PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Z.Z.*, 2024 NSPC 42

Date: 20240830
Docket: 8538040, 8538041, 8538045, 8538046
Registry: Port Hawkesbury

Between:

His Majesty the King

v.

Z.Z.

Restriction on Publication: Section 486.4 *Criminal Code*
Any information that will identify the complainant shall not be published in any document or broadcast or transmitted in any way.

Judge: The Honourable Associate Chief Judge D. Shane Russell

Heard: July 19, 2024, in Port Hawkesbury, Nova Scotia

Decision: August 30, 2024

Charge: Sections 271 (x2) and 162(1)(c) of the *Criminal Code*

Counsel: Constance MacIsaac, for the Crown
Nick Fitch, for the Defence

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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:

Introduction

[1] This is the sentencing of Z.Z. The offender entered guilty pleas to four offences against two former Indigenous female partners, A.A. ("victim A") and B.B. ("victim B").

[2] The offender committed the following offences involving victim A between the dates of January 1, 2014, and June 1, 2015:

1. Sexual assault, contrary to section 271 of the *Criminal Code* ("*Code")*; and
2. Surreptitiously making a visual recording, contrary to section 162(1)(c) of the *Code*.

[3] The offender committed the following offences involving victim B between the dates of January 1, 2016, and March 30, 2019:

1. Sexual assault, contrary to section 271 of the *Code*; and
2. Surreptitiously making a visual recording, contrary to section 162(1)(c) of the *Code*.

[4] This decision will explore the application of *Gladue* principles, the vulnerability of Indigenous women, the scourge of intimate partner violence, the calculation of *Duncan* credit, and the challenges of balancing sections 718.04 and 718.201 with section 718.2(e).

Counsel's Recommendations

[5] The Crown argues for a global sentence of nine years, less credit for remand and any *Duncan* credit as deemed appropriate. The Crown suggests the global sentence should be apportioned as follows, with each sentence to run consecutively:

- Three-and-a-half years for the sexual assault involving victim A;
- Six months for the voyeurism offence involving victim A;
- Four years for the sexual assault involving victim B ; and
- One year for the voyeurism offence involving victim B.

[6] The Crown urges the Court to emphasize the principles of deterrence and denunciation. Their submissions are grounded in the Supreme Court of Canada's recent directives in *R. v. Friesen*, 2020 SCC 9, the heightened vulnerability of Indigenous women, and the aggravating context of intimate partner violence.

[7] The Accused argues for a global sentence of four years less remand and *Duncan* credit. He suggests the global sentence should be apportioned as follows, with each sentence to run consecutively:

- Two years for each of the sexual assaults;

- Six months for each of the voyeurism offences; and

- A one year reduction to reflect totality and restraint.

[8] The Accused urges the Court to emphasize the principles of restraint, totality, and rehabilitation. The Accused's submissions are grounded in the offender's acceptance of responsibility, his expression of remorse, the personal impact of his pre-sentence incarceration, his minimal prior record, his prospects for rehabilitation, and *Gladue* considerations.

Circumstances of the Offences

[9] Counsel presented an Agreed Statement of Facts. Both victims are Indigenous. The offender had been in a [..] year common-law relationship with victim A. This was followed by a [..] year common-law relationship with victim B.

[10] After the offender's relationship with victim B ended, he repeatedly contacted her requesting the return of a laptop. Victim B examined its contents and

discovered it contained several explicit photos and videos of both her and the offender's former partner, victim A.

[11] The offender took the photos and videos within the private bedrooms of both victims without their knowledge or consent.

[12] While both victims were asleep or unconscious, he had non-consensual vaginal intercourse with them. He did not use a condom. The offender acknowledged that he knew both victims were asleep or unconscious when he committed these violent, invasive acts. The offender used his cell phone to record the sexual assaults.

[13] In addition to making recordings of the sexual assaults, the offender surreptitiously recorded each victim on one other occasion. The recordings and photos from these incidents depict the vaginal and anal regions of both victims. A child was present in the room when these recordings were made.

Circumstances of the Offender

[14] The offender is 42 years old.

[15] With respect to his criminal record, he has a single prior conviction from 2013: possession for the purpose of trafficking contrary to section 5(2) of the

Controlled Drugs and Substances Act. The Court imposed a fifteen-month conditional sentence.

[16] He has $5,285 in outstanding fines.

[17] The offender grew up in a rural Nova Scotia community. His parents separated when he was 12 years old, at which point he moved with his mother and grandmother. He then spent summers with his father.

[18] The offender and his younger brother were raised in a peaceful home. There were no reports of physical, emotional, or verbal abuse.

[19] The offender's mother remains supportive despite describing their relationship as a mixture of "positive and negative" elements. She described her son as "intelligent" and a "brilliant artist". She denied that he had any issues with drugs or alcohol. She noted that he was severely bullied at school and that her marital breakdown had a negative impact on him.

[20] The offender and victim A were together for [..] years and they have [..] children. He described actively co-parenting these children up until the police charged him with these offences.

[21] The offender and victim B were together for [..] years and they have [...] children. They had an unhealthy relationship, marked by accusations of infidelity, domestic violence, mental health concerns, substance abuse, and other forms of self-destructive behaviour. Mi'kmaw Family & Children Services were a steady presence.

[22] With respect to his education, the offender completed his GED and a one-year certificate in Industrial Mechanics.

[23] Prior to his remand the offender had been consistently employed. He has never been terminated from any position. Furthermore, the offender has employment available to him as a roofer upon his eventual release from custody.

[24] The offender is considered to be a "trustee inmate". While on remand he has demonstrated exemplary conduct and steered clear of administrative sanctions. As a result, correctional staff have granted him the opportunity to work within the facility. He receives modest compensation for his janitorial responsibilities. This work has had a positive impact on both his physical and mental health. He also takes great pride in having been asked to paint a mural within the facility. Once completed, he hopes his artwork will have a positive impact on the wellness of other inmates.

[25] While on remand the offender has been heavily invested in his rehabilitation. Defence counsel tendered numerous certificates confirming his commitment. The offender has completed the following programs: life lessons; respectful relationships; options to anger; substance abuse management; grief and loss; meditation; two wolves; and spirituality. The offender has also completed, or is close to completing, the following courses: new leaf; relationships; communications; and parenting.

[26] The offender was asked why he participated in substance abuse programing when it is not an area of concern. His genuine response reflected his insight and commitment to his long-term wellness and rehabilitation. Given his circumstances, stressors, and fragility, he believed it would be helpful to learn strategies to ensure that he avoids falling into a cycle of substance dependence.

[27] The offender was diagnosed in 2016 with Wolff-Parkinson-White syndrome, a congenital heart defect, and he has experienced irregularities with his heartbeat.

[28] He reports having been generally well up until his time on remand. The stress of being in pre-sentence custody has been particularly difficult and has impacted his sleep and both his physical and mental health. I will later refer to his circumstances and experiences while on remand.

[29] The offender expressed remorse for his conduct. He was apologetic to both victims. He stated that he is ashamed of himself and that he regretted his actions. He described his behaviour as “ignorant, not right, and disrespectful”. He said that he “did something bad but (that he) is not a bad person”. With respect to the videos and the intimate images, he stressed that it was never his intention to share or distribute them.

[30] The offender became emotional when addressing the Court and revealed for the first time that he had been sexually assaulted by an older cousin at the age of 12. Until now he has held back this disclosure. He is only starting to come to terms with how this may have impacted him.

The Offender’s Indigenous Ancestry

[31] In advance of sentencing the offender advised the Court of his Indigenous ancestry. Defence counsel then requested the preparation of a *Gladue* report through the Mi’kmaw Legal Support Network (“Network”).

[32] Ultimately, however, the Network was unable to prepare a *Gladue* report as they were unable to confirm the offender’s Indigenous ancestry. By way of a letter attaching several pages of genealogical information, the *Gladue* Coordinator stated:

> ……At this point in time, we are unable to prepare a *Gladue* Report for Z.Z. for two reasons. First, we are unsure about the specific nature of his Indigenous ancestry, and second, even if Z.Z.'s ancestry was somehow able to be confirmed, we cannot address how being an Indigenous person has affected his life circumstances.
>
> The purpose of a *Gladue* Report is to discuss the way in which the individual before the court has been influenced and affected by their Indigenous ancestry - either directly or by systemic and historical factors.
>
> This letter should not be read in any way as stating that Z.Z. is not an Indigenous person; we are not in a position to draw such a conclusion. Neither should this letter be read as stating that there may not be relevant *Gladue* issues at play in this case. The fact that we are not able to prepare a *Gladue* Report for Z.Z. does not mean that there are no *Gladue*-related issues counsel may wish to raise with the Court.

[33] The offender testified at the sentencing hearing. The Crown did not contest the accused's evidence of his Indigenous ancestry, nor did they cross-examine the offender with respect to his evidence of the personal impact of his ancestry. Despite this, the Crown argued that the Court ought to give "limited weight" to the offender's evidence as it related to *Gladue* factors.

[34] It is improper and misguided for this court to act as a gatekeeper when it comes to who is Indigenous. Engaging in such an exercise after an individual has made that assertion is "fraught with moral, ethical, and legal concerns, all of which are heightened by the impacts of colonialism, but most importantly are irrelevant to applying the law" (Jonathan Rudin, *Indigenous People and the Criminal Justice System* (Toronto: Edmond Montgomery, 2018) at page 103).

[35] The engagement of *Gladue* and *Ipeelee* principles is not an exercise in proving or disproving Indigenous ancestry. The process, responsibility, and

assessment of *Gladue* “must go beyond a technical assessment of bloodline” (*R. v. P. (T.A.)*, 2013 ONSC 797 at para. 40).

[36] The offender testified that he is of Mi’kmaw, Metis, and Acadian decent. He was raised in a household where there were four generations under the same roof. He was raised to believe that his father was Indigenous and that he shared the same ancestry. He has several uncles and cousins who have recognized Metis status. He testified that his great-grandmother was, in his words, “part Mi’kmaw”.

[37] At the age of 18 he moved with victim A to her First Nations community. He has resided within that community for over [..] years, apart from sporadic occasions when he and victim A moved out temporarily but later returned. He testified to having participated in various traditional ceremonies as well as being involved in fishing and hunting for community elders. He has volunteered within the First Nations community. He was also involved in community initiatives such as working at the community [...] and the construction of a [..].

