PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v A*, 2019 NSPC 87

Date: 20190619
Docket: 2969899
Registry: Kentville

Between:

Her Majesty the Queen

v.

A.

Restriction on Publication: s. 486.4 *Criminal Code*

Identifying Information Removed from this Decision

Judge:	The Honourable Judge Ronda van der Hoek
Heard:	April 17, 2019 in Kentville, Nova Scotia
Decision	June 19, 2019
Charge:	S. 271 *Criminal Code*
Counsel:	James Fyfe, for the Crown Kyle Williams, for the defendant

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

- **(i)** an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
- **(ii)** any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

By the Court (orally):

[1] In 2016, Mrs. A contacted police reporting a February 18, 2012 sexual assault. At the time of the assault her marriage to Mr. A was in difficulty but they were living together raising their children.

[2] While Mr. A was at work, she put the children to bed and retired to her bedroom. She awoke at 2:30 am to digital vaginal penetration and Mr. A.'s hand around her neck. She immediately yelled as loud as she could, and he told her to, "Shut the fuck up". Alerted by her yell, one of their two teenaged children knocked on the bedroom door asking if her mother was okay. Mr. A told the child to go back to bed.

[3] Mrs. A believes the digital penetration was of short duration, it ended with her yell, and she ordered Mr. A out of the house. He left.

The Charge:

[4] On April 27, 2017, Mr. A entered a guilty plea to sexual assault, contrary to section 271 of the *Criminal Code*.

[5] The Court ordered the preparation of a pre-sentence report and a *Gladue* Report, and Mr. A advised both writers that he was not guilty and wanted to change his plea.

[6] The Court reviewed the reports and sentencing was adjourned while he made application to withdraw the plea. On December 20, 2017, I heard and denied that application and, as a result, the guilty plea stood.

[7] This sets the stage for a somewhat unusual sentencing hearing in that Mr. A, who at one time denied committing the offence, has now by counsel submission and his own words, acknowledged committing it and expressed regret for it.

The Issues:

[8] After hearing the sentencing positions of Crown and defence, that a period of incarceration is necessary, the only issues are:

1. Should the period of incarceration be served in the community on a conditional sentence order, and if so,
2. Should a non-consumption of alcohol condition be imposed.

The Circumstances of the Offender:

The Presentence Report:

[9] Mr. A is 50 years old and the youngest of three children, whose parents divorced approximately 35 years ago. He reports no family history of psychiatric illness or mental health disorders, and while never a victim of physical or sexual abuse within his own family, acknowledged that he has been witness to plenty of this behaviour in his community.

[10] He has a strong relationship with his father who he acknowledged is an alcoholic, adding that his father's drinking has not been problematic. (The *Gladue* Report would shed a contrary light on this issue.)

[11] He lived with his family of origin in […] from 1973 until, at eighteen years of age, he married the victim of this offence and they moved to the Annapolis Valley. They have two children who continue to reside in that community with Mrs. A.

[12] Mr. A's daughter from a previous relationship died at a young age from an accidental drug overdose leaving behind a young child who was adopted by the couple. As a result of these proceedings, Mr. A has not had visitation with that child in over two years, and while he has been texting his daughter, there has been no communication whatsoever with his son.

[13] Mr. A completed grade 11 at Hants East Rural High School where he considered himself a quiet and good student.

[14] When the presentence report was prepared, Mr. A was working at odd jobs, but has found work in construction which he enjoys, and hopes will evolve into full-time employment.

[15] At 17 years of age he started using marijuana which led to periodic use of cocaine. At 19 years of age, he began to drink alcohol, consuming up to a dozen beer each week, and while he does not consider alcohol to be a problem in his life, the victim of this offence says otherwise. Such would appear well-founded since the report advises Mr. A has met with a doctor at the […] Health Center to discuss a seven-day detox program in the community.

[16] His closest friend, and cousin […], says "like everyone, he likes to drink." She recognizes that there must be healing for Mr. A and his family and believes he would benefit from accessing a month-long treatment and healing program away from the community and out of the province. She also recommended a sentencing circle or a healing circle as the best option for the family, but that of course did not happen as Mrs. A was understandably not interested in proceeding in that manner.

The Gladue Report:

[17] Gladue Writer, Margaret White, prepared a report on behalf of the Mi'kmaw Legal Support Network (MLSN). As is often the case, this report contained a comprehensive and thorough review of relevant considerations applicable to sentencing aboriginal offenders.

[18] Contributors to this report included Mr. A, his family members including a daughter and a cousin, a […] Band Office representative, and two […] First Nation Chiefs. Mr. A and others were very forthcoming with the *Gladue* writer, fully describing the incidents of experienced racism and the intergenerational effect of alcohol and domestic abuse in the T family and its connection to the residential school experience. I appreciated provision of such a well-prepared document.

