by counsel. Counsel have a duty to bring that individualized information before the court in every case, unless the offender expressly waives his right to that information being considered.

[Emphasis Added]

[34] In **Ipeelee**, at para. 73, the Court added that

> [73] First, the systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness. … the unique systemic and background factors that are mitigating in nature in that they may have played a part in the Aboriginal offender's conduct… failing to take those circumstances into account would violate the fundamental principle of sentencing—that the sentence must be proportionate to the gravity of the offence *and the degree of responsibility of the offender* [emphasis in original text].

[35] However, the Court specifically noted in **Ipeelee**, *supra*, at para. 75, that:

> [75] Section 718.2(e) does not ask courts to remedy the overrepresentation of Aboriginal people in prisons by artificially reducing incarceration rates. Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavor to achieve a truly fit and proper sentence in any particular case. … **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.

[36] As for the parity principle in section 718.2(b), the Supreme Court of Canada stated in **Ipeelee**, *supra*, at para.79 that:

> [79] In practice, similarity is a matter of degree. No two offenders will come before the courts with the same background and experiences, having committed the same crime in the exact same circumstances. Section 718.2 (b) simply requires that any disparity between sanctions for different offenders be justified. To the extent that **Gladue** will lead to different sanctions for Aboriginal offenders, those sanctions will be justified based on their unique circumstances, which are rationally related to the sentencing process.

[37] However, the Court also observed, in **Ipeelee**, *supra*, at paras. 81-83, that there is no requirement for the offender to establish a causal link between

background factors and the commission of the current offence before being entitled to have those factors considered by the sentencing judge. The Supreme Court of Canada recognized that it would be "extremely difficult for an Aboriginal offender to ever establish a direct causal link between his circumstances and his offending" and the operation of section 718.2 (e) does not logically require such a connection. Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine the appropriate sentence. However, unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.

[38] In the redacted Gladue Report [Exhibit 5], the author has stated, and both counsel have acknowledged, that the following Gladue Factors are present:

1. Mr. Tyler Power is a man of Mi'kmaq Métis descent;
2. There is strong support and culturally appropriate treatment available for Tyler Power, including substance abuse treatment and personal counseling;
3. Tyler Power has personally experienced the adverse impact of many factors continuing to plague Aboriginal communities since colonization, including:
    a. family deterioration, separation and absent parents;
    b. substance abuse personally and in the immediate family;
    c. low income and unemployment due to lack of education;
    d. poverty and covert racism;

e. violence in the family;
f. family involvement in the criminal environment;
g. loss of identity, culture and ancestral knowledge.

ANALYSIS:

[39] In all sentencing decisions, determining a fit and proper sentence is highly contextual and is necessarily an individualized process which depends upon the circumstances of the offence and the particular circumstances of the specific offender. On this point, the Supreme Court of Canada stated, in **R. v. M.(C.A.)**, [1996] 1 SCR 500 at paras. 91 and 92, that the determination of a just and appropriate sentence requires the trial judge to do a careful balancing of the societal goals of sentencing against the moral blameworthiness of the offender and the gravity of the offence while at the same time taking into account the victim or victims and the needs of and current conditions in the community.

[40] Given the circumstances of the offences committed by Mr. Power, I agree with both counsel that denunciation of the unlawful conduct and specific and general deterrence are primary purposes of sentencing in section 718, especially with respect to the serious crime of violence. In addition, however, given Mr. Power's young age, lack of any prior criminal record at the time of the offences before the Court, his status as an Aboriginal offender and his present circumstances, I find that the sentencing decision must also focus on efforts to

rehabilitate him, promote a sense of responsibility and acknowledge harm done to the victim.

[41] The Court must also consider the fundamental sentencing principle of proportionality in section 718.1 **Criminal Code** - the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Here, I find that the most serious of all the charges is the vicious assault on a good Samaritan who was trying to break up the fight between females when he was suddenly attacked by Mr. Power and two others, causing serious injuries to be suffered by Mr. Ward. I find that the gravity of the offence is at the higher end of a continuum of assaults, since this unprovoked attack caused significant bodily harm and injuries to the victim, which lasted several weeks. In addition, I find that Mr. Power continued to assault Mr. Ward while he was laying on the ground, motionless, defenseless and probably unconscious. In those circumstances, I find that Mr. Power's degree of responsibility for his role in the assault causing bodily harm to Mr. Ward, is also very high.

[42] With respect to other principles of sentencing found in section 718.2 of the **Code**, in addition to considering the parity principle, the impact of the aggravating and mitigating circumstances that are present in this case, as I indicated above, section 718.2(e) requires me to consider background and systemic factors in

crafting a sentence and all available sanctions other than imprisonment that are reasonable in the circumstances for all offenders, with particular attention to Aboriginal offenders like Mr. Power, and not to deprive the offender of his liberty if a less restrictive sanction is appropriate in all the circumstances of the case.