[38] The offender testified to being “caught between two cultures”. For example, he experienced racism when he worked outside the First Nations community. He was the target of racial slurs and made to feel unwelcome and unsuited for his employment.

[39] At other times, however, he struggled with being fully accepted within the First Nations community given his French ancestry. On one occasion this led to him being the victim of a violent attack.

[40] Finally, the offender testified as to the impact and trauma he experienced as a result of a close friend's suicide in the First Nations community.

[41] *Gladue* principles apply to all Indigenous peoples, whether status or non-status (*Daniels v. Canada*, [2016] S.C.J. No 12).

[42] With that in mind, section 718.2(e) reads:

> Other sentencing principles
>
> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders (emphasis added).

[43] Section 718.2(e) imposes an important duty on a sentencing court and on counsel. This duty was explained by the Supreme Court of Canada in *R. v. Ipeelee*, 2012 1 SCR 433, beginning at para. 59:

> … s. 718.2(e) …..does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders. Section 718.2(e) directs sentencing judges to pay particular

> attention to the circumstances of Aboriginal offenders because those circumstances are unique and different from those of non-Aboriginal offenders (*Gladue*, at para. 37). 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).
>
> … 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. Counsel have a duty to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered… (emphasis in original).

[44] As Judge Wakefield stated in *R. v. Parent*, 2019 ONCJ 523, beginning at para. 66:

> Clearly, the "mere assertion of aboriginal heritage" is not a switch which once flicked sparks an automatic race-based sentence reduction (*F.L.*, [2018] O.J. No. 482, para 38).
>
> "The correct approach... the systemic and background affecting Aboriginal people in Canadian society must have impacted the offender's life in a way that (1) bears on moral blameworthiness, or (2) indicate which types of sentencing objectives should be prioritized in the offender's case" *F.L.*, para. 40.

[45] Ideally, the best vehicle to explore section 718.2(e) and how to incorporate *Gladue* principles into the sentencing algorithm would be through a comprehensive *Gladue* report. Unfortunately, and through no fault of anyone, we do not have that benefit.

[46] The offender's testimony represents the sole source of case-specific, individualized evidence. While the individualized evidence before me is not as robust as that in other cases, it is of assistance in my analysis.

[47] I am satisfied that this court can meet its obligations. I can take judicial notice of the significant systemic and historical considerations affecting Aboriginal people in Canadian society as outlined in leading authorities such as *Ipeelee* at para. 60. I can then combine this with the individualized evidence offered by the offender. By synthesizing the two, this court can assess how the offender's life circumstances may have impacted his moral blameworthiness. I adopt the following informative passages from *Parent* :

> 21 In the absence of *Gladue* information by way of my ordered report, the duty on me to consider individualized *Gladue* information about Mr. Parent does not expire. My duty in sentencing is quite clear -- I must still consider that individualized information:
>
> > "There is no discretion as to whether to consider the unique situation of the aboriginal offender; the only discretion concerns the determination of a just and appropriate sentence" (*Ipeelee*, paragraph 85 quoting *Gladue*, paragraph 82).
> >
> > …
>
> 28 … As the Court in *Macintyre-Syrette* at paragraph 18 states
>
> "The application of *Gladue* factors is not a matter of weight, and the duty to apply *Gladue* factors does not vary with the offender".

[48] I reject the Crown's suggestion that I should give the offender's Indigenous ancestry and evidence "limited weight" in the absence of a *Gladue* report. The Crown did not challenge the offender's individualized evidence on his ancestry and

its personal impacts on him. I accept his testimony. As such, it is not a matter of weight as I proceed forward in this analysis. My task remains squarely on applying the individualized evidence before this court in light of the systemic and background factors affecting Aboriginal people in Canadian society in an effort to assess the offender's level of moral blameworthiness. As outlined in *F.L.* at para. 46:

> Sentencing judges must therefore be attentive to whether the circumstances of Aboriginal offenders -- viewed in the light of the systemic and background factors described above -- "diminish their moral culpability". In conducting this inquiry, however, courts must display sensitivity to the "devastating intergenerational effects of the collective experiences of Aboriginal peoples", which are often difficult to quantify: *Ipeelee*, at para. 82. When inquiring into "moral blameworthiness", courts must ensure they do not inadvertently reintroduce the same evidentiary difficulties that *Ipeelee* sought to remove…

[49] As stated by the Saskatchewan Court of Appeal in *R. v. Whitehead*, 2016 SKCA 165 at para. 63, the "…link between systemic or background factors and moral culpability for an offence does not require a detailed chain of causative reasoning".

[50] In *F.L.* these principles were articulated in the following way beginning at para. 38:

> The law… is clear. In order to be relevant to sentencing, an offender's Aboriginal background need not be causally connected to the offence(s) for which a sentence is being imposed. In what circumstances, then, will an offender's Aboriginal background influence their ultimate sentence? The answer is "not so easily ascertained or articulated": *R. v. Whitehead*, 2016 SKCA 165, 344 C.C.C. (3d) 1, at para. 60. Clearly, the mere assertion of one's Aboriginal heritage is insufficient -- s. 718.2(e) does not create a "race-based discount on sentencing": *Ipeelee*, at para. 75. Although Aboriginal offenders are not required to

> "draw a straight line" between their Aboriginal roots and the offences for which they are being sentenced, more is required "than the bare assertion of an offender's Aboriginal status": *R. v. Monckton*, 2017 ONCA 450, 349 C.C.C. (3d) 90, at para. 115.
>
> It is also insufficient for an Aboriginal offender to point to the systemic and background factors affecting Aboriginal people in Canadian society. While courts are obliged to take judicial notice of those factors, they 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": *Ipeelee*, at para. 60 (emphasis in original); *R. v. Radcliffe*, 2017 ONCA 176, 347 C.C.C. (3d) 3, leave to appeal refused, [2017] S.C.C.A. No. 274, at para. 54.

[51] I also take guidance from our Court of Appeal in the following passages from *R. v. Cope*, [2024] NSCA 59:

> 81 In discharging their "fundamental duty", sentencing judges "are required to pay particular attention to the circumstances of Indigenous offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case". In the appellant's case his circumstances included a severe mental illness, significant drug addiction, a lack of culturally-focused treatment and support, and the overarching *Gladue* factors, all of which, in combination, impacted his moral culpability and the proportionality calculus.
>
> …
>
> 89 The sentencing of Indigenous offenders is to be approached differently "because the circumstances of Aboriginal people are unique and call for a special approach". Due to "[s]ocial and economic deprivation with a lack of opportunities and limited options for positive development", an Indigenous offender's "constrained circumstances may diminish their moral culpability".
>
> …
>
> 107 The interconnection between the appellant's serious mental illness and substance abuse and his *Gladue* factors raises additional considerations relevant to proportionality. In the assessment of moral blameworthiness, "…the presence of addiction or mental health problems in an Indigenous individual must be viewed through the lens of the residual effects of residential schools and intergenerational trauma"…

[52] A review of the case-specific evidence reveals differences between the circumstances of Z.Z. and other Indigenous offenders like Mr. Cope. For example, the accused grew up in a home free of violence and substance abuse. The case-

specific evidence also shows that he has not suffered the devastating effects of substance abuse, severe mental illness, unemployment, lack of educational opportunities, or homelessness. However, the absence of these impacts does not mean absence of impact.

[53] I conclude from the case-specific evidence that Z.Z.'s unique circumstances as an Indigenous offender have had a bearing on his moral blameworthiness in other ways that factor into the "proportionality calculus".

[54] For example, it is impossible to ignore his lifelong feelings of a loss of identity and early connection to his ancestry. This has impacted the way he sees himself in the world. He has struggled with a sense of belonging and a lack of full acceptance within both First Nations and non-First Nations communities. His early disconnection from his Indigenous identity and community has impacted his mental health both before and after the offences.

[55] The offender has also been the target of overt acts of racism. He has been the victim of physical violence motivated by his status as a cultural outsider.

[56] Furthermore, he still struggles with the trauma of losing a close friend to suicide which occurred before his offences. As mentioned, this close friend was also a member of the same First Nations community.

[57] In addition, he was a victim of sexual abuse as a child. He is only starting to make sense of this reality and the resulting trauma.

[58] These are all mitigating circumstances which impact on his moral culpability. They will factor into the sentencing matrix. However, I wish to repeat the words of the Supreme Court of Canada and the Saskatchewan Court of Appeal that the "devastating intergenerational effects of the collective experiences of Aboriginal peoples" are “difficult to quantify”. Exactly how an accused’s Indigenous background will influence their ultimate sentence is "not so easily ascertained or articulated”.

Impact On The Victims

[59] The offender’s violence has had a devastating impact on both of these Indigenous women. In her victim impact statement, victim A speaks of the shame she feels and the extreme stress of trying to keep the abuse a secret from her children. She continues to grapple with the uncertainty of how her children will ever come to terms with this knowledge should it come to light. Victim A also speaks to the anguish of having the proceeding hanging over her head for close to five years. This has impacted her ability to move forward and truly begin the healing process.

[60] Victim B expressed that this has been the most difficult period of her entire life. She too described being unable to move forward with the healing process. She is also reminded of how sickened she felt when she first discovered the photos and videos. These feelings have never left her. She cannot get the images and videos out of her head. The gross interference with her bodily integrity and autonomy continues to haunt her. Victim B speaks of the depths of the violation she experienced. She was in a vulnerable state, asleep and incapacitated by alcohol, when the violence occurred. She reflected on the profound betrayal of her trust. The ongoing trauma impacts her everyday life and affects her both mentally and physically.

[61] Victim B once felt safe in her home. She no longer feels the same way. She suffers from anxiety and feels that no one should ever have to experience what she has gone through. She shared some of the same feelings of shame and concerns as victim A. In particular, she expressed her worries about others learning of what the offender did to her. She is impacted by the trauma of knowing that children were present when the offender surreptitiously recorded her. She is grateful that the offender is no longer a part of their lives.

Intimate Partner Violence and Indigenous Female Victims

[62] Our province currently faces an "…epidemic of gender based, intimate partner, and family violence…" (*Turning the Tide Together: Final Report of the Mass Casualty Commission, v. 3: Violence*, at page 268).