[19] Mr. A is a full status Mi'kmaq and a member of the […] First Nation. His father and paternal grandparents are from the […] First Nation. The latter, established in February 1880, is in Kings County, Nova Scotia, where it encompasses 144.9 hectares of land and is surrounded by mountains. Until 1950, the community was monitored by an Indian agent who travelled from Indian Brook to deliver ration certificates. By 1950 John Toney had been elected Chief and a Band Council was created. Today the Annapolis Valley First Nation has 256 members, 112 living on reserve and 144 members living off.

[20] The legacy of the Canadian government residential school system was visited upon members of the […] First Nation. Mr. A's father, […], was born in 193[..] and forced to attend residential school at only five years of age. While his parents tried to hide him, even travelling far from home, they were located and both he and his younger sister were sent to the school. While a student there, Mr. A's father was sexually abused and is now a vocal advocate for survivors of the residential school system.

[21] The report sets out the official policy of the residential school system – eradication of indigenous culture, language, and rights. It also details the history of the residential school.

[22] The report describes the inevitable destruction of aboriginal families in this community arising from government policies of assimilation, economic disadvantage arising in single-parent families, and the impacts of culture loss. These general impacts are becoming increasingly well-known in Canadian society as a result of *Truth and Reconciliation Commission* efforts and past reports such as the *Royal Commission on Aboriginal Peoples, 1996*.

[23] What may not be well known is the degrading impact of colonialism on the people of this community. Dependence on unpredictable government funding laid

a foundation for poverty and dysfunction. For example, the Indian agent would, every two weeks, provide each family an $18 voucher. Members of the community would go into town to use the vouchers and, living in poverty, often with only one set of clothes, members of the First Nation stood out in town. The local merchants would not allow them to enter the stores, instead taking their vouchers outside and providing the goods.

[24] Facing oppression and total government control, adults lost control of their family units and violence and alcohol abuse became established. The former Chief stated, “the poverty and social ills created through the process of colonization on the […] First Nation, created an entrenched environment of discrimination that still exists today.”

[25] While Mr. A’s father was forcibly confined to the school, his family left the province and moved to the United States. As a result, when he was released from the school at age 16, he no longer spoke his language and had lost his bond with his family. He did not have a community to return to and as a result left to work in the blueberry fields of Maine where he married and had a number of children. Mr. A was born in Boston, Massachusetts in […] where he resided until he came to Indian Brook, Nova Scotia. His family of six moved into a small three-bedroom house in that community living on a ration of $9.09 per week.

[26] The report detailed a centralization policy implemented by Indian Affairs which took place in 1942. This policy saw Indian Brook's population of 155 people swell to over 2000 as families were brought in from all over the province.

[27] The community was just barely able to support its population with available resources. The influx of people undermined the authority of the sitting Chief and increased the insecurity of all the new and original residents. The overcrowding pushed resources to the brink also adding to instability in the aboriginal leadership structures that various communities were trying to support.

[28] The forests were decimated for heating, the game population was over-hunted, and the people lost their ability to support themselves. The population had to resort to social welfare.[1] All this created an even more desperate situation of, in a word, chaos. People increasingly turned to alcohol.

[29] The *Gladue* Report sets out how substance abuse and violence invaded the homes and families in this community. A related example, one of Mr. A's relatives observed and reported a violent murder that took place in the community in 1975.

[1] *Gladue* Report pages 7 to 8 and Anita Marie Tobin, *The Effect of Centralization on the Social and Political Systems of the Mainland Nova Scotia Mi'kmaq*, 1999 SMU.

[30] When Mr. A's father found employment, their lives improved somewhat, but there was much drinking in the community, and the children did not have adequate supervision.

[31] When Mr. A enrolled in public school, he was aware of tensions between indigenous and non-indigenous children. He explained that the tensions increased as the children entered high school. He says, "There was so much discrimination in school, we had to fight every single day. People would always be calling my sister squaw and I had to fight for her. There were always two sides, whites and Indians. If you went to play sports with whites, your own people would see you as a traitor. That school … fought all the time and the teachers didn't do anything about it".

[32] The report also points out that the fighting did not contain itself to school. Mr. A reported his parents were engaged in domestic violence and he had to interject himself into the situation to end his father's assaults on his mother.

[33] He also acknowledged to the *Gladue* writer, that his father's drinking was becoming a problem. His father was a bootlegger in the community and ran his business from their family home. The traumas suffered by Mr. A's father in the residential school took a toll on him and his family. By the time Mr. A was 13 years of age his parents had separated and divorced.

