PROVINCIAL COURT OF NOVA SCOTIA

Citation: R v. Christmas, 2017 NSPC 48

Date: 20170831

Docket: 2935470

Registry: Sydney

Between:

Her Majesty the Queen

v.

Gary Graham Bernard Christmas

DECISION ON SENTENCE

Judge:	The Honourable Judge Amy Sakalauskas, J.P.C.
Place Heard:	Sydney, Nova Scotia
Date Heard:	July 19, 2017
Oral Decision:	August 31, 2017
Written Decision:	September 13, 2017
Charge:	s. 5(2) *Controlled Drugs and Substances Act*
Counsel:	David Iannetti, for the Crown
	Christa Thompson, for the Defence

BY THE COURT:

[1] Gary Christmas plead guilty to, on October 7, 2015, possessing Percocet and Hydromorphone for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act* ("CDSA"). This matter was before me for a sentencing hearing on July 19, 2017. The Crown requested a two-year custodial sentence. The Defence requested a suspended sentence with 3 years' Probation or, alternatively, a shorter custodial term to be served intermittently.

[2] As per s. 5(3)(a) of the CDSA, I am precluded from granting a Conditional Sentence Order. My options are a custodial term, or a suspended sentence with Probation. Section 5(3)(d) CDSA mandatory minimums do not apply. A fine would not be appropriate (and neither party suggested it).

[3] The sentencing hearing proceeded by submissions, with Exhibits including:

- Statement Mr. Christmas gave upon his arrest on October 7, 2015;
- Letter from Blair Paul, Membertou Addictions, dated October 4, 2016;
- Letters from Lawrence Paul, Membertou Housing Development, dated November 3, 2016 and November 29, 2016;
- Letter from Allistair Joseph, Membertou Band Council Member, undated;
- Urine Test Results dated January 2017 and February 2017, from the Nova Scotia Health Authority;
- Letters from John Fuller, Crosbie House Society, dated April 8, 2016 and February 17, 2017, and
- Letter from Gary Michael Christmas, Gary Christmas' father, dated May 20, 2017.

[4] I have the benefit of a Gladue Report prepared by Ben Marshall of the Mi'kmaw Legal Support Network.

[5] Gary Christmas and his brother, Cory Christmas, briefly addressed the Court at the close of submissions. Cory Christmas was a major source of support for his brother. I recently learned of his unexpected passing, and express my condolences to Gary Christmas and his family.

FACTS OF THE OFFENCE AND CIRCUMSTANCES OF MR. CHRISTMAS

[6] Members of the Cape Breton Regional Police received information from a confidential source that Mr. Christmas was selling Percocet pills. They executed a search warrant on his residence on October 7, 2015. When they entered the home, Mr. Christmas was kneeling by his stove in the kitchen, trying to hide pills. The police seized 152 (5 mg) Endocet (Percocet) tablets and 28 Hydromorphone pills (4 mg).

[7] Mr. Christmas gave a statement to police immediately after his arrest. He was forthright with the officers. He declined legal counsel. Mr. Christmas explained that he was a heavy pill user, snorting them. He used Hydromorphone, Percocet, and Clonazepam daily. The former was prescribed, but not in a large enough number, so he would supplement by street purchases. He took two Clonazepam pills a day since he was 15-16 years old, and got heavy into the Hydromorphone and Percocet about three years earlier. He crushed the Percocet and Hydromorphone and snorted them together, taking 10-15 pills a day. He would get his pills over time, as he had some money. The ones the police found took him four months to accumulate. He paid around seven or eight dollars per Percocet tablet, and would sell some to his friends for ten dollars. He would pay four or five dollars per Hydromorphone tablet and sell some to his friends for seven dollars. Friends would come to his home and they did the drugs together. There was no cash found in Mr. Christmas' home and no signs of dealing other than the

presence of pills and his confession. Police found a pill crusher, which Mr. Christmas admitted was for his own use.

[8] In his Gladue Report, Mr. Christmas reported that he "had the Percs to pay for the Hydros". He said his addiction was costing him approximately $150.00 a day and he probably would have used the Hydromorphone in a couple of days.

[9] Mr. Christmas has a dated criminal record. He was convicted, in 2005, of Mischief, Causing a Disturbance, and two Failures to Comply. In 2007, he was convicted of Failure to Provide a Breath Sample, and with simple Possession contrary to s. 4(1) of the CDSA. He has never been to jail.

[10] Gary Christmas is a 35-year-old Mi'kmaq man from the Membertou First Nation. He was 33 years old at the time of the offence. Mr. Christmas' first language is English. He also speaks Mi'kmaq. In the Gladue Report prepared by Ben Marshall, he notes the following about Membertou:

> *Named after the Grand Chief Membertou (1510-1611) the community of Membertou belongs to the greater tribal group of the Mi'kmaw Nation. Membertou is situated 3 kms from the heart of Sydney, Nova Scotia, within its tribal district of Unama'ki (Cape Breton). It is one of five Mi'kmaw communities in Cape Breton, and one of thirteen in the Province of Nova Scotia. Membertou is an urban First Nation community consisting of over 1260 people, and one of 5 communities that make up the Cape Breton Regional Municipality, with a total population of over one hundred and fifteen thousand people.*
>
> *Membertou was not always situated in its present location. Many years ago, Membertou (formally known as the Kings Road Reserve) was located just off King's Road, along the Sydney Harbour. In 1916, the Ezchequer Court of Canada ordered the relocation of the 125 Mi'kmaq; the first time an aboriginal community has been forced through the courts to relocate in Canadian history. In 1926, the Membertou community was officially moved to its present day location.*
>
> *Former Sydney mayor W.A. Crowe testified that the Mi'kmaq had to be moved: "They are hardly over the nomad state yet. This is an anomaly in my judgement that in the centre of a city which is the size of Sydney that there should be two acres occupied by Indians in that spot.*
>
> *Chief Joe Christmas said his people didn't want to move. He said his people "do not like to live away from that place. It is handy for their work, and they have a good schoolhouse and everything is complete, and we have good doctors and good agents*

> *and good teachers and the children go to school every day". But they were bringing down property values, as William C. Wicken explains in his book, The Colonization of Mi'kmaw Memory and History, so Justice Audette ordered that they be evicted. "No one cares to live in the immediate vicinity of the Indians," he wrote. "The overwhelming weight of the evidence is to the effect that the reserve retards and is a clog in the development of that part of the city."*
>
> *The Mi'kmaq were moved inland a few kilometres to Membertou, to a bowl of swampland that nobody wanted, out of sight out of mind, where they lived as second-class citizens in a community of tarpaper shacks and outhouses – Membertou Then and Now: For First Nations Success Follows Power", Stephen Maher January 18, 2013.*

[11] The Gladue Report author notes that Membertou is now one of the more prosperous Mi'kmaq communities in Unama'ki. Employing over 700 people, it is one of the largest employers in the Cape Breton Regional Municipality.

[12] Gary Christmas has been in a common-law relationship for four years. He and his partner live together in Membertou. His partner is also Mi'kmaq. She introduced him to the pills he eventually started crushing and heavily abusing. They have two children together, a two-year-old and an infant, who are in the care of a close family member, given parental drug abuse.