[63] Intimate partner violence tears at the moral fabric of our society and calls for forceful denunciation. It is a complex and multifaceted problem. It is a crime of forced control, most frequently perpetuated by men against women. The resulting trauma is often devasting for the individual victim and the secondary impacts are far reaching. Intimate partner violence also remains alarmingly persistent. The multigenerational cycle of violence against women has to end. Courts have a responsibility to deter all generations from engaging in such conduct.

[64] In response to the disturbing frequency and devastating impacts of intimate partner violence, Parliament codified the following aggravating factor:

> Other sentencing principles
> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
> (a) A sentence should be increased…to account for any relevant aggravating … circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
> …
> (ii) evidence that the offender, in committing the offence, abused the offender's intimate partner or a member of the victim or the offender's family,
> …
> shall be deemed to be aggravating circumstances…

[65] The Nova Scotia Court of Appeal in *R. v. Butcher*, 2020 NSCA 50 addressed this provision at para. 136:

> Parliament's inclusion of domestic violence as an aggravating factor on sentencing codified what the common law already took into account. Whether it is through the application of statutory or common law principles, violence perpetrated in the context of intimate relationships requires emphatic denunciation.

[66] Furthermore, the sentencing provisions of the *Code* were recently amended to emphasize the Court's responsibility to give primary consideration to the objectives of denunciation and deterrence when sentencing offenders in relation offences involving vulnerable Indigenous women:

> Objectives - offence against vulnerable person
>
> > 718.04 When a Court imposes a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances - including because the person is Aboriginal and female - the Court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

[67] Indigenous women are repeatedly marginalized. One of the tragic impacts of marginalization is an increased vulnerability to harm. Sadly, marginalized Indigenous women continue to be frequent targets for sexual and other forms of violence by their intimate partners (*Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (Ottawa: Government of Canada, 2019) ("the MMIWG report").

[68] The Court must also consider section 718.201 of the *Criminal Code*:

> Additional consideration - increased vulnerability
>
> 718.201 A court that imposes a sentence in respect of an offence that involved the abuse of an intimate partner shall consider the increased vulnerability of female

> persons who are victims, giving particular attention to the circumstances of Aboriginal female victims.

[69] As stated by the majority of the Quebec Court of Appeal in *R. v. L.P.*, 2020 QCCA 1239 at para. 78:

> Section 718.201 of the *Criminal Code* adds, as a sentencing consideration, the increased vulnerability of female victims of intimate partner violence, with "particular attention to the circumstances of Aboriginal female victims…".

[70] Sections 718.04 and 718.201 address recommendations in the MMIWG Report and the concerns noted by the Supreme Court in *R. v. Barton*, 2019 SCC 33. The provisions were enacted to address concerns regarding the criminal justice system's treatment of Indigenous women and girls who are victims of sexual assault (see *R. v. Bunn*, 2022 MBCA 34 at paras.104-105).

[71] In *R. v. Wood*, 2022 MBCA 46 the Court spoke to the legislative history of section 718.04 and 718.201:

> 32 …sections 718.04 and 718.201 of the *Code* exist, in part, due to recommendations in the Canada, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (Ottawa: NIMMIWG, 2019) (the MMIWG Report). This constitutes direct evidence of society's evolving understanding of harm caused by violence against, and the vulnerability of, victims of intimate partner violence and the circumstances of victims who are Aboriginal and female. The fact that these factors have been considered in earlier case law does not detract from our evolving knowledge.
>
> …
>
> 36 Thus, contrary to the argument of the accused, section 718.04 does not merely direct a sentencing judge to consider the circumstances of a vulnerable victim, including in circumstances where the victim is Aboriginal and female. Rather, it mandates primary consideration of the objectives of denunciation and deterrence, factors that often lead to a harsher sentence.

[72] The Court in *Wood* further considered the current landscape of how these provisions apply in cases where there is the presence of intimate partner violence, sexual violence, and Indigenous female victims. Specifically, the Court noted:

> 29 In *Friesen*, the Supreme Court held that sentences can and should depart from prior sentencing ranges when Parliament raises the maximum sentence for an offence and when society's understanding of the severity of harm arising from the offence increases (see paras 62-67, 74).
>
> 30 In the recent case of *R v Bunn*, 2022 MBCA 34, this Court held that this principle in *Friesen* should not be limited to cases involving sexual abuse of children, as the law has historically recognized that "sentences may be raised or lowered to bring them into harmony with prevailing social values" (at para 72).
>
> …
>
> 38 Like section 718.04, section 718.201 was enacted as part of Bill C-75. During the second reading of Bill C-75, former Minister of Justice and Attorney General of Canada, Hon Jody Wilson-Raybould, stated that one area of reform in Bill C-75 was to address intimate partner violence. She stated (at p 19604):
>
> …
>
> Intimate partner violence is a reality for at least one in two women in Canada. Women who are Indigenous, trans, elderly, new to Canada, or living with a disability are at increased risk for experiencing violence due to systemic barriers and failures. The personal and often lifelong consequences of violence against women are enormous.
>
> …
>
> 49 In my view, section 718.3(8) reinforces the position that, for offences where violence is perpetrated against an intimate partner who is vulnerable because of personal circumstances -- including because the person is Aboriginal and female -- Parliament intended the court to consider these factors and increase sentences where appropriate.

[73] I also refer to the important and compelling comments from Scanlan J.A. of our Nova Scotia Court of Appeal earlier this year with respect to vulnerability of marginalized Indigenous women in R. v. Cope, 2024 NSCA 59. While his passionate remarks came as part of the dissent, his reflections on their vulnerability were not

controversial, nor were they at all out of synch with the views of the majority. In fact, the majority shared, expressed and endorsed the same concerns on this point. They also agreed that these concerns rise to prominence during the sentencing process.

[74] Sentencing is contextual and the core concerns with respect to the vulnerability of marginalized Indigenous women was a principle share by all in *Cope*. I take into consideration the following reflections of Scanlan J.A. in *Cope*:

> 177 I am convinced our justice system has not done enough to protect the most vulnerable within Indigenous communities. The Missing and Murdered Indigenous Women's Inquiry ("MMIWG") questioned whether Indigenous women and girls were being well served by our justice system and afforded the protection they so much need.
>
> 178 Parliament has amended the *Criminal Code* in an attempt to better recognize the vulnerability of Indigenous women and intimate partners….
>
> …
>
> 213 Failure to protect the most vulnerable serves only to perpetuate the cycle of violence. Violence begets violence, especially if subsequent generations understand violence directed at the most vulnerable is the norm. The sooner the cycle of violence is stopped the sooner communities will heal.
>
> 214 …the National Inquiry (MMIWG) expressed concern that sentencing as it is currently being carried out, is not resulting in safer communities, or reducing the rate of violence against Indigenous women, girls, and other at-risk vulnerable persons within Indigenous communities.
>
> …
>
> 231 Sections 718.04 and 718.201 were a Parliamentary response to the MMIWG Inquiry which noted the disproportionate victimization of Indigenous women and girls. In the end courts must balance the various factors in a way that holds offenders accountable…… Parliament has made it clear that victimization of Indigenous women, Indigenous intimate partners, can lead to a harsher sentence; one that emphasizes denunciation and deterrence…….Given the treatment of Indigenous women and Indigenous intimate partners, when offences involve serious harm to those vulnerable persons it is time for the amended sections of the *Code* to have meaningful impact as well.

> 232 The message in the legislation is that Parliament has listened and agrees that Indigenous women and girl victims need more protection.

Inherent Tensions: Indigenous Accused and Indigenous Victims

[75] An inherent tension exists when sections 718.04 and 718.201 collide with the need to adhere to *Gladue* principles. A court must arrive at a proportionate sentence which fully reflects the vulnerabilities of Indigenous victims while at the same time balancing the moral blameworthiness of an Indigenous accused. This tension places a sentencing judge in an unenviable position. As stated in *Cope*, this "will be challenging for any sentencing judge" (para. 116). More specifically, Derrick J. stated:

> [119] While ss. 718.04 and 718.201 do not negate or dilute the application of s. 718.2(e), or the imperatives in *Gladue* and *Ipeelee*, they contribute to the challenges judges confront when endeavouring to balance what the Intervenor has called:
>
> > …two aspects of the ongoing legacy of colonialism in the Canadian criminal justice system: the mass incarceration of Indigenous people and the failure to protect Indigenous women and girls from violence.
>
> [120] Notwithstanding ss. 718.04 and 718.201, the sentencing principles of restraint and rehabilitation must not be marginalized. In the individualization of an Indigenous offender's sentence, it is necessary to account for their role. The objectives of denunciation and deterrence, foregrounded in the appellant's sentence, did not displace the application of:
>
> > [123] … all the principles mandated by ss. 718.1 and 718.2 to craft a sentence that "furthers the overall objectives of sentencing" (*Ipeelee*, at para. 51). Deference to Parliament's objectives is not unlimited; to ensure respect for human dignity, the door to rehabilitation must remain open (*Bissonnette*, at paras. 46 and 85; *Hills*, at paras. 140-41; *Nasogaluak*, at para. 43).

[76] I keep this at the forefront of my sentencing analysis. The need to emphasize denunciation and deterrence must never overshadow or ignore the identifiable *Gladue* factors and case-specific evidence impacting the accused's moral blameworthiness. A fulsome consideration of both sides of the equation will lend itself to a proportionate sentence.

