PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Ryan, 2019 NSPC 35

Date: 2019-09-09

Docket: #8274256; #8320804

Registry: Sydney

Between:

Her Majesty the Queen

v.

Rein Kyler Rodman RYAN

Judge:	The Honourable Judge A. Peter Ross,
Heard:	March11, June 19, July 8, 2019, in Sydney, Nova Scotia
Decision	Orally July 8, 2019, written decision delivered July 31, 2019
Charge:	s.267(a) and s.90, Criminal Code
Counsel:	Mr. Darcy MacPherson, PPS for the Crown
	Mr. James Snow, NSLA, for the Accused

SUMMARY

Sentence decision for a 20 year old indigenous man who pled guilty to assault with a weapon and carrying a concealed weapon. Incident involved a stabbing which endangered life of victim and resulted in serious lingering injuries to him and negative effects on family. Accused had no prior record, pled guilty at an early date and effected a positive change of lifestyle and behavior subsequent to the offence.

Competing principles of sentence discussed. Attribution of blame considered in light of mitigating historical influences. *Gladue* factors led to consideration of a restorative justice approach, but this could not be given full effect in the circumstances. A term of incarceration was required, albeit outside the general range for crimes with this degree of violence. Sentence of four months imprisonment assessed for s.267 offence. Given credit for time served, a three month jail term imposed from date of sentence, served intermittently, with probation on strict house arrest terms during period intermittent sentence being served. Two month conditional sentence, consecutive to the jail sentence, for the s.90 offence. Ancillary orders.

By the Court:

INTRODUCTION

[1] This is a sentence decision in a case which has been challenging for the court and for counsel, in a situation which has been life-changing for both victim and accused.

[2] I will first set out the charges and the facts, then speak about Mr. Ryan's personal history up to the date of the offence, then proceed to the impact of this crime on the victim and his family. I will next speak about Mr. Ryan's behavior since the offence, consider some relevant case law, comment on the competing sentencing principles and lastly state my conclusions.

THE CHARGES

[3] Rein Kyler Rodman Ryan has pled guilty to a charge of assault with a weapon contrary to s.267(a) of the Criminal Code and to carrying a concealed weapon under s.90. The original charge of aggravated assault was withdrawn, but the degree of violence and the life-threatening nature of the injuries still inform this decision.

[4] The offences occurred on October 13, 2018. Guilty pleas were entered on March 11, 2019. Sentence was passed on July 8, 2019 at which time the accused, Mr. Ryan, had just turned 20 and the victim, Mr. Corbett, had just turned 18. This is their first involvement in criminal proceedings.

[5] Reasons were given orally on the date of sentence. I undertook to provide written reasons to supplement those remarks. A transcript of the July 8 proceedings will be delivered to counsel along with this written judgement. Needless to say, all earlier proceedings are available as a matter of public record.

FACTS

[6] The facts are the foundation for every sentence decision. Here they are sourced from witness statements and from the testimony of the victim and accused at a contested sentence hearing.

[7] Briefly put, the accused stabbed and very nearly killed the victim with a knife in a brief encounter outside a residence in Sydney. They were attending a party; it was the first time they had met.

[8] Although Mr. Ryan imparted some information in statements to the police, he actually recalls very little of the evening in question. The part he seems to recall most clearly is being arrested and put in jail. He remembered being kicked out of his mother's house earlier in the day for not paying his board but has little recollection of what happened at the scene of the crime.

[9] The victim, Dawson Corbett, recalls that he was at a friend's place until about 11:30 p.m. at which time he and Daniel Hillier and Brea MacKinnon went to a party nearby. He knew neither the host nor the accused, who had arrived earlier. He and the accused spoke briefly inside. The accused was carrying two bottles of open liquor, one in each hand. Mr. Corbett asked for a shot of the "Hennessy"; Mr. Ryan obliged. The party seems to have gotten a bit rowdy. Mr. Corbett and his friends wanted to leave. Although the main entry way to the apartment was blocked they made an exit out the rear into the parking lot. Mr. Ryan emerged and confronted Mr. Corbett, accusing him of taking his liquor. Mr. Corbett lifted his shirt to show the accused that he hadn't, but Mr. Ryan continued to blame Mr. Corbett and became even more aggressive. The accused and the victim engaged. It is not clear exactly what occurred. Mr. Corbett said the accused "threw the first punch" and that he "fought back." Brea said to the police, "they got into it".

Daniel said that “they just got in each other’s face.” At this point the accused produced a knife and stabbed Mr. Corbett in the left groin area. Mr. Corbett says he was stabbed when he was up against a van. He did not see it coming. He felt the blood on his pants. It immediately disabled him, and he collapsed. Friends applied pressure to the wound until the ambulance arrived. According to one witness, a Mr. James, Mr. Ryan produced the knife and stated explicitly “you better give the bottle back or I will stab you” but it is not possible to conclude that Mr. Ryan’s actions were quite as ‘thought-through’ as that comment suggests.

[10] There are varying accounts of how Mr. Ryan was carrying the knife. One witness said it was in his hand from the outset, a second that he took it from his waistband and a third that he took it from his back pocket. He still had possession of the sheathed knife a short time later when found by the police on a nearby street. He did carry the knife concealed after the stabbing and quite likely before, and hence the facts support his plea of guilty to the s.90 charge.

[11] Mr. Ryan told the police he had stabbed Mr. Corbett. He made this admission almost immediately and expressed concern that the victim might be dead. He knew at the time what he had done although by all accounts he was heavily intoxicated by alcohol and his memory has largely been ‘blacked out’ as a result.

[12] Mr. Ryan gave a vivid description of how he reacted to perceived threats. He said he would “see red”, lose control and lash out. This accords with his actions on this fateful evening.

[13] I accept that Mr. Ryan does not know where he got the knife. Based on the scant evidence I have heard it seems quite possible he found it inside the residence. The owner of the premises was an avid hunter. The knife was a hunting knife, sometimes called a buck knife, with a fixed blade about six inches in length.

[14] At one point in the investigation, Mr. Ryan indicated that he had acted in self defence, at another he suggested he may have become enraged because Mr. Corbett directed a racial slur at him. At the sentence hearing neither of these theories was advanced in a serious way; there is no evidence to support either one.

[15] Mr. Corbett was taken to the hospital, put in the ICU, transfused, then taken for emergency surgery. Thankfully a vascular surgeon, Dr. Rex Dunn, was available to come to the hospital to do a reconstruction of Mr. Corbett's femoral artery, which had been completely severed. Dr. Dunn saved Dawson Corbett's life, and spared Mr. Ryan from a charge of homicide.

[16] It is difficult to explain what would motivate a person to do such a thing. It most certainly is impossible to justify it. Perhaps some understanding comes from the Gladue Report, and it is that to which I now turn.

THE ACCUSED'S HISTORY

[17] The Gladue writer summarizes the history of the Mi'kmaq in Nova Scotia, of Eskasoni in particular, of the colonization of indigenous people. She speaks about the residential school experience, of life on Reserves and the attendant loss of culture, economic status and well-being of indigenous communities.

[18] Mr. Ryan's mother, Robyn Dennis, went to Indian Day School in Eskasoni, which opened in 1875 and finally closed its doors in 1983. She did not graduate. She gave birth to a number of children while still in high school and had to stay home to watch them. She had 13 children from various relationships. She lost many of them to Mi'kmaq Family and Children Services and feels embittered about this, believing she did everything that had been asked of her.

