IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Rose, 2013 NSPC 99

Date: 10162013
Docket: 2376180, 2439875, 24387678, 2511809, 2511811,2511812, 2511816, 2564541
Registry: Sydney

Between:

Her Majesty the Queen

-and-

Stephen Richard Rose

DECISION on Sentence

Revised Decision: The date at the top right has been corrected. This decision replaces the previously released decision.

Judge: The Honourable Judge Jean M. Whalen, J.P.C.

Heard: October 16, 2013

Charges: 264.1(1)(a), 348(1)(b), 145(3)x6 *Criminal Code*

Counsel: Steve Melnick, for the Crown
Alan Nicholson, for the Defence

Facts

September 10, 2011 – s. 348(1)(b)

[1.] The owners of a residence in Halifax returned home to find their front door and kitchen window damaged. Their back door glass was completely shattered. A fingerprint taken from the kitchen window was identified as the right ring finger of the defendant. A laptop, monitor and jacket were taken. The complainants are seeking $3,444.81 in restitution for damages and loss of property.

April 3, 2012 – s. 145(3) and s. 264.1(1)(a)

[2.] The defendant was on a recognizance dated March 12, 2012 requiring him to reside in Halifax and abide by a curfew. The defendant went to the complainant's home in Sydney and requested his keys. S.P. refused to let him in and he threatened to assault her. The complainant called the police. When the police arrived the defendant had left but he subsequently called the complainant on her phone while the police were at her home.

October 3, 2012 – s. 145(3) x 4

[3.] The defendant was on a recognizance dated March 12, 2012 and an undertaking from April, 2012. He was to attend court, refrain from alcohol and drugs, and have no contact with the complainant. Mr. Rose was at the home of

S.P., the complainant, and refused to leave, so she phoned police. Upon their arrival police observed the usual signs of intoxication and Mr. Rose was subsequently arrested. A records check confirmed a warrant was outstanding for the defendant for his failure to attend court.

February 17, 2013 – s. 145(3)

[4.] S.P. phoned police to report that Mr. Rose was calling her and her family. The defendant was in the Correctional Facility on remand at the time and he had been ordered to have no contact with the complainant. As well, the undertaking from April of 2012 was still in effect.

Victim Impact Statement

[5.] The Crown notified the complainants of their right to file a Victim Impact Statement but none were received by the court.

Presentence Report (28 January 2013)

[6.] Mr. Rose was born on the 7th of February, 1978. He was 33 years of age when he committed the break and enter. He is the oldest of four children. He was born in Boston but considers East Bay, Nova Scotia his home. He has lived in several provinces. After his mother passed away in 1990 he left at the age of 12 and went to live with family in Boston.

[7.] There was a history of alcohol and drug abuse in the home, and alcohol has been an issue for him most of his life. He gets in trouble when he is under the influence. According to his father, the defendant is not a violent person, nor does he have a quick temper.

[8.] Mr. Rose was married to S.P., the complainant in three of the matters before the court. They have three sons who all reside with S.P. The defendant feels there are no issues regarding alcohol and drug abuse, or violence between them. However, S.P. says she and the defendant are separated because of his issues with alcohol and drugs. She has told the police she does not want to be around the defendant when he is drinking (p.32 – Gladue Report).

[9.] Mr. Rose has a Grade 7 education and completed a M.E.T.I. program. He does have a history of gainful employment and has been described as a "reliable employee."

[10.] The defendant has met with mental health professionals in the past, but he has never been involved in any detox programs through Addiction Services except as required by Correctional Services Canada.

[11.] The defendant was first supervised by Probation Services in July of 1997 in Ontario, and has had four other probation orders since that time. Records indicate

he responded more favourably to the more recent order but they also show a longstanding problem with alcohol.

[12.] Mr. Rose has also been on day parole to Howard House. He was scheduled for an addictions education program in 2008, but obtained a job and its not clear if he completed the program. His probation officer noted "no negative incidents" during his term of supervision.

