PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Wentzell,* 2020 NSPC 20

Between:

Date: 2020-01-14
Docket: 8324213, 8324214, 8324215, 8392043, 8392044, 8354166
Registry: Bridgewater

Her Majesty the Queen

v.

Jennifer Lynn Wentzell

Judge:	The Honourable Judge Catherine M. Benton, JPC
Plea:	October 2, 2019, in Bridgewater, Nova Scotia
Decision	January 14, 2020
Charge:	Section 239(1)(b), Section 268, Section 264.1(1)(a), Section 145(3), Section 145(3) and Section 145(3) of the **Criminal Code of Canada**
Counsel:	Leigh-Ann Bryson, Crown Attorney Jade Pictou, Defence Attorney

By the Court:

[1] On October 2, 2019, Ms. Jennifer Wentzell appeared before the Bridgewater Court with respect to three separate Informations.

[2] Information one, offence date March 22, 2019, at or near Bridgewater, Ms. Wentzell did attempt to murder Craig Smith while using a knife by stabbing him contrary to section 239(1)(b) of the **Criminal Code**; and furthermore, did endanger the life of Craig Smith, thereby committing an aggravated assault contrary to section 268 of the **Criminal Code**; and furthermore, did by speaking knowingly utter a threat to Craig Smith to cause death to Craig Smith contrary to section 264.1(1)(a) of the **Criminal Code**.

[3] On this Information, Ms. Wentzell elected to be tried by a Provincial Court Judge and entered a guilty plea to the aggravated assault charge, contrary to section 268 of the **Criminal Code**.

[4] Information two, offence date, June 14, 2019 and June 17, 2019, at or near Blockhouse, Ms. Wentzell, did, while being at large on a Recognizance entered into before a Judge and being bound to comply of a condition of that Recognizance, house arrest, remain in her residence, failed without lawful excuse to comply with that condition, by failing to reside at 1129 Highway 329, Blockhouse, Nova Scotia, contrary to section 145(3). Ms. Wentzell entered a guilty plea to this matter.

[5] Information three, offence date, October 11, 2019, at or near Gold River, Ms. Wentzell, did, being at large on a Recognizance entered into before a Justice and being bound to comply with a condition of that Recognizance that she not possess or consume alcohol or intoxicating substances, without lawfully excuse, failed to comply with that condition by consuming alcohol, contrary to section 145(3); and further, being at large on a Recognizance being entered into before a Justice and being bound to comply with a condition of that Recognizance that while living at 1129 Highway 329, Blockhouse, Nova Scotia, remain within that residence, without lawful excuse, fail to comply with that condition by not residing in the residence outside the designated 12:00 p.m. to 4:00 p.m. hours each Friday, contrary to section 145(3). Ms. Wentzell entered guilty pleas to both counts on the Information.

[6] A *Gladue* Report was prepared November 12, 2019, and a sentencing circle was held in the Gold River community on January 14, 2020. Briefs were provided by both the Crown and Defence in advance of the sentencing circle. At the

sentencing circle, Ms. Wentzell was sentenced to a Suspended Sentence with a period of Probation for thirty-six months.

[7] These are my reasons behind my decision in this matter.

<u>FACTS:</u>

[8] The following facts are with respect to section 268, aggravated assault matter. On March 22, 2019 at approximately 1:35 a.m. the Bridgewater Police received a call about a shirtless bloody male standing in the street on King Street in Bridgewater, Nova Scotia. On police arrival, Craig Smith was located on the sidewalk holding his upper left arm with his right hand. His left arm was covered in blood and there were blood drops all over the ground around him. He advised the Police that his girlfriend, Jennifer

Wentzell had just stabbed him.

[9] The officers followed the blood drops to an apartment and observed blood on the ground and a large bloody handprint on the righthand door of the double door entrance. With no response to knocks and concern for Jennifer Wentzell's safety, given the large amount of blood outside, Constable Creaser forced entry and located Jennifer Wentzell asleep in bed.

[10] Ms. Wentzell had a strong odor of alcohol coming from her breath, she was unsteady on her feet and her speech was slurred. She was belligerent and irate with police. Police observed no injuries on Ms. Wentzell, who was wearing only undergarments when first encountered. They noted she had blood on her feet and there was blood on the bed. The police also observed that within the residence there was blood that was on the inside of the door, droplets of blood on the floor and a mop that appeared to have been used to clean up the blood.