[13] Gary Christmas' grandfather, Bernie Christmas, was one of the founders of the Native Alcohol and Drug Abuse Counselling Association, a group that has provided addiction services in Mi'kmaq communities since 1971. Gary Christmas reports heavy alcohol use going back generations, along with violence and dysfunction in the family homes. Mr. Christmas advised that he had his first sip of beer at 4-5 years of age and was regularly stealing alcohol and drugs from his parents at age 12. There was a lot of drinking and partying in the house, leaving the children unsupervised. As his sister explained, "We all started drinking and drugs and smoking at a young age, because it was always around we saw it and didn't think twice about it". The lack of supervision also left Mr. Christmas vulnerable to victimization from others in the community, which he experienced.

[14] Christmas has suffered loss and experienced trauma from a young age:

- When Mr. Christmas was 10 years old, he and friends went to a small fort they built near the Membertou ballfield. Upon arriving, they discovered the body of Mr. Christmas' cousin, who hung himself;

- When Mr. Christmas was 11 years old, that cousin's brother shot himself in the family home on the reserve. Mr. Christmas again saw the body;

- When Mr. Christmas was 12 years old, his uncle was charged and convicted of beating a man to death in his home, again on the reserve;

- When Mr. Christmas was 22 years of age, Mr. Christmas' best friend was stabbed to death on the reserve;

- When Mr. Christmas was 23 years old, another cousin hung himself in his home on the reserve. They were described as like brothers and Mr. Christmas named his child after this cousin;

- Later that same year, in 2005, that cousin's father killed himself in the same spot;

- Mr. Christmas attempted suicide in 2012, and

- Mr. Christmas' partner has children with a former partner. In 2014, that former partner hung himself. Mr. Christmas found him and cut him down.

[15] These events had a great impact on Mr. Christmas, who relied on substances to deal with the associated pain and loss. His siblings reported the same unfortunate coping mechanisms from an early age. It is hard to imagine another Canadian community in which this timeline would exist, other than within a First Nation.

[16] Mr. Christmas has his grade 10. There is no high school in Membertou. He attended high school in Sydney. He used alcohol and drugs, and there was inter-racial conflict. This impacted his ability to attain more education. He was heavily drinking by age 14 and regularly smoking marijuana by age 13. He was able to receive ration from an early age, which he used to purchase substances. He also stole from extended family members, noting nerve pills used for hangovers. He started using cocaine at age 17. As Mr. Christmas explained to the Gladue report author:

> "In Membertou, 75% of people were on welfare. There wasn't many jobs. All there was to do was to hang out Rez style. We would meet up by the rock, family, cousins. I would spend my ration or we would all chip in on a Texas mickey and 5 grams of coke."

[17] Over the years, Mr. Christmas worked as a general labourer, mostly in carpentry. After becoming sober in March 2016, he sought employment. He worked with a private security company on a casual basis, then he gained more steady employment with Membertou Housing. Lawrence Paul, the Assistant to the Housing Director, submitted a letter to the Court in which he confirmed Mr. Christmas' good work and that he would be considered for future jobs. He was employed with his late brother, Cory Christmas, Membertou Fishing Captain, at the time of the hearing. There is a union for the fishers in Membertou, of which Gary Christmas is a member. He fishes in Sydney and Yarmouth, Nova Scotia, on his brother's boat. In Yarmouth, he has risen to First Mate.

[18] Cory Christmas was present in Court for the sentencing and spoke of his brother's good work and that he is needed on the boat and in his community. He spoke of his brother doing well in turning his life around. He guaranteed his brother continued work. He noted that Gary Christmas is drug tested as part of his employment and those tests are clean. He said, of his brother, "I need him and his kids need him".

[19] Mr. Christmas has been sober since March 11, 2016. He attended a residential treatment program at Crosbie House in New Minas, Nova Scotia. He entered the program in March 2016 but left short of completing the full 28 days, given the need to address the care situation of his children. He did so with the support of his professionals and with a plan for ongoing addictions work. He remained sober and continued his treatment. He stayed on track and returned to Crosbie House to successfully complete the program in February 2017. He has the availability of ongoing support from those at Crosbie House, along with supports in his community. In a letter dated February 17, 2017, John Fuller, Addictions Counsellor, notes:

> *It appears that Mr. Christmas has gained knowledge about the disease of addiction and how it has negatively affected all aspects of his life and is willing to take the steps necessary to work on recovery.*
>
> *…*
>
> *From my observations, I believe Mr. Christmas has a good understanding of the nature of addiction and the necessity for total abstinence to maintain a healthy lifestyle. If he continues to follow his aftercare plan as laid out, Gary should be able to live a clean, sober and productive life.*

[20] Mr. Christmas also attended addictions treatment at Membertou Addictions. Staff there got him connected with the program at Crosbie House. This was confirmed by way of a letter from Blair Paul, Treatment Supervisor with Membertou Addictions. Mr. Christmas' lawyer advised the Court that he continues to attend Narcotics Anonymous/Alcoholics Anonymous meetings 1-2 times a week, and more if he has time.

[21] Mr. Christmas has a mental health therapist in his community.

[22] Mr. Christmas' eldest child is with the child's mother. He has a relationship with his two youngest children, who are in family care. He describes them as his main motivator for staying clean. Eventually, as he further establishes himself and his partner works on her own addictions, he would like to have them in his care.

[23] Mr. Christmas has support in his community. Allister Joseph Matthews, a Band Councillor in Membertou for 30 years, submitted a letter in which he urged rehabilitation for Gary Christmas.

[24] Gary Christmas' father, Gary Christmas, Sr., submitted a letter to the Court. He spoke of "Little Gary's" struggles with substances when growing up on the reserve. He spoke of how proud he is of his son's progress. In the Gladue Report, I am advised that Mr. Christmas, Sr., was with Donald Marshall Jr. and Sandy Seal the night Sandy Seal was killed, leaving his company shortly before those events unfolded. Mr. Christmas thinks his father was greatly

affected by that night. Membertou is the home community of the late Donald Marshall, Jr. The ramifications of Donald Marshall, Jr.'s treatment at the hands of our criminal justice system were widely felt and certainly those in Membertou were greatly affected.

[25] Mr. Christmas and his family members (mother, sister, and aunt) provided a lot of information to the author of his Gladue Report. In her submissions, his lawyer noted his early exposure to violence and substance abuse in his childhood home, leading to his early experimentation with substances and eventual reliance on them, along with his experiences of violence, suicide, and loss.

[26] Mr. Christmas cried throughout the sentencing hearing, especially when his lawyer spoke of his own experiences. He nodded his head in agreement with the Crown submissions, including that he was lucky to be alive when considering his previous heavy drug use. He accepted responsibility. He apologized to the Court and importantly, to his community. He showed remorse. He said he was ashamed and explained the extreme impact drugs had on his actions.

[27] Mr. Christmas has been on an Undertaking since his arrest in October 2015 and has complied with its conditions.

SENTENCING PRINCIPLES

[28] The purpose and objectives of sentencing and the principles to be considered are set out in s. 718, 718.1, and 718.2 of the *Criminal Code*, along with s. 10 of the CDSA

[29] Section 718 sets out that the fundamental purpose of sentencing is to protect society and to contribute to respect for the law and maintenance of a peaceful society. It also states that sentences should attempt to do one or more the following: denunciation, deterrence, separation

from society where necessary, rehabilitation, reparations to victims/community, promote a sense of responsibility and acknowledge harm done to victims/community.