[19] Robyn's own mother had a large number of children, drank heavily and according to Robyn "was not a mother to me."

[20] Mr. Ryan's father is Chad Ryan. He is non-native. He lives in Sydney and runs a small business. Robyn and Chad separated when Rein was very young. Robyn acquired new partners, but none were a father figure in any sense to Rein.

[21] As Rein got older he wanted to live with his father. His mother supported this, but according to Rein he was beaten and abused by Chad, and his mother "didn't care because she would be drinking." Rein ended up living between them. Conditions at his mother's were crowded - insufficient beds, kids sleeping on the floor. His paternal grandparents recall conditions in Rein's mother's home as unhealthy and unsanitary. They remember him being filthy as a child.

[22] Robyn admitted to drinking a lot and living with a number of different men. Rein recalls drinking parties at the house and being punched by grown-ups. He said he suffered continuous beatings from various of his mother's partners. He also witnessed his mother being beaten by her boyfriends. These occurrences are corroborated by various sources.

[23] Rein once had to save his mother from suicide by hanging. Chad's parents took Rein to Sydney after this incident and placed him with Chad. Rein lived with his father for about three years. He was initially happy but both Rein and his grandmother, Mrs. Delaney (Chad's mother) agree that Chad betrayed the promise he made to Rein to make Rein his priority. Chad took up with a woman who did not care for Rein. He began to beat him. When Chad's mother witnessed this abuse she took her grandson to live with her. It is clear that Rein felt rejected by his father and that this has had a profound impact on him. Neither Rein nor Chad's parents have had contact with Chad for almost seven years. Rein speaks of his grandmother as "the most important person in my life."

[24] Rein lived with his grandparents for about six years. He had good marks in Coxheath Elementary School during this time but he experienced racism from other students and got into a lot of fights. He went through Malcolm Munroe Junior High and enrolled at Riverview High School, but he returned to Eskasoni after half a semester in Grade 10 to attend high school there. He graduated in June of 2018.

[25] The move back to Eskasoni and the return to his mother's residence coincides with Rein "hanging around with the wrong crowd and experimenting with drugs."

[26] Rein had worked part time at McDonald's when living with his grandmother in Sydney. After finishing high school in Eskasoni he went to Fredericton for one summer to live with his brother, where worked at a Tim Horton's. Seemingly he was doing well, but sensing a need to help his younger brother and sister he returned to Eskasoni, once again living with his mother. Rein is currently

employed at the Foodland Supermarket in Eskasoni. He was hired in November 2018. The manager terms him his “best worker”. His mother has been sober for the past year.

[27] Rein speaks fluent Mi’kmaq. He is closely connected to his culture and to his community.

[28] Rein testified that he began to use drugs at 13. He was “living in a white community”, taunted for being a “brown boy” and goaded into doing drugs. By this point his father had given up on him.

[29] The Presentence Report confirms that Rein’s family lived in poverty in Eskasoni and that when he moved to Sydney he was afforded things he would not have received at home. It sets out the fighting and racial abuse. Sources indicate that Rein tended to become aggressive when under the influence of drugs or alcohol.

[30] Rein lost some friends and family members in recent years. By October of 2018 he was drinking hard liquor nearly every day and also abusing hard drugs. As noted he was drinking heavily on the date of the offence and had been kicked out of his mother’s home, at which point his life trajectory crossed with the victim’s.

THE VICTIM

[31] I don't know a great deal about the personal history of the victim, Dawson Corbett. I gather that he lives with his father and mother here in Sydney, N.S. His father is a roofer; his mother works as well - she speaks in her victim impact statement of having to miss three months to look after her son. There is mention of siblings, specifically the seven-year-old who saw his older brother in the hospital on the verge of death.

[32] Mr. Corbett's momentary encounter with the accused on October 13th resulted in profound changes to his physical and emotional well being. When he presented at the hospital the note there indicates, "penetrating trauma, stabbing to the lower left quadrant above the pubic area". The general surgeon reports that he saw Dawson Corbett unresponsive. He underwent a major resuscitation. He was "in extremis". As time passed his breathing became agonal and he had to be intubated prior to going to the OR. The OR team was called out on an emergency basis. He was in danger of losing his life because of the severe blood loss.

[33] The vascular surgeon, Dr. Dunn, prepared a report which describes an "exsanguinating hemorrhage" from a single stab wound in the left groin. The femoral artery had been completely severed. The superficial femoral vein had been cut. It was necessary for him to harvest a saphenous vein from the left groin for a graft. He describes the surgical procedures in detail. He says "it was necessary, because of the extensive time that passed, over six hours in surgery, to do a four-quadrant fasciotomy of the leg. We did two incisions, one lateral and one medial and ran the scissors up and down the fascia to be sure we had released as much as we could."

[34] Mr. Corbett bears the scars of that surgery today, and the emotional scars that accompany them. He took the stand to speak about the impact of this horrible crime on him. From October 13, 2018 he was in hospital for ten days, three in the ICU. Mr. Corbett missed three months of school, returning after the Christmas break. He has six scars; he showed the two in the lower left leg in court. The others are in the belly and pubic area. He said the incisions were done to save his leg. He also broke three teeth when he fell, which had to be capped. He did physiotherapy for five weeks. He sees a doctor still. He says the right side of his left leg is still numb, that he's not as strong as he was. He says he often gets pain when walking, the leg gets weak and gives out, and sometimes he has to catch himself. He takes Melatonin to sleep. He takes nothing for pain. On the day he testified he had written a Grade 12 exam. It appears he has finished his Grade 12 and he expects to graduate.

[35] Mr. Corbett says he's more nervous now and stays in the house most of the time. He says he often wakes up with nightmares. He says he doesn't want psychological counselling.

[36] Mr. Corbett says the event had a terrible effect on his family. He says, "it hurt my mom a lot." His father is a roofer - he thought he might be working with his father, but now he doesn't think he can because of his leg.

[37] Mother Michelle Corbett filed a Victim Impact Statement. She said, "the event impacted me and my son for the rest of our lives." She says Dawson doesn't really move out of the house, wakes up with nightmares, and is always "looking over his shoulder". She feels that she will be traumatized for the rest of her life.

[38] Dawson's father filed a statement describing the stress caused to the family. He is haunted by the image of his son lying on the ground in a pool of his own blood. He remembers screaming to his son to wake up. He remembers the doctor advising him to say whatever he wanted to say to his son "just in case". He remembers hearing in the ICU his son might lose his leg. He was deeply affected by the fact that his younger son, the seven-year-old, witnessed some of the aftermath.

THE ACCUSED'S BEHAVIOR SINCE THE OFFENCE

[39] Mr. Corbett's life took a turn for the worse on October 13th. In a certain sense, Mr. Ryan's life took a turn for the better. The dawning of the awful truth of what he had done, the realization his life was being ruined by alcohol and drug abuse, has brought about a significant change. His brief incarceration on remand seems to have had an effect on him. The death in February of an uncle and trusted friend seems to have strongly motivated him. But I accept that he is also motivated by a desire to make amends by improving his own life and becoming a valuable and trusted member of his community. This motivation arises from an understanding of the harm that he did and the remorse that he feels. There is extensive evidence of these steps towards rehabilitation. He began to act on these almost immediately after the event. His early guilty plea, five months later, also displays a willingness to take responsibility.

[40] Mr. Ryan wrote a letter to the court, saying he has "come to accept" what he did. He says that when he put the orange jumpsuit at the jail he knew he had made a big mistake. He says he feels a lot better and healthier since being off the drugs.