The Purpose and Principles of Sentencing

[77] The purpose and principles of sentencing have been cited in countless ways. However, Derrick J. (as she then was) in *R. v. Thompson*, 2017 NSPC 18 captured their essence in a few short passages, beginning at para. 27. Her reflections remain as relevant and on-point today as they were then. They will serve as the blueprint for my sentencing analysis:

> The Purpose and Principles of Sentencing
>
> The Supreme Court of Canada has described sentencing as "one of the most delicate stages" of our criminal justice process. (*R. v. Lacasse,2015 SCC 64, para. 1*) It is a "profoundly subjective process" (*R. v. Shropshire, 1995 CanLII 47 (SCC), [1995] S.C.J. No. 52, para. 46*) which requires the careful balancing of "the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence ..." (*R. v. C.A.M.,* 1996 CanLII 230 (SCC), *[1996] S.C.J. No 28, para. 91*) An appropriate sentence cannot be determined in isolation. Regard must be had to all the circumstances of the offence and the offender. (*R. v. Nasogaluak,* 2010 SCC 6 (CanLII), *[2010] S.C.J. No. 6, para. 44*) It is a "profoundly contextual" process in which the judge has broad discretion and must balance "all the relevant factors in order to meet the objectives being pursued in sentencing." *(R. v. L.M.,* 2008 SCC 31 (CanLII), *[2008] S.C.J. No. 31, para. 15; R. v. Lacasse, para. 1*)
>
> Section 718 of the *Criminal Code* sets out the objectives a sentence must achieve: denunciation, deterrence - both specific and general, separation from society where

necessary, rehabilitation of the offender, reparations by the offender, and the promotion of a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

Assessing moral culpability is a fundamental aspect of determining the appropriate sentence: a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. (*section 718.1, Criminal Code*) Proportionality is "closely tied to the objective of denunciation", promotes justice for victims, and seeks to ensure public confidence in the justice system. The principle of proportionality, ...ensures that a sentence does not exceed what is appropriate, given the blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other. (*R. v. Ipeelee,* 2012 SCC 13 (CanLII), [2012] S.C.J. No. 13, *para. 37*)

The principle of restraint operates in the sentencing analysis so that what is imposed is "a just and appropriate punishment, and nothing more." ((*R. v. M. (C.A.),* 1996 CanLII 230 (SCC), [1996] S.C.J. No. 28, *para. 80)*

Proportionality

[78] The fundamental principle of sentencing is set out in section 718.1:

> A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[79] The Supreme Court of Canada in *R. v. Bissonnette*, 2022 SCC 23 methodically reviewed the concept of proportionality and explained why it remains the fundamental principle of sentencing:

1. Proportionality is essential to maintaining public confidence in the sentencing process (para. 50).

2. "…The sentence must be severe enough to denounce the offence but must not exceed "what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence. …" (para. 50).

3. "…There is no mathematical formula for determining what constitutes a just and appropriate sentence. …" (para. 49).

4. The goal of sentencing is to "…balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. …" (para. 49).

5. "The relative importance of each of the sentencing objectives varies with the nature of the crime and the characteristics of the offender. …" (para. 49).

The Intersection of Denunciation, Deterrence, and Rehabilitation

[80] The Supreme Court of Canada in *Bissonnette* also reflected on how rehabilitation, deterrence, and denunciation intersect. I pause to remind myself to avoid the analytical pitfall of overemphasizing deterrence and denunciation while losing sight of rehabilitation, restraint, and totality. In particular, I keep the following points from *Bissonnette* at the forefront of my mind when striving to achieve a proportionate sentence:

1. The principle of denunciation "…must be weighed carefully, as it could, on its own, be used to justify sentences of unlimited severity…" (para. 46).

2. Deterrence comes in two forms, general and specific. Certainty of punishment and criminal sanction "…does produce a certain deterrent effect, albeit one that is difficult to evaluate, on possible offenders..." (para. 47).

3. The objective of rehabilitation "presupposes that offenders are capable of gaining control over their lives and improving themselves, which ultimately leads to a better protection of society". Rehabilitation "is one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world." (para. 48).

Parity and Individualization

[81] The application of the parity principle can be a challenge. The number of sentencing cases relating to a particular offence may be vast. The facts are rarely on point. As sentencing is an individualized process, the weighing of competing principles will vary from case to case and this affects the net results. Nevertheless, Parliament was clear when they stated in section 718.2(b) of the *Criminal Code*:

> …a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances…

[82] The Supreme Court of Canada discussed how individualization and parity factor into the sentencing algorithm in *R. v. Parranto*, 2021 SCC 46. I take the following considerations from *Parranto* into account as I navigate my way towards a proportionate sentence:

1. "…Individualization is central to the proportionality assessment. Whereas the gravity of a particular offence may be relatively constant, each offence is "committed in unique circumstances by an offender with a unique profile"... …This is why proportionality sometimes demands a sentence that has never been imposed in the past for a similar offence. …" (para. 12).

2. "…The question is always whether the sentence reflects the gravity of the offence, the offender's degree of responsibility and the unique circumstances of each case…" (para. 12).

3. The mitigating and aggravating factors of each case must be considered (paras. 17-18).

4. "…parity and proportionality are not at odds with each other. …consistent application of proportionality will result in parity…" (para. 11).

5. At para. 12, as “to the relationship of individualization to proportionality and parity, this Court in *Lacasse* aptly observed:

> …Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. [para. 53]”…

6. “…However, parity is a secondary sentencing principle, subordinate to proportionality (*Lacasse*, at para. 54) and cannot "be given priority over the principle of deference to the trial judge's exercise of discretion…" (para. 234).

7. A “trial judge must calibrate a sentence that is proportionate for *this* offence by *this* offender, while also being consistent with sentences for similar offences in similar circumstances…"(*Parranto*, para. 234) (emphasis in original).

Consider Alternatives to Imprisonment

[83] Section 718.2 (d) requires me to consider that “an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances”.

[84] Section 718.2 (e) states that “all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders”.

Duncan Credit and Credit for Strict Release

[85] The offender has spent 654 days on remand up to the date of sentencing. The Crown and Defence agree that the offender should receive enhanced credit on a 1.5:1 basis in accordance with s. 719(3.1). This amounts to a remand credit of 981 days.

[86] The Accused argues that the Court should also grant *Duncan* credit for particularly harsh pre-sentence custody conditions on a 2:1 basis for the entire remand period.

[87] The Accused agrees that the Court has a wide discretion as to how Duncan credit is apportioned and quantified. Counsel provided the following cases: *R. v. Chaisson*, 2024 NSCA 11; *R. v. Lambert*, 2020 NSPC 39; *R. v. Robinson*, 2021 NSPC 20; *R. v. Steed, 2021* NSSC 71; *R. v. Casey*, 2015 NSSC 187; *Jennings v. Nova Scotia (Attorney General)*,2023 NSSC 148; *Downey v. Nova Scotia (Attorney General)*, 2023 NSSC 204; *Keenan v. Nova Scotia (Attorney General)*, 2023 NSSC 217; and *Durrell Diggs v. Attorney General of Nova Scotia and The Nova Scotia Health Authority*, 2024 NSSC 11.

[88] In *Chaisson* our Court of Appeal provided helpful guidance earlier this year with respect to a consideration of *Duncan* credit. Beginning at para. 71, the Court stated:

The opportunity for enhanced credit beyond a 1.5:1 basis as a result of particularly harsh pre-sentence incarceration was recognized by the Ontario Court of Appeal in *Duncan*. There, an additional credit was not granted, but the following comments from the Court provided the foundation for such applications:

[6] On our reading of the trial judge's reasons, we agree with counsel. The trial judge effectively held that any credit or consideration in relation to presentence incarceration was capped at the 1.5 limit. We agree with counsel that in the appropriate circumstances, particularly harsh presentence incarceration conditions can provide mitigation apart from and beyond the 1.5 credit referred to in s. 719(3.1). In considering whether any enhanced credit should be given, the court will consider both the conditions of the presentence incarceration and the impact of those conditions on the accused. In this case, there was evidence that the appellant served a considerable part of his presentence incarceration in "lockdown" conditions due to staffing issues in the correctional institution. There was, however, no evidence of any adverse effect on the appellant flowing from the locked down conditions. Indeed, some of the material filed on sentencing indicates that the appellant made positive rehabilitative steps during his presentence incarceration.

[7] While the pattern of "lockdowns" endured by the appellant is worrisome, without further evidence as to the effect of those conditions, we cannot say that the appellant suffered particularly harsh treatment entitling him to additional mitigation beyond the 1.5 credit. Consequently, although we agree that the trial judge misinterpreted the relevant provision, we would not reduce the sentence to reflect any added mitigation for the conditions of presentence incarceration.

In *R. v. Marshall*, 2021 ONCA 344, Justice Doherty provided direction, and warning, on the use of *Duncan* credit:

[50] Before I move to *Marshall #2*, I propose to make some observations about the calculation of the "*Duncan*" credit. A "*Duncan*" credit is given on account of particularly difficult and punitive presentence custody conditions. It must be borne in mind the 1.5:1 "*Summers*" credit already takes into account the difficult and restrictive circumstances offenders often encounter during pretrial custody: *Summers*, at paras. 28-29. The "*Duncan*" credit addresses exceptionally punitive conditions which go well beyond the normal restrictions associated with pretrial custody. The very restrictive conditions in the jails and the health risks brought on by COVID-19 are a good example of the kind of circumstance that may give rise to a "*Duncan*" credit: *R. v. Morgan*, 2020 ONCA 279.

> [51] It is also important to appreciate and maintain the clear distinction between the "*Summers*" credit and the "*Duncan*" credit. The "*Summers*" credit is a deduction from what the trial judge determines to be the appropriate sentence for the offence. The "*Summers*" credit is calculated to identify and deduct from the appropriate sentence the amount of the sentence the accused has effectively served by virtue of the pretrial incarceration. The "*Summers*" credit is statutorily capped at 1.5:1. It is wrong to think of the "*Summers*" credit as a mitigating factor. It would be equally wrong to deny or limit the "*Summers*" credit because of some aggravating factor, such as the seriousness of the offence: *R. v. Colt*, 2015 BCCA 190.
>
> [52] The "*Duncan*" credit is not a deduction from the otherwise appropriate sentence, but is one of the factors to be taken into account in determining the appropriate sentence. Particularly punitive pretrial incarceration conditions can be a mitigating factor to be taken into account with the other mitigating and aggravating factors in arriving at the appropriate sentence from which the "*Summers*" credit will be deducted. Because the "*Duncan*" credit is one of the mitigating factors to be taken into account, it cannot justify the imposition of a sentence which is inappropriate, having regard to all of the relevant mitigating or aggravating factors.
>
> [53] Often times, a specific number of days or months are given as "*Duncan*" credit. While this quantification is not necessarily inappropriate, it may skew the calculation of the ultimate sentence. By quantifying the "*Duncan*" credit, only one of presumably several relevant factors, there is a risk the "*Duncan*" credit will be improperly treated as a deduction from the appropriate sentence in the same way as the "*Summers*" credit. If treated in that way, the "*Duncan*" credit can take on an unwarranted significance in fixing the ultimate sentence imposed: *R. v. J.B.* (2004), 187 O.A.C. 307 (C.A.). Arguably, that is what happened in this case, where on the trial judge's calculations, the "*Duncan*" credit devoured three-quarters of what the trial judge had deemed to be the appropriate sentence but for pretrial custody.