[30] s. 718.1 mandates that the fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[31] s. 718.2 provides further sentencing principles, including that:

- aggravating and mitigating factors should be taken into account;
- parity;
- an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances;
- all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims' community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[32] Section 10 of the CDSA mirrors these sentencing purposes and adds consideration to treatment for offenders in appropriate circumstances.

SENTENCING ABORIGINAL OFFENDERS

[33] The reference to Aboriginal Offenders in s. 718.2(e) is a significant consideration in this sentencing. s. 718.2(e) was introduced to address the over-representation of Aboriginal offenders in custody.

[34] In ***R v. Gladue*** **[1999] S.C.R. 688**, the Supreme Court of Canada offered guidelines for using this section, and summarized them (para 93):

1. *Part XXIII of the Criminal Code codifies the fundamental purpose and principles of sentencing and the factors that should be considered by a judge striving to determine a sentence that is fit for the offender and the offence.*

2. *Section 718.2(e) mandatorily requires sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of aboriginal offenders.*

3. *Section 718.2(e) is not simply a codification of existing jurisprudence. It is remedial in nature. Its purpose is to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision's remedial purpose real force.*

4. *Section 718.2(e) must be read and considered in the context of the rest of the factors referred to in that section and in light of all of Part XXII. All principles and factors set out in Part XXII must be taken into consideration in determining the fit sentence. Attention should be paid to that fact that Part XXIII, through ss. 718, 718.2(e), and 742.1, among other provisions, has placed a new emphasis upon decreasing the use of incarceration.*

5. *Sentencing is an individual process and in each case the consideration must continue to be what is a fit sentence for the accused for this offence in this community. However, the effect of s. 718.1(e) is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders.*

6. ***Section 718.2(e) directs sentencing judges to undertake the sentencing of aboriginal offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the 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.***

7. ***In order to undertake these considerations the trial judge will require information pertaining to the accused. Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing.*** *In the usual course of events, additional case-specific information will come from counsel and from a pre-sentence report which takes into account the factors set out in #6, which in turn may come from representations of the relevant aboriginal community which will usually be that of the offender. The offender may waive the gathering of that information.*

8. *If there is no alternative to incarceration the length of the term must be carefully considered.*

9. *Section 718.2(e) is not to be taken as a means of automatically reducing the prison sentence of aboriginal offenders; nor should it be assumed that an offender is receiving a more lenient sentence simply because incarceration is not imposed.*

10. *The absence of alternative sentencing programs specific to an aboriginal community does not eliminate the ability of the sentencing judge to impose a sanction that takes into account principles of restorative justice and the needs of the parties involved.*

> *11. Section 718.2(e) applies to all aboriginal persons wherever they reside; whether on- or off – reserve, in a large city or a rural area. In defining the relevant aboriginal community for the purpose of achieving an effective sentence, the term "community" must be broadly defined so as to include any network of support or interaction that might be available, including in an urban centre. At the same time, the residence of the aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to try to find an alternative to imprisonment.*
>
> *12. Based on the foregoing, the jail term for an aboriginal offender may in some circumstances be less than the term imposed on a non-aboriginal offender for the same offence.*
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> *13. It is unreasonable to believe that aboriginal people do not believe in the importance of traditional sentencing goals such as deterrence, denunciation, and separation, where warranted. In this context, generally, the more serious and violent the crime, the more likely it will be as a practical matter that the terms of imprisonment will be the same for similar offences and offenders, whether the offender is aboriginal or non-aboriginal.*
>
> **[emphasis added]**

[35] In considering the "circumstances of Aboriginal offenders", the Supreme Court of Canada explained in *Gladue*:

> *67 The background factors which figure prominently in the causation of crime by aboriginal offenders are by now well known. Years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, lowliness, and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration. …*
>
> *68 It is true that systemic and background factors explain in part the incidence of crime and recidivism for non-aboriginal offenders as well. However, it must be recognized that the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions. Moreover, as has been emphasized repeatedly in studies and commission reports, aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be "rehabilitated" thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.*

[36] Aboriginal overrepresentation continued after *Gladue* and in ***R. v. Ipeelee*** **[2012] 1 S.C.R. 433**, the Supreme Court stressed that judges must use a different method of analysis in this sentencing (para 59) and recognized:

> *61 It would have been naïve to suggest that sentencing Aboriginal persons differently, without addressing the root causes of criminality, would eliminate their overrepresentation in the criminal justice system entirely. In Gladue, Cory and Iacobucci JJ. Were mindful of this fact, yet retained a degree of optimism, stating, at para. 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 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 preventing future crime.*
>
> *62 This cautious optimism has not been borne out. In fact, statistics indicate that the overrepresentation and alienation of Aboriginal peoples in the criminal justice system has only worsened. In the immediate aftermath of Bill C-41, from 1996 to 2001, Aboriginal admissions to custody increased by 3 percent while non-Aboriginal admissions declined by 22 percent (J.V. Roberts and R. Melchers, "The Incarceration of Aboriginal Offenders: Trends from 1978-2001" (2003), 45 Can. J. Crim. & Crim. Just. 211, ay p. 226). From 2001 to 2006, there was an overall decline in prison admissions of 9 percent. During that same period, Aboriginal admissions to custody increased by 4 percent (J. Rudin, "Addressing Aboriginal Overrepresentation Post-Gladue: A Realistic Assessment of How Social Change Occurs" (2009), 54 Crim. L.Q. 447, ay p. 452). As a result, the overrepresentation of Aboriginal people in the criminal justice system is worse than ever. Whereas Aboriginal persons made up 12 percent of all federal inmates in 1999 when Gladue was decided, they accounted for 17 percent of federal admissions in 2006 (J. Rudin, "Aboriginal Over-Representations and R. v. Gladue: Where We Were, Where We Are and Where We Might be Going", in J. Cameron and J. Stribopulous, eds., The Charter and Criminal Justice: Twenty-Five Years Later (2008), 687, at p. 701).*

[37] Canadian courts are increasingly providing sentencing decisions that more fully consider Gladue principles. A recent example is found in ***R. v. Morriseau,*** **2017 ONCJ 307**, where Justice Gibson sentenced a man from the Anishinabe First Nation. In doing so, he considered

the meaning of a pre-colonialism Aboriginal system of justice and highlighted that, "The underlying philosophy in Aboriginal societies in dealing with crime was the resolution of disputes, the healing of wounds and the restoration of social harmony" [para 69]. The goal was not punishment. Post-colonialism saw a racist discounting of Aboriginal approaches coupled with a concerted move to eradicate this way of life in what Chief Justice Beverly McLachlan called an attempted "cultural genocide" in 2015. As Justice Gibson explains:

> *[71] After colonization, non-Aboriginal forms of dispute resolution were substituted … and residential schools were used as a tool to undermine the shared values that kept it alive…[T]he motivation of those who conceived and implemented the Canadian Indian Residential School policy was explicitly racist and based on a belief that Aboriginal people were savages and their traditions barbaric…*
>
> *[72] It is important today, not for the purposes of assigning or apportioning guilt, because, to be clear, those who conceived and authorized those policies must bear the burden of history's judgment on their conscience. It is important because those of us who follow them as stewards of our public institutions must take up the responsibility to ameliorate the devastating consequences of their actions.*
>
> *….*
>
> *[75] To be schooled in an environment where your culture, your values, and your identity are judged and taught to be inferior is harmful to the human spirit. The damage those policies and that instruction did to Aboriginal people and their children echoes through generations to this day. It is for this reason that it is entirely appropriate that 718.2(e) of the Code be remedial.*