He talks about attending boxing classes, and his job at Eskasoni Foodland. He says he can't express how sorry he feels. He writes, "it has opened a new path in life for me. I can do good for others. I would also like to get more involved in community events and I would like to be a role model. I've definitely learned from my mistakes." The letter expresses regret; not much is said about the victim, but Mr. Ryan did show empathy for Mr. Corbett during his testimony at the sentence hearing.

[41] There is a letter from Paul Wukitch, a psychologist and Alcohol and Addiction Counsellor at Mi'kmaq Lodge who has been seeing Mr. Ryan. It is a very positive letter. He concludes, "there are no guarantees, changes take time, but I believe Rein is on the right track and that his motivation has been sincere."

[42] Mr. Ryan himself took the stand and spoke about his steps towards rehabilitation. He says he started the first week he got out. He spoke about how determined he was to gain employment. He started in November and has been working ever since. He goes to the boxing club after work and even at lunch. He says he's taken other members of the club to Membertou to box.

[43] He began a treatment program in Eskasoni in the fall and produced a number of certificates showing the various aspects of the counselling that he has completed. He had five weeks of extensive and intensive programming. He says he's been straight since he got out of jail in October. He says he saw Mr. Wukitch twice a week and still goes to see him. He regards the certificates as reminders rather than awards, which is a very mature and wise thing for him to say.

[44] He spoke about the indigenous content of the programs, the ‘seven secret teachings’ for instance. He says he now has routine. He works on his mother’s house. He has a better understanding of the anger cycle, having done anger management counselling as part of his programming. He has learned strategies for conflict resolution. He says he applies those strategies daily.

[45] In the spring Mr. Ryan took further programming, and more certificates were produced. He took an ‘options to anger’ workshop. He was very articulate when he described the symptoms of anger and what to do about them. He has gone to Sweats.

[46] He says he is proud of himself rather than feeling like a failure. He feels that his life has purpose, has routine, has structure. He says he wakes up with a plan. He spends most of his time between the gym, the boxing club, his workplace and at home. He says “I feel really sorry and terrible for what I’ve done. I know now that I am sober I won’t do it again. I want to prove it wasn’t me, that I have the potential to do good.”

[47] Mr. Ryan testified that he would like to help with Mr. Corbett’s recovery. Mr. Corbett could not be in court the day that the accused testified. Mr. Ryan said, “I wish he were here; I would even help him to work out”, presumably talking about the need for physical rehabilitation.

[48] In cross-examination Mr. Ryan elaborated on the time spent with his brother in New Brunswick. He enjoyed life there, but felt he had to come home to help his younger siblings. He thought his brother’s was a good place for him. He said, “I

would like to do this if I can, work there in July, it pays much better than Foodland."

[49] He talked about maintaining a curfew while awaiting sentence. There was evidentially one breach, but I understand that since that early transgression he's been compliant. He has been on strict conditions now for a number of months, I think eight. He recognizes that when his sentence is finished, whatever the length might be, whether two years or one day, there will still be possible risks or triggers to drinking. He says he has his priorities straight. He understands the risk that drugs and alcohol could again take over his life, but he believes he now has the internal strength and the knowledge to prevent that from happening. In saying this he did seem sincere and self aware.

[50] Mr. Barry Bernard testified in support of the accused. Mr. Bernard is well known to the court as a Mi'kmaq court worker. He is on the Board of Directors of Nova Scotia Legal Aid. He is also a coach of the Red Tribe Boxing Club in Eskasoni. Mr. Bernard acknowledged that he came to this proceeding with a less objective role than he normally occupies. He acknowledged he was advocating on behalf of Mr. Ryan and believes he should be given a second chance.

[51] Mr. Bernard said he met Mr. Ryan late last fall when he was approached by Mr. Ryan and some others about joining the club. He said Mr. Ryan was the only one of that group that stuck with it. He talked about how difficult it is for the members, what's expected of them in terms of cardiovascular exercise and discipline. He said that Rein has shown leadership. He said he is "my guy" and guides younger ones during their bouts and during their workouts. He said Mr. Ryan is a "different man" now - he works, opens up the club, tells kids about his

previous lifestyle. He said many of the kids in his club come from foster parents, but it is a safe house for them and Rein is a good example for them. He has the keys to the boxing club; he does janitorial work there. Mr. Bernard has had Rein to his own home and trusts him implicitly.

[52] He explained that boxing is especially important for Rein because it teaches him self-control. If true, this should ameliorate the risk of him behaving again as he did on the date of the offence. The accused has evidently learned to maintain his composure and not to lose control in the face of aggression.

[53] Mr. Ryan's grandmother Ruth and his mother Robyn both say that the place for Rein is in New Brunswick with his brother Michael who will give him a home, help him find a job and encourage him to seek counselling. They say that jail would not be good for him, given his age and the fact he requires help, and Rein himself says that Fredericton was good for him and if he returned there he would have a chance of making something out of his life.

[54] There was some mention that Mr. Ryan was waiting to go to secondary school. This was not flushed out in much detail but I do proceed on the understanding that there could be an electrical program available to him in the fall. Mr. Ryan also talked about taking a relapse prevention program in the fall and seemed receptive to living with his brother in New Brunswick. I take that to be a long-term option.

[55] Although a sentence circle or restorative forms of justice were considered, for one reason or another it appears they were not feasible in this case. These were mentioned late in the proceedings but the Crown didn't think it was a viable

option, possibly because the victim and family come at this from a different perspective - not only the perspective of a victim but from a different cultural perspective, with different expectations about what would be a fair outcome.

CASELAW AND DISCUSSION

[56] There is a dizzying array of cases regarding crimes of violence, assault with a knife, aggravated assault etc. I will touch on those which were raised in argument and some I looked at subsequently. I will say at the outset that no case has been brought to my attention where an assault of this severity was met with a purely noncustodial sentence.

[57] R. v. Kershane 2005 SKCA 18 concerns a 19-year-old who committed an aggravated assault, who was a person of aboriginal ancestry but without strong connections to the community. There was no drug and alcohol problem. It was a gang related offence. It was a calculated attack. The victim was stabbed near the heart, suffered a permanent injury, his life was endangered, and a two-year sentence was increased on appeal to four years in a federal penitentiary.

[58] In R. v. S.A.T., 2016 BCPC 355 there was an aggravated assault with serious effects on the victim. It was a brutal beating of a stranger, fractured bones and concussion, leaving the victim with PTSD. That accused had a lengthy record. That accused was much older than Mr. Ryan. He pled guilty. The court had the benefit of a Gladue report. The court meted out a four-year sentence.

[59] At the other end of the sentence spectrum is R. v. Nicholls [2013] BCJ No.1369 (BCSC). It concerned an aggravated assault and an assault with a weapon - two penetrating stab wounds with a three-inch knife. In that case there was a suspended sentence and 30 months of probation, demonstrating the wide range of sentences that have been imposed for similar charges. I am cognizant of the lesser impact on the victim there - he appears to have recovered fully and the injuries were never life-threatening.