[34] Many children in the community suffered the same fate. Mr. A reported the children would look for a home where parents were not drinking, pool their food and resources and hang out with each other. Eventually alcohol was provided, and the young people began drinking as well.

[35] After leaving school at the age of 17 he started working odd jobs. In the 1980's he was charged with […] and sentenced to [..].[2]

[36] Mr. A says that after being charged with a subsequent failure to take a breathalyzer, he had no other involvement with police for 23 years, stating he left the reserve because, "there is just too much pain there and people are stuck".

[37] After the death of a child and his mother, Mr. A's drinking became very problematic. These deaths preceded the offence before the Court.

Gladue Factors:

[38] Mr. A is a 50-year-old man of Mi'kmaq descent.

[39] He has demonstrated a willingness to address the underlying factors that contributed to the incident.

[2] Although this offence was pardoned it was mentioned in the *Gladue* Report.

[40] There is strong community support and culturally appropriate treatment available to him, including substance abuse treatment and personal counselling.

[41] He has personally experienced the adverse impact of many factors continuing to plague the aboriginal communities since colonization including:

-Substance abuse personally, in the immediate family, and among peers;

-family deterioration, separation and absent parents;

-foster care;

-low income and unemployment due to lack of education and substance abuse;

-loss of children from accidental death;

-poverty;

-overt and covert racism;

-domestic violence;

-abuse - emotional, verbal, mental, physical;

-food and housing insecurity;

-involvement of child protection agency;

-residential school;

-socioeconomic conditions; and

-low educational achievement.

Gladue Report Recommendations:

[42] The report sets out a restorative manner of addressing Mr. A's situation.

1. That he continue to participate in alcohol abuse treatment, which is culturally appropriate addictions treatment offered by the Native Alcohol and Drugs, Two Wolves Program with Dan Walsh. Mr. A is said to have made contact and is willing to work with Mr. Dan Walsh to address underlying factors leading to substance abuse.

2. That he attend the AA program run on the […] First Nation to aid in his control of his alcohol abuse.

3. That he seek treatment for past trauma and grief counselling for the multiple losses he has suffered. Appropriate treatment can be found at the Alsustic Aboriginal Crisis Counselling Services Centre to deal with the underlying traumas

including but not limited to sexual abuse in the family, multiple losses of family members, loss of culture, loss of language and stability, which are endemic in aboriginal communities.

The Impact of the offence on the Victim:

[43] Mrs. A prepared a compelling Victim Impact Statement (VIS). It required editing by the Crown and the defence prior to my review. I will say it is my practice to follow the direction of then Judge Derrick in *R v BP*[3] and Judge Gorman in *R. v Morgan*[4], before reading these statements. I appreciate that Victim Services does not provide a vetting role, but it is troubling how many VIS come before the Court containing information that is not properly before the Court. I appreciated the diligence of counsel in editing the document, and I am sure editing did not lessen the important contribution Mrs. A's statement made at the sentencing hearing.

[44] She chose to read it, and while it was clear she was overwhelmed at the prospect, accepted my invitation to read but a portion should she choose. Electing

[3] 2015 NSPC 34.
[4] 2016 CanLII 60965 (NL PC)

to read the conclusion section, she summarized the overall impact this offence has had in her life. She was assured that I would consider the entire document.

[45] Mrs. A explained that she has been having “unimaginable, haunting nightmares”. Initially she was reluctant to prepare a victim impact statement at all, out of concern that Mr. A would derive some satisfaction from hearing of her ongoing pain.

[46] Since 2013, she has been attending counselling at various venues. She also explained that since the offence she has distanced herself from family and friends. She explained that she had to change her social media profile and her telephone numbers.

[47] She also explained that the offence has led to estrangement between her and their eldest daughter, who was witness to her mother’s scream that night. The pending trial caused a rift in the family that has been mending since the guilty plea.

[48] The portion of the VIS read in court detailed her feelings of being manipulated, harmed, used, distrusted, ashamed, humiliated, treated unjustly, the negative repercussions of all kinds and her loss of hope and faith in mankind. She also spoke of the public embarrassment, shame, and being alone to tackle the world.

[49] On a positive note, Mrs. A says today she looks in the mirror and realizes that she has turned an important page in her life. Her next chapter is becoming a stronger aboriginal woman who is wiser, confident and can walk with her head held high looking forward to a future without fear of harm.

[50] Finally, she says her aggressor will be sentenced for his crime and she will have closure.