[11] Mr. Smith, in a statement to the police, indicated that Ms. Wentzell was upset with him believing he was involved with another female. Ms. Wentzell said, "do you want to get stabbed?" Mr. Smith said, "are you serious?" Ms. Wentzell retrieved a knife and swung it. Mr. Smith said, "if you are going to hurt me, get me good". Ms. Wentzell approached him and stabbed him in the upper left arm with a large black handled kitchen knife. Blood gushed from his arm and Mr. Smith covered the wound with his right hand saying, "you just stabbed me". Ms. Wentzell said, "do you want me to stab you again?' Mr. Smith went outside and asked a neighbour to call for help.

[12] Mr. Smith was brought to the hospital and received eight stitches to close the wound to his shoulder. Ms. Wentzell provided a statement in which she acknowledged telling Mr. Smith that she was going to kill him because he was an asshole when he was drinking.

[13] At the sentencing circle an Agreed Statement of Facts was filed indicating that on May 22, 2019, the incident between Ms. Wentzell and Mr. Smith was partially filmed over the course of two videos. The first video is thirty-three seconds long and shows Ms. Wentzell on the floor on her back and Mr. Smith is seen pulling her pants off of her. Mr. Smith is heard saying, "look at you, you're gross". Ms. Wentzell calls Mr. Smith a goof. Mr. Smith then smacks Ms. Wentzell in the head as she is on the ground. Mr. Smith is heard saying that Ms. Wentzell is miserable and as she attempts to get back up, he pushes her back down and she falls backwards. The person filming asks them to stop. Ms. Wentzell has no pants or underwear on. She gets up and walks towards Mr. Smith and they start a short altercation. Ms. Wentzell then walks away and says, "I'm

going to stab you". Mr. Smith says, "what are you doing?" and Ms. Wentzell responds, "I'm going to put some pants on". Mr. Smith then says to Ms. Wentzell that her body is gross and he sits down.

[14] The second video is one minute long and shows Ms. Wentzell telling Mr. Smith to get out of her house. He says, "it is not your house dummy". Fighting ensues, Ms. Wentzell appears to put her hands on Mr. Smith and Mr. Smith pushes Ms. Wentzell backwards and she falls. She gets up and Mr. Smith is asking her to leave him alone. Ms. Wentzell then goes back over to Mr. Smith and begins pushing him. Mr. Smith asks whoever is filming to help him, saying, "get your friend, she's about to stab me". The person filming can be heard asking Ms. Wentzell to stop. Ms. Wentzell says, "get out of my face". The video is not pointed on anyone, but the person filming can be heard yelling stop and Jen why the fuck are you trying to stab people. Mr. Smith can be heard saying, "because she's an ignorant half breed".

[15] The victim in this matter declined to provide a Victim Impact Statement or participate in the sentencing circle.

[16] The following are the facts related to Section 145(3) offence, June 14, 2019. On May 7, 2019 Ms. Wentzell had been released upon entering into a Judicial Recognizance with house arrest at her parent's residence. On June 6, 2019, that Recognizance was varied to allowed Ms. Wentzell to reside at Holly House each Tuesday at 1:00 p.m. until each Friday at 4:00 p.m., for the purposes of engaging in programming with the Elizabeth Fry Society.

[17] On June 11, 2019, Ms. Wentzell did not attend the Holly House as required and on June 13, 2019 her mother and Surety, Christine Wentzell, who still had not heard from her, attended court to render as surety. Ms. Wentzell's whereabouts remained unknown for approximately fifteen days when she turned herself in at the Bridgewater Provincial Court on June 26, 2019.

[18] The following are the facts related to the section 145(3) offence on October 11, 2019. On August 2, 2019, Ms. Wentzell was released from custody on a Judicial Recognizance to complete a residential treatment program at the Rising Sun Centre. Ms. Wentzell completed twenty-three days of programming and her Recognizance was further varied so that she could return to her parent's residence on house arrest and be allowed to fish. On October 11, 2019, Ms. Wentzell's mother contacted the Police to advise that her daughter was in breach of her Recognizance. Accordingly, the officers attended the Gold River Gas Station to speak to Ms. Wentzell's mother. While on scene a vehicle pulled into the gas station in which Jennifer Wentzell was a passenger. Ms.