[38] Importantly, in *Morriseau*, Justice Gibson addressed the second part of this "different method of analysis". The first is the need to recognize background factors of Aboriginal offenders and how they might reduce moral culpability. The second is a careful re-assessment of the role of retributive justice in sentencing Aboriginal offenders. Instead of living within a strict sentencing range, Justice Gibson noted:

> *[85] The Court in Ipeelee stated very clearly that s. 718.2(e) of the Code was designed to "encourage sentencing judges to have recourse to a more restorative approach to sentencing" (Ipeelee, para. 59). To address the problem of the over-incarceration of Aboriginal people, our court must expand our understanding of restorative justice principles because restorative approaches have been more in keeping with Aboriginal conceptions of justice.*
>
> *…*

> *[87] The challenge for non-Aboriginal courts is to craft dispositions that strike the right balance between restitution for the victim, reparations to the community and redirecting the offender's behavior. Additionally, the offender may have dependents and Aboriginal people believe care has to be taken so that actions to control the offender do not being hardship to others. Justice in Aboriginal societies is relationship-centered and attempts to take into account the consequences of dispositions on individuals and the community, as well as on the offender. [Manitoba [Aboriginal Justice Inquiry] Report, p. 37]*
>
> *…*
>
> *[94] It should be obvious that a justice system alienated from Aboriginal people that responds to symptoms of that alienation with harsh punitive actions will only lead to further alienation, loss of respect, and ultimately, the need for even greater repressive actions. It is a cycle that has to stop. Sadly, in our communities so many Aboriginal people have been incarcerated that that form of punishment is in danger of becoming less a source of shame for Aboriginal young people and more a rite of passage.*
>
> *[95] So, despite the challenges, our system of justice must become more adept at formulating restorative dispositions. This will require all of us to be more flexible in our approach and avoid the paradigms that lock us into primarily punitive approaches to the sentencing. As I was once told by Darryl Mandamin, our Aboriginal Liaison Officer, our job is to bridge the Rule of Law with the Natural Law. Our highest court has set us that mandate and we on the front line of the justice system need to remember that it can only be effected by us.*

[39] Here in Nova Scotia, our Court illustrates the value of restorative approaches in our Domestic Violence Court, Court Monitored Mental Health Court, Court Monitored Drug Treatment Court, and our Aboriginal Wellness/Gladue Court. The restorative practices of Aboriginal communities infuse our specialty Courts. How ironic it would be if that value did not materialize in our other Provincial Courts, especially (although not exclusively) when addressing Aboriginal offenders. Courts across the country are providing decisions that recognize this reality. We cannot compartmentalize our respect for restorative approaches. As Justice Gibson explained in *Morriseau*:

> *[98] We have built a great machine for the delivery of justice but we should be careful not [to] neglect the soul of the law. We are not an offender-processing system forever striving for even greater efficiencies, we are also peacemakers …*

[40] August 9, 2017 was the United Nations International Day of the World's Indigenous Peoples. The United Nations adopted its ***Universal Declaration on the Rights of Indigenous***

***People* (UNDRIP)** nearly 10 years ago, and Canada became a signatory just one year ago. In ***R. v. Francis-Simms,* 2017 ONCJ 402**, Justice Shamai considered the UNDRIP when sentencing an Aboriginal man for drug trafficking. She noted Articles 5 and 11 of the UNDRIP as describing the ambition from *Gladue* that restorative approaches to remedying crime should seek to restore pre-colonialism harmony (para 47). The UNDRIP provides further illustration of the context in which trial judges sentence Aboriginal offenders, one in which their histories and the need for redress are increasingly recognized by our broader community.

[41] The **Final Report of the Truth and Reconciliation Commission of Canada** also offers valuable context for sentencing judges, and as reported in Volume 5, at page 238:

> *The Supreme Court's landmark decisions in Gladue and Ipeelee remind trial judges to take a different approach in applying the purposes and principles of sentencing to Aboriginal offenders, including those related to deterrence, denunciation, and retribution. These decisions recognize that the application of a uniform one-size-fits-all approach to punishment will be discriminatory and ineffective given the treatment of Aboriginal people in Canadian society, including the intergenerational legacy of residential schools.*

[42] Sentencing judges need to be proactive to give full effect to s. 718.2 (e), as was directed in *Gladue* and *Ipeelee*.

SENTENCING RANGE

[43] The pills Mr. Christmas sold are Schedule I substances and the maximum penalty is life imprisonment. This is a serious offence.

[44] I reviewed the cases provided by counsel. The Crown relied heavily on the decision in ***R. v. Knickle,* 2009 NSCA 59** for its submission that Mr. Christmas should be incarcerated for two years.

[45] The Defence provided these cases, some in support of the primary argument for a suspended sentence with probation, and some in support of the alternative argument for a short custodial term:

- ***R. v. Gladue***
- ***R. v. Ipeelee***
- ***R. v. Prosper* 2017 NSSC 173**
- ***R. v. Rushton* [2017] N.S.J. No. 23**
- ***R. v. McGill* [2016] O.J. No. 1346**
- ***R. v. Munroe* [2016] O.J. No. 5800**
- ***R. v. Irish* [2016] O.J. No. 3837**
- ***R. v. Kasian* [2016] M.J. No. 126**
- ***R. v. Cleghorn* [2015] N.S.J. No. 386**

[46] I agree with the Crown's position that pills should be likened to cocaine for sentencing purposes. In ***R. v. Oldham,* 2012 NSSC 326**, Justice Woods adopted the reasoning in ***R. v. Calder,* 2011 NSSC 312** that any attempt to distinguish between cocaine and dilaudid would be fruitless and found that the court should not create subcategories of Schedule I drugs for sentencing purposes. Judge Atwood made a similar conclusion in ***R. v. MacPherson,* 2014 NSPC 13**.

[47] The Crown readily admits that Mr. Christmas is a "petty retailer", selling to friends to feed his own habit, as per ***R. v. Fifield* [1978] N.S.J. No. 42**.

[48] When considering the sentencing range for this offence, Justice Woods' discussion in *Oldham* is helpful:

> *[14] The Crown's second fundamental proposition is that the courts have established a sentencing range for cocaine (and by extension, dilaudid) that starts with*

two years incarceration. Counsel for the Crown argues that only if exceptional circumstances are established should a penalty below that range be considered.

[15] I have carefully reviewed all of the case authorities referred to me by both counsel and I am not satisfied that the Crown's proposition is an accurate reflection of the law as it currently exists. There is a wide range of activities that fall within the scope of trafficking. The development of the Fifield criteria was an attempt to provide some degree of categorization which could assist in the sentencing process.

[16] I accept that trafficking activities which fall within the third Fifield category (i.e. large scale retailers and commercial wholesalers) will result in a range of sentence starting at two years in a penitentiary except in exceptional and rare circumstances. That is what our Court of Appeal expressly found in R. v. Knickle, 2009 NSCA 59 at para. 28. I have not been referred to any case which says that for a petty retailer, such as Mr. Oldham, the normal range starts at two years incarceration. In fact, a survey of the case law discloses multiple examples of petty retailers who received lesser sanctions.

[17] A comprehensive review of Nova Scotia sentencing decisions dealing with trafficking offences is found in the recent decision of Judge Tufts in R. v. Scott, 2012 NSPC 6. He refers to a number of trial decisions where conditional sentences were imposed for trafficking offences. The Nova Scotia Court of Appeal does not appear to have dealt with the sentencing of a petty retailer who has no prior criminal record.