Position of the Parties:

[51] The Crown submits the presentence report, which was not as detailed as the *Gladue* Report, is best described as neutral. The *Gladue* Report goes somewhat further in explaining the cultural background and direct impacts of the residential school system experience on Mr. A's family, and also details a history of familial domestic abuse and imprudent consumption of alcohol. The criminal antecedents of a 1991 refusal and a 2016 s. 811 *Criminal Code* recognizance breach, committed subsequent to this offence, involving the same victim, demonstrate a 50-year-old man with fairly minimal involvement in the criminal justice system.

[52] Given the domestic context, the sleeping victim assaulted in her bed, the hand on her neck, measured against the brevity of the invasive digital penetration, the Crown says deterrence and denunciation warrant a four-month custodial

sentence, followed by 12-18 months of probation and a section 743.21 *Criminal Code* no contact order.

[53] The Crown correctly acknowledges that the *Code,* amended one month after the commission of this offence, rendered conditional sentence orders unavailable for indictable sexual assault[5]. However, by operation of section 11(i) of the *Charter*, it remains an available sentencing option for Mr. A[6].

[54] As a result, should a conditional sentence order be adjudged appropriate in the circumstances, the Crown asks that consideration be given to imposing it for six months, with the first three months served on house arrest and the last three months subject to a curfew.

[55] The Crown also seeks a ten-year s. 109 weapons prohibition order, a SOIRA order for 10 years and a DNA order.

[56] Defence counsel takes no issue with any of the four requested orders, submitting the real point of divergence is whether a period of incarceration should be served in the community. He argues denunciation and deterrence can be

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[5] *Safe Streets and Communities Act* S.C. 2012, c. 1

[6] Any person charged with an offence has the right
…(i) if found guilty of the offence and the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

achieved by imposing a six-month conditional sentence that includes strict conditions. He also asks the Court not to order a condition precluding Mr. A from possessing or consuming alcohol as that would "set him up to fail" while he is addressing his alcoholism through counselling. The Crown responds pointing out house arrest is meant to be similar to physical jail except insomuch as it is served at home, therefore possessing and consuming alcohol should not be permitted.

[57] Defence counsel argues conditional sentence orders have been imposed for sexual assault cases in this province; Mr. A does not represent a danger to the community; the small community where it would be served represents a benefit for community monitoring; the *Gladue* factors and the recommendations in the report support it; it is not contrary to the purposes and principles of sentencing; section 718.2(e) directs the Court to consider alternatives to incarceration for aboriginal people; and finally, a conditional sentence order serves to achieve the proper balance in these circumstances for this offence and this offender in this community.

The Principles of Sentencing:

[58] Sections 718, 718.1 and 718.2 of the *Criminal Code,* provide the general principles and factors courts are directed to use in fashioning a sentence that serves

to protect the public and contribute to respect for the law and the maintenance of a just, safe society.

[59] Section 718 instructs me to impose a just sanction that has, as its goal, one or more of the following: denunciation; general and specific deterrence; separation from society where necessary; rehabilitation of the offender; promotion of responsibility in offenders; and acknowledgment of the harm done to victims and to the community.

[60] Section 718.1 says it is a fundamental principle of sentencing that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[61] Section 718.2 requires a court to consider the aggravating and mitigating factors relating to the offence and to the offender, the principles of parity and proportionality, that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances. With particular attention to the circumstances of aboriginal offenders, I am directed to consider all available sanctions, other than imprisonment, that are reasonable in the circumstances and are consistent with the harm done to victims or to the community.

[62] The common law also guides courts in interpreting and balancing the sentencing principles, directing how they should be applied to different categories of offences. In following that direction, I must consider the particular offender and the circumstances of the offence, recognizing that both are unique in each case. After all, I am sentencing the offender, not applying a mandatory sentence for a specific offence. (*R. v. Lacasse,* 2015 SCC 64 and *R. v. M. (C.A.),* [1996] 1 S.C.R. 500 at para. 49, 91-92).

[63] Finally, it is well established that sentencing has an overarching goal of promoting the long-term protection of the public. I must keep that at the fore when balancing the principles and purposes of sentencing to arrive at a fit and proper sentence for Mr. A.

Sentencing Aboriginal Offenders:

[64] Finally, because Mr. A is Mi'kmaq, I must consider s. 718.2(e) which is a significant sentencing consideration for aboriginal people. I am aware that section 718.2(e) was introduced by Parliament with the aim of addressing the over-representation of aboriginal offenders in custody.