Wentzell had red, glassy eyes, slurred speech and the vehicle smelled of alcohol. Ms. Wentzell was advised that she was under arrest and she began quickly drinking from a mug. The officer swatted the mug from her hand and the liquid that spilled out smelled like alcohol.

Crown and Defence Recommendations:

[19] The Crown made the following recommendation:

(i) Section 268, eighteen to twenty-four-month period of incarceration less remand time of one hundred seventy-one days;
(ii) Section 145(3) from June 11, 2019, forty-five days incarceration to run consecutive to the previous matter;
(iii) Section 145(3) times two from October 11, 2019, fifteen days incarceration on each of the charges, concurrent to each other but consecutive to the previous matter.

[20] Accordingly, the Crown was recommending a fourteen to twenty-month sentence of incarceration, to be followed with two years Probation. In addition, specifically on the 268 matter, the Crown sought the mandatory weapons prohibition pursuant to section 109 for ten years and as it is a primary designated offence, a DNA order pursuant 487.05 and Forfeiture of the knife pursuant to 491 of the **Criminal Code**.

[21] The Defence, taking into account remand time with respect to these matters submitted that a suspended sentence and period of probation would be appropriate in the circumstances. The defence was not opposed to the ancillary orders requested by the crown.

Remand Time:

[22] With respect to the first information, the aggravated assault matter, occurring on March 22, 2019, Ms. Wentzell was released with respect to this matter on May 7, 2019. Accordingly, she was on remand at the Correctional Centre for a period of 45 days times the 1.5 credit, which equals 70.5 days of remand.

[23] With respect to the breach of Recognizance from June 14, 2019, she was released on August 2, 2019 and thus was on remand for a period of 38 days times the 1.5 credit for a total of 57 days.

[24] With respect to the breach of Recognizance times two on October 11, 2019, she was subsequently released on those matters on November 8, 2019. Accordingly, she was on remand for 29 days times 1.5 credit for a total of 43.5 days.

[25] As a result, Ms. Wentzell spent almost 6 months on remand for a total of 171 days.

Criminal Record:

[26] Ms. Wentzell came before the Court with a prior record. Upon review of her record, notably she has had twenty-four prior breach of release conditions, three prior breach of probation matters, seven prior convictions for crimes of violence, which included a prior 267(a), assault with a weapon in 2014.

[27] The most serious of the offences before the Court, the 268 matter, occurred six months after she completed a Conditional Sentence Order and a period of probation for the assault in 2017.

[28] I was advised that she did not breach the conditions of the Conditional Sentence Order or the period of Probation. Hence, there were no new charges since 2017.

[29] Ms. Wentzell has previously received jail time in 2013, 2014, 2015 and 2016. She has had the benefit of a Conditional Sentence Order in 2011 and also in 2017 for which neither Orders were breached. I do note that although Ms. Wentzell has a

deplorable track record with respect to compliance with release orders, the same cannot be said for her compliance with sentences imposed by the court.

Sentencing Principles:

[30] The principles and purposes of sentencing are set out in the **Criminal Code** and are intended to guide the Courts in framing the appropriate disposition. The fundamental purposes of sentencing are the protection of the public and to contribute to the respect for the law and the maintenance of a safe society.

[31] Section 718 instructs that this is to be done by imposing just sanctions that have as their goal one or more of the following:

(i) Denunciation;
(ii) general and specific deterrence;
(iii) separation from society where necessary;

(iv) rehabilitation of the offender;
(v) promotion of responsibility in offenders;
(vi) acknowledgement of the harm done to victims and to the community;

[32] Section 718.1 says that the fundamental principle of sentencing is that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Section 718.2 requires that I consider the aggravating and mitigating factors relating to the offence and the offender and specifically that this was a domestic assault. The principles of parity and proportionality and that an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances and that all available sanctions other than imprisonment that are reasonable in the circumstances and consistent with the harm done to the victims or the community should be considered for all offenders, with particular attention to the unique circumstances of Indigenous offenders, given Ms. Wentzell's Indigenous status.

[33] In paragraph 34 of **R v. Christmas**, 2017 NSPC 48, my colleague, Judge Sakalauskas, referenced **R v. Gladue**, 1999 SCR 688 ("*Gladue"*), beginning at paragraph 93, where the Supreme Court of Canada offered guidelines for using this section of the **Criminal Code** and summarized them as follows:

> (i) 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.
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> (ii) Section 718.2(e) mandatorily requires sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstance of aboriginal offenders.
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> (iii) 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.
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> (iv) 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 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 XXII, through ss. 718, 718.2(e), and 742.1, among other provisions, has placed a new emphasis upon decreasing the use of incarceration.
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> (v) 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.