[18] In other jurisdictions, appellate courts have approved conditional sentences for trafficking which would appear to fall in the highest Fifield category. For example, in R. v. Byrne, 2009 NLCA 3, the Newfoundland and Labrador Court of Appeal approved a conditional sentence of two years less a day for possession of cocaine for the purpose of trafficking where the offender had drugs valued at $18,000.00, cash of $10,000.00, scales, score sheets and drug paraphernalia. There did not appear to be any obvious exceptional circumstances.

[19] In R. v. Ramos, 2007 MBCA 87, the Manitoba Court of Appeal substituted a conditional sentence of two years less a day where the offender had cocaine valued at $10,000.00 to $20,000.00 in his possession. The offender had no prior record and presented a low risk to reoffend, but there were otherwise no apparent exceptional circumstances.

[20] In R. v. MacKinnon, 2009 PECA 3, the Prince Edward Island Court of Appeal substituted a conditional sentence of 18 months for a conviction of conspiracy to traffic crack cocaine. The offender acted as a courier moving drugs from Nova Scotia to PEI. The value of the cocaine in question was $7,200.00. The offender had a previous conviction for possession of marijuana, entered a guilty plea and had a positive presentence report.

[21] In R. v. Pang, 2010 BCCA 500, the British Columbia Court of Appeal upheld a conditional sentence of two years less a day plus probation for a conviction of possession of methamphetamine for the purposes of trafficking. The offender was engaged in a sophisticated dial-a-dope trafficking operation and had in his possession drugs with a street value of $67,000.00 to $135,000.00. He had a prior conviction for

> *possession of ecstasy. The offender plead guilty and had strong family support. There did not appear to be any other exceptional circumstances.*
>
> *[22] Having carefully considered the above jurisprudence and the other authorities referred to me by both counsel, I do not believe that there is any legal impediment which would prevent me from considering a sanction of imprisonment for less than two years for Mr. Oldham. If it were necessary for me to find exceptional circumstances I would do so.*

[49] In ***R. v. Scott,* 2012 NSPC 6**, Associate Chief Judge Tufts granted a Conditional Sentence Order for a person who trafficked cocaine. Associate Chief Judge Tufts provided an in-depth review of Nova Scotian sentencing decisions at the appeal and trial level for those who traffic in Schedule I drugs. He concluded that there is no caselaw to indicate that a federal jail sentence is required. He also noted the absence of aggravating features and presence of mitigating factors as an important part of the question as to whether a sentence less than two years is appropriate.

[50] Judge Tufts' decision was upheld on appeal. In ***R. v. Scott,* 2013 NSCA 28**, Justice Beveridge (for the majority), concluded:

> *[53] There is no question that this Court has long stressed the need to emphasize deterrence and denunciation for those that traffic in cocaine, and depending on the circumstances of the offence and of the offender, may well mean that a sentence of federal incarceration is called for. With all due respect, what I cannot accept is that these or any other cases make a federal prison term mandatory – to be avoided only if an offender can demonstrate "exceptional circumstances".*

[51] Judge Buckle embarked on a similar discussion in ***R. v. Rushton* [2017] N.S.J. No. 23**, and noted:

> *[80] Section 718.2 also requires consideration of the principles of parity. This requires an examination of the range of sentences imposed for trafficking cocaine or other Schedule I substances. A long line of cases from our Court of Appeal have established that cocaine traffickers should generally expect to be sentenced to imprisonment in a federal penitentiary (see: Steeves, 2007 NSCA 130; Knickle, 2009 NSCA 59; Butt, 2010 NSCA 56; Jamieson, 2011 NSCA 122; and Oickle, 2015 NSCA 87).*
>
> *[81] The Court, however, has never established that a federal penitentiary term is mandatory and has recognized that in some circumstances the principles of sentencing*

> *can be otherwise satisfied. In those cases, shorter periods of custody served in a provincial institution or in the community under a conditional sentence order, when those were available, have been accepted (See for example: R. v. Scott (supra); and, R. v. Howell, 2013 NSCA 67.)*
>
> *[82] In R. v. Scott (supra), Beveridge, J., writing for the majority, concluded that it was not necessary for a sentencing judge to find "exceptional" circumstances to justify a sentence lower than two years for trafficking cocaine (at para. 53). The task of a sentencing judge in imposing a sentence for cocaine trafficking is the same as any other offence – "considering all of the relevant objectives and principles of sentence as set out in the Criminal Code, balancing those and arriving at what the judge concludes is a proper sentence" (para 26).*
>
> *[83] I take from his reasons that while it may be rare for a cocaine trafficker to receive a sentence less than a federal penitentiary sentence, where the proper application of sentencing principles justifies that result, a sentencing judge is not required to make any specific conclusion that the circumstances are exceptional.*

[52] I do not accept the Crown's submission that I am obligated to pass a sentence of two years custody, and note the cases outlined above in that regard. I will consider the circumstances of Mr. Christmas, his community, and give fulsome deliberation to what have come to be known as "Gladue factors" in this decision.

[53] In ***R. v. McGill*** **[2016] O.J. No. 1346**, Justice Green of the Ontario Court of Justice sentenced an Aboriginal offender for possession of cocaine for the purpose of trafficking. The Crown requested two years less a day imprisonment. The defence requested a 90-day intermittent custodial sentence. In granting a suspended sentence with 30 months' probation, the Court found a custodial sentence was not necessary to satisfy the proportionality principle, noting the offender's remorse, family and community involvement, dreadful childhood, and self-directed rehabilitation. Strict conditions and supervision, along with the risk of re-sentencing for future criminality were seen as meeting the need for specific deterrence. The offender had a commercial motivation. He had a minimal and dated criminal record, complied with his release conditions, and had a childhood with daily exposure to drugs, dealing, addiction, and violence, and widespread racism. The judge in that case was driven by *Gladue* factors in his

determination that the circumstances were exceptional so as to justify the non-custodial sentence. He further noted:

> *31. The same outcome results from an alternative orientation to sentencing that is neither grounded in nor chiefly mediated by sanctioned ranges. With respect, there is a risk of injustice in relying on a sentencing model premised on judicially-created fixed ranges of imprisonment from which the sole reprieve is resort to an uncertain doctrine of exceptionality. By way of analogy only, ranges relieved only by exceptional circumstances is akin to the Court's development of a "principled approach" in R. v. Khan [1992] 2 S.C.R. 531, R. v. Smith [1992] 2 S.C.R. 915 and R. v. B. (K.G.) [1993] 1 S.C.R. 740. The fairer and, in the end, more "principled approach" to the law of sentencing – as repeatedly mandated by the Supreme Court – is that of individualized proportionality. On this model, the distance between the sentence I here impose on McGill and that ordinarily directed for the offence of cocaine trafficking of this gravity is "exceptional" only in a descriptive sense, not a normative one. Put differently, based on an individualized assessment of McGill and his offence, a non-carceral disposition by way of a suspended sentence is the proportionate response. While I am mindful of and have carefully considered the range endorsed by appellate authority for similar offences, application of the full breath of s. 718.1, the "fundamental principle" of Canadian sentencing law, leads here to a result outside its parameters. Both approaches reach the same sentence destination in the instant case, but the test of the sentence's integrity is ultimately its proportionality and not whether it meets the amorphous criteria of exceptionality to an approved range.*