[60] In a somewhat similar vein is R. v. Moore, 2018 NSPC 48, a decision of Judge Atwood, where the accused was charged with an aggravated assault, pled guilty a month later, and received a suspended sentence and probation. However, the injuries were minor, described at par. 93 as being at the lower end of the spectrum. The knife blade had glanced off a rib. Ms. Moore's moral culpability was also described as being at the lower end of the spectrum. There was no victim impact statement and the victim harboured no fear of the accused. There was a Gladue Report and some Gladue factors were raised but there was a much more tenuous connection to her indigenous community than Mr. Ryan has to his. Judge Atwood noted that courts have a legal duty to take into account systemic factors that have a bearing on a First Nation's person coming into conflict with the law. At par.84 he notes that the accused faced overwhelming challenges in developing a healthy way of life, and reacted badly in cases of interpersonal conflict. Those comments resonate with the facts in the case at hand. There is a very good summary of general sentencing principles at paras. 40 to 59 of *Moore.*

[61] I have also looked at *R. v. Gaudet*, 2009, NSJ No. 489, a provincial court decision of Judge Tax. There were two common assaults and one aggravated

assault in that case, two months apart. Gaudet pled guilty, had a short criminal record, was 21. The incident involved a fight with his brother whom he stabbed three times with a kitchen knife. The wounds were relatively superficial, and not life threatening. It was described as a crime of senseless violence. The accused was in a machinist program; jail would result in the loss of that program and the tuition he had paid. The victim was supportive of the accused, in fact he testified on the accused's behalf at the sentence hearing. The accused appeared to minimize his actions somewhat and a probation officer questioned the sincerity of his acceptance of responsibility. This is a difference with Mr. Ryan, whose sincerity I do accept and who has never played down the seriousness of what he did. Judge Tax imposed nine months in jail followed by probation.

[62] In R. v. Barrons, [2017] NSJ No. 342, there was a break, enter and commit assault on an ex-girlfriend in her residence. Some of the ensuing altercation involved another man that the accused found inside. It is a different sort of offence than Mr. Ryan's. I mention it only because there, as here, there was quite a disparity in the sentence recommendation, the Crown looking for a two year sentence, the Defence suggesting a suspended sentence. Justice Arnold imposed a suspended sentence on three years of probation, even though home invasions generally attract a lengthy federal sentence. In similar fashion to this case the accused pled guilty, was young, was successful. Mr. Barron had gained admission to Law School, had supportive family and community, had undertaken counselling and was described as a "model citizen". There was not nearly the level of violence as in the case at hand. There were no physical injuries to the victim at all. The Court said the most impressive aspect of the case was how Mr. Barron responded after he was charged, which does resonate with this case. The Court was

concerned that even short-term imprisonment would jeopardize his significant accomplishments. Although it wasn't mentioned specifically I note the decision came in August and the accused was due to start Law School that September. The judgement refers to a decision of Buckle, PCJ in R. v. Rushton [2017] N.S.J. No. 23, which was a drug case. Arnold, J. quoted extensively from that decision, particularly where it discusses how, in certain situations, a suspended sentence might better serve to protect the public than a short jail sentence. I should note that it is not as obvious here, in Mr. Ryan's case, that a short jail sentence would come at the cost of a career or educational opportunity.

[63] In R. v. Chase, 2019 NSJ No. 203 our Court of Appeal upheld a 90-day intermittent sentence for possession of cocaine for the purpose of trafficking. This is a very different sort of crime, but again it illustrates the fact that occasionally a case arises where the normal range of sentence does not fit. There the accused had a significant prior record including a robbery. He had trafficked in hard drugs, cocaine.

[64] Drug trafficking cases are different than crimes of violence. The harm is real in the drug trafficking case, but the link between the crime and the harm is less direct and less obvious. Mr. Corbett's injuries are a direct result of Mr. Ryan's senseless act of violence. There is one victim and one wrongdoer with no intervening circumstances, no lapse of time, no middleman. When a crime directly causes serious harm to a particular person it is more difficult to conceptualize good social deeds as compensatory. And so, in a case like Mr. Ryan's, in a crime of significant personal violence, rehabilitation and deterrence and denunciation are brought into conflict in a very stark way. Mr. Chase, rather like Bethany Moore,

had recently rekindled an interest in his aboriginal heritage. In the case before me, the link between Mr. Ryan and his community is much brighter and clearer than in *Chase* or *Moore*. In other words, the Gladue factors deserve more attention. In *Chase*, at para 39 to 42 the Court of Appeal speaks to the principles of parity, proportionality and deterrence and denunciation. I think *Chase* has some general application in that the sentence I am going to impose on Mr. Ryan will be outside the general range.

[65] Defence raised an unreported 2012 case – R. v. William Francis Paul. When I listened to the recording on Voxlog, I recalled that this was a decision of mine, which may explain why it was recommended back to me. Paul was charged with aggravated assault but as here the accused entered a plea of guilty to assault with a weapon, a knife. The accused and victim were both members of a local First Nations community. Mr. Paul stabbed Mr. Kabaty with a knife. Mr. Kabaty had behaved very aggressively towards Mr. Paul, having swung a bat at him and attempting to enter Mr. Paul's residence. Mr. Paul's young child was inside. In response, Mr. Paul took a knife out of the butcher block, ran outside after Mr. Kabaty and thrust the knife into Kabaty as he walked away. Mr. Kabaty suffered a punctured lung; he was in hospital for a number of days. There were no lasting effects. The Crown had recommended nine months in jail but I sentenced Mr. Paul to a suspended sentence and 24 months of probation. As noted there were extenuating factors given the victim's own behavior. Another distinguishing feature is that the conviction, regardless of the resulting the sentence, cost Mr. Paul a career opportunity. He had planned all his life to be a police officer and the conviction evidently took that option away from him. That price was certainly

accounted for in determining that a suspended sentence and two years probation was a fit sentence.

[66] I have also revisited a written but unreported decision I gave on one *Constance Stevens* from Wagmacook. It was a charge of assault with a weapon. The weapon was a motor vehicle. It is a rather dated case but I mention it because it emphasized how important it can be for people like Ms. Stevens, like Mr. Paul in the earlier case, and like Mr. Ryan in the case at hand, to be role models in their communities. A court should be mindful that jail can be a setback for an accused but also for his or her community. I noted that with crimes of violence the objectives of sentencing are advanced over the entire spectrum of cases that come before the court. Deterrence and denunciation need not be given the maximum expression in every single case. Exceptionally, even a case of violence, rehabilitation may take precedence. In the *Stevens* case that went so far as to merit a conditional discharge for the accused. She was a schoolteacher who taught in Mi'kmaq, at risk of losing her job over the incident. One of two victims, who was pregnant at the time, was struck in the lower legs and abdomen, but there were no effects to the fetus. The victims were struck in the legs when Ms. Stevens reversed the vehicle. The victims suffered psychological trauma. There was prior animosity between the parties. I needed to be cognizant then, and still today, of the impact of a sentence, not only on the accused but in the case of an aboriginal offender in particular, the impact on the community. In saying this I hope not to lose sight of the fact than an unduly lenient sentence may also have detrimental impacts on the community.

[67] The Supreme Court decisions in R. v. Gladue [1999] 1 SCR 688 and R. v. Ipeelee 2012 SCC 13, and s.718.2(e) of the Criminal Code loom over this case. S.718.2(e) reads:

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

[68] In *Gladue* the court said that in cases where there is no alternative to incarceration, the length of the term must be carefully considered. It says the jail term for an aboriginal offender may in some circumstances be less than a term imposed on a nonaboriginal offender for the same offence, but, at the same time, s.718.2(e) should not to be taken to mean an automatic reduction in the prison sentence of aboriginal offenders. In *Ipeelee*, a seminal decision in the area of sentencing of aboriginal offenders Justice LeBel said at par.68:

> Section 718.2(b) is properly seen as a direction to members of the judiciary to inquire into the causes of the problem and endeavor to remedy it to the extent that a remedy is possible through the sentencing process.