(vi) 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.

(vii) 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.

(viii) If there is no alternative to incarceration the length of the term must be carefully considered.

(ix) Section 718.2(e) is not to be taken as 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.

(x) 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.

(xi) 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 and 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.

(xii) 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.

(xiii) 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.

(xiv) With **R v. Ipeelee**, 2012 1 SCR 433 ("*Ipeelee*"), came acknowledgement that the overrepresentation of Indigenous people in custody is continuing. The Supreme Court of Canada stressed that judges must use a different method of analysis in sentencing. At paragraph 61 the Supreme Court recognized the following:

> [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 paragraph 65:
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> > 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, lace of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders. There are many aspects of this sad situation which cannot be addressed in these reasons. What can and must be addressed, though, is the limited role that sentencing judges will play in remedying injustice against aboriginal peoples in Canada. Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.

As well the Court in *Ipeelee* directed at paragraph 60:

> Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society (see, e.g., **R. v. Laliberte**, 200 SKCA 27 (CanLII), 189 Sask. R. 190). To be clear, courts *must*

> *take judicial notice of* such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course *higher levels of incarceration for Aboriginal peoples*. (emphasis added)

Gladue Report:

[34] Despite the legislative requirement pursuant to section 718.2(e) of the **Criminal Code** and the instructions from the Supreme Court of Canada in *Gladue* and *Ipeelee* with respect to sentencing Indigenous offenders, this is the first time a Gladue Report has been ordered and prepared on behalf of Ms. Wentzell. This is unfortunate given Ms. Wentzell's liberty previously has been severely impacted as a result of the imposition of several periods of custody.

[35] In order to give full effect to section 718.2(e) and the unique circumstances that may have played a part in bringing this individual before the Court, the Court

cannot fulfill its duty without a more fulsome understanding of Ms. Wentzell's life path.

[36] Ms. Wentzell is a 38-year-old woman of Mi'kmaq ancestry and a member of the Gold River First Nation. She has a grade 9 education and a limited employment history. She has three children from two long term relationships. Out of respect of Ms. Wentzell and not wishing to retraumatize her, I will not review her life circumstances in detail.

[37] However, I note that her life has been marred with instability, poverty, homelessness, and a lack of education and employment opportunities. She has experienced domestic violence, sexual abuse, the involvement of the child welfare system. She has suffered from addictions to alcohol and drugs, along with intergenerational trauma as result of the legacy of the residential school system, discrimination and colonization.

[38] Since her various releases on these matters, Ms. Wentzell has been attending programming at Holly House, which is run by the Elizabeth Fry Society. Since December 26, 2019, she has been residing there at Holly House full time with a plan of staying there for at least three more months.

[39] Ms. Wentzell has been an engaging in individual addictions counselling. She has attended the Rising Sun Treatment Rehabilitation Centre on two occasions and has

plans to attend again for the relapse prevention program. She has attempted to reduce her consumption of alcohol.

[40] Her plan going forward is to continue with counselling for addictions and healthy relationships. She also will be attending sweats on a regular basis and is working towards long term sober living. She would like to continue her education by attending the Nova Scotia Community College in a trades program and find part time employment.

Sentencing Circle:

[41] Ms. Wentzell agreed to participate in a Sentencing Circle in her community as part of an alternate sanction with respect to the matters before the Court. The Mi'kmaq Legal Support Network (MLSN) is responsible for facilitating the Mi'kmaq Customary Law Program. It is within this program that sentencing circles are arranged for Mi'kmaq and Aboriginal persons involved in the Criminal Justice System. The circle process has been used by Indigenous people since the time

immemorial as a means of decision making, reconciling differences, repairing and healing the community.

[42] The sentencing circle process acts to connect an individual wrongdoer with services and resources that are meaningful and culturally appropriate. The circle is focused on finding ways of holding the wrongdoer accountable and seeking to repair the harm, bringing balance the community in accordance with the Indigenous perspective. (MLSN sentencing protocol May 2014)

[43] Ms. Wentzell had been involved in a relationship with the victim for approximately four years. The relationship was one where both were abusing alcohol and drugs. Their relationship was fraught with domestic violence. Unfortunately, this type of intimate relationship with domestic violence was normalized for Ms. Wentzell due to her life circumstances and experiences. She expressed being quite relieved when she was brought to the Correctional Centre on this offence, as this distanced her from the relationship, giving her the opportunity to recognize that the relationship needed to be terminated.