[43] As indicated previously, Defence counsel has submitted that the Court impose a short, sharp period of imprisonment for all offences or a more lengthy Conditional Sentence Order ("CSO") as a means of accomplishing all of the sentencing purposes and principles at play in this case. It is the position of the Defence that the imposition of a CSO would immediately allow Mr. Power to continue his rehabilitation in the community.

[44] In **R. v. Proulx**, [2000] 1 SCR 61, Chief Justice Lamer said at para. 102 that:

> [102] Incarceration will usually provide more denunciation than a conditional sentence, as a conditional sentence is generally a more lenient sentence than a jail term of equivalent duration. That said, a conditional sentence can still provide a significant amount of denunciation. This is particularly so when onerous conditions are imposed and the duration of the conditional sentence is extended beyond the duration of the jail sentence that would ordinarily have been imposed in the circumstances.

[45] Similar remarks with respect to deterrence were expressed by the Chief Justice in **R. v. Proulx**, *supra*, at para. 107, however, Chief Justice Lamer went on to say that:

> [107] Nevertheless, there may be circumstances in which the need for deterrence will warrant incarceration. This will depend in part on whether the offence is one in which the effects of incarceration are likely to have a real deterrent effect, as well as on the circumstances of the community in which the offences were committed.

[46] In this case, I find that a conditional sentence order is an available sanction which may be imposed by the Court under section 742.1 of the **Criminal Code** as there is no maximum term of imprisonment or minimum term of imprisonment which would preclude the Court from making a conditional sentence order of imprisonment to be served in the community.

[47] In terms of the offences committed on July 8, 2014, I conclude that a CSO is an available option with respect to the charge of assault causing bodily harm contrary to section 267(b) of the **Code** since the Crown proceeded summarily and therefore, the maximum sentence for that offence is a term of imprisonment not exceeding 18 months. The section 145(3) **Code** offence for breaching the terms of a recognizance, was also prosecuted by way of summary conviction and it is subject to a maximum sentence of imprisonment not exceeding six months. In terms offences committed on June 30, 2014, both were prosecuted by indictment and therefore, the possession of stolen property exceeding $5000 charge contrary to section 355(a) of the **Code** is subject to a maximum term of imprisonment not exceeding 10 years. The section 88(1) **Code** offence for unlawfully having possession of a weapon for purpose dangerous to the public peace, is subject to a

maximum term of imprisonment not exceeding 10 years. However, I find that none of the CSO limiting criteria which are listed in s.742.1(b)-(f) of the **Code** are present in the circumstances of this case.

[48] Furthermore, I conclude that a CSO remains an available sanction since I find that the range of sentence recommended by the Crown Attorney and Defence Counsel and my review of several sentencing precedents, would not result in a federal term of incarceration. On the other hand, I also find that it would not be a just and appropriate sanction to suspend passing sentence on Mr. Power and order him to be under terms of probation for a lengthy period of time.

[49] Therefore, since a CSO remains an "available" sanction, the key question to determine is whether a CSO is a just and "appropriate" sanction or whether the circumstances of this offence, the particular circumstances of this offender and the needs of the community to maintain a just, peaceful and safe society require the separation of this offender from society in order to deter him and other like-minded persons from committing offences of this nature.

[50] As I indicated previously, the just and appropriate sanction is determined by the primary purposes and principles of sentencing in play in sections 718, 718.1 and 718.2 of the **Criminal Code**. The Supreme Court of Canada has made it very

clear, on many occasions, that the proportionality principle found in section 718.1 of the **Code** is the fundamental principle of sentencing. Of course, other sentencing principles found in section 718.2 have to be considered in determining the just and appropriate sanction, such as the relevant aggravating or mitigating circumstances which will either increase or reduce the sentence imposed as well as the parity principle, totality and restraint.

[51] In this case, since Mr. Power was one of the three co-accused who committed the assault which caused bodily harm to Mr. Ward, for the purposes of the parity principle in section 718.2(b) of the **Criminal Code**, I have been informed of the sentences imposed by Judge Hoskins on Mr. Brushett and Mr. Gannon. While all three young men were involved in the assault of Mr. Ward, I find that each one of them had a different role and that there are certainly distinguishing features in their personal circumstances.

[52] In Judge Hoskins' unreported sentencing decision with respect to Kyle Gannon, which was made subsequent to his sentencing decision of Mr. Brushett, Judge Hoskins commented on the particular circumstances of Mr. Gannon and the role played by him in the assault of Mr. Ward in order to determine whether he and Mr. Brushett were, in reality, similar offenders who had committed similar offences in similar circumstances. In the final analysis, Judge Hoskins sentenced

Mr. Gannon to a CSO of imprisonment in the community of 12 months followed by 18 months on terms of a probation order. Mr. Brushett was sentenced to serve a period of six months in jail followed by 24 months on terms of a probation order.