[54] In ***R. v. Noble,* 2017 CarswellNfld 234**, Judge Joy noted:

> *88 McGill provides a roadmap to follow in all sentencing hearings, and especially those for Aboriginal offenders where judges are faced with limited sentencing options. Justice Green's analysis is an important compendium of sentencing principles that the Supreme Court of Canada, appellate and trial courts have identified, authorized and applied as a part of the evolving sentencing law in the present Charter of Rights and Freedoms and Criminal Code climate.*

[55] In ***R. v. Cleghorn*, [2015] N.S.J. No 386**, Judge Tax discussed the decision ***R. v. Nasogaluak*, 2010 SCC 6**. After recognizing the fundamental principle of proportionality, along with secondary sentencing principles, Judge Tax noted:

> *39. However, the Supreme Court of Canada clearly stated in Nasogaluak, supra, at paras 41 and 42 that the principle of proportionality is central to the sentencing process. The principle requires that the sentence not exceed what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence. In that sense, the principle serves a limiting or restraining function. Since the court observed that sentencing is also a form of judicial and social censure, the application of the principle of*

> *proportionality by the sentencing judge speaks out against the offence and punishes the offender, but no more than is necessary.*
>
> *40. Moreover, in Nasogaluak, supra, at paras 43-44, the Supreme Court of Canada observed that Sections 718 to 718.2 of the Code are sufficiently general to ensure that sentencing judges have a broad discretion in an individualized process, subject to some specific statutory rules, to craft a "fit" sentence that is tailored to the nature of the offence and the circumstances of the offender. However, the wide discretion of sentencing judges is fettered, in part, by similar cases which have established, in some circumstances, general ranges of sentences for particular offences, to promote greater consistency between sentencing decisions in accordance with the parity principle [Section 718.2(b) Code]. But, the Supreme Court of Canada added that while the sentencing judge should pay heed to those ranges, they are guidelines rather than hard and fast rules.*

[56] Whether it is described as exceptional circumstances or as the result of an individualized assessment of Mr. Christmas applied against our sentencing laws, my conclusion is that a lengthy custodial sentence would not be a fit one. I recognize that some Courts have imposed relatively shorter custodial sentences in similar situations, but I find that Mr. Christmas' situation is distinguishable for reasons I outline below.

REASONABLE ALTERNATIVES TO CUSTODY

[57] My considerations lead me to view a suspended sentence as a reasonable alternative to custody in these circumstances.

[58] A suspended sentence is a significant consequence when properly administered. As succinctly explained in *McGill*:

> *49. … As s. 731(1)(a) of the Code makes clear, a "suspended sentence" is one in which it is "the passing of sentence" that is suspended — not service of the sentence itself. Where a person bound by a probation order attaching to a suspended sentence is convicted of a breach of his or her probation order or (unlike the case with conditional sentences)* any other offence*, a court may, as with breaches of the terms attending a conditional sentence, amend the optional conditions of the order. However, unlike the case of conditional sentences, the court may instead extend the duration of the order for up to an additional year. Most radically, a court may, in the alternative, revoke the*

> *suspended sentence initially imposed and levy* any sentence *it could have imposed in the first instance "if the passing of sentence had not [then] been suspended".*
>
> *50 As concisely explained in R. v. Galang, 2014 BCPC 240 (B.C. Prov. Ct.), at para. 14, s. 732.2(5),*
>
> > *... provides that if a person who is subject to a suspended sentence is convicted of another offence during the probation term, including a breach of the probation order, the court that made the order may revoke the order suspending sentence and "...impose any sentence that could have been imposed if the passing of sentence had not been suspended...".*
>
> *This formulation of the punitive reach of s. 732.2(5) echoes G.A. Martin J.A.'s construction of the provision for the Court of Appeal in R. v. Oakes (1977), 37 C.C.C. (2d) 84 (Ont. C.A.), at p. 89, which, in turn, was approved by the Supreme Court of Canada in R. v. Clermont, [1988] 2 S.C.R. 171 (S.C.C.), affg. [1986 CarswellQue 255 (C.A. Que.)] 986 CanLII 3727. For examples of the continuing utilization and efficacy s. 732.2(5), see the cases of R. v. Moore, [1982] B.C.J. No. 416 (B.C. C.A.) and R. v. Patrick, [2013] B.C.J. No. 1552 (B.C. C.A.) in which suspended sentences were revoked and replaced with penitentiary-length terms of imprisonment — 5 years and 2 years, respectively.*
>
> *51 The British Columbia Court of Appeal has, within the past year, several times affirmed the deterrent value of suspended sentences. In R. v. Voong, 2015 BCCA 285 (B.C. C.A.), the Court, at para. 39, added:*
>
> > *Because a breach of the probation order can result in a revocation and sentencing on the original offence, it has been referred to as the "Sword of Damocles" hanging over the offender's head.*
>
> *See also, R. v. Carrillo, supra, at para. 35; R. v. Thompson (1983), 58 N.S.R. (2d) 21 (N.S. C.A.), at 24; and R. v. Scott (1996), 152 N.S.R. (2d) 93 (N.S. C.A.), at 97.)*

[59] The appropriateness of suspended sentences for drug traffickers has been considered across the country in recent years, as Parliament decided to maintain them as a sentencing option when there is no mandatory minimum.

[60] Several appeals were heard together in Manitoba in 2015, including ***R. v. Peters*****, 2015 MBCA 119**, which involved an Aboriginal offender. Mr. Peters was convicted of trafficking cocaine. He was 31 years old with a lengthy criminal record, including a previous trafficking conviction. He was deemed a very high risk to re-offend. He got clean after the offence date and was awarded custody of his three young children. The Crown sought three years imprisonment,

while the defence sought a suspended sentence. The trial judge suspended sentence, relying heavily on *Gladue* factors. In *Peters*, the Manitoba Court of Appeal referred to ***R. v. Voong (DM) et al*, 2015 BCCA 285** (one of four appeals heard together, dealing with the same issue) when addressing the deterrent effect of probation. The Court noted that suspended sentences were imposed for drug traffickers prior to Conditional Sentence Orders becoming available in 1996 and when done, there were exceptional mitigating circumstances:

> *[42] Other Courts have confirmed the deterrent effect of a suspended sentence and a probation order in certain circumstances. See, for example, R. v. George (1992), 112 N.S.R. (2d) 183 (C.A.) at 187 (and a number of cases following, including R. v. Martin, 154 N.S.R. (2d) 268 (C.A.); R. v. R.T.M., 151 N.S.R. (2d) 235 (C.A.)) and R. c. Savenco (1988), 26 Q.A.C. 291 (C.A.).*
>
> *[43] The statutory phrase "protection of the public" now found in the Criminal Code gives a broad discretion to sentencing judges to impose conditions (see Shoker at para. 3). The public is protected when a former criminal is rehabilitated and deterred from committing more crimes (see R. v. Grady (1971), 5 N.S.R. (2d) 264 at 266). It is also protected when other offenders are deterred by the sentence imposed. Thus, imposing conditions for the protection of the community may have a deterrent and denunciatory effect in addition to a rehabilitative effect. Put another way, a condition need not be punitive in nature in order to achieve deterrence or denunciation. In D.E.S.M. (and affirmed in R. v. Sidhu (1998), 129 C.C.C. (3d) 26 (B.C.C.A.)), this Court concluded that "home confinement" was an appropriate term of a probation order for the purpose of the maintenance of rehabilitation. The court concluded, at p. 381:*
>
> > *It should not be thought that home confinement, if we may call it that, should readily be substituted for regular imprisonment. Such a disposition is suitable, in our judgment, only where very special circumstances are present such as where the accused demonstrates that he has rehabilitated himself prior to arrest, where he is not a danger to anyone, where others are dependent upon him, and where there are no factors that make it necessary in the public interest that punishment should be by conventional imprisonment.*

[61] Just this month, in ***R. v. Barrons,* 2017 NSSC 216**, Justice Arnold imposed a suspended sentence and probation for a break and enter, and recognized that a suspended sentence can have a significant deterrent effect. He cited jurisprudence from our Court of Appeal to highlight that general deterrence and denunciation can be achieved by way of a suspended sentence (See: *R. v. Scott*, 1996 NSCA 165; *R. v. George (*1992), 112 NSR (2d) 183 (NSCA)).