[44] This appeared to be the first time that Ms. Wentzell was proactive and engaged in arranging in and participating in treatment and programming. There was a noted positive and sincere change in Ms. Wentzell's motivation and sincerity in wanting to address long standing issues.

[45] The sentencing circle consisting of an elder, MLSN workers, family, friends, and support persons endorsed Ms. Wentzell's plan of rehabilitation in which in the long run provides for repair and protection of the community.

Case Law:

[46] **R v. Peters**, 2010 ONCA 30, Ms. Peters, an Aboriginal youth of 26 years plead guilty after a Preliminary Inquiry to aggravated assault. Ms. Peters and the victim were not involved in a domestic relationship but rather were acquaintances. An earlier altercation had been reconciled between the parties. Later on in the evening at a bar, the victim made a comment which resulted in Ms. Peters pushing the victim and swinging a beer bottle at her. The victim received two lacerations to the face, which resulted in twenty-one stitches to close the wound. The victim's scars remain visible and the victim was still experiencing pain at the time of the sentencing. A *Gladue* report was prepared for the Court prior to sentencing. Ms. Peters came before the court with no adult record but did have two Youth Court record matters, one of which included a 276(b). Ms. Peters was sentenced to a suspended sentence with a period of probation for three years.

[47] **R v. Ryan**, 2019 NSPC 35, The Aboriginal accused was 20 years of age at a party and had thought the 18 year old victim had stolen a bottle of liquor from him. Mr. Ryan was heavily intoxicated. He stabbed the victim in the groin area, severing the femoral artery and the injuries were considered life threatening. The victim underwent surgery followed by ten days of hospitalization. Mr. Ryan had been charged with aggravated assault and possessing a concealed weapon. He received credit of one-month remand time and was sentenced to a ninety-day intermittent sentence for specifically the aggravated assault charge. He had no prior record and a *Gladue* report had been prepared for the Court.

[48] **R v. Dizikowski**, 99 NSR (2d) 362 (NSCA) (November 1990), Mr. Dizikowski had entered a guilty plea with respect to aggravated assault on his ex- spouse. They had been separated for a short period of time, but he was visiting her. They were consuming alcohol and playing cards. He ended up losing at cards and became verbally abusive, threatening to kill her. He then threw her to the floor and stabbed her in the back, turned her over and stabbed her in the chest. Mr. Dizikowski came before the Court with fifteen prior offences on his Criminal Record. Those offences included six prior assault related matters, including an assault with a weapon. He had spent three-months on remand. The Court taking the remand time into account sentenced him to a further twelve-month

period of custody and probation for two years. On appeal the sentence was varied to a twenty-month period of custody.

[49] **R v. Moore**, 2018 NSPC 48, The accused, an 18-year-old young woman of Mi'kmaq ancestry entered a guilty plea to aggravated assault. She had been in a relationship with the victim previously, but that relationship ended quite a bit of time before the offence. She was under the influence of alcohol and the victim made disparaging comments to her. Ms. Moore retrieved a knife from her room and stabbed him in the abdomen. His injuries were non-life threatening and he had no long-term effects. The victim in his comments to the writer of the Pre-Sentence Report said he was not afraid of the accused but did not intend to have any further contact with her. A *Glade* report was prepared, and Ms. Moore was sentenced at the same time with respect to driving over the legal limit and a breach of release conditions involving alcohol. She had been subject to strict release conditions for approximately a year. Ms. Moore was sentenced to a suspended sentence with a period of probation for two years.

[50] **R v. Melvin**, 2015 NSSC 165, although the conviction in this matter was subsequently overturned, Justice Chipman, at paragraph 31, cited **R v. Tourville**, 2011 ONSC 1677 because of the Courts consideration of aggravating assaults sentencing matters.