[53] In the Gannon decision, Judge Hoskins explained that there were significant differences in the role played by those two offenders and their particular personal circumstances. Mr. Gannon did not have any prior record of any nature, the pre-sentence report was very positive, the incident was completely out of character, possibly due to the fact that he was under the influence of alcohol at the time of the incident. In addition, it was noted that Mr. Gannon had entered an early guilty plea, expressed complete remorse, had accepted full responsibility, he had strong family support and he had commenced his rehabilitative efforts by enrolling in an anger management course.

[54] On the other hand, Judge Hoskins noted that Mr. Brushett had a prior record for crimes of violence, was subject to a probation order at the time of the assault causing bodily harm to Mr. Ward and he found that Mr. Brushett's role in the assault was considered to be the "most egregious" as he viciously and forcefully kicked Mr. Ward in the area of his face while Mr. Ward lay motionless and defenseless on the ground, after being punched by the other two co-accused. Given Mr. Brushett's failure to abide by court orders in the past, the serious nature of this

crime of violence and a previous crime of violence, Judge Hoskins determined that a CSO of imprisonment in the community was not an appropriate option given the risk of Mr. Brushett re-offending in the community.

[55] In terms of Mr. Power's role in the assault causing bodily harm, I find that the security video initially shows him at a distance from the females who became involved in the physical altercation, but standing near and generally in front of a private security official who was on the phone as females came to blows. Very shortly after the second female, who was with Mr. Power, intervened in the physical confrontation between her friend and the unknown female, Mr. Power started to move towards them, but as Mr. Ward ran over to attempt to break up the fight between the females, Mr. Power and Mr. Gannon raced forward to intercept him. As soon as Mr. Gannon and Mr. Power reached Mr. Ward, they both immediately punched him, which knocked the victim to the ground. While it appears that Mr. Gannon backed off from Mr. Ward, Mr. Power stood over Mr. Ward and continued to punch him at least two or three more times, while he was laying on the ground, motionless and defenseless. Based upon a significant difference in the actions of Mr. Power compared to Mr. Gannon as well as the significant differences in their personal circumstances, I find that Mr. Power's

actions were much closer to the gravity of the offence and degree of responsibility which was assessed by Judge Hoskins for Mr. Brushett than for Mr. Gannon.

[56] In addition to considering the parity principle as it applied to the three offenders who were actually involved in the assault causing bodily harm to Mr. Ward, it is also important to review other sentencing precedents which involved similar offenders who have committed offences in similar circumstances, to establish a range of sentences for the particular offences before the Court.

[57] In that regard, the Crown Attorney referred to **R. v. Cormier**, 1994 NSCA 83, where the Court overturned the trial court's decision of a suspended sentence and two years on probation and substituted a six month jail sentence followed by two years on probation for a charge of assault causing bodily harm contrary to section 267(1)(b) of the **Code**. The victim was a passenger on a bus when three young men boarded the bus and sat beside him. The three young men verbally and physically taunted the victim, and when the victim got off the bus, the three young men followed and continued to physically harass him. One of the young men struck the victim first, but then the offender punched the victim with a most significant blow to the face which rendered him almost unconscious. The attack on the victim was completely unprovoked. The victim was taken to the hospital, his nose was fractured, he had two black eyes, suffered severe headaches that caused

him to miss work for a week and he still had those headaches 15 months later, at the time of the sentencing hearing.

[58] The question on appeal was whether the gravity of the offence was such that a youthful first-time offender should receive a custodial sentence. The Court stated that the overriding consideration in sentencing with respect to crimes of violence is specific and general deterrence. The Nova Scotia Court of Appeal also noted in **Cormier** *supra*, at para. 44, that there had been several recent incidents of youthful gangs "swarming" innocent citizens in the community and that the sentence imposed was clearly inadequate. While that case is similar in many respects to the instant case; however, it is important to note that the decision was rendered on April 8, 1994 and that the regime for CSO's set out in the **Criminal Code** only came into force in September 1996. Therefore, neither the trial court nor the Court of Appeal were able to consider the option of a CSO of imprisonment in the community.

[59] In **R. v. Mackenzie**, 1997 CanLii 15004 (NSSC), the victim, who was acting as a "good Samaritan" very much like Mr. Ward in the present case, stopped a fight between two females while a large crowd which had gathered around the two females, was cheering them on. When the victim tried to leave the area, a crowd gathered around him and started taunting him. The accused hit the victim in the

back of the head with a beer bottle, which knocked him down and then the mob proceeded to kick the victim while he was on the ground. As a result of this attack, the victim suffered torn ligaments and severe break in his leg, a concussion, a broken nose, a black eye and cracked ribs. The victim spent a week in hospital and needed an operation to insert a six inch steel plate with screws to stabilize his leg. He was off work for three months, then returned to work on light duties for a time, but was still experiencing pain a year later.