[89] I would add that a *Duncan* “credit” need not be expressed in terms of a precise numerical value (*R. v. Hilaire*, 2024 ONSC 2910 at para. 51). Consistent with this approach, the Court in *Chaisson* adopted the following comments from the Ontario Court of Appeal at para. 73:

> In *R. v. Smith*, 2023 ONCA 500, Fairburn, A.C.J.O. recently explained:
>
> > [37] *Marshall* added an important nuance to the *Duncan* framework. While it does not amount to an error to deduct a specific number of days or months as *Duncan* credit, it is preferable if sentencing judges simply address any *Duncan*-type concerns as a type of mitigating factor when determining the fit global sentence. Therefore, the *Duncan* credit should not be approached as a "deduction from the otherwise appropriate sentence", but as a factor to be taken into account when determining the fit sentence in all of the circumstances: *Marshall*, at para. 52.

[90] Ultimately, when this court is "considering the appropriateness of a *Duncan* credit, it is not only the nature of the harsh conditions that is relevant, but also the impact on the individual claiming it" (*Chaisson* at para. 75). It is necessary to consider whether this accused has adduced a sufficient evidentiary record to demonstrate the presence of particularly harsh conditions and that these conditions have had an adverse effect on him.

[91] I also take from *Chaisson* that the *Duncan* analysis is case specific. It is not enough to simply point to another case where a particular category, circumstance, or condition existed. The evidentiary record must establish the presence of particularly harsh conditions in *this* case and that they have materially impacted *this* accused. In other words, conditions that result in the granting of *Duncan* credit in one case may not yield a similar result in another.

[92] Finally, I must be cautious that the granting of *Duncan* credit does not “serve to inappropriately "devour" what was otherwise a fit sentence” (*Chaisson* para. 75).

[93] All of this said, I do find the cases presented by counsel to be extremely helpful in understanding the types of unduly harsh conditions which have resulted in *Duncan* credit. The cases also illustrate how specific harsh conditions have impacted other offenders.

[94] For example, counsel tendered evidence of the following circumstances in support of a *Duncan* credit application in *Lambert*: inadequate access to healthcare; reduced privileges during the pandemic; close confinement; frequent lockdowns; unsanitary conditions; poor water quality; and staff shortages resulting in frequent isolation. The Court held that some, but not all of these considerations, had impacted the offender enough to warrant mitigation of sentence (see paras. 64 to 76).

[95] In *Robinson*, the Court considered the impact of increased restrictions on inmates during the Covid pandemic resulting in the loss of programming, limited to no visitation, and reduced time out of the cell. The Court stated at para. 45:

> Given the absence of specific evidence on how this has impacted Mr. Robinson and the seriousness of the offences for which I am sentencing him, the mitigation provided by this is limited, but it will form part of my sentence calculation.

[96] In *Steed*, Rosinski J. heard evidence from the offender and a corrections employee. It was established that Covid restrictions had contributed to "harsh conditions". As the Court discussed at para. 193, these conditions resulted in:

> …the reduction in programming available, liberty (within the correctional centres where he was housed -- including less outdoor time; less mingling among inmates; less contact with family and friends etc.), and the occasions of "lockdowns" etc.; and a significant assault that caused serious injury to his eye, some symptoms of which are ongoing.

[97] In *Casey*, the Court considered the denial of a medication to a mentally ill inmate during pre-sentence custody to support credit above and beyond the statutory maximum. As the Court stated at paras. 11, 22, and 37:

> …She endured the agony of being in jail without medication for a major psychiatric illness. This was not for want of trying by Ms. Casey, her lawyer, and Provincial Court judges. Despite their efforts, the institution provided no care.
> …
> …Judge Scovil concluded, "given the egregious conduct of the state, the appropriate remedy here is that the Accused be given credit at two days for each day served in custody."
> …
> …the sentencing judge made no error when he gave Ms. Casey credit of two days for every day she spent in pre-sentence detention living with the agony of being deprived of her anti-bipolar medication.

[98] In *Chaisson*, Norton J. granted *Duncan* credit at a ratio of 0.5 per day for the period when the accused had been denied dental care. However, Norton J. also

found that the accused had not met the evidentiary burden as it related to COVID-19 restrictions and the loss of in-person visitation.

[99] A series of recent decisions from the Supreme Court of Nova Scotia also casts a spotlight on the current staffing shortages at Nova Scotia correctional facilities. These cases have exposed how the shortages have impacted inmates on remand.

[100] In *Jennings v. Nova Scotia (Attorney General)* the Court stated at para. 42:

> It is a very bad situation. Staffing issues appear to be endemic in many sectors of the economy since COVID-19 struck. …Within a correctional facility there are limited ways to respond given the concerns about safety and security. Inmates have felt the impacts. …

[101] In *Downey v. Nova Scotia (Attorney General)* Justice Brothers expressed "deep concern about the routine use of rotational lockdowns" as a band-aid solution to address staffing challenges (para. 93).

[102] The same concern was shared by Arnold J. in *Keenan v. Nova Scotia (Attorney General)* at para. 1:

> There is a significant problem at the Central Nova Scotia Correctional Facility. It is seriously understaffed. As a result, the inmates have been subject, off and on, to rotational lockdowns for months. Whether on a general population range or on a protective custody range, because of the chronic staffing shortages, all inmates are subject to close confinement for significant periods of time. The rotational lockdowns create havoc with the daily schedule. Inmates do not know if or when they will be released from their cells. Programming has been impacted, but not cancelled completely. Calls to lawyers have been impacted. Visitation has been impacted. Meals have been impacted. Tensions are high.

> Inmate-on-inmate intimidation and violence, as well as inmate-on-staff intimidation, abuse and violence, is an issue, which leads to more lockdowns and more staffing shortages.

The Particularly Harsh Conditions of Pre-sentence Incarceration in this Case and Their Impact on the Offender

[103] The offender was on remand at the Northeast Nova Scotia Correctional Facility. He gave robust evidence about this experience. I will not recite every detail. He has a *habeas corpus* application pending before the Nova Scotia Supreme Court.

[104] Based on the evidentiary record before me, I am satisfied that the offender has experienced particularly punitive and unduly harsh pretrial conditions.

[105] Furthermore, I find that these circumstances have had a demonstrable impact on him. Therefore the accused will receive *Duncan* credit. As per the cases of *Hilaire* and *Smith* it will be addressed as a mitigating factor when determining the fit global sentence.

[106] The unduly harsh circumstances were frequent, varied, and overlapped. I find as whole that his oppressive circumstances were ever-present. The oppressive catalysts were collective and there was an ongoing interplay between them. In this case there are no easily identifiable hard lines separating one circumstance from the next. Microscopic apportionment would be a futile exercise.

[107] The offender was remanded on three occasions:

1. Three days in February of 2020 prior to being released on his first release order with a nine p.m. to six a.m. curfew.

2. Five days in April of 2022 prior to being released on a second release order with a house arrest subject to limited exceptions.

3. November 15, 2022, until today – continuous remand.

[108] The offender was meticulous in documenting his unduly harsh experiences. He kept copies of the formal complaints he filed. He also diligently maintained a detailed daily log of the repeated lockdowns and conditions. The Defence tendered these documents as exhibits and they corroborated the offender's testimony.

[109] The Crown did not contest most of the offender's evidence. He provided details about staffing issues, the lack of programming, the extensive lockdowns, the lack of dental care, the lack of health care, the unsanitary conditions, and the assaults he endured.

[110] I am satisfied of the following circumstances and note that this is not a comprehensive list:

1. Due to Covid restrictions the intake process changed. The accused had to wait in isolation for five days before he was given full access to a shower.

2. The frequent lockdowns contributed to tensions between inmates and staff. Normally, inmates would interact in a shared common area outside of their two-person cells between the hours of nine a.m. and nine p.m.

   Covid restrictions and staffing shortages frequently disrupted this reality. As a result, a culture developed where inmates would threaten other inmates. Inmates were warned not to report Covid related symptoms for fear that it would result in a loss of privileges for all. Some inmates were pressured not to wear masks. The accused was subjected to these pressures.

   While on remand the accused twice contracted Covid. On another occasion the whole unit contracted Covid, forcing it into lockdown. This resulted in further close confinement. Due to his pre-existing heart condition, the accused found the impacts of Covid particularly hash. He lost his appetite, he suffered sleep disturbances, and he experienced shortness of breath and headaches.

3. Staffing shortages led to the loss of timely access to phone privileges and private meetings with legal counsel. This was frequently raised by the accused's counsel throughout this proceeding that has spanned several years. I note that counsel and the Court expressed their frustration multiple times on the record.

   The integrity of the criminal justice system depends on assurances from institutions that an offender on remand will have regular access to legal counsel. In this context, the staffing shortages are inexcusable. There ought to be some level of accountability. On one occasion, the accused was violently assaulted by another inmate while waiting in line for the phone –

a direct manifestation of the mounting tensions over shortened and backlogged phone access.

Furthermore, rotational lockdowns due to staffing shortages resulted in restrictions to the accused's time for exercise and access to fresh air which impacted his physical health and mental wellbeing. The offender testified to the added stress of waiting in his cell and wondering if, and when, he was going to be in the rotation.

4. Water quality was an issue within the institution. There were issues with the water pipes in February of 2023. The inmates, including the offender, were unable to drink the water.
The offender testified that the issue had been ongoing for some time prior to an official decision being made to address the problem. He and other inmates reported ongoing concerns about the colour and odour of the water prior to the repair.

   As well, due to the water being shut off he was unable to flush the toilet within his cell. He shared a cell with another inmate and the toilet was left backed up with feces.

5. In cross-examination the Crown did establish that the offender had a number of pre-existing dental issues prior to his remand. However, the offender had repeatedly expressed concern and filed complaints about his need for dental care while on remand. Despite his repeated complaints about loose teeth which were causing him pain he was never given access to dental care. He reports not being able to eat due to the pain. This resulted in him removing several of his own teeth. He currently has loose teeth due to being assaulted. Again, despite requests he has not received any treatment.