Prior Record

[13.] Between 1997 and 2008 the defendant has amassed 42 adult *Criminal Code* convictions and two *Controlled Drugs and Substances Act* convictions in Nova Scotia. Between 1997 and 2005 there are 21 adult *Criminal Code* convictions (Ontario). Lastly, between 1995 and 1996 there are 7 youth *Criminal Code* and *Youth Criminal Justice Act* convictions (Nova Scotia). In total, Mr. Rose has 65 adult convictions and 7 youth convictions.

[14.] Mr. Rose has been subject to the following orders time and again since 1996: Undertakings, Recognizances with Surety, Probation Orders and Recognizances Without Surety; all of which have the same recurring theme, to abstain from alcohol and drugs, attend for counseling in areas of substance/alcohol abuse and anger management.

Crown and Defence Positions on Sentence

[15.] The Crown argues that the defendant's problem has been drugs and alcohol for a very long time. Those addictions "far outweigh" any problems he may have encountered being an Aboriginal person. Mr. Melnick argues the *Gladue* factors were relevant when the defendant was younger, not older (p. 24 Gladue Report) and that the defendant has risen above his difficulties (p. 25 Gladue Report).

[16.] The Crown also argues that even though Mr. Rose is not statutorily disqualified from consideration of s. 719(3.1), he should not get remand credit calculated at 1.5 to 1 because the defendant did not apply for a bail hearing.

[17.] The Crown asks for a global sentence of three years citing aggravating factors such as:

(1.) The break and enter was violent in nature;
(2.) The defendant's lengthy record;
(3.) The defendant was on various court orders when he committed some of the offences, particularly aggravating is the February 17, 2013 offence. (Mr. Rose phoned the complainant from the jail);
(4.) The more serious the charge, the less weight should be given to the *Gladue* factors.

[18.] Mr. Melnick argues the defendant should only get 1:1 remand credit for a total of 12 months. The Crown is also seeking a Restitution Order. The DNA Order is mandatory for the s. 348(1)(b).

[19.] Mr. Nicholson had his client testify as to the conditions at the Cape Breton Correctional Facility.

[20.] Mr. Rose testified that he is on remand awaiting the final outcome of his case. He has been moved four or five times between "Burnside" and Cape Breton. When in "Burnside" he has had to sleep on the floor because of overcrowding. He cannot remain in Cape Breton if someone has court here if all beds are taken. He has missed several dental appointments because he has been moved due to overcrowding.

[21.] On one occasion when there was no room he was put in the lockdown range where there is no fresh air and no programs. There are no programs in Burnside for remand prisoners. In Cape Breton he has been able to attend Alcoholics Anonymous meetings and take an upgrading class.

[22.] Defence counsel argues that the defendant "falls under all concerns set out in *Gladue* and because of the conditions existing in the institution (i.e. overcrowding and lack of programs), Mr. Rose should get 1.5 to 1 credit for his remand time.

[23.] Mr. Nicholson submits the defendant's 12 months on remand is equivalent to 18 months custody, and suggests the defendant be sentenced to time served,

followed by a period of probation. He takes no issue with the Crown's request for restitution.

[24.] Ruby, 6th Ed. at para 2.1 states:

> It is a basic theory of punishment that the sentence imposed bear a direct relationship to the offence committed. It must be a fit sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender deserves the punishment received and feel confidence and fairness in the rationality of the system. To be just, the sentence imposed must also be commensurate with the moral blameworthiness of the offender. A sentence that is not just and appropriate produces only disrespect for the law. These common-law principles have been codified in sections 718, 718.1 and 718.2 of the *Criminal Code.*

[25.] Parliament has codified a number of other important values to help sentencing judges give effect to the fundamental principles of proportionality. The articulated principles however, are general in form, and moreover they provide no mechanism for resolving the inevitable conflicts that arise between these various principles in individual cases. Sentencing judges are simply told to weigh and balance the competing principles and fashion an appropriate sentence.