[60] On a summary conviction appeal, Scanlan J. (as he then was) held that the sentence imposed by the trial judge of 90 days in custody was "clearly inadequate" and substituted a sentence of six months in jail. At the time of this incident, the CSO of imprisonment in the community pursuant to section 742.1 of the **Code** was in force. In granting the appeal, Scanlan J. said that where there are crimes of violence like this one which involved the "brutal and intentional application of force" by the offender and others as a part of a "mob scene," then, general deterrence and denunciation of the unlawful conduct called for periods of imprisonment to be served in prison.

[61] Although there are some aspects of the **Mackenzie** decision which are quite similar to the instant case, I note that the victim's injuries in that case were more significant and the offender had two prior convictions for crimes of violence.

[62] In **R. v. Metzler**, 2008 NSCA 26, the offender and two other men met the victim outside a convenience store where he was taking a break from work at 3 AM. They demanded cigarettes from him, but when the victim refused, one of the people with the offender "sucker punched" him twice. The offender then punched the victim with a closed fist on his jaw which caused severe injuries. The victim's jaw was broken and required surgery, and he had a permanent scar on his face. He also sustained damage to two teeth which required dental reconstruction. The trial judge ordered a period of 22 weeks imprisonment followed by 12 months on terms of probation.

[63] The Court of Appeal dismissed Mr. Metzler's conviction and sentence appeals. Mr. Metzler was a 20-year-old high school graduate, with no criminal record and had received awards for bravery. The trial judge had rejected the Crown's recommendation of a CSO and the Defence recommendation for a conditional discharge. The trial judge declined to order a CSO as he concluded that the offender posed danger to community safety because of the violent nature of his offence and that he had breached the terms of his release pending sentencing. The Court held that the sentence was fit in the circumstances of this "brutal, unprovoked and random assault" which had profound and lasting consequences for the victim.

[64] In **R. v. Sutton**, 2012 NSPC 98, the accused pled guilty to assault causing bodily harm which was committed while he was highly intoxicated. The incident occurred outside a bar when the victim, who was also highly intoxicated, invited the offender and three other people to join him at a party. In an unprovoked assault, the offender suddenly threw a punch, striking the victim in the face which knocked him to the ground and rendered him unconscious. While the victim was lying on the ground, he was further assaulted by the accused and the other three males. As a result of the assault, the victim suffered a concussion and injuries to his eye and teeth. The accused was 19 years of age time of the offence and had no prior record. The pre-sentence report was very positive, he was employed full-time and he would likely lose his employment if he was incarcerated. In that case, which was before me, taking into account specific and general deterrence, denunciation of the conduct as well as rehabilitation, promoting a sense of responsibility in the Mr. Sutton and restraint, a sentence of 90 days incarceration was imposed, to be served on an intermittent basis, followed by two years under terms of a probation order.

[65] More recently, in **R. v. Googoo**, 2015 NSSC 110, Justice Edwards sentenced an Aboriginal offender, who was 30 years old at that time, for an assault causing bodily harm to his common-law wife's sister contrary to section 267(b) of the **Criminal Code** and for an assault on his common-law wife contrary to section 266

of the **Criminal Code**. Briefly, the Court found that all three people had been out drinking and were intoxicated. Back at their home, Mr. Googoo and his wife got into a verbal argument in their bedroom, which escalated and Mr. Googoo began choking his wife. When his sister-in-law tried to intervene, Mr. Googoo punched her in the face, knocking her to the ground and then, he continued punching her in the face. The assault ended after Mr. Googoo jumped on her leg and broke it.

[66] A Gladue report was prepared in **Googoo**, which noted that his father was violent, abused alcohol and his mother had psychological issues. At age seven, Mr. Googoo was diagnosed with ADHD and by the time he was 14 years old, he had been placed in his third foster home, where he was subjected to sexual abuse. In 2002, Mr. Googoo was diagnosed with bipolar symptoms and left school at grade eight. He managed to complete level II of the Adult Learning Program at Springhill Institution. His employment history was picking blueberries in Maine and some lumber work in the woods for a relative. Mr. Googoo had 45 prior convictions as an adult including several crimes of violence and breaches of court orders.

[67] In **Googoo**, Mr. Justice Edwards took into account the Gladue factors which had been personally experienced by Mr. Googoo - substance abuse among his immediate family and peers, family deterioration, violence and abuse, suicide and

loss within family, community and peers, low income and unstable employment due to lack of education, substance abuse and loss of identity, culture and ancestral knowledge. In the final analysis, while the Court noted that there were many culturally appropriate programs available to Mr. Googoo in the community, the Court sentenced the offender to total a period of three years in a federal penitentiary less 304 days credit for pre-sentence custody.