6. While in custody the offender was violently assaulted by other inmates on two occasions.

   He was assaulted by one inmate with whom he shared a cell. He was repeatedly beaten during the unprovoked attack. He was stuck in the head upwards of 20 times and had it smashed against the concert floor. It left him unconscious.

   He was hospitalized for several days and described having fluid on his brain, a dislocated jaw, and bruising to his ribs and spine. He is awaiting follow up as to whether he will require corrective nose surgery. He still has several loose teeth for which he has been denied access to dental care.

   At one point during the proceedings the accused had significant bruising to both eyes and notable swelling to most of his face. Due to the injuries interfering with his ability to sleep the accused requested a different mattress. He reports that he was denied this request and told there were ‘too many inmates” to make this accommodation.

7. Due to Covid, programming was suspended for a lengthy period of time. The offender was eager to take steps towards his rehabilitation but was forced to wait as programs were not being offered. This led to stress, disillusionment, and frustration. I do note that programs resumed in the summer of 2023 and that the accused gained full access at that time.

8. The offender reports having two other health concerns while on remand.

   Firstly, he has a pre-existing skin issue and suffers from a rash that impacts the pigment on his face and torso. He had been taking the medically prescribed ointment until the correctional

staff seized it during a search of his cell. Despite his requests the staff have never returned it. His rash has since spread, leading to discomfort and embarrassment.
Secondly, the offender fell and chipped his heel bone. He was then treated at the hospital. While back at the institution he did not have access to walking supports for a period of three to four weeks.

9. The offender testified to the personal impact of the suicide of another inmate. While on remand, the offender befriended an inmate who later took his own life within the correctional centre. The offender spoke of how this impacted his already fragile mental health and overall wellness.

10. The offender described several incidents where he felt he was the target of overworked or otherwise uninterested staff within the institution.

    For example, he described having his razor taken away from him for no valid reason. He also testified that a nurse swore at him. Furthermore, he recalled that a captain told him to “shut up” or he would be shipped off the protective range.

    I am cautious here. While the Crown chose not to challenge the veracity of these claims or to call the subjects of these allegations to allow them an opportunity to respond, I find myself lacking important surrounding details when assessing this evidence. I am not rejecting the offender’s evidence outright on these points. However, I do not have the full context surrounding each incident.

Restrictive Release Conditions

[111] When not in custody, the offender was subject to strict release conditions for extensive periods of time. The offender was subject to house arrest from April 27 to November 15, 2022. Prior to that he was bound by a nine p.m. to six a.m. curfew from February 28, 2020, to April 23, 2022.

[112] While the accused has not put forward a great deal of direct evidence of substantial hardship arising out of these restrictive release conditions, they will still factor "into the mix regarding the crafting of an appropriate sentence"(*R. v. Fardy*, 2024 NSSC 211 at para. 43).

Sexual Violence

[113] Nova Scotia has not adopted a "starting point" approach to sexual assault sentencing (*R. v. C.J.P.M.*, 2022 NSSC 315 at para. 19; *R. v. Percy*, 2021 NSSC 353 at para. 56; and *R. v. J.J.W.*, 2012 NSCA 96 at para. 21).

[114] Recognizing the wide range of acts that constitute sexual violence, Brothers J. noted the following in *Percy* at para. 55:

> Sexual assaults, at any end of the spectrum, are a serious social problem that the courts of Nova Scotia, and all other provinces, are grappling with regularly. Canadians have the expectation that they will be protected from sexual assaults as they go about their daily lives. They should know that actions like those of Mr. Percy will not be tolerated and will result in incarceration. No one is ever simply entitled to any sexual act they desire from any individual they choose.

[115] The following passage from *Friesen* at para. 89 also weighs heavily in my mind:

> All forms of sexual violence, including sexual violence against adults, are morally blameworthy precisely because they involve the wrongful exploitation of the victim by the offender -- the offender is treating the victim as an object and disregarding the victim's human dignity (see *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at paras. 45 and 48). As L'Heureux-Dubé J. reasoned in *L. (D.O.)*, "the occurrence of child sexual abuse is one intertwined with the sexual abuse of all women" precisely because both forms of sexual offences involve the sexual objectification of the victim (p. 441). Courts must give proper weight in sentencing to the offender's underlying attitudes because they are highly relevant to assessing the offender's moral blameworthiness and to the sentencing objective of denunciation (*Benedet*, at p. 310; *Hajar*, at para. 67).

Range of Sentence for a Major Sexual Assault

[116] Non-consensual intercourse has been referred to as a "major sexual assault" (*R. v. Arcand*, 2010 ABCA 363 at para. 171; *R. v. J.W.W*, 2012 NSCA 96 at para. 16). The Court stated in *Arcand* at para. 176:

> …When an offender commits a major sexual assault, including rape, against a person, this act of violence causes harm. It is harm to both the victim and society. A major sexual assault constitutes a serious violation of a person's body and an equally serious violation of their sexual autonomy and freedom of choice. These breaches of one's physical integrity and privacy are indisputable and undeniable. That harm, and it is substantial, is inferred from the very nature of the assault. Add to this the serious breach of a person's human dignity and the gravity of a major sexual assault perpetrated on a victim becomes readily apparent.

[117] This court has previously expressed concerns with respect to the precedential value of *J.W.W.* (see *R. v. S.R.M*, 2023 NSPC 33 at paras. 61-67). While *J.W.W.* is a decision of our Court of Appeal, this decision is over a decade old. It is difficult to reconcile *J.J.W.* with the post-*Friesen* landscape. I repeat that

the time has come to set aside *J.J.W.* as a precedent that forced intercourse on an intimate partner yields a sentence in the range of two years imprisonment in this province. Such an interpretation is discordant with recent guidance from the Supreme Court of Canada.

[118] Twelve years ago the Nova Scotia Court of Appeal did not have the benefit, guidance, wisdom, and direction of the Supreme Court of Canada's landmark decisions of *Friesen* and *Goldfinch*. In both cases, the Supreme Court of Canada spoke of the evolution of the law in this area. They also addressed our evolving awareness of the impacts of sexually based crimes in the decade since *J.J.W.*

[119] As the Supreme Court of Canada stated in *Goldfinch* at para. 37:

> ...As time passes, our understanding of the profound impact sexual violence can have on a victim's physical and mental health only deepens. ...Throughout their lives, survivors may experience a constellation of physical and psychological symptoms including: high rates of depression; anxiety, sleep, panic and eating disorders; substance dependence; self-harm and suicidal behaviour. A recent Department of Justice study estimated the costs of sexual assault at approximately $4.8 billion in 2009, an astonishing $4.6 billion of which related to survivors' medical costs, lost productivity (due in large part to mental health disability), and costs from pain and suffering. The harm caused by sexual assault, and society's biased reactions to that harm, are not relics of a bygone Victorian era.

[120] As stated by the Supreme Court of Canada in *Friesen* at para. 108:

> Courts can and sometimes need to depart from prior precedents and sentencing ranges in order to impose a proportionate sentence. Sentencing ranges are not “straitjackets” but are instead “historical portraits”…

[121] Other appellate courts have revised their own “historical portraits”. For example, the Ontario Court of Appeal in *R. v. A.J.K*, 2022 ONCA 487 concluded at para. 71:

> The Supreme Court recently reiterated that ranges and starting points are malleable products of their time. They are "historical portraits" that provide insight into the operative precedents of the day, but they are not "straitjackets" and can be departed from as societal understanding of offences and the severity of harm arising from those offences deepens: see *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 57; *R. v. Friesen*, 2020 SCC 9, 444 D.L.R. (4th) 1, at para. 108. To that end, it is not unusual "for sentences to increase and decrease as societal and judicial knowledge and attitudes about certain offences change": *R. v. Parranto*, 2021 SCC 46, 463 D.L.R. (4th) 389, at para. 22, citing *R. v. Smith*, 2017 BCCA 112, at para. 36, citing *R. v. Nur*, 2011 ONSC 4874, 275 C.C.C. (3d) 330, at para. 49; *Friesen*, at para. 108.

[122] With these concepts in mind, I will later turn to an examination of parity and the cases submitted by counsel.

Mitigating and Aggravating Factors

[123] Section 718.2(a) of the *Criminal Code* requires me to account for the fact that “a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender”.

Mitigating Circumstances

1. The offender has plead guilty. The magnitude of this course of action must not be understated. The offender’s decision to plead guilty has spared multiple victims from testifying. Had the offender exercised his constitutional right to a trial, both

victims would have been required to recount what happened in open court. I note that victim B has referred to the negative impact of seeing the illicit photos and videos during the investigation. This would have been repeated at trial. Both victims would also have been subject to necessary, yet probing, cross-examinations.

Both victims speak to the agony of having had to endure proceedings which have spanned years. The offender's decision to enter guilty pleas brought finality to their question of whether he would be held accountable for his actions.

The guilty pleas also demonstrate the offender's acceptance of responsibility. Here, they serve as a formal admission of wrongdoing. They speak to the offender's prospects for rehabilitation.

The Crown has also benefitted from the certainty of outcome with respect to the Court registering criminal convictions against the offender. The offender has spared the Crown and the Court countless hours of preparation, deliberation, and trial time. For example, had this matter proceeded to trial a prior sexual history application was certain. As well, the trials were severed. This would have necessitated separate trials over multiple dates with different judges.

2. The offender expressed genuine remorse. While his words will not erase the pain, suffering, and trauma that he has inflicted, they demonstrate his insight into the wrongfulness of his actions. Again, this speaks to his prospects for rehabilitation.

3. There are recognized *Gladue* factors. These directly impact the offender's level of moral blameworthiness. The details were outlined earlier.

4. The offender has a limited, dated, and unrelated prior record. This will be the offender's first custodial sentence served outside of the community. This is a large "jump" in the sentencing ladder. Based on his experiences while on remand, I am satisfied that further custody will be particularly difficult for him.

5. The offender has expressed a willingness and commitment to all forms of rehabilitation. As outlined earlier, the offender has demonstrated a positive attitude and proactive efforts towards rehabilitation. One of the paramount goals of sentencing is the protection of the public. The protection of the public is best served through rehabilitation. The offender's sincere and exceptional dedication to rehabilitation is a significant mitigating factor.