[65] In *Gladue*[7], the Supreme Court of Canada offered guidelines for using section 718.2(e) setting out a general summary:

> [93]
>
> 1. Part XXIII of the *Criminal Code* codifies the fundamental purpose and principles of sentencing and the factors that should be considered by a judge in striving to determine a sentence that is fit for the offender and the offence.
>
> 2. Section 718.2(e) mandatorily requires sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of aboriginal offenders.
>
> 3. Section 718.2(e) is not simply a codification of existing jurisprudence. It is remedial in nature. Its purpose is to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision's remedial purpose real force.
>
> 4. Section 718.2(e) must be read and considered in the context of the rest of the factors referred to in that section and in light of all of Part XXIII. All principles and factors set out in Part XXIII must be taken into consideration in determining the fit sentence. Attention should be paid to the fact that Part XXIII, through ss. 718, 718.2(e), and 742.1, among other provisions, has placed a new emphasis upon decreasing the use of incarceration.
>
> 5. Sentencing is an individual process and in each case the consideration must continue to be what is a fit sentence for this accused for this offence in this community. However, the effect of s. 718.2(e) is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders.
>
> 6. Section 718.2(e) directs sentencing judges to undertake the sentencing of aboriginal offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider:
>
> (A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
>
> (B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

[7] *R. v. Gladue*, [1999] 1 SCR 688

> 7. In order to undertake these considerations the trial judge will require information pertaining to the accused. Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing. In the usual course of events, additional case-specific information will come from counsel and from a pre-sentence report which takes into account the factors set out in #6, which in turn may come from representations of the relevant aboriginal community which will usually be that of the offender. The offender may waive the gathering of that information.
>
> 8. If there is no alternative to incarceration the length of the term must be carefully considered.
>
> 9. Section 718.2(e) is not to be taken as a means of automatically reducing the prison sentence of aboriginal offenders; nor should it be assumed that an offender is receiving a more lenient sentence simply because incarceration is not imposed.
>
> 10. The absence of alternative sentencing programs specific to an aboriginal community does not eliminate the ability of a sentencing judge to impose a sanction that takes into account principles of restorative justice and the needs of the parties involved.
>
> 11. Section 718.2(e) applies to all aboriginal persons wherever they reside, whether on- or off-reserve, in a large city or a rural area. In defining the relevant aboriginal community for the purpose of achieving an effective sentence, the term "community" must be defined broadly 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.
>
> 12. Based on the foregoing, the jail term for an aboriginal offender may in some circumstances be less than the term imposed on a non-aboriginal offender for the same offence.
>
> 13. It is unreasonable to assume that aboriginal peoples 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.

[66] The importance of systemic and background factors was also addressed in *Gladue*:

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

[67] In *Gladue* at paragraph 65, the Court reminds sentencing judges:

> …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.

[68] In *R. v. Christmas*, 2017 NSPC 48, Judge Amy Sakalauskas helpfully explained paramount considerations when sentencing aboriginal offenders. Her decision was thorough, on point, and her considerations are worth repeating as they are applicable here.

> [37] Canadian courts are increasingly providing sentencing decisions that more fully consider *Gladue* principles. A recent example is found in **R. v. Morriseau, 2017 ONCJ 307**, where Justice Gibson sentenced a man from the Anishinabe First Nation. In doing so, he considered the meaning of a pre-colonialism Aboriginal system of justice and highlighted that, "The underlying philosophy in

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

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

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

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

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

[69] Finally, it is useful to point out the direction provided to trial judges by the Supreme Court of Canada in *Ipeelee*[8] at paras 59-60 and 75:

> [59]… When sentencing an Aboriginal offender, a judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection (*Gladue*, at para. 66). Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people generally, but additional case-specific information will have to come from counsel and from the pre-sentence report (*Gladue*, at paras. 83-84).

[8] *R. v. Ipeelee*, 2012 SCC 13

> [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*, 189 Sask. R. 190 (Sask. C.A.)). 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. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel.
>
> …
>
> [75] Section 718.2(*e*) does not create a race-based discount on sentencing. The provision does not ask courts to remedy the overrepresentation of Aboriginal people in prisons by artificially reducing incarceration rates. Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case. This has, and continues to be, the fundamental duty of a sentencing judge. *Gladue* is entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them. *Gladue* affirms this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process. Section 718.2(*e*) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples. Neglecting this duty would not be faithful to the core requirement of the sentencing process. [Emphasis added]

Denunciation and Deterrence:

[70] Denunciation and general deterrence must be the primary considerations when sentencing those who commit sexual assaults and that does not rule out the imposition of a conditional sentence order in appropriate cases. Cases provided by the defence in support of these propositions included: *R. v. KRD*, 2005 NSCA 13;

R. v. Nowe, 2004 NSCA 137; *R. v. AC*, 2011 ONSC 4389; *R. v. CKH*, [1998] NSJ No. 520 (NSSC); *R. v. LFW*, [2000] 1 SCR 132; *R. v. Mehanmal*, 2012 ONCJ 681; *R. v. Wells*, [2000] 1 SCR 207; *R. v. John*, 2004 SKCA 13).