[26.] In crafting the appropriate sentence the Court must have regard to the factors set out in the *Code* as well as the nature of the offence committed and the personal circumstances of the offender. According to the Supreme Court of Canada, the

appropriate sentence will also depend on the circumstances of the community in which the offence took place.

> "It must be remembered that in many offences there are varying degrees of guilt and it remains the function of the sentencing process to adjust the punishment of each individual offender accordingly.
>
> The appropriate sentence for the specific offender and the offence is therefore determined, having regard to the compendium of aggravating and mitigating factors present in the case. It is the weight attached to the aggravating and mitigating factors which shape and determine the sentence imposed and this is an individual process. In each case the court must impose a fit sentence for this offence in this community.
>
> The nature and gravity of the offence is properly the central factor in sentencing. It is and must be the first rule that prompts the court. The concern behind this consideration is that there should be a just proportion between the offence committed and the sentence imposed. Our basic notion of fairness demands that every sentence be primarily and essentially appropriate to the offence committed having regard to the nature of the crime and the particular circumstances in which it was committed." *Sentencing*, Ruby, 6th Ed.

[27.] Other common law principles of sentencing must also be appropriately applied. In the end, the punishment must be proportionate to the moral blameworthiness of the offender. The public must be satisfied that the offender deserved the punishment received and must feel a confidence and fairness and rationality of the sentence. This principle of proportionality is fundamentally

connected to the general principle of criminal liability which holds that the criminal sanction may be imposed only on those who possess a moral culpable state of mind. The cardinal principle is that the punishment shall fit the crime.

[28.] **Aggravating Factors**:

(1.) Break and enter into a dwelling (life imprisonment offence);

(2.) Violence against spouse;

(3.) Abuse of alcohol;

(4.) Lengthy record.

[29.] **Mitigating Factors:**

(1.) Change of plea;

(2.) Availed himself of Alcoholics Anonymous and education classes while on remand.

[30.] Pursuant to the case of ***Gladue***, s. 718.2(3) of the ***Criminal Code*** requires the court to consider all available sanctions other than imprisonment that are reasonable in the circumstances for all offenders with particular attention to the circumstances of aboriginal offenders. Justice Melvyn Green writes at p. 373 of his article entitled ***The Challenge of Gladue Courts*** at 89 C.R. (6th ed.) 362:

"Following more than a decade of jurisprudence and its strong re-affirmation in ***Ipeelee***, here is some of what ***Gladue*** means in practice today.

- First, ***Gladue*** considerations obtain in *every* situation in which an Aboriginal offender is at risk of losing his or her liberty or opportunity for release from custody: not only sentencing, but, for example, bail, jury selection, parole eligibility, civil contempt, conditional release and forensic mental health reviews. Further, the ***Gladue*** analytical framework applies regardless of the seriousness of the offence and in all criminal cases cases in which the offender is an Aboriginal person. As recently reiterated in ***Ipeelee***: 'application of the Gladue principles is required in every case involving an Aboriginal offender… and a failure to do so constitutes an error justifying appellate intervention.' Further still, where the circumstances of the offence inevitably demand an incarcerative sentence, application of the Gladue principles may well mitigate the duration of that imprisonment.

- Second, Aboriginal defendants are not required to establish a direct nexus between their cultural heritage or personal antecedents and their conflict with the criminal law. As recently said by the Ontario Court of Appeal in ***R. v. Collins***,

> There is nothing in the governing authorities that places the burden of persuasion on an Aboriginal accused to establish a casual link between the systemic and background factors and commission of the offence. Further, s. 718.2(c) and the Gladue approach to sentencing Aboriginal offenders Is not about shifting blame or failing to take responsibility: it is recognition of the devastating impact that Canada's treatment of its Aboriginal population has wreaked on the members of that society.