[69] In subsequent paragraphs he discusses sentencing principles in ways that are directly relevant to this decision:

> 71 In *Gladue*, this Court rejected Ms. Gladue's argument that s. 718.2(*e*) was an affirmative action provision or, as the Crown described it, an invitation to engage in "reverse discrimination" (para. 86). Cory and Iacobucci JJ. were very clear in stating that "s. 718.2(*e*) should not be taken as requiring an automatic reduction of a sentence, or a remission of a warranted period of incarceration, simply because the offender is aboriginal" (*Gladue*, at para. 88 (emphasis added)). This point was reiterated in *R. v. Wells*, 2000 SCC 10, [2000] 1 S.C.R. 207, at para. 30. There is nothing to suggest that subsequent decisions of provincial and appellate courts have departed from this principle. In fact, it is usually stated explicitly. For example, in *R. v. Vermette*, 2001 MBCA 64, 156 Man. R. (2d) 120, the Manitoba Court of Appeal stated, at para. 39:

> The section does not mandate better treatment for aboriginal offenders than non-aboriginal offenders. It is simply a recognition that the sentence must be individualized and that there are serious social problems with respect to aboriginals that require more creative and innovative solutions. This is not reverse discrimination. It is an acknowledgement that to achieve real equity, sometimes different people must be treated differently.

73 . . . Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely -- if ever -- attains a level where one could properly say that their actions were not *voluntary* and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability.

74 The second set of circumstances -- the types of sanctions which may be appropriate -- bears not on the degree of culpability of the offender, but on the effectiveness of the sentence itself. As Cory and Iacobucci JJ. point out, at para. 73 of *Gladue*: "What is important to recognize is that, for many if not most aboriginal offenders, the current concepts of sentencing are inappropriate because they have frequently not responded to the needs, experiences, and perspectives of aboriginal people or aboriginal communities." As the RCAP indicates, at p. 309, the "crushing failure" of the Canadian criminal justice system *vis-à-vis* Aboriginal peoples is due to "the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice." The *Gladue* principles direct sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community.

82 This judgment (Alta) displays an inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples. It also imposes an evidentiary burden on offenders that was not intended by *Gladue*. As the Ontario Court of Appeal states in *R. v. Collins*, 2011 ONCA 182, 277 O.A.C. 88, at paras. 32-33:

> There is nothing in the governing authorities that places the burden of persuasion on an Aboriginal accused to establish a causal link between the systemic and background factors and commission of the offence....

84 The second and perhaps most significant issue in the post-*Gladue* jurisprudence is the irregular and uncertain application of the *Gladue* principles to sentencing decisions for serious or violent offences. . . . The passage in *Gladue* that has received this unwarranted emphasis is the observation that "[g]enerally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for Aboriginals and

> non-Aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing" (*Gladue*, at para. 79; see also *Wells*, at paras. 42-44). Numerous courts have erroneously interpreted this generalization as an indication that the *Gladue* principles do not apply to serious offences (see, e.g., *R. v. Carrière* (2002), 164 C.C.C. (3d) 569 (Ont. C.A.)
>
> 85 . . . in *Wells*, 2000 SCC 10 Iacobucci J. reiterated, at para. 50, that
>
> > [t]he generalization drawn in *Gladue* to the effect that the more violent and serious the offence, the more likely as a practical matter for similar terms of imprisonment to be imposed on aboriginal and non-aboriginal offenders, was not meant to be a principle of universal application. In each case, the sentencing judge must look to the circumstances of the aboriginal offender.

[70] The Gladue factors identified in the report included Mr. Ryan's Mi'kmaq heritage, strong community support, the availability of culturally appropriate treatment in Eskasoni, background factors such as poverty, family disintegration, substance abuse, emotional and physical abuse, sudden violent deaths of family and friends, isolation and racism. The Gladue writer recommends "in order to resolve the current situation in the most restorative manner that he be permitted to continue treatment in the community." Prudently, the writer does not expressly reject jail as a possible outcome or a fit sentence.

[71] None of the Gladue factors can be laid at the victim's doorstep. With this in mind, should the perpetrator of the harm done to Mr. Corbett be punished any less, or in any different way, because the perpetrator is of aboriginal ancestry? Justice is owed to both the accused and the victim. There are non-native persons who find themselves in trouble with the law who have been beaten and abused, who have lived in poverty, who have been rejected by mainstream society, who have not received the care that children deserve. Should Mr. Ryan be given any special allowance that a non-native person would fail to receive? This is a vexing and

difficult question. It is well to remember that such hardships and deprivations, while not unique to individual indigenous persons, were visited wholesale upon them as a people. They were largely the result of laws and policies which were formed and animated by racism.

[72] Two appellate decisions worthy of note are discussed in a blog at https://ablawg.ca posted September 5, 2016, "Making sense of aboriginal and racialized sentencing". The cases are R v Laboucane, 2016 ABCA 176 and R v Kreko, 2016 ONCA 367. The writers distill certain principles from Gladue and Ipeelee and discuss how these were applied in Laboucane and Kreko. In the authors' view there are two possible justifications for a more lenient sentence for an aboriginal offender. They comment on the difficulty of annunciating a clear test. I include these extracts:

> With respect to affirming the principles established in Gladue, the Court restated in Ipeelee that:
>
> 1.The Proportionality Provision Still Persists: The Aboriginal Sentencing Provision does not displace the Proportionality Provision, but rather, furthers the objective of proportional sentencing in the context of Aboriginal offenders (Ipeelee, at paras 59, 68, 72-75 and 87).
>
> 2.Still No Automatic Leniency: The Aboriginal Sentencing Provision does not result in automatic leniency for Aboriginal offenders (Ipeelee, at para 75).
>
> 3.Still Possible Accommodation of Aboriginal Offenders: The Aboriginal Sentencing Provision may result in a more lenient sentence for an Aboriginal offender than for a non–Aboriginal offender who is ostensibly similarly situated (Ipeelee, at paras 78-79).
>
> 4.Aboriginal Sentencing Provision Still Always Considered: The Aboriginal Sentencing Provision must always be considered, even for serious offences (Ipeelee, at paras 84-87).
>
> In addition to reaffirming that the Aboriginal Sentencing Provision does not displace the Proportionality Provision, the Court explained that the Aboriginal Sentencing Provision does not displace the parity principle. The parity principle requires that "a sentence

should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances" (Criminal Code, s 718.2(b); the Parity Provision). The Court explained that this principle is not displaced by the Aboriginal Sentencing Provision because, when sentences imposed on Aboriginal offenders are more lenient, they will be "justified based on their unique circumstances … which are rationally related to the sentencing process" (Ipeelee, at paras 76-79).

Lastly, the Court in Ipeelee clarified that Aboriginal offenders need not "establish a causal link between background factors and the commission of the current offence before being entitled to have those matters considered by the sentencing judge." Rather, those background factors need only be "tied in some way to the particular offender and offence" such that they "bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized" (at paras 81-83). This final point is, in our view, simply a rephrasing of the Gladue Test. Put differently, Ipeelee rephrases the Gladue Test in the following terms:

The Aboriginal Sentencing Provision will impact the sentence of an Aboriginal offender if their Aboriginal heritage either:

1. bears on their culpability for the offence (Contributory Mitigation); or

2. indicates which sentencing objectives can and should be actualized (Suitability Mitigation).