[68] The Court noted that these were violent crimes which must be denounced and that the sentence must be one which would deter both Mr. Googoo and others from committing such offences and that there was a need to separate him from society in this case. While the Court had considered a CSO of two years less one day to be followed by a lengthy period of probation, Edwards J. determined, at para. 28, that the circumstances of the offences, Mr. Googoo's prior record and the key statutory aggravating factor that the assaults were committed upon his common-law partner and her sister in her house, all required the imposition of a sentence of imprisonment, greater than two years.

[69] Based upon the sentences imposed by Judge Hoskins on Mr. Power's co-accused for assaulting Mr. Ward as well as my review of several sentencing precedents for similar offences committed in similar circumstances by similar offenders, I find that the range of sentence for Mr. Power's role in the vicious and

unprovoked assault to thwart the efforts of a "good Samaritan" trying to break up a fight between females, which assault continued after the victim had been knocked to the ground, motionless and defenseless would range between three to six months in jail. I also found that the gravity of Mr. Power's offence and his degree of responsibility are both very high, and therefore, I find that his conduct would result in a sentence at the higher end of that range.

[70] In terms of the range of sentences for the other most serious offence, that is, the possession of a weapon, to wit, bear spray that is capable of injuring, immobilizing or otherwise incapacitating a person for purpose dangerous to the public peace, contrary to section 88(1) **Criminal Code** on June 30, 2014, I note that the Crown elected to proceed by way of indictment for that offence. As a result, Mr. Power faces a maximum punishment of up to 10 years of imprisonment. The offence of possession of property obtained by crime over $5000 contrary to section 355(a) **Code** is an indictable offence with a maximum sentence of imprisonment of 10 years.

[71] In terms of the possession of a weapon dangerous to the public peace, it would appear that there is a wide range of sentences that have been ordered by courts, through an individualized sentencing approach to the circumstances of the offence and the particular circumstances of offender. In some cases, courts have

ordered a significant fine, while in other cases, courts have ordered a term of imprisonment.

[72] As an example of the wide range of sentences for the possession of a weapon dangerous to the public peace, in **R. v. Ugodnikov**, 2008 ABPC 249, the offender was convicted of wielding a knife in Edmonton on a busy street filled with fans following a Stanley Cup playoff game. The accused was a young man with no prior record, the pre-sentence report was positive, but the Court found that brandishing a knife in those circumstances was a very dangerous act, obvious to all, except the offender. In ordering a sentence of 60 days in jail, the Court noted, at para. 44:

> [44] In my view it is absolutely necessary the persons who decide to carry a weapon on Whyte Avenue or anywhere else in the City must understand that the consequences will be that you go to jail. Anything less than that simple message will not, in my view, suffice to provide for general deterrence. The public is entitled to, at least, that protection from the courts. Anything less encourages serious injury and more.

[73] In **R. v. Clarke**, 2012 CarswellNfld 348 (NLPC) the offender was found guilty of assaulting two individuals and carrying a weapon dangerous to the public peace, which in that case was having a locking knife, with the blade locked open in his pants pocket during the assault of the two individuals. In that decision, the Court reviewed several cases where the offender had possession of a weapon dangerous to the public peace, in particular, a knife, which ranged from two to five

months in jail. In the case, the Court ordered 30 days concurrent for each of the two assaults, one day concurrent for causing a disturbance and 60 days consecutive for carrying a knife for purpose dangerous to the public peace.

[74] More recently, in **R. v. Collins**, 2015 Carswell Nfld 490 (NLPC) the offender was seen by Sheriff's officers at 9 AM outside the Family Division courthouse in St. John's, brandishing a chainsaw. When the police arrived, the offender was ordered to stop, but he continued revving the chainsaw and approaching the officer who had drawn his service revolver. Eventually, Mr. Collins put the chainsaw down the ground and surrendered to police. During the sentencing hearing, the offender stated that he was frustrated and "emotionally worn out" by the family court proceedings. He claimed that he had no intention to harm anyone, and he only used the chainsaw as an attention seeking exercise and to "make some noise." Mr. Collins had no prior criminal record, pled guilty at an early stage and acknowledged that what he did was wrong. The Court noted that in the context of the use of a chainsaw as weapon for a purpose dangerous to the public peace, "it is not difficult to appreciate the alarm, fear and concern which Mr. Collins' actions must have generated that morning at a busy courthouse." Given the seriousness of the offences and the fact they were directed towards justice system participants, deterrence and denunciation were held to be the primary

consideration. The Court ordered a sentence of six months of imprisonment with a sentence of three months, served concurrently, being ordered for the offence of assaulting a peace officer.