Rehabilitation:

[71] Rehabilitation is an important sentencing objective, even in cases that require emphasis on denunciation and deterrence. This was confirmed by the Supreme Court of Canada in *Lacasse* in a sentence appeal for the offence of dangerous driving causing death:

> One of the main objectives of Canadian criminal law is the rehabilitation of offenders. Rehabilitation is one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world, and it helps the courts impose sentences that are just and appropriate. (at para. 4)

Proportionality:

[72] The principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender requires me to consider the gravity of the offence and the degree of Mr. A's responsibility.

[73] Indictable sexual assault carries a maximum sentence of ten years. He violated the trust of his spouse in what should have been the safety of her own home, in her bed, in the middle of the night. Her terror at being awoken by this

degrading assault became by extension, distressing to her child who answered her call. While the assault itself was intrusive, it was accompanied by added violence with his hand on her neck and an expletive-laced direction for her to quiet her complaint.

[74] The couple was at the time in the midst of marital difficulties and Mr. A was sleeping on the sofa. He was engaged in problematic drinking, likely increased by recent familial deaths, but I am not aware if he was intoxicated at the time of the offence. It is not surprising, given his exposure to alcohol abuse in his family of origin and in the community, coupled with early use as a teenager as set out in the *Gladue* report, that he turns to alcohol. Likewise, the report explains that he was raised in a violent home where his mother was abused.

[75] To his credit, he finally accepts responsibility for the offence, and is undertaking counselling to address the underlying factors that contributed to his criminality.

Aggravating and Mitigating Factors:

[76] Section 718.2 requires me to identify and consider the aggravating and mitigating factors relating to the offence and to the offender. They are as follows:

Aggravating Factors

- The victim is his spouse (a statutorily aggravating factor);
- the victim was asleep at the time of the offence;
- the assault was invasive – digital vaginal penetration;
- the victim's neck was held - a degree of violence;
- the offence had a significant effect on the victim's health and financial situation (s. 718.2(a)(iii.1)), and
- a child was impacted at the time by virtue of her vicinity to the assault, rendering her an intended crown witness.

Mitigating factors

- he pled guilty and neither victim nor child had to testify at trial;
- he is a low risk to reoffend;
- he is described as a good worker;
- he is currently employed;
- he has suffered the impacts set out in the *Gladue* report;

- he indicates “I want to be mentally strong again”;
- he has acknowledged alcohol and drug issues;
- he attends Narcotics Anonymous as well as Alcoholics Anonymous;
- he also attends Alsusuti Aboriginal Crisis Counselling Services where doctors are providing mental health support;
- he has been in the community for more than two years without breaches of his release conditions; and
- he has extended family and community support.

Parity / Range of Sentences:

[77] Sentences for this offence range from suspended sentences and probation to lengthy periods of incarceration. There is no real dispute between the parties that incarceration is necessary in the circumstances with Crown counsel seeking four months, or six if a conditional sentence order is imposed, and the defence seeking a six-month conditional sentence order.

[78] I accept their position with respect to incarceration and conclude that the appropriate sentence is imprisonment for less than 2 years. Were I to impose

incarceration in a facility, I would accept the four months as recommended by Crown counsel, however I must consider reasonable alternatives to custody for this aboriginal offender and determine if he meets the test for a conditional sentence order.

Reasonable Alternatives to Custody:

[79] *R. v. Proulx*[9] set out the well-known test that sentencing judges must apply when considering whether to impose a conditional sentence. It also reminds the Court that, "[c]onditional sentences are designed as an alternative to incarceration in order to encourage rehabilitation, reduce the rate of incarceration, and improve the effectiveness of sentencing"[10]

[80] Our Court of Appeal has considered and affirmed the appropriateness of such orders for sexual assault offences arising in a variety of circumstances. As far back as *R. v. M.A.W.*, 1999 NSCA 49 and *R. v. C. (S.).*, 1999 NSCA 82, where such orders were deemed to meet sentencing objectives in such cases.

[9] [2000] 1 SCC 5.
[10] *Proulx*, *supra*, at para. 20.

[81] In a recent NSSC decision, *R. v. CP*, 2019 NSSC 157, Justice Murray imposed a conditional sentence order for a 33-year-old aboriginal offender who sexually assaulted a child by means of vaginal touching.