In Laboucane, the Alberta Court of Appeal narrowly distinguishes its approach to the Aboriginal Sentencing Provision from that taken by the Ontario Court of Appeal in Kreko (see Laboucane, at paras 65–73). This alleged distinction relates to how the Gladue–Ipeelee Test should be applied.

The Ontario Court of Appeal clarified that, to trigger the Aboriginal Sentencing Provision, a causal link between an offender's Aboriginal heritage and the offence is not required (at para 21). Rather, the offender's Aboriginal heritage need only be "tied to the particular offender and offence(s) in that [it] must bear on his or her culpability or indicate which types of sanctions may be appropriate in order to effectively achieve the objectives of sentencing" (at para 23).

The Alberta Court of Appeal strongly criticized the Ontario Court of Appeal's judgment in Kreko. by saying that the decision "runs perilously close" to making the Aboriginal Sentencing Provision an "automatic mitigating factor" for all Aboriginal offenders rather than making it a mitigating factor only in those cases where Aboriginal heritage is related to determining a proportional sentence (at paras 68-69).

Accordingly, the Alberta Court of Appeal appears to only be critical of how the Ontario Court of Appeal described the relevant legal principles, not how it applied those legal principles in this instance.

The distinct facts in Kreko, which more appropriately justified leniency in light of that Aboriginal offender's identity, may partially explain the alleged divide between Alberta and Ontario. Indeed, the Alberta Court of Appeal itself appears to admit this, to our confusion (Laboucane, at para 66).

Given these distinct facts, the Alberta Court of Appeal's critique of Kreko seems ill-founded, as the same test was applied in both cases, and led to different outcomes that appear responsive to the facts in both cases.

As we summarized above, ever since Gladue, the Supreme Court, and other appellate courts, have been clear about two extremes, neither of which reflect the proper approach to Aboriginal sentencing:

> 1.Aboriginal heritage only reducing a sentence when it is causally linked to the offence, which is too strict (Gladue, at para 93.6; Ipeelee, at paras 81–83; Kreko at para 21; Laboucane, at para 63.1); and
>
> 2.Aboriginal heritage automatically reducing every sentence, which is too lenient (Gladue, at paras 78-80, 88, and 93.9; Ipeelee, at para 75; Kreko, at para 19; Laboucane at para 54).

In this way, courts have been clear in negatively defining Aboriginal sentencing. But a clear positive definition for Aboriginal sentencing remains elusive. At best, the Supreme Court has positively defined Aboriginal sentencing as requiring that an offender's Aboriginal heritage be "tied in some way to the particular offender and offence" such that it "bear[s] on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized" (Ipeelee, paras 81–83). But what does it mean for an offender's Aboriginal heritage to be "tied in some way" to an offender or their offence? And what does it mean for an offender's Aboriginal heritage to "bear" on their culpability? These general terms, without instructive examples, make it difficult for courts to know the threshold at which leniency is warranted in the context of Aboriginal sentencing. Indeed, we suspect that the Alberta Court of Appeal's alternate and broad language ("a measurable connection"; see Laboucane at para 66) is yet another indicator of these courts not really understanding the type of connection required to warrant leniency in Aboriginal sentencing.

The only logical source of confusion is the vagueness of the test itself. In particular, the test lacks clarity regarding what it means for an Aboriginal offender's heritage to tie to or

> bear on their culpability or to inform the sentencing objectives that should be emphasized in a given case.
>
> In particular, greater positive definition of when Contributory Mitigation and Suitability Mitigation may be triggered will bring much needed clarity to this area of the law. Requiring that Aboriginal heritage tie "in some way" to proportionality is simply too vague.
>
> The Supreme Court's own pronouncements that proportional sentencing demands an exploration of each individual offender's culpability requires that courts pay attention to racialized offenders and how their background, history, and relationship with the criminal justice system may inform the proportionality of their sentence. Some will confuse such considerations with playing "the race card". But, in actuality, such considerations will simply ensure that all offenders come before the criminal justice system with an even deck.

[73] The parity principle, s.718.2(b), relates to the treatment of offenders across different cases. What about the "deck" from which a sentencing court deals out justice to victim and accused in a single case? Parity considerations may not assist in addressing the tension between the legitimate expectations of victims and accused in one proceeding, particularly where those expectations are shaped by different cultural backgrounds.

[74] In *R. v. Gabriel*, [2017] N.S.J. No.125 both a Gladue report and a cultural assessment were considered. It was a far more serious offence than Mr. Ryan's but the commentary is none the less pertinent. Justice Campbell notes at par.52 that the purpose of the cultural assessment and the Gladue Report was not to justify a discount with respect to an otherwise appropriate criminal sentence. At para.90 he says:

> The assessment does not provide a justification for a lighter sentence. Like a Gladue Report it might prompt consideration of restorative justice options where these are appropriate but it doesn't position the offender as a helpless victim of historical circumstances.

[75] In R. v. Elvira, [2018] O.J. No. 6185 (OSC) Justice Schreck states at par.26:

> Crown counsel submits that since Mr. Elvira's brother grew up in similar circumstances but became a successful businessperson and not a criminal, it follows that Mr. Elvira's circumstances growing up played no role in his criminality. With respect, this submission misunderstands the role of adverse personal circumstances in the sentencing calculus as well as the concept of causation. The fact that an individual may have encountered obstacles in his or her life, including the effects of systemic racism, is simply an exemplification of what is sometimes referred to as "sad life mitigation": R. v. P.V., 2016 ONCJ 64, at paras. 37-100. It recognizes the fact that an offender's background may affect the degree of his or her moral culpability. However, it does not operate to excuse criminal conduct. Mr. Elvira chose to be a criminal. His brother did not. The issue is not whether Mr. Elvira is morally culpable, but, rather, the degree of that culpability. The fact that others in similar circumstances made different choices does not mean that those circumstances had no role to play in the choices that were made. Were it otherwise, the fact that most Indigenous Canadians do not commit crimes would mean that the principles in Gladue are irrelevant.

[76] In R. v. Jackson, [2018] O.J. No. 2136 (OSC) Justice Nakatsuru states at par.71 et seq:

> . . . Like Rosenberg J.A. in R. v. Borde, (2003) 63 O.R. (3d) 417, Doherty J.A. in R. v. Hamilton and Mason, (2004) 72 O.R. (3d) 1, pointed out the differences between Indigenous offenders and those of other marginalized communities. He held that Parliament had chosen to identify Indigenous persons as a group to whom the restraint principle in s. 718.2(e) applies with particular force given the historical mistreatment of and the cultural views of that group which made imprisonment ineffective in achieving the goals of sentencing.. . .
>
> 72 At the same time, Doherty J.A. recognized the potential importance of such materials. What he found fault with was the lack of any evidentiary link between the social context provided by that material and the particular circumstances of the two offenders whose sentences had been significantly decreased by it. In the course of his reasoning, he confirmed what was earlier said in Borde that such evidence could play a significant role in the sentencing of an individual.
>
> 104 That said, the task of sentencing cannot be delegated to others like Mr. Wright. It does not affect the demand of the law that a person is held accountable for their crimes. I can only agree with Campbell J.'s thoughtful characterization in *Gabriel* of an IRCA or a cultural assessment:

> The Cultural Assessment is not a single simple answer to a complicated question. It does not suggest that Kale Gabriel was destined by his race or his circumstances to find himself here. Like the Gladue report it provides important context and raises as many questions as it answers... Like a Gladue report it might prompt the consideration of restorative justice options where those are appropriate. It doesn't position the offender as helpless victim of historical circumstances.