6. The offender has been subject to particularly difficult and punitive conditions in pre-sentence custody. These were explored in detail earlier.

7. While on release, the offender was subject to restrictive release conditions. This was also explored in detail earlier.

Aggravating Circumstances

All the offences involve intimate partner violence. This is aggravating pursuant to sections 718.2 (ii) and 718.201 of the *Code*.

1. Both victims are Indigenous women. This is aggravating pursuant to sections 718.04 and 718.201 of the *Code*. Both victims were particularly vulnerable due to their marginalization.

2. The offender was in a position of trust with respect to both victims. This is aggravating pursuant to section 718.2 (iii) of the

Code. The offender would not have had access to the victims and the opportunity to commit these crimes had he not exploited his relationship of trust.

3. The sexual assaults were "major sexual assaults" as defined in *Arcand*, and *J.W.W.*

4. Both victims were in a particularly vulnerable state when the offender sexually assaulted them. Both were helpless – either unconscious or asleep - when the offender committed the violent acts.

5. There was a pattern. The offender committed his criminal acts of violence and voyeurism against multiple victims in a similar manner.

6. There was an additional level of invasion, intrusiveness, and violation to the sexual violence as the offender kept photos and videos of his deviant criminal acts.

7. Both victims were violated in their bedrooms. The sexual assaults and voyeurism occurred in the very place where they ought to have had the highest level of safety, security, and privacy.

8. The presence of children. During both acts of voyeurism, the offender recorded the victims' vaginal and anal regions. This is particularly egregious. The offender exhibited a blatant disregard for how his criminal deviance could impact the vulnerabilities of a child. His lack of insight is both troubling and disturbing.

9. Section 718.2 (iii.1) requires this court to consider whether the offences had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation.

> These offences have had a significant impact on both of these marginalized and vulnerable Indigenous victims. There has been lasting psychological and emotional damage. The details were outlined earlier.

Parity: Sexual Assault

[124] The principle of parity set out in section 718.2 (b) of the *Criminal Code* requires me to impose similar sentences on similar offenders for similar offences committed in similar circumstances. This is not an easy task given that two cases are seldom identical and sentencing is a highly individualized process. Nevertheless, it is vital that a consideration of parity informs the analysis. As Wagner, J. , as he was then, directed in *Lacasse* at para. 53:

> ...Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s. 718.2(a) and (b) of the *Criminal Code*.

The Crown's Comparative Cases: Sexual Assault

***R. v. A.J.K*, 2022 ONCA 487 – Global Sentence: Five Years Imprisonment**

[125] The offender was found guilty of assault, sexual assault, and breach of probation. The offender and the victim had been dating. The offender demanded to know if the victim had been sexually active since the last time he had seen her. He then drove to a parking lot and had non-consensual vaginal intercourse with the

victim, all the while choking her. When she attempted to retrieve her belongings and leave, he started punching her in the side of the head. The accused had a prior record which included communicating with an underage person for the purpose of prostitution.

[126] In upholding the sentence and affirming the sentencing range of between four and seven years, Fairburn, A.C.J.O, speaking for a unanimous Ontario Court of Appeal, stated at paras. 74-76:

> All sexual assaults are serious acts of violence. They reflect the wrongful exploitation of the victim whose personal autonomy, sexual integrity, and dignity is harmfully impacted while being treated as nothing more than an object. Whether intimate partners or strangers, victims of sexual violence suffer profound emotional and physical harm and their lives can be forever altered. So too can the lives of their loved ones.
>
> As the years pass, enlightenment on the implications of sexual violence continues to permeate our conscious minds. In *Friesen*, the court noted, at para. 118, that "our understanding of the profound physical and psychological harm that all victims of sexual assault experience has deepened" and, I would add, is continuing to deepen: see also *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3, at para. 37. As Moldaver J. stated in *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at para. 1:
>
> > "Without a doubt, eliminating ... sexual violence against women is one of the more pressing challenges we face as a society" and "we can - and *must*-do better" (emphasis in original). This comment encapsulates why these sentencing ranges as they have come to be understood must be reconciled.
>
> [76] There is no justifiable reason for why sexually assaulting an intimate or former intimate partner is any less serious than sexually assaulting a stranger. The fact is that a pre-existing relationship between the accused and complainant places them in a position of trust that can only be seen as an aggravating factor on sentencing: *Criminal Code*, R.S.C., 1985, c. C-46, s. 718.2(a)(ii). Therefore, contrary to the impression that may be left when contrasting the *Smith* range with the non-*Smith* range, the sexual assault of an intimate or former intimate partner can actually attract a greater sentence.

[127] Cleary there are distinguishing features between *A.J.K.* and this case. Here there is a guilty plea, there are *Gladue* considerations, and the sexual assaults lack additional features such as choking. However, unlike *A.J.K.* the present matter involves multiple victims, vulnerable Indigenous women, victims in an unconscious state, and recordings of the sexual violence.

R. v. Percy, 2021 NSSC 353 - Global Sentence: Five Years - Joint Recommendation.

[128] The offender pleaded guilty to three offences: sexual assault causing bodily harm; attempting to choke to facilitate the sexual assault; and assault. The accused and victim were long-time friends. They socialized and shared drinks. While seated on a couch to watch a movie, the offender lunged on top of the victim, pushed her down, held his arm across her clavicle area by her throat, forced non-consensual vaginal intercourse, slapped her face, and bit her arm. She suffered bruising, a swollen lip, and a bite mark. The accused had no prior record and his risk for sexual reoffence was assessed to be in the moderate to moderate-high range. He accepted responsibility and was remorseful during the sentencing hearing. He had continued family supports which spoke to his prospects for rehabilitation.

[129] Justice Brothers stated at para. 72:

> In *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, Major J. explained how a sexual assault harms the very core of human dignity, autonomy, and physical integrity:

> [28] The rationale underlying the criminalization of assault explains this. Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one's body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the Code expresses society's determination to protect the security of the person from any non-consensual contact or threats of force...

[130] In *Percy* the sexual assaults were paired with bodily harm, a slap, a bite, and an attempt to choke the victim to facilitate the sexual act. These additional aggravating features are not present in this case. Furthermore, there were no *Gladue* considerations for Mr. Percy, and unlike the offender in this case, he had not demonstrated exceptional rehabilitation efforts prior to sentencing. However, in *Percy* the Court was not dealing with intimate partner violence, there was only one victim, and the victim was not a vulnerable Indigenous women.

R. v. C.B.K, 2015 NSSC 62 – Global Sentence: Four-and-one-half years Imprisonment

[131] The offender was found guilty of six offences: sexual assault; unlawful confinement; assault causing bodily harm; two counts of uttering threats; and theft. The offender and victim were in a common law relationship. Prior to the events before the court there had been no history of violence within the relationship. The offender suspected the victim had been unfaithful with a former boyfriend. Upon seeing pictures of the victim with her former boyfriend on her phone he lost control. Throughout the night the accused hit the victim many times causing

significant physical injuries, including two black eyes. He threatened her, took her money, and ultimately forced intercourse without her consent. The accused was 26 years of age and had a significant prior record.

[132] This case was decided prior to *Friesen*. Justice Gogan, in reviewing the jurisprudence from that time and referencing *J.J.W.*, stated:

> [28] In that case, the jurisprudence indicated that a major sexual assault involving intercourse, particularly in the spousal context, mandated a term of imprisonment of at least two years less a day, and frequently a term of between 3 and 5 years. The starting point approach to sentencing was rejected.
>
> ...
>
> [34] Having reviewed the authorities submitted by the parties, I conclude that the appropriate sentencing range for sexual assault is anywhere from 2 to 5 years but typically 3 to 5 years depending upon the relevant circumstances, and the weight to be given to the sentencing objectives and principles.

[133] Unlike the offender before me, *C.B.K.* had an extensive prior record, was found guilty after trial, and was also sentenced for the additional offences of unlawful confinement, threats, and assault causing bodily harm. However, this court is sentencing the accused for sexual violence involving two victims along with the additional acts of voyeurism. I note as well that *C.B.K.*, while helpful, was decided in a pre-*Friesen* landscape almost ten years ago. There have been significant developments in the law since that time.

The Accused's Comparative Cases: Sexual Assault

***R. v. Burton*, 2017 NSSC 181 - Global Sentence: Two Years Imprisonment**

[134] The accused had vaginal intercourse with the victim who was in a vulnerable state - either asleep or unconscious – while under the influence of sleeping pills. They had known each for about a year and dated casually. The offender was found guilty.

[135] The offence had a significant psychological impact on the victim.

[136] The accused had no prior record, addictions issues, ran a successful business, cared for two young children, and had overwhelming family and community support. Those who knew him described his behaviour as out of character.

[137] Arnold J. reminds this court not to lose sight of rehabilitation at para. 21:

> Deterrence and denunciation are of paramount consideration in sentencing Burton. Reformation and rehabilitation have a lesser, but still important, role, considering his personal circumstances.

[138] This case, like all others presented by both the Crown and Defence, has obvious distinguishing features. First, unlike Mr. Burton, the offender before me engaged in a pattern of sexual deviance as he moved from one intimate partner to the next. Second, he recorded the sexual abuse. Third, he is not a first-time offender.

R. v. Percy, 2019 NSPC 12 – Global Sentence: Two-and-One-Half Years Imprisonment and Three Years Probation

[139] The offender was found guilty of sexual assault and voyeurism. He and the victim were friendly acquaintances when they ran into each other at a bar. Later that evening at her residence, Mr. Percy had unlawful vaginal intercourse with the heavily intoxicated victim while she was "not moving, not responding to external stimuli, and could not consent". The accused made two recordings of the victim. The first was made while she was heavily intoxicated and performing oral sex on him. The second was made while she was unconscious and he was having non-consensual sexual intercourse with her.

[140] The victim suffered from anxiety, depression, and feelings of a lack of security in her home after the incident.

[141] The accused had no prior record, expressed remorse, had strong family supports, a positive work history, and was willing to commit to rehabilitation.

[142] After a comprehensive review of the cases submitted by counsel Buckle J. concluded at para. 46:

> I have reviewed these decisions and they have informed my decision. These cases suggest that the range, across Canada, for sexual assault involving intercourse is from 18 months to four years, even where the accused has no prior criminal record. Cases at the lower end generally include mitigating factors such as a guilty plea and genuine remorse. Aggravating

> factors such as the use of violence or threats to overcome resistance or having intercourse with an unconscious person generally moves the accused up within the range.