[82] *R. v. K.R.D.*, *supra*, involved an unsuccessful Crown appeal of a two-years less a day conditional sentence order for sexual assault upon a young daughter over a period of five years.

[83] In confirming the conditional sentence was not statutorily barred, the Court acknowledged that Judge Ross, the sentencing judge, recognized that by serving the sentence in the community, a relatively small one in that case, the goals of denunciation and deterrence were more likely to be achieved than in a larger community. Judge Ross said house arrest "can have a more stigmatizing and negative and denunciatory effect than it would in a large city where people are more anonymous and where people don't understand what their neighbours are doing…".

[84] The Supreme Court of Canada in the aforementioned *Wells* decision set out how a court should proceed to consider the appropriateness of the conditional sentence order when sentencing aboriginal offenders. The case highlighted the importance of balancing the relevant sentencing principles with *Gladue* factors.

[85] This offence occurred in the context of a failing marriage, grief, and alcohol abuse. That relationship is over, and the parties have almost no reason to ever see each other again. The risk of Mr. A reoffending in this manner is very low. Of course, it would be grave indeed if he did, but I conclude that it is near impossible that he will ever be trusted to be alone with Mrs. A ever again and she has made clear that she does not intend to reconcile with him, nor will she seek contact with him. And while subsequent to this offence he breached a peace bond, I was not led to believe the contact was physical in nature. In any event, conditional sentence orders are not restricted to cases in which there is no risk of re-offending. (*R. v. W. (J.)*, 1997 CarswellOnt 969 (Ont C.A.), 5 C.R. (5th) 248, 115 C.C.C. (3d) 18)

[86] I am satisfied that denunciation and deterrence can be achieved by imposition of a conditional sentence order with strict conditions including house arrest and curfew. Such a sentence will not endanger the safety of the community.

[87] Paying particular attention to the *Gladue* factors, which in part explain why Mr. A finds himself before this Court, I find a conditional sentence order will aid in ameliorating the serious problem of overincarceration of aboriginal people in prisons. Instead, the CSO conditions and the probationary conditions adopt a restorative approach to sentencing that will afford compliance with the carefully crafted recommendations created by his community.

[88] Such a sentence applies the relevant purposes and principles of sentencing with an emphasis on decreasing the use of incarceration. The sentence is a fit one for this accused in the circumstances. It balances the need for general deterrence and denunciation with rehabilitation and is based on the very complete picture of Mr. A provided by the materials prepared for this Court.

[89] I will also take a moment to say that his sentence should not be considered light, a CSO is after all jail in the community. It also recognizes that due to Mr. A's unique systemic background, as set out in the reports, actual incarceration would adversely impact him and not support rehabilitation. This sentence affords a better opportunity to restore balance by preventing future offences as a direct result of the counselling components.

[90] A condition to provide for dependants strikes a balance between restitution for the victim and redirecting Mr. A to his obligations to community.

[91] Mr. A will take benefit of a conditional sentence in his small aboriginal community of […] where he will be under scrutiny of his family and neighbors. Incidentally, this is not the community where Mrs. A and the children reside. It is also the community where he is addressing grief, trauma and addictions counselling that were plaguing him at the time he committed the offence.

[92] I accept the recommendation that the CSO be for a period of six months. The sentence will be divided between three months of house arrest and three months of curfew. I am reminded of the Supreme Court of Canada's direction:

> [C]onditions such as house arrest should be the norm, not the exception. This means that the offender should be confined to his or her home except when working, attending school, or fulfilling other conditions of his or her sentence, e.g. community service, meeting with the supervisor, or participating in treatment programs. Of course, there will need to be exceptions for medical emergencies, religious observance, and the like."[11]

Issue 2: Alcohol condition:

[93] Having determined that a conditional sentence order is the fit and proper sentence, I now must consider the alcohol condition. First, alcohol prohibitions are not included in the mandatory conditions contained in s. 742.3(1). Instead, they are discretionary under s. 742.3(2)(a), and a court may prescribe such a condition if it considers it desirable for securing the good conduct of the offender and for preventing the offender committing offences in the future. (*R. v. Proulx*, *supra*)

[94] Likewise, a court may impose a discretionary order directing attendance at a treatment program approved by the province (s. 742.3(2)(*e*)). I must conclude that

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[11] *R. v. Proulx*, *supra*, at p. 492.

in cases where offenders are struggling to remove alcohol from their lives imposing an abstinence condition could serve to set up breaches. I cannot undermine Mr. A's laudable rehabilitative prospects by imposing such a condition. For the reasons previously stated, such as it being unclear whether alcohol was a factor during the commission of the offence and no risk of future contact with Mrs. A, I do not find it necessary to impose such a condition to secure your good conduct and prevent you from committing offences in the future.