[77] In R. v. Brissett, [2018] O.J. No. 4337 Justice LeMay disagreed with his colleague about whether police profiling practices should inform sentence decisions. However, I detect no disagreement with extracts reproduced above.

[78] In a personal sense Mr. Corbett is blameless for the terrible hardships that Mr. Ryan has endured. Mr. Corbett is lucky to be a member of "mainstream" society; he is not at fault for this. On the other hand the accused *is* blameworthy, in a direct and personal sense, for what he did to Mr. Corbett.

[79] The reduction of a sentence because of state misconduct is permitted in Canadian law, per R. v. Nasogaluak [2010] S.C.J. No.6. There a person's Charter right was breached by state authorities, which the sentencing judge properly considered as a factor tending towards a reduced sentence. The analogy to s.718.2(e) is far from exact – the actions of police in one situation are not the same as the actions of Canadian institutions over generations. None the less, victims in both situations are faultless and may feel that the need for retribution is given short shrift.

[80] However, this court and society at large must try to understand how Mr. Ryan's upbringing, how his experience as an indigenous person in a society which marginalized and humiliated Mi'kmaq people may have contributed to Rein's actions on the night in question.

[81] Mr. Ryan said, “I’ve learned from my mistakes” and that is true in a very real sense, but of course stabbing Mr. Corbett with a knife was not simply a mistake. At times Mr. Ryan used the passive tense to describe the events of October 13th – i.e. “it happened”. Such language hides his action, his agency.

[82] One may be tempted to blame Rein’s behavior on his father Chad who beat and rejected him. But can we lay the blame at the father’s doorstep without knowing what factors shaped his behavior towards Rein? Gladue reports highlight the influence of discrimination and disfunction across generations, but Rein’s father is non-native. The causal factors spread out in many directions, but they nonetheless come together in the person of Rein Ryan, who the justice system presumes had some control over his actions on the date in question and hence bears some responsibility for them. One of the most important rehabilitative measures undertaken by the accused is predicated on this same belief. The training he receives at boxing is aimed at improving his self control; this also presumes that a person is capable of making considered decisions and need not be captive to his or her personal or community history.

[83] Mr. Ryan said, “I’ve come to accept what I have done.” It may be somewhat more difficult for Mr. Corbett to accept what was done to him. Mr. Ryan has some control over the event in the sense that he can now take steps to change his behavior and ensure something like it won’t happen again. Mr. Corbett had no control over what occurred, and limited control over the future course of his life. He can try to accept what happened, to live without bitterness, to heal and adapt, to make the best of things going forward, but this may be an even more difficult challenge than the one facing Mr. Ryan.

[84] Defence counsel has asked me to consider the "off target" effects of the sentence. Mr. Ryan himself spoke about the possible impact on his grandmother who has suffered recent strokes. If he goes to jail the boxing club will lose the benefits he brings and the positive example he provides. The community generally may lose the hope and inspiration his story provides and which it sorely needs. This will certainly occur if, after a lengthy jail sentence, having lost contact with his supports, the discipline of daily work and his place in the community of Eskasoni, he turns back to his old ways and thus emerges a danger to society.

[85] But as with almost every aspect of this case there are correlative questions that could be asked. What about the off target affects of the crime on the victim? Not only did Mr. Corbett suffer horribly from this, his family suffered, and I don't think it is any stretch to say that the community at large is hurt by these actions. The community is shocked and outraged at what Mr. Ryan did, made to feel less safe, deeply concerned that such things occur in its midst.

[86] Canadian Criminal Justice is predicated on concepts of freewill and moral responsibility. If we truly had no choice in our actions we would never be blameworthy. The law presumes that we are free actors and have agency, that we have some measure of control over our actions, that we bear responsibility for the decisions we take. Criminal sanction serves to remind and warn us that bad decisions, in particular those personal and voluntary actions which cause harm to others, will be punished. This, is it hoped, will discourage others from acting likewise. Of equal importance it denounces the harmful conduct and thus validates the law-abiding behavior of the vast majority of citizens.

[87] Modern sentence principles strive to replace the desire for revenge with the more general concept of retribution. It has been said that courts attempt to substitute public justice for private revenge. From what I understand, aboriginal perspectives of justice regard actions like Mr. Ryan's as an injury to the community from which it must heal. This approach is restorative, and it emphasizes the healing of both the offender and the victim. Ada Pecos Melton, Office of Justice Programs, U.S. Department of Justice, writing in Judicature, Vol.79, No.3, November 1995, at p.126 says:

> The American paradigm has its roots in the world view of Europeans and is based on a retributive philosophy that is hierarchical, adversarial, punitive, and guided by codified laws . . . The vertical power structure is upward, with decision making limited to a few. The retributive philosophy holds that because the victim has suffered, the criminal should suffer as well . . . Punishment is used to appease the victim, to satisfy society's desire for revenge, and to reconcile the offender to the community by paying a debt to society . . . The indigenous justice paradigm is based on a holistic philosophy and the world view of the aboriginal inhabitants of North America. These systems are guided by unwritten customary laws, traditions and practices that are learned primarily by example and through the oral teachings of tribal elders. The holistic philosophy is a circle of justice that connects everyone involved with a problem or conflict on a continuum . . . The methods used are based on concepts of restorative and reparative justice and the principles of healing and living in harmony with all beings and with nature.

[88] In the Indigenous Law Journal, Volume 4, Fall 2005 at page 4 Justice LaForme wrote that there is great diversity among aboriginal societies, but he never the less suggests some unifying features of aboriginal justice:

> Aboriginal people do not adhere to a single life philosophy, religious belief or moral code. Contrary to much popular thought, an Indian is not simply an Indian. There are currently at least 50 distinct linguistic groupings among First Nations and, among Inuit and Métis there are different dialects and languages spoken. Many of these Aboriginal philosophies differ from Canadian or mainstream society . . . The very meaning of the word justice is understood differently by Aboriginal society from that of what I will refer to as "mainstream society." Aboriginal people believe justice is about restoration of peace and equilibrium within the community, and reconciling the wrongdoer with his or

> her own conscience and with the individual or family who has been wronged. Mainstream society, on the other hand, is about controlling actions it considers potentially or actually harmful to society. The emphasis is on punishment for the deviant behaviour as a means of making people conform —and to inform other members of society in respect of similar deviant behaviour. In my court, we call it specific deterrence and general deterrence.

[89] However, I think it is correct to say that in indigenous cultures individuals were sometimes subjected to forms of punishment and made to pay a personal price of some kind. The Report of the Aboriginal Justice Inquiry of Manitoba, 1999 – Chapter 2, "Aboriginal Concepts of Justice" makes the following points:

> Sanctions imposed in aboriginal societies included ridicule, avoidance and banishment, which in close, family-oriented societies, where survival depended upon communal cooperation, were considered a humane alternative to death, no matter how traumatic to the offender.
>
> Aboriginal societies felt it important that offenders atone for their acts to the aggrieved person and the victim's family
>
> Reparations might be borne by all members of the offender's family and shared by all members of the victim's family

[90] I have noted above the very different views of the victim and accused on the appropriate disposition of this case. How does one reconcile the wrongdoer with the victim and his family when there is no unifying cultural imperative, when their views of justice are yoked to different traditions? They are part of broader Canadian society but there is no specific context that unifies the victim and the accused. They are not part of one closely-knit community, something which is presumed by traditional indigenous justice principles. How can the court reconcile Mr. Ryan with the victim in any meaningful way? The offence itself did not occur within the context of a unified culture. These people had no prior relationship or knowledge of each other. They were not engaging in any communal practice or

common endeavor. They found themselves, by sheer happenstance, at a house party.