> 27 The parties have helpfully provided me with a large number of sentencing cases, dealing with the offence of aggravated assault. That offence, contract to s. 268 of the *Criminal Code*, carries a maximum sentence of fourteen years imprisonment. The cases disclose a wide range of sentences. At the bottom end is an exceptional case like *R. v. Peters* (201), 2010 ONCA 30 (CanLII), 250 C.C.C. (3d) 277(Ont. C.A.) where an Aboriginal offender received a suspended sentence and three years probation on her guilty plea to aggravated assault. She was twenty-six years old with no prior adult record. She had used a broken beer bottle in the assault, during a bar room dispute, causing serious facial laceration to the victim. The "*Gladue* report" disclosed a very difficult upbringing in a violent and abusive home, leading to alcoholism and drug abuse. By the time of sentencing, she had obtained employment and was making real progress in counseling for her substance abuse problems. Some of these features are not dissimilar to the case at bar.
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> 28 In the mid-range are cases where high reformatory sentences have been imposed of between eighteen months and two years less a day. These cases generally involve first offenders and generally contain some elements suggestive of consent fights but where the accused has resorted to excessive force. See: *R. v. Chickekoo* (2008), 79 W.C.B. (2d) 66 (Ont. C.A.) [2008 Carswell Ont 3653 (Ont. C.A.)]; *R v. Moreira*, [2006] O.J. No. 1248 (Ont. S.C.J.); *R v. Basilio* (2003), 2003 CanLII 15531 (ON CA), 175 C.C.C. (3d) 440 (Ont. C.A.).
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> 29 All three of the above cases were arguably worse offences of worse offenders than the case at bar. In *Chickekoo*, *supra*, the Aboriginal accused came from a similar

background to Mr. Tourville but had a prior criminal record, including a conviction for assault. She caused "severe, life-threatening and permanently disfiguring" injuries to the head and face of the victim as a result of assaults with a broken beer bottle during a fight. In *Moreira, supra*, the accused was the aggressor who followed the victim on a public street in Toronto, provoking a consent fight. During the fight, the accused pulled out a knife and slashed the victim. He was in possession of the concealed knife for the dangerous purpose of using it in a fight and he was convicted of these further possessory offences, in addition to aggravated assault. He was a nineteen year old first offender at the time of the offences but had gone on to commit a number of further offences while on bail for which he received jail sentences. In *Basilio, supra*, as in *Moreira*, the accused was convicted of being in unlawful possession of a knife for a dangerous purpose, in addition to aggravated assault as a result of using the knife in a fight outside a bar. He stabbed the victim from behind, causing "life-threatening injuries" to the chest, diaphragm and liver. The accused did not retreat from the fight but swaggered about afterwards waving the knife. It should be noted that the Court of

Appeal described the two years less a day sentence in *Basilio* as "lenient" and the eighteen month sentence in *Chickekoo* as "the lower end" of the appropriate range.

30 At the end of the range are cases where four to six years imprisonment have been imposed. These cases generally involve recidivists, with serious prior criminal records, or they involve "unprovoked" or "premeditated" assaults with no suggestion of any elements of consent or self-defence. See: *R. v. Scott*, [2002] O.J. No. 1210 (Ont. C.A.); *R. v. Thompson*, [2005] O.J. No. 1033(Ont. C.A.); *R. v. Vickerson* (2005), 2005 CanLII 23678 (ON CA), 199 C.C.C. (3d) 165 (Ont. C.A.); *R v. Pakul*, [2008] O.J. No. 1198 (Ont C.A.).

[51] The facts in *Melvin* included an aggravated assault caused by a stabbing resulting in an injury of a superficial five-inch-long laceration to the lower back of the victim requiring eight stitches. The Court found that the stabbing was not spontaneous and was out of proportion to being sucker punched by the victim earlier. The weapon had been concealed, the offender was subject to a conditional sentence and bail conditions at the time and came before the Court with a record which included a low-end violent offence.

[52] However, the Court in *Melvin* found that mitigating, was the fact that the offender had family and community support, regular employment, positive peer group, and no alcohol or drug difficulties along with the fact that there was "significant provocation". Justice Chipman sentenced Mr. Melvin to eighteen months incarceration followed by an eighteen-month period of probation.

[53] **R v. Tourville**, 2011 ONSC 1677, the offender, a twenty-eight-year-old Indigenous first offender, during the latter part of a consensual fight with two other males, pulled out an exacto knife he had possessed for employment purposes. The injuries resulted from nine slashes with the knife. The Court noted that Mr. Tourville was

an Indigenous first offender from a disadvantaged background. He had rehabilitative potential and appeared to be sincerely motivated to address the underlying causes that lead him to become involved in the Criminal Justice System.