[95] Mr. A, the Court sentences you to a period of imprisonment for a period of six months and is satisfied that your serving the sentence in the community will not endanger its safety and is consistent with the fundamental purpose and principles of sentencing. You shall serve the sentence in the community under the following conditions:

- Keep the peace and be of good behaviour,
- Appear before the Court when required to do so by the Court,
- Report to a supervisor at 136 Exhibition Street, Kentville today and as directed,
- You will remain in the Province of Nova Scotia unless written permission is obtained,

- You will notify promptly of any change of name, address, employment, or occupation,
- In addition, you shall not take or consume drugs except in accordance with a medical prescription,
- Participate in and cooperate with any assessment, counselling or program directed by your supervisor,
- You are to have no contact directly or indirectly with [Mrs. A], except through a lawyer,
- You are to be assessed for any sexual offender treatment or counselling programs as recommended by your supervisor and if so recommended by your supervisor you are to attend and enroll in any such treatment or counselling programs and you are directed to abide by all directions given by your supervisor or the directors of such programs and take and receive all such treatment and counselling in strict compliance with such program rules and directives.
- House arrest – you are to remain in your residence at […] at all times and be available for telephone calls at […] for the first three months of the

conditional sentence, except as indicated below. You will also be subject to a curfew for the last three months.

- During the curfew portion you will remain in your residence from 10 pm until 6 am the next day, seven days a week, following the house arrest provision of the conditional sentence.

- You are not to have more than one visitor at your residence or property at any one time and you are not permitted to have any visitors whatsoever between 10 pm and 6 am each day except immediate family.

- Here are the exceptions to the house arrest as well as the curfew:

    - When at regularly scheduled employment which your supervisor knows about and travelling to and from that employment by a direct route;

    - When attending a regularly scheduled education program which your supervisor knows about or at a school or educational activity supervised by a principal or teacher and travelling to and from the education program or the activity by a direct route;

- When dealing with a medical emergency or attending a medical appointment involving you or a member of your household, including […] with advance notice to your supervisor, and travelling to and from it by a direct route,

- When attending a scheduled appointment with your lawyer, your supervisor or a probation officer and travelling to and from the appointment by a direct route,

- When attending court at a scheduled appearance or under subpoena and travelling to and from court by a direct route,

- When attending a counselling appointment, a treatment program or meeting of Alcoholics Anonymous or Narcotics Anonymous at the direction of or with the permission of your supervisor and travelling to and from that appointment, program or meeting by a direct route,

- When attending a regularly scheduled religious service with the permission of your supervisor, and on the house arrest condition,

- You are allowed to be out of your house for not more than four hours per week approved in advance by your sentence supervisor for the purpose of attending to personal needs.

You will also provide for dependents in accordance with Federal Child Support Guidelines. You are still financially responsible for your […]. If you are working you will consult the Guidelines and determine child support obligations and ensure that money is provided to Mrs. A. You will not be able to do so directly; you will have to do that indirectly in some manner and I am sure something can be set up to make sure that happens.

[96] Following the completion of the conditional sentence order you will be subject to 18 months probation with the following conditions:

- Keep the peace and be of good behaviour,
- Report to and be under the supervision of a probation officer, report to the probation office here in Kentville at 136 Exhibition Street within two days of the completion of your CSO,
- Abstain/refrain from having contact or communication directly or indirectly with [Mrs. A], except through a lawyer,
- Remain/stay away from the residence/place of employment of [Mrs. A] except as specified by an order of the Family Court with regard to exercising access to your children,

- Take any assessment, counselling, treatment for alcohol/drug/substance abuse as may be recommended/directed by your probation officer,

- Take any assessment, counselling treatment for any issues of a personal nature as may be recommended/directed by your probation officer, including counselling for issues of spousal/partner violence intervention as may be directed,

- You are not to have in your possession any weapons, firearms, ammunition, or explosive substances,

- You are to provide your probation officer with the authorization necessary to allow them to communicate with any counsellor, psychiatrist or program coordinator that you are seeing for the purpose of supervising your compliance with this probation order.

  I should also add that on the CSO there is also a compliance part: prove compliance with the curfew/house arrest condition by presenting yourself at the entrance of your residence should a peace officer attend there to check compliance.

[97] I am also imposing four requested orders: a section 109 weapons prohibition for a period of 10 years; there will be a SOIRA order for 10 years, and there will be a primary DNA order, and a section 743.21 no contact order prohibiting you from having communication directly or indirectly with Mrs. A during the time you are serving the conditional sentence order, except through a lawyer.

Judgment accordingly

van der Hoek J.