[75] From those sentencing precedents, I find that the sentence for the possession of a weapon dangerous to the public peace would result in a period of imprisonment in the range of two to six months in jail, depending upon the circumstances of the offence and the circumstances of the particular offender. In this case, while I have no evidence that the weapon was actually used in the commission of an offence, I find that specific and general deterrence must be the primary purposes of this sentencing decision, as it is important that the Court send a clear message that if a person decides to carry a weapon for a purpose dangerous to the public peace in this community, there will be serious consequences as the Court has a responsibility, through sentencing, to maintain a just, peaceful and safe society.

THE JUST AND APPROPRIATE SANCTION:

[76] It is worth repeating that with respect to the proportionality principle found in section 718.1 of the C**ode,** I have found that the gravity of the assault causing bodily harm is at the higher end of a continuum of assaults given the nature of the

assault and the injuries suffered by Mr. Ward. Furthermore, I have found that Mr. Power's moral culpability is also very high for his vicious and completely unprovoked "sucker punches" on an unsuspecting, good Samaritan which knocked the victim to the ground where Mr. Power continued to throw two or three punches to the face while the victim lay motionless, defenseless and probably unconscious. In these circumstances, I find that Mr. Power's assault of Mr. Ward and the actions of the other two co-accused caused significant bodily harm to the victim.

[77] In addition, I find that general and specific deterrence as well as denunciation of the unlawful conduct are the primary purposes of sentencing where there are serious crimes of violence, especially in circumstances which involved gratuitous, unprovoked, "swarming" violence by a group perpetrated upon an unsuspecting stranger, who was simply attempting to act as a good Samaritan and break up a fight between the females. However, I also find that, given the fact that the offender is a youthful, Aboriginal offender who, at the time of these offences, had not been previously convicted of any criminal offence, the sentencing decision should also assist the offender in his rehabilitation as well as promoting sense of responsibility in him. Therefore, I also find that the sentencing principles of restraint mentioned in 718.2(d) and 718.2(e) of the **Code**, in particular, with

respect to the circumstances of Aboriginal offenders, must be taken into account in determining the appropriate disposition.

[78] As I indicated previously, a CSO of imprisonment in the community is an "available" sentencing option, and therefore, I must also determine whether, in all the circumstances of the case, it is the "appropriate" sentencing option. Section 742.1 of the **Criminal Code** requires the Court to take into account the following factors in reaching that determination and be satisfied that: (1) the service of the CSO in the community would not endanger the safety of the community and (2) such an order would be consistent with the fundamental purposes and principles of sentencing set out in sections 718-718.2 of the **Code**.

[79] In **Proulx**, *supra*, at para. 69, Lamer C.J.C. provided guidance to trial courts in the evaluation of the danger to the community. In assessing the danger to the community posed by the offender who is serving his or her sentence in the community, the Court should take into account: (a) the risk of the offender reoffending; and (b) the gravity of the damage that could ensue in the event of re-offence. If the judge finds that there is a real risk of re-offence, incarceration should be imposed. The Supreme Court of Canada went on to note that some factors relevant to assessing the risk of re-offence include whether the offender has a prior criminal record which might suggest that he or she would not be able to

abide by the strict conditions of a conditional sentence, the risk that a particular offender poses to the community and the personal circumstances of the offender.

[80] In this case, although Mr. Power did not have a prior criminal record at the time of these offences, there were two subsequent convictions for failing to comply with the recognizance or undertaking contrary to section 145(3) of the **Code** on February 6, 2015 and June 14, 2015, with the sentences for those offences being imposed on February 9 and November 30, 2015; he was sentenced on June 15, 2015 for two offences of possession of a controlled substance contrary to section 4(1) of the **Controlled Drugs and Substances Act ("CDSA")**, which offences occurred on July 8, 2014, which was the date of the charge of assault causing bodily harm to Mr. Garrett Ward and finally, Mr. Power was also sentenced on November 30, 2015 for an assault charge contrary to section 266 of the **Code** and a theft under charge 334(1)(b) of the **Code** with an offence date of June 14, 2015. From this record of convictions, I find that Mr. Power has, since the date of the offences before the Court, failed to comply with the terms and conditions of a Recognizance and he has also committed crimes of violence, **CDSA** offences, as well as property offences.

[81] While Mr. Power is a youthful, adult, Aboriginal offender, I find that the evidence of his breach of court orders and commission of several criminal offences

while under terms of a recognizance pending trial or resolution of several criminal charges, is a significant factor in assessing his future conduct.

[82] In addition, the number and variety of convictions stemming from charges which arose before, at the same time as or subsequent to the current charges that are before the Court today for sentencing, does not really limit the nature of the risk posed by Mr. Power to those offences which would not involve a risk of physical or psychological harm to individuals. In these circumstances, I cannot conclude that either the risk of reoffending or the gravity of the potential damage to the community in the case of reoffending would be minimal. When considering this criterion, the Court noted in **Proulx**, at para. 74, that even a small risk of very harmful future crime may well warrant a conclusion that this pre-requisite is not met. Taking into account all of the foregoing factors and the personal circumstances of the offender, I cannot conclude that Mr. Power serving a CSO of imprisonment in the community would not endanger the safety of the community.