[54] After considering the circumstance of the case, along with the offender's background and the *Gladue* factors, the Court sentenced Mr. Tourville to a twenty- one-month period of incarceration.

[55] **R v. *Okimaw***, 2016 ABCA 246, the Alberta Court of Appeal reduced Mr. Okimaw's sentence from thirty months incarceration to twenty months incarceration. Mr. Okimaw was an Indigenous person before the Court with his first crime of violence. In this case, the victim (the offender's girlfriend) initiated the

physical altercation. The Offender responded by entering into a fight with the victim and then pulling a knife. The victim was stabbed 8 times.

[56] The Court noted that Mr. Okimaw was intoxicated at the time, suffered from mental health issues and while on remand was addressing these issues. The Court found, however, that the response to his girlfriend's actions was grossly disproportionate.

<u>Analysis:</u>

[57] In considering fully the aforementioned case law I note that Ms. Wentzell's criminal record is more significant than in the cases of *Peters, Moore, Ryan, Melvin, Okimaw* and *Tourville*.

[58] However, the severity of the assault and the lasting effects of the injuries were more extensive in the cases of *Dizikowski, Touville, Melvin, Peters* and *Ryan* then in Ms. Wentzell's matter.

[59] Additionally, the cases of *Tourville, Melvin, Ryan, Peters* and *Moore* did not involve a spousal relationship as in the case of Ms. Wentzell.

The aggravating factors in Ms. Wentzell's case include:

- The use of a weapon, a knife;
- This was a spousal assault, deemed aggravating by the virtue of section 718.2(a)(ii);
- There was a penetrative stab wound requiring 8 stitches;
- She has a criminal record with crimes of violence and poor compliance

with release orders;

Mitigating factors include:

- A guilty plea;
- Accepting responsibility;
- Addressing issues related to addictions and healthy relationships;
- Positive support from family members and community supports;
- The relationship has terminated;
- There is culturally appropriate programming available;
- *Gladue* factors, which included substance abuse, incarceration, family breakdown, low income and unemployment due to a lack of education, poverty, homelessness, food insecurity, involvement in the child welfare system, domestic abuse, physical and emotional and sexual abuse, community breakdown, overt and covert racism;

[60] In reviewing the circumstances of Ms. Wentzell's behaviour which involved the use of a knife and a resulting penetrative wound to the victim coupled with Ms. Wentzell's prior criminal record, it appears that the offence would fall into the midrange category as described in *Tourville*. However, I must also impose a sentence that is proportionate to the gravity of the offence and the degree of responsibility of Ms. Wentzell.

[61] Consequently, I must review the context in which this behaviour occurred. Ms. Wentzell was involved in a volatile and abusive spousal relationship. The victim's prior treatment, assaultive and degrading behaviour towards Ms. Wentzell along with her intoxication and impulsive reaction to the events must be taken into consideration. These events in addition, to Ms. Wentzell's prior history of trauma and experiences of an Indigenous person in my view, reduce her moral culpability in these offences.

[62] In cases where denunciation and general deterrence must be emphasized, imprisonment will often be the only option. Although I am mindful that in certain circumstances, noncustodial sentences and short sharp periods of custody can provide significant and meaningful consequences that resonate with the specific offender and society. Society is protected when the offender is rehabilitated and deterred from committing more crime.

[63] I have crafted a sentence having regard to the instructions provided by the Supreme Court of Canada when sentencing someone of Indigenous descent. The long-term protection of the community requires that Ms. Wentzell's efforts be acknowledged

and that she be allowed to continue on that path without interruption. It is hopeful that she will be able to show the community, by her example, that there is life beyond addiction and involvement in the Criminal Justice System.

[64] As a result of the circumstances of this case and Ms. Wentzell, I was of the view that the principles and purposes of sentencing including denunciation and general deterrence did not require a further period of custody.

[65] I found that a suspended sentence with a significant period of probation was the reasonable alternative to incarceration in this case. It is of significant consequence to Ms. Wentzell. As Section 731(1)(a) of the **Code** makes clear, a suspended sentence is one in which the passing of the sentence that is suspended not the service of the sentence itself. If Ms. Wentzell, during the period of probation, is convicted of another offence or she breaches any of the conditions, the Court could revoke the suspended sentence and impose any sentence that could have been imposed which in this case may very well include jail.