[91] The sentencing arguments might be viewed as a battle between competing visions of justice, especially as the accused and the victim come from different traditions and communities. This runs the risk of viewing the outcome as a victory of one over the other.

[92] It is virtually impossible to reconcile all the principles at play. The victim and his family, the accused and his - neither is in a position to give or to accept reparations. It is simply not realistic to expect the accused and his family to make redress directly to the victim and his. The absence of any means or mechanism to make amends leaves a void which must be filled in some way.

DECISION

[93] Crown and Defence are both cognizant of the relevant legal principles and the facts of the case and the circumstances of the offender, and yet they diverge greatly in their recommendations. The Crown very fairly has recommended one to two years in jail followed by probation. The Defence on the other hand makes an equally compelling argument for a suspended sentence and probation served entirely in the community.

[94] Mr. Ryan must atone for his wrongdoing. Mr. Ryan’s self improvement is simply not enough, although his rehabilitation does work to the betterment and protection of the community. I don’t think that Mr. Ryan’s realization of the

wrongfulness of his actions is enough, although I accept that he does understand this. Neither do I think that his remorse is sufficient.

[95] I don't think any sentence I can impose would give full expression to all the competing interests at stake. What one strives for is a sentence that gives some consideration, hopefully due consideration, to all the strongly opposed interests such that none are ignored even though none may be fully satisfied. As noted earlier one case cannot carry all the freight for denunciation and deterrence; expression of these principles occurs across a number of cases and finds expression in the general response of the justice system to crimes of violence.

[96] A conditional sentence of imprisonment is not available on the s.267(a) charge, given the resulting bodily harm – s.742.1(e). A conditional sentence is available on the s.90 charge; indeed the Crown took a plea to that offence expressly to leave open the possibility of a CSO. However, I must be careful not to fall into error as occurred in *R. v. Oickle*, [2015] N.S.J. No. 408 (NSCA). That was a sentencing in a drug trafficking charge coupled with a firearms offence. A conditional sentence was imposed on the firearms offence, a suspended sentence on the drug charge. In effect, the Court of Appeal said it was improper for the sentencing judge to attempt to circumvent Parliament's intent respecting conditional sentence orders by switching offences.

[97] Consequently the s.267 charge must be dealt with on its own terms. Parliament has legislated that a CSO must not be imposed, leaving me with a stark choice between a suspended sentence and probation on the one hand and a jail sentence on the other. While the s.90 charge cannot serve as a vehicle by which to sentence Mr. Ryan on the 267, I think is still permissible to consider the overall

impact of all available sentences on all the charges. In that sense only, the availability of a CSO on the s.90 charge does factor into the global sentence.

[98] The totality principle is generally applied to *reduce* a sentence that would otherwise by imposed, where an accused is being sentenced for multiple offences and the overall result would be unduly harsh. Having concluded that a term of imprisonment under the usual range is merited on the s.267 charge I will *increase* the punishment that I would otherwise impose on Mr. Ryan for a stand-alone s.90 offence. I do not wish to compensate for an unduly light sentence on the assault, but to tailor a global sentence which achieves the overall objective of protecting of the public by moving in step-wise fashion, over the course of his sentence, from the most restrictive form to the least.

[99] I am concerned that if I were to sentence Mr. Ryan to jail for one to two years it might result in more harm than good - that the stronger message of denunciation and deterrence given by a sentence in that range would come at a great cost - the defeat of Mr. Ryan's aspirations. I worry that a lengthy jail sentence would discourage the many people in the community who find hope in his story and see in him, since the offence, the emergence of a proud, self disciplined and respectful young man.

[100] When all the relevant sentence principles are brought to bear on this case it is my view that nothing less than a four-month jail sentence is required. Mr. Ryan will be given a credit of one month for the time spent on remand. Some of that was served on a breach charge that was ultimately dealt with by Restorative Justice, but I agree with counsel that this remand time is properly considered a credit against a sentence he would otherwise receive for the s.267 offence.

[101] I have not crafted this sentence precisely to make an intermittent sentence available. In fact, it is my strong inclination that the jail sentence should not be served intermittently. However, I should now give both parties an opportunity to address this issue.

DECISION ON INTERMITTENT SENTENCE

[102] Upon hearing counsel on whether it is appropriate for the accused to serve the balance of his sentence on an intermittent basis I have decided that he will. The overall length of sentence is unchanged, but Mr. Ryan will be permitted to serve it on consecutive weekends commencing Friday July 12 at 7:00 p.m. until the following Sunday July 14 at noon, and each and every weekend thereafter until the sentence is served in full. Fashioned in this way he will serve three days of his sentence for each weekend spent in jail. With remission he may be finished serving his sentence towards the end of November. That jail sentence will be coupled with probation for 18 months.

[103] Mr. Ryan is sentenced to a consecutive sentence of two months on the charge under s.90, carrying a concealed weapon, which will contain a house arrest type of curfew. Given that an intermittent sentence must be coupled with probation, I consider it appropriate to impose a similar curfew during the first part of the probationary period when he is serving his intermittent sentence. Mr. Ryan will, in effect, be under house arrest, with certain exceptions, from now until late-January of 2020, except for those weekends which he must spend in the Correctional Centre. In this sense, serving the jail sentence intermittently comes at some cost to the accused – he will be on house arrest for a longer period than if it

were straight time - but it permits him to maintain employment and his involvement at the boxing club, which are important aspects of his rehabilitation.

[104] He will be serving the conditional sentence of imprisonment at his mother's residence at 20 Rocky Point Rd. in Eskasoni, and that will be "home base" for the house arrest curfew which also applies early in the probation order, until his intermittent sentence has run. In addition to the usual medical / legal reasons, exceptions to confinement in the house will be (i) to engage in paid employment between 8:00 a.m. and 6:00 p.m., (ii) to attend at the Red Tribe Boxing Club between 6:00 p.m. and 9:00 p.m., (iii) assessment and counselling appointments, (iv) meetings with his supervisor or probation officer, (v) attendance at sweat lodge ceremonies at Eskasoni and (vi) if he is in the constant company of his mother. Along with the requirement to undertake all recommended assessments and counselling, conditions in both the CSO and probation orders include the following. He is not to possess any weapons, firearms, etc. He must abstain absolutely from the use and possession of alcoholic beverages, drugs listed in the CDSA and cannabis, unless such are prescribed by a doctor and then only in strict compliance with the doctor's orders. In accordance with the wishes of the victim and his immediate family he is to have no contact with them whatsoever and must not be found within 1000 feet of the Corbett residence or any place of employment or education which any of them may attend. He must not keep company with anyone possessing a criminal record, excepting members of his immediate family. There will be the usual reporting, keep the peace and jurisdiction clauses.

[105] This being a primary designated offence there will be an order to provide a sample of his DNA pursuant to s.487.051(2) of the Criminal Code.

[106] Lastly, I am imposing a 10 year ban on the possession of firearms and a lifetime ban on the possession of prohibited firearms, restricted weapons, etc. pursuant to s.109(2) and (3).

Dated this 31 day of July, 2019

A. Peter Ross, PCJ