[83] In terms of the analysis of whether a CSO of imprisonment in the community would be consistent with the fundamental principles of sentencing, I have found that several of those fundamental principles are at play in this decision. As Watt J.A. noted in **Jacko**, *supra*, at para. 64:

> [64] As a general rule, the more serious and violent an offence, the more likely it is that the terms of imprisonment imposed on similarly-circumstanced Aboriginal and non-Aboriginal offenders will not differ significantly, and indeed may be the same.

[84] I also find that Mr. Power's possession of a weapon, namely, bear spray, for a purpose dangerous to the public peace on June 30, 2014, just eight days before the assault of Mr. Ward, in particular, is a matter for which the primary purposes and principles of sentencing at play under sections 718, 718.1 and 718.2 of the **Criminal Code**, are specific and general deterrence as well as denunciation of the unlawful conduct. In my view, both of those offences undermine the safety and security of people in this community through either a serious crime of gratuitous and unprovoked violence on an unsuspecting good Samaritan who was trying to maintain a peaceful and safe community when he was viciously assaulted or by simply carrying a weapon for a purpose dangerous to the public peace. In terms of those offences, in particular, I regard them as serious crimes of violence with a high degree of responsibility of the part of the offender, I find that these types of crimes of violence must be strongly condemned and deterred. In these circumstances and dealing with the individualized circumstances of Mr. Power, I find that the imposition of a CSO would not be consistent with the fundamental purpose and principles of sentencing set out in sections 718-718.2 of the **Code**.

[85] After a careful review of the circumstances of this offence, the particular circumstances of this offender, the needs of the community to maintain a just, peaceful and safe society and the fact that I find that the primary purposes of sentencing are specific and general deterrence and denunciation of the unlawful conduct, I conclude that a CSO is **not** the "appropriate" sanction in this case.

[86] In terms of the offences committed by Mr. Power on June 30, 2014, as I indicated previously, there is a wide range of sentences that have been ordered by various courts across the country for possession of stolen property, exceeding $5000 and for that matter, possession of a weapon dangerous to the public peace. Given the fact that Mr. Power is a youthful, adult, Aboriginal offender, section 718.2(e) **Code** requires me to exercise restraint in imposing a just sanction. In addition, given the number of charges before the Court, it is also important to keep in mind the sentencing principle of totality found in section 718.2(c) of the **Code** which requires judges who are imposing consecutive sentences to ensure that the combined sentence is not unduly long or harsh.

[87] Having considered all of those sentencing purposes and principles, for the offences which were committed on June 30, 2014, that is, having possession of a motor vehicle, of a value in excess of $5000, knowing that it was obtained in

Canada by the commission of the indictable offence of theft, I hereby order Mr. Power to serve a period of eight weeks in jail.

[88] For the offence of possession of a weapon dangerous to the public peace; namely, bear spray, contrary to section 88(1) of the **Criminal Code**, I cannot conclude that those two offences which occurred on the same date formed part of one "criminal adventure" so that the Court could consider the imposition of a concurrent sentence for that offence. Given the range of sentence that I have determined for that offence and given the principles of restraint, as well as taking into account the Gladue factors which may have contributed to these charges, I am prepared to order a sentence at the lower end of that range. Therefore, for the possession of a weapon dangerous to the public peace charge, I hereby order Mr. Power to serve an additional eight weeks in jail, consecutive to the sentence that I just imposed for the other offence which was committed on June 30, 2014.

[89] In terms of what I regard as the most serious of the offences before the Court for sentencing; namely, Mr. Power's vicious and unprovoked assault of Mr. Ward which caused him bodily harm, while it is often difficult to find similar offenders who have committed similar offences in similar circumstances, in this case, there are two co-accused who have already been sentenced. Based upon my review, I have found that the gravity of Mr. Power's actions and his moral culpability for

them is much closer to Mr. Brushett than to Mr. Gannon. In addition, I find that the **Mackenzie** case does bear a very striking similarity to the facts and circumstances of this case. In that case, like this one, the victim was acting as a good Samaritan to intervene in a fight between the females when he was suddenly and without warning, "sucker punched" by the offender and another person, which caused bodily harm to the victim. The offender was essentially the same age as Mr. Power with no prior record and he was ordered to serve a period of 22 weeks in jail followed by a term of 12 months on probation.