[143] I agree with Judge Buckle's comments with respect to the continued application of the principles of rehabilitation and restraint where she states:

> 23 Rehabilitation contributes to the long-term protection of society. It continues to be a relevant objective, even in cases requiring that denunciation and deterrence be emphasized (*Lacasse*, at para. 4).
>
> …
>
> 54 Finally, s. 718.2 requires me to consider that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances, that all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, and consecutive sentences should not be unduly long or harsh.
>
> 55 This principle of restraint, that the punishment should be the least that would be appropriate in the circumstances, applies even when sentencing for crimes of violence and is particularly important when sentencing a first offender (*R. v. Colley*, [1991] N.S.J. No. 62; *R. v. Priest*, [1996] O.J. No. 3369); *R. v. Best*, [2005] N.S.J. No. 347 (S.C.), para. 25).

[144] Judge Buckle sentenced Mr. Percy to two years in custody for the sexual assault and six months consecutive for the voyeurism offence.

[145]I pause here to state the obvious. *Burton* and *Percy*, while of assistance, were both decided prior to the clear guidance and reflections of the Supreme Court of Canada in *Friesen*.

[146] After *Friesen* was released in 2020 courts have repeatedly stated that earlier decisions – and the sentencing ranges therein - ought to be approached with caution. For example, I am reminded of the recent observation of Gogan J., now a Justice of the Nova Scotia Court of Appeal, in *R. v. Murray*, 2023 NSSC 62 at para. 50:

> The consideration of cases decided before *Friesen* for parity purposes must be done with care. (*R. v. Sinclair*, 2022 MBCA 65, at para. 61; *R. v. RGH*, 2021 BCCA 54, at para. 20). …

[147] As stated by the Manitoba Court of Appeal in *Sinclair* at para. 61:

> Cases that pre-date *Friesen* should be approached with caution since they may not reflect the change in jurisprudence (see, for example, *R v Lemay*, 2020 ABCA 365; and *R v RJH*, 2021 BCCA 54 at para 20). …

[148] This is not to say that I am dismissing the relevance of *Burton* and *Percy* in the parity analysis. However, neither offender was sentenced through the lens of *Friesen*.

R. v. Fardy, 2024 N.S.J. No. 349 - Global Sentence: Four Years Imprisonment

[149] The offender was found guilty of sexual assaulting three victims. The first victim was not well acquainted with the accused. She attended a party, became intoxicated, and fell asleep. While incapacitated, and without her consent, the offender put either his finger or his penis into her vagina.

[150] The accused assaulted and sexually assaulted a second victim on another occasion. The second victim was in an intimate relationship with the accused. The accused had been drinking and became jealous. He grabbed the victim by the throat and pushed her. On another date the accused and victim had been engaged in consensual intercourse. When the victim declined to perform oral sex on him, the accused then forced the victim's face towards his penis in an unsuccessful attempt to have her perform oral sex. A struggle ensued and the accused pinned the victim to the floor.

[151] The offender had also been in an intimate relationship with the third victim. After a night of heavy drinking and continuous belittling of the victim, the offender forced himself on top of her with his arm across her chest/neck area. Without the victim's consent he had vaginal intercourse with her, after which he rolled over and went to sleep.

[152] The accused had been steadily employed and had one prior unrelated conviction for impaired driving. An extensive number of support letters portrayed him as a considerate, sensitive, and pro-social person. None of the three victims filed victim impact statements.

[153] At paragraph 63 in *Fardy*, Arnold J. outlined an extensive number of cases which I have found to be helpful in the parity analysis. With the exception of a few outliers, the sentences for most major sexual assaults ranged between two and five years incarceration with most falling at three years.

[154] Arnold J. determined that a global proportionate sentence for all offences against the three victims was four years imprisonment. The sentence would have been four years and ten months but for a reduction attributable to established hardship due to strict release conditions and a *Charter* violation.

[155] In summary, while I do find the cases submitted by both counsel to be helpful it is not surprising that the parity analysis is fraught with imprecision due to the individualized nature of the cases. It is a difficult and exhausting exercise. However, I am satisfied that the appropriate range of sentence in this particular case for a major sexual assault is above two years and more in line with three to five years.

Comparative Cases: Voyeurism

[156] The Crown and Defence are close in their recommendations with respect to the sentence for the voyeurism offences. While there is a vast range of sentences available for the offence of voyeurism, I find that the appropriate range in this case

is between six months and one year. However, I do state this with some reservation as the offender's nefarious behaviour took place in the presence of children which I find to be a significant aggravating feature.

[157] The Crown reminded the Court how these offences recognize a need to protect individuals' privacy and sexual integrity, particularly from new threats posed by the abuse of evolving technologies. The evolution and ubiquity of cell phones, with their capacity to produce high resolution photographs and recordings, leaves victims vulnerable to having the most intimate parts of their bodies and lives being recorded with unprecedented ease by those who wish to exploit them. These offences are grounded in humiliation, objectification, and shame. They cause immense emotional and psychological harm. Victims are left to live with the fear and trauma of knowing that these videos "may still exist, and may at any moment be being watched and enjoyed by someone" (*R. v. Jarvis,* 2019 SCC 10 at para. 62, quoting from *R. v. Sharpe*, 2001 SCC 2 at para. 92).

[158] In assessing parity for voyeurism, I have reviewed the following cases:

1. *R. v. R.R.*, 2022 ONCJ 407

   Thirty months custody for sexual assault and six months consecutive for the act of voyeurism (taking a surreptitious

photograph of the victim's naked breasts after the sexual assault).

2. *R. v. McFarlane*, 2018 MBCA 48

   Sentence varied on appeal to fifteen months custody for extortion, six months concurrent for distribution of an intimate image, and three months consecutive for voyeurism (surreptitiously recording his younger sister's friend – then 17 – undressing and showering in the bathroom in their family home).

3. *R. v. Russell*, 2019 BCCA 51

   Sentence varied on appeal to 365 days for LTSO breach and 18 months consecutive (with 18 months probation) for voyeurism (recording under the skirts of females with a camera in his backpack).

   The British Columbia Court of Appeal referenced *McFarlane* and noted that many reported decisions for voyeurism were coupled with sentences for other offences. When this is the case sentences for voyeurism are typically consecutive.

4. *R. v. Percy*, 2019 NSPC 12

   The first-time offender made two recordings of the victim. As outlined earlier, the first was made while she was heavily intoxicated and the second while she was unconscious. During the second incident he recorded himself engaged in the non-consensual sexual intercourse. The accused was sentenced to six months consecutive to the two-year sentence for sexual assault.

Conclusion

[159] Having regard to all of the sentencing principles and the cases reviewed earlier, I am satisfied that the proportionate sentence in this case requires a federal penitentiary sentence just above three years for each of the sexual assaults.

[160] This is a difficult case. I draw solace from the insightful words of Wager, J., as he was then, in *R. v. Lacasse*, 2015 SCC 64 at para. 1, where he described sentencing as "one of the most delicate stages of the criminal justice process in Canada". There is a natural and expected tension between the various sentencing principles in this case having regard to the unique constellation of case-specific variables. This required a comprehensive assessment and balancing of the mitigating and aggravating factors.

[161] The offender has a high level of moral blameworthiness even after given due consideration to the relevant *Gladue* factors. The accused committed two major sexual assaults on two highly vulnerable Indigenous intimate partners. They were either asleep or unconscious. As if the immense resulting trauma from the violence itself wasn't enough, the recordings and photos of the victims have left both feeling exploited and objectified with high levels of humiliation and shame.

[162] I echo the powerful words of Scanlan J.A. in *Cope*, "I am convinced our justice system has not done enough to protect the most vulnerable within Indigenous communities" (para. 177). Indigenous women and girls have indeed not been "well served by our justice system and afforded the protection they so much need" (para. 177).

[163] I have considered how *Duncan* credit will fit into the matrix of what is an appropriate sentence. I choose not to express such credit in terms of a precise numerical value (*Hilaire* & *Smith*). Rather it has been considered as a mitigating factor in determining the fit and global sentence. However, if I were required to express it in a numerical value, the fit and global sentence in this case is one year less than what would otherwise have been but for the mitigating impact of the *Duncan* considerations. Prior to taking one last look at restraint and totality, I conclude that the sentence for each offence will be as follows:

- Sexual assault on victim A, contrary to section 271 of the *Code*:

  Three years imprisonment

- Surreptitiously make a visual recording of victim A, contrary to section 162(1)(c) of the *Code*:

  Six months consecutive

- Sexual Assault on victim B, contrary to section 271 of the *Code*:

Three years imprisonment consecutive

- Surreptitiously make a visual recording of victim B, contrary to section 162(1)(c) of the *Code*:

Six months consecutive

[164] The global sentence is seven years.

Restraint & Totality

[165] Section 718.2 (c) requires me to consider "where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh". Consistent with the framework in *R. v. Adams*, 2010 NSCA 42, I am required to take "one last look".

[166] I cannot ignore the accused's expressions of remorse, his life circumstances, the *Gladue* considerations, and the extraordinary commitment he has already made towards his rehabilitation. I do fear that a seven year sentence in this case may impair his extensive rehabilitative efforts. Denunciation and deterrence, while foregrounded in this analysis, cannot marginalize restraint and rehabilitation. As a result, I do believe that the total exceeds what would be a just and appropriate sentence for the offender. Therefore, the total sentence will be six years. To reflect this, the sentences for both voyeurism offences will be concurrent.

[167] The resulting six year sentence will then be subject to a remand credit of 981 days (i.e., 654 days at 1:5:1). The go forward sentence will be forty months (1,209 days).

[168] With respect to ancillary orders:

- A DNA order (s. 487.051);
- SOIRA Order for a period of 20 years (s. 490.011(1)(a));
- A firearms prohibition order for a period of 10 years (s. 109(1)(a.1)(i));
- A prohibition on contact with both victims during any custodial portion of the sentence (s. 743.21);
- An order for the forfeiture of offence-related property (lap top) (s. 490); and
- The victim fine surcharge is waived (s. 737)(2.1).

D. Shane Russell, ACJPC