DECISION ON SENTENCE

[62] I find that the protection of the public is best served by a non-custodial sentence. As summarized by the Supreme Court of Canada in *Nasogaluak*: In the final analysis, the sentencing judge must have regard to all of the circumstances of the offence and the offender and to the needs of the community in which the offence occurred.

[63] I must give paramount importance to general deterrence and denunciation. Selling drugs destroys lives, homes, and communities. It leads to violence and other crime. It causes deaths. A suspended sentence with probation carries significant deterring qualities and threatens grave consequences for breach.

[64] Mr. Christmas demonstrated that he does not need more specific deterrence from committing crime. He is clean and law-abiding, after making great rehabilitative steps at a down point in his life. He lost care of his children due to drugs. He is remorseful and ashamed. He is an excellent candidate for rehabilitation. I have no reason to see him as a danger to the public, requiring his separation. At least two stories outlining his name, conviction, and this upcoming sentencing were reported in the Cape Breton Post. This publicity and stigma resultant from a conviction can contribute to both general and specific deterrence.

[65] It was 21 months between the offence date and the sentencing hearing. Gary Christmas accomplished a remarkable change in his life during those months. He quit drugs and maintained his sobriety. He found good employment and has the support of his family and his community. He shows remorse and wants to continue to improve his situation. His lawyer described him as being at “rock bottom” at the time of this offence. Every day since is a struggle and one Mr. Christmas is tackling with success.

[66] As for proportionality, this is a very serious offence with a maximum sentence of life imprisonment. A federal jail sentence can often be expected. But, we must go beyond the

specific charge and look to the circumstances behind the offence. While the number of pills may, at first glance, appear to be substantial, the reality is that Mr. Christmas was using many of them himself. No money was found, nor were any tools of the drug trade. Mr. Christmas sold the drugs on his own; he is solely responsible that that. He did so for purposes of maintaining his own chronic drug use.

[67] As noted by Justice Warner in ***R. v. Forward,* 2017 NSSC 190**:

> *[20] An addiction certainly does not excuse criminal behavior, but it has been recognized by some courts as a factor which, when proven, can have a mitigating effect on sentence. Justice Hill of the Ontario Superior Court of Justice in R. v. Andrews [2005] OJ No. 5708, provides a summary of the philosophy behind this approach:*
>
> > *36. As a general rule, heroin and cocaine trafficking are properly seen as grave offences with a high degree of moral blameworthiness. Most often, these are planned crimes carried out for profit by individuals apparently philosophically opposed to holding gainful and lawful employment as opposed to simply conducting illicit drug sales. Not surprisingly, then, the overarching principles of sentencing in these cases have been denunciation and general deterrence.*
> >
> > *37. That said, the law has tended to treat the addict who trafficks to support her habit somewhat differently – the profiteering for greed element is absent, a serious health issue emerges as context, and many question the efficacy of general deterrence in controlling the actions of one who is ill.*
> >
> > *38. In R. v. Smith, (1987) 34 C.C.C. (3d) 97 (S.C.C.), Justice Lamer, spending in the context of a drug importing case, stated, at page 124:*
> >
> > > *The direct cause of the hardship cast upon their victims and their families, these importers must also be made to bear their fair share of the guilt for the innumerable serious crimes of all sorts committed by addicts in order to feed their demand for drugs. Such persons with a few exceptions (as an example, the guilt of addicts who import not only to meet but also to finance their needs is not necessarily the same in degree as that of cold-blooded non-users), should, upon conviction, in my respectful view, be sentenced to and actually service long periods of penal servitude.*

[68] Mr. Christmas' addiction is relevant to sentencing, as is the relationship between his addiction and his experiences as an Aboriginal person. His moral blameworthiness is significantly diminished when these circumstances are properly considered.

[69] The range of actions that can constitute drug trafficking, and the circumstances of drug traffickers, are infinitely varied. I must consider parity, as much as comparisons can be made, to other individuals who share characteristics with the offender before me. The circumstances that Mr. Christmas presents to this Court are ones regularly seen as mitigating.

[70] Regarding aggravating factors, none of the specific ones listed in s. 10(2)(a) of the CDSA are present, but these are Schedule I drugs with a devastating impact on the local community.

[71] The mitigating factors are that Mr. Christmas accepted responsibility and plead guilty at an early opportunity, he is a lifelong abuser of substances and was heavily addicted at the time of the offence, he is well on the way to rehabilitation, he has young children and is working to be a good father, he has a supportive family and community, and he was selling to friends to subsidize his own heavy use of the drugs as opposed to a commercial motivation. He is Aboriginal and has spent his life facing intergenerational and community-wide effects of colonialism.

[72] The Crown takes no issue with the information in the Gladue Report, including the reported improved circumstances of Mr. Christmas. They accept that he had a horrible addiction and said “it’s no wonder”, noting his personal history and the systemic issues plaguing his local First Nation community. However, the Crown cautioned me that dealing drugs to feed a serious addition is not unusual in any community. They note that First Nation communities are some of the most victimized by drug dealers and they highlight the plague that pills represent in the Cape Breton Regional Municipality. Pills are highly available (being over-prescribed and portable), addictive, and cause too much harm. The Crown submits that Mr. Christmas was contributing to the victimization of his own community. This is far too simplistic a characterization of the communal disadvantage suffered by Mr. Christmas and those to whom

he sold drugs. It fails to recognize the unique experiences of Aboriginal people, realities this Court must be bear in mind.

[73] The Crown position is that they have factored in consideration of *Gladue* factors and Mr. Christmas' situation, and that is why the two-year custodial sentence is being requested. In short, they would have requested more time otherwise. The defence tells me that *Gladue* and *Ipeelee* invite a more creative approach from this Court, and Mr. Christmas is deserving of same. I agree with the defence.

[74] The Supreme Court of Canada tells us that we must take a more thoughtful and fulsome approach when sentencing Aboriginal offenders, as opposed to the simplistic approach to "knock off time". Gladue principles are more than new math when it comes to sentencing. A "different method of analysis" does not stop short at simple subtraction. *Gladue* is a clearly written decision, with a direct mandate from our highest Court. It has been nearly 20 years since its release and courts across this country are increasingly applying its principles.