[90] After having considered the range of a jail sentence for a similar offence committed by similar offenders in similar circumstances is between three to six months of imprisonment, and taking into account that I regard Mr. Power's moral culpability for the assault causing bodily harm to Mr. Ward is similar to that of Mr. Brushett, I hereby order Mr. Power to serve a term of 22 weeks of imprisonment for the offence of assault causing bodily harm contrary to section 267(b) of the **Code**. Since that offence was completely unrelated by date, time and all other relevant factors to the offences which were committed on June 30, 2014, I cannot regard them as part of one "criminal adventure" and I hereby order Mr. Power to serve those 22 weeks consecutive to the other sentences that I have just ordered.

[91] Finally, as a result of the charges which Mr. Power was facing from the incident on June 30, 2014, he was released on the terms of a recognizance which included a clause to comply with the terms of a curfew to remain in his residence between the hours of 10 PM and 6 AM the following day, 7 days per week with only an exception for medical emergencies or medical appointments. In my findings of fact, I have concluded that the assault which caused bodily harm to Mr. Garrett Ward occurred around 9:21 PM on July 8, 2014, which still left Mr. Power almost 40 minutes to return to his residence in order to comply with the curfew condition. However, he did not do so and as a result, when he was located by the police outside of his residence beyond the curfew time, he was charged with the breach of a recognizance contrary to section 145(3) of the **Criminal Code**. I cannot regard this offence as being part of the same "criminal adventure" which resulted in the assault causing bodily harm to Mr. Ward, and although Mr. Power has now been sentenced for two breaches of recognizance for which he received what appeared to be 15 day and 30 day jail sentences, taking into account the principles of totality and restraint, I hereby order a Mr. Power to serve a sentence of imprisonment of five weeks, consecutive to the other sentences that I have just ordered, for the offence contrary to section 145(3) **Code**.

[92] As a result of the foregoing, I have ordered Mr. Power to serve a total of 43 weeks of imprisonment in a provincial correctional center. Calculated in days, the sentence that I have just ordered Mr. Power to serve is 301 days. However, on a go forward basis it is important to provide Mr. Power credit for the period of time that he has already served in pre-sentence custody. As I indicated previously, since Mr. Power's bail was revoked under section 524(4) of the **Code**, both counsel have agreed that Mr. Power's go forward sentence should be reduced by the amount of pre-sentence custody on a one to one basis. As at January 18, 2016, when the initial sentencing submissions were made by counsel, I was advised that Mr. Power had a credit of 80 days of pre-sentence custody. On February 1, 2016, I asked counsel to make further sentencing submissions on outstanding issues, and indicated that I would render my sentencing decision on February 12, 2016. Therefore, Mr. Power should be credited with an additional 25 days of pre-sentence custody for a grand total of 105 days, which results in a total go-forward sentence of 196 days.

[93] Following the completion of the sentence of imprisonment, I hereby order Mr. Power to be subject to terms of probation for a period of 24 months. He shall comply with the following statutory terms and conditions:

- Keep the peace and be of good behavior;

- Appear before the court as and when required to do so by the court;
- Notify the court or probation officer, in advance, of any change of name, address, employment and occupation;

and in addition, to comply with these additional terms and conditions:

- Report to the probation officer at 277 Pleasant Street, Dartmouth, Nova Scotia within three days of the expiration of your sentence of imprisonment and thereafter as directed by the probation officer;
- remain within the province of Nova Scotia unless you receive written permission from your probation officer;
- have no direct or indirect contact or communication with Mr. Garrett Ward;
- you are not to be on any Metro Transit bus within the HRM or within 50 m of any Metro Transit terminal facility, between the hours of 6 PM and 6 AM, 7 days per week;
- you are to complete 100 hours of community service work as directed by your probation officer, preferably in service of an Aboriginal community, within the first 18 months that you are under the terms of this probation order;
- you are prepare a written expression of apology to Mr. Ward which would be forwarded to him through your probation officer;
- you are to attend for assessment, counselling or a program as directed by the probation officer; and finally,
- you are to participate in and cooperate with any assessment, counseling or program directed by the probation officer;

[94] In addition, I am signing a mandatory order under section 487.051(1) of the **Code** to authorize the taking of a sample of bodily substances for the purpose of forensic DNA analysis as the charge of assault causing bodily harm is a "primary designated offence" for the purposes of DNA orders.

[95] I am also prepared to exercise my discretion under section 110(1)(a) of the **Criminal Code** and I hereby order that you are prohibited from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance for a period that begins today and ends 10 years after your release from imprisonment.

[96] Finally, with respect to the victim fine surcharge, the offences which occurred on June 30, 2014 were prosecuted by way of indictment, therefore, each offence carries a victim fine surcharge of $200 for a total of $400. With respect to the two charges on July 8, 2014, the Crown proceeded by way of summary conviction and therefore, each offence carries a victim fine surcharge of $100, for a total of $200. Since the total amount payable for victim fine surcharge is $600 and I have just ordered a prison sentence of 28 weeks on a go-forward basis, I prepared to provide two years to make payment of those victim fine surcharges.

Theodore K. Tax, JPC