[66] I am satisfied that this sentence provides the best mechanism for assuring that Ms. Wentzell continues on her path towards a pro-social lifestyle. Society's protection is best assured by the continued supervision and encouragement of Ms. Wentzell's efforts and progress in her rehabilitation.

[67] In imposing this sentence, I was mindful of the seriousness of the offences before the Court, which translated into crafting the length of sentence which was significant and the conditions which included a curfew and community service hours.

<u>Sentence:</u>

[68] I sentenced Ms. Wentzell to a global sentence of a suspended sentence with a period of probation for three years with the following conditions:

- Keep the peace and be of good behaviour;
- Appear before the Court when required to do so by the Court;
- Notify the Court or the Probation Officer in advance of any changes of name or address, and promptly notify the Court of the Probation Officer of any changes of employment or occupation;
- Report by telephone to a Probation Officer at 99 High Street, Bridgewater, Nova Scotia, (902) 543-4721 within 2 business days from today's date and thereafter as directed by your Probation Officer;
- Reside within the Province of Nova Scotia unless you receive written

permission from your Probation Officer to reside elsewhere or to attend treatment of which your Probation Officer is advised in advance;

- Not possess or consume alcohol or any other intoxicating substances, except while in the residence of Christine Wentzell or at another location approved by her Probation Officer in advance;
- Not possess or consume a controlled substance as defined in the Controlled Drugs and Substances Act except in accordance with a physician's prescription or a legal authorization;
- Not enter of be in any premises where alcohol is the primary product of sale including liquor stores, taverns, pubs, beverage rooms, night clubs and licensed pool halls;
- Not own, possess or carry any weapon, firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition or explosive substance as those items are defined in the **Criminal Code** except for the purpose of engaging in ceremonial hunt or while engaging in fishing, or if she has given notice to Bridgewater Police Service that she will be transporting a knife to fishing activity;
- Attend for, participate in and successfully complete any and all counselling, assessment, treatment or program as directed by her Probation Officer, including but not limited to:
  - (i) Attend appropriate trauma-based counselling to address the underlying reasons behind her substance abuse;
  - (ii) Culturally appropriate counselling services;
- Have no direct or indirect contact or communication whatsoever with Craig Smith;
- Not to be on or within 20 metres of the premises known to be the residence of Craig Smith;
- Participate in Healing Circles with MLSN as deemed appropriate by MLSN;
- Make reasonable efforts to attend sweats on a monthly basis;
- To abide by a curfew, for the first nine months, to abide by a curfew daily in her residence (her mother's house or Holly House) from 9:00 p.m. until 6:00 a.m. the following day, seven days a week commencing January 14, 2020. The only exceptions to the curfew are as follows:
  - (i) When at regularly scheduled employment, which her Probation Officer is aware of in advance, and travelling to and from that employment by the most direct route;
  - (ii) When attending at a regularly scheduled education program, which her Probation Officer is aware of in

advance, or at a school or educational activity supervised by a principal or teacher, and travelling to and from the education program or activity by the most direct route;

(iii) When dealing with a medical emergency or medical appointment involving her or a member of her household, and travelling to and from by the most direct route;

(iv) When attending a counselling appointment, a treatment program or a meeting of alcoholics anonymous or narcotics anonymous, at the direction of or with the

permission of her Probation Officer, and travelling to and from that appointment, program or meeting, by the most direct route;

(v) When in a residential treatment program if her Probation Officer is told, in advance, where she will be and she agree that the facility can tell her Probation Officer if she is there, should you Probation Officer inquire;

(vi) With written approval of your Probation Officer given beforehand;

- Prove compliance with the curfew condition by presenting herself at the entrance of her residence or answering the telephone in the event that a peace officer or any other authorized personnel should attend at her residence or call her on the telephone to check on your compliance;
- Report back to Bridgewater Provincial Court within the first six months, twelve months and eighteen months of this order;
- Perform one hundred hours of community service work under the supervision of your Probation Officer or someone acting in his/her stead within the period probation.

[69] The following ancillary orders were imposed with respect to the section 268 matter:

(i) A mandatory weapons prohibition for a period of ten years pursuant to section 109 of the **Criminal Code**;

(ii) A DNA order pursuant to section 487.04 of the **Criminal Code** as it is a primary designated offence;

(iii) A section 491 of the **Criminal Code** forfeiture order in any offence related to property;

[70] The remaining charges were dismissed.