[75] Mr. Christmas' lawyer drew a connection from his life experiences as a Mi'kmaq person on reserve, to his addictions, to his offence. She connected his experiences to systemic issues facing his community for generations – violence, substance abuse, racism, dislocation, suicide, family dysfunction. The Gladue Report before me also draws these connections and provides further context:

- The pattern of family violence is distinct in Aboriginal communities in important ways from that which we see in mainstream society. First, it invaded whole communities. Second, family struggles can be traced to institutionalized interventions meant to specifically disrupt or displace the Aboriginal family. Third, racism sustains violence in Aboriginal communities, promoting demeaning stereotypes of Aboriginal woman and men and seeking to diminish their value as human beings;
- Substance abuse in Aboriginal and Inuit communities is of the greatest concern;
- Aboriginal people are more likely to report being the victim of violent crimes; and
- Suicide rates among Aboriginal people are at least twice the national average and show no signs of decreasing.

[76] These realities are linked to the concurrent stressors that plague Aboriginal communities, brought on by colonialism and its legacy, and that impacted Mr. Christmas throughout his life. Drawing a causal connection between Mr. Christmas' circumstances and the offence is not necessary and is difficult to do, as explained in *Ipellee*. Despite that, I see a connection between Mr. Christmas' experiences and his crime. On a broader level, as explained in *Ipellee* (para 80-83), the oppression, discrimination, and grossly destructive treatment of Aboriginal people in Canada intersect to create a collective intergenerational experience that needs to be recognized and remedied.

[77] When considering s. 718.2(e), the Court has to mindful of the individual application to the offender. The Court also has to be mindful of the purpose of s. 718.2(e) as a broader measure to combat the destructive forces of colonialism that manifest in the overrepresentation of Aboriginal offenders in jail.

[78] Gary Christmas has the chance to help break the cycle for his own children. His lawyer explained that given the availability of drugs in prison, Mr. Christmas is worried that he would relapse in an institution. He has developed coping skills for sobriety while in his community and he wonders whether he would be able to cope the same while being in jail for the first time. That is a legitimate concern.

[79] In Mr. Christmas, the Membertou community has an example of someone who has overcome great adversity and is bettering himself. Selling drugs to others on the reserve, while contributing to the destruction drugs bring on his community, was a symptom of the harm suffered by Mr. Christmas himself. Like those he sold to, Mr. Christmas was a victim. He is now showing what is possible with community and family support, and with hard work. He is a good community member with a lot to offer. His community members wrote to the Court on his behalf, showing their support for his efforts and rehabilitation.

[80] Membertou is working to reinvent itself and offer a better life for its people to help them overcome historical injustices. The community resources are a large part of why Mr. Christmas is doing so well. It is by staying in this community and drawing on that support that Mr. Christmas will be able to continue his rehabilitation. This is how the public will be protected. It is also where he can be held accountable for his actions and positively contribute to the place where this offence took place. Mr. Christmas' children are his greatest motivation. Jail would separate them. Mr. Christmas' community is his biggest support. Jail would separate them. The needs of Mr. Christmas' community would be better served with him continuing his rehabilitation in it with strict judicial oversight. A sentence based simply on applying a range does not consider the full mandate, and indeed promise, of our sentencing regime and would instead needlessly perpetuate the devastating impact of our history on Aboriginal Canadians.

[81] Aboriginal Canadians face unparalleled familial separation – residential schools, foster care, and incarceration are obvious examples. I see no benefit to separating another family in this situation. Justice Suche of the Manitoba Court of Queen's Bench, in ***R. v. Letandre,* 2016 MBQB 91**, considered Gladue principles in sentencing an Aboriginal offender for robbery, and noted:

> *39. … Too many Aboriginal families have no father present. Too many Aboriginal boys have grown up without a male role model, or with one who is psychologically damaged or emotionally unhealthy. The absence of positive male role models is another circumstance of Aboriginal communities that clearly relates to the impact of colonization. I am of the view that a disposition that allows an Aboriginal offender to maintain a positive presence in his family's life is an important consideration in sentencing.*

[82] I am imposing a suspended sentence and placing Mr. Christmas on probation for three years.

[83] In addition to the other terms of probation that I outline below, there will be a requirement for Mr. Christmas to make a charitable donation. I am including this as an optional condition, under s. 732.1(3)(h) of the *Criminal Code*, which provides me with a broad discretion to make a

reasonable condition that has the purpose of protecting society and facilitating the offender's successful reintegration into the community. My inclusion of a requirement to pay a charitable donation during a term of probation is not a punitive measure. The law is clear that is not allowable. The organization I have chosen is one with a personal connection to Mr. Christmas. It will help Mr. Christmas provide reparations to his community, promote his long-term rehabilitation, and build upon his sense of responsibility to be an engaged, sober, law-abiding citizen.

[84] This sentence reflects Mr. Christmas' unique situation applied to our sentencing laws. Mr. Christmas' background, the circumstances of the offence, and his rehabilitative efforts are essential elements of it.

[85] The probation conditions are:

- Keep the peace and be of good behavior;
- Appear in Court as and when directed, including before me for regular updates as to your status while under probation conditions;
- Reside at your home in Membertou, or another address on Membertou reported to your Probation Officer in advance. Mr. Christmas' residency in Membertou appears to be an integral part of his ongoing rehabilitation and will more easily allow him to demonstrate it to the community and to make ongoing reparations. And, promptly notify the court or the probation office of any changes in your employment or occupation;
- Report to a Probation Officer within three days to the Sydney Probation Office, and then as directed by that person on an ongoing basis;
- Remain within the Province of Nova Scotia, unless you obtain written permission to go outside Nova Scotia, in advance from your Probation Officer;
- Continue mental health treatment, as directed by your supervisor and in consultation with your mental health service provider;
- Continue addiction prevention services, as directed by your supervisor provider and in consultation with your addiction service provider;
- Attend for, participate in and complete any other treatment or assessment as directed by your Probation Officer;
- Participate in urinalysis or other screening to determine the presence of substances in your body;

- Do not possess or consume alcohol, any other intoxicating substances, or any controlled substances as defined in the *Controlled Drugs and Substances* Act (except with a doctor's prescription or other legal authorization);
- Maintain your employment, and if that employment is lost, make reasonable efforts to obtain further employment at the earliest opportunity;
- Do not attend any place where alcohol is sold as the principle product;
- Complete 160 hours of community service, within Membertou if available, during the first 18 months of this Order, as approved by your supervisor;
- Donate $1800 to the Crosbie House Society within the first 18 months of this Order, with proof of this donation to be provided to your supervisor;
- Make a written apology to the Membertou community for committing this offence, via the Membertou Band Council, within the first 3 months of this Order;
- For the first 12 months of this Order, obey a curfew and remain in your residence from 8:00 p.m. to 7:00 a.m. every day, or as otherwise agreed to by your supervisor, with the following exceptions:
    - For purposes of scheduled employment;
    - When dealing with a medical emergency for you or a member of your immediate family;
    - Other exceptions for purposes of special family or cultural events, to be pre-approved by your Probation Officer;
    - For four hours, one day a week as agreed by your Probation Officer, to deal with personal errands and appointments;
    - To attend treatment or services.

[86] I grant these Ancillary Orders:

- Forfeiture Order for the seized items, pursuant to s. 16 of the CDSA;
- DNA Order (secondary designated offence), pursuant to s. 487.051(3) of the *Criminal Code,* and
- Firearms prohibition (mandatory 10 years), pursuant to s. 109 *Criminal Code.* Mr. Christmas confirmed to the Court that he does not hunt, does not anticipate doing so in the future, and was not seeking an exception to this prohibition.

[87] Mr. Christmas shall pay a Victim Surcharge of $200.00 within 1 year.