- Third, ***Gladue*** is directed at all criminal justice system workers. The legal obligations imposed on counsel – both Crown and defence – are at least as onerous as those borne by the court. Unless expressly waived by the defendant, both sides are obliged to inform the sentencing court of an Aboriginal offender's

antecedents and community connectivity and the judge must make the appropriate inquiries when this information is not forthcoming. The result, in theory and often in practice, is a less adversarial hearing where all parties are focused on rehabilitative and restorative alternatives to the cycle of recidivism.

- Finally, the sentencing methodology prescribed by ***Gladue*** applies even in cases involving the gravest of offences. There is language in ***Gladue*** and ***Wells*** that is open to a different construction, one suggesting that, despite the differing approaches to sentencing, as a practical matter the sentencing outcomes for Aboriginal and non-Aboriginal offenders are likely to be the same of violent and serious crimes. Some courts took the view that this generalization meant that the Gladue principles do not apply to serious offences, an interpretation now characterized as "erroneous" by the Supreme Court in ***Ipeelee***. The sentencing framework dictated by ***Gladue*** primarily focuses on two questions: First, what background or systemic factors brought this particular Aboriginal offender to court? And second, given this offender's Aboriginal heritage and the nature and degree of nexus to his or her First Nations or Inuit community, what types of adjudicative procedures, interventions and sanctions are most likely to advance a fit sentence *and* one consistent with Aboriginal conceptions of restorative justice and the s. 718.2(3) objective of restraint? This is the methodology to be applied in *all* Aboriginal sentencing cases and one that is likely to yield a different disposition in most such cases. Even before the Supreme Court's clarification in ***Ipeelee*** , the Ontario Court of Appeal, in ***R. v. Jacko***, had observed that what it mistakenly called the "rule,"

> …that sentences for serious or violent offences should approach or be equivalent for aboriginal and non-aboriginal offenders is a rule of general, but not universal or unremitting application.

[31.] The court should receive information/answers to the following questions to assist in arriving at a fit and proper sentence:

(i.) does the community support the offender and think that he/she is capable of change,

(ii.) what are the main social issues affecting the community,

(iii.) how has the community addressed those issues,

(iv.) is there a willingness and capability of the community to assume responsibility for providing restorative approaches to criminal behaviour,

(v.) does the community have a program or tradition of alternative sanctions,

(vi.) what culturally relevant alternatives to incarceration can be set in place that are healing for the offender and all others involved, including the community as a whole,

(vii.) does the community have resources to assist in supervision of the offender,

(viii.) what is the offender's understanding of and willingness to participate in traditional Aboriginal justice, whether through the identified Aboriginal community or local First Nations support agencies,

(ix.) what mainstream/non-traditional healing resources are available to the offender,

(x.) what is the quality of the offender's relationship with family and extended family,

(xi.) who comprises the offender's support network; spiritual, cultural, family, community.

[32.] A Gladue Report was prepared by Mi'kmaw Legal Support Network on behalf of Mr. Rose.

[33.] Although Mr. Rose was born in Boston, Massachusetts he is a registered member of Eskasoni First Nations. He has lived and worked in numerous places but now considers East Bay, Cape Breton his home.

[34.] At page 35 of the Gladue Report, the writer states:

> "(2.)That Stephen Richard Rose has personally experienced the adverse impact of many factors continuing to plaque aboriginal communities since colonization, including:
>
> - Substance abuse, personally, in the immediate family, and among peers.
> - Family deterioration; separated parents, absent mother.
> - Violence and abuse, mentally, physically, and emotionally, personally and witnessed between parents.
> - Suicide and loss within family, community and peers.
> - Lack of education, lack of support and motivation in childhood and general family distrust in school and state systems.
> - Low income and unstable employment due to lack of education and substance abuse.
> - Loss of identity, culture, and ancestral knowledge.
>
> (3.)That Stephen Richard Rose has demonstrated a willingness to address the underlying factors that caused the incidents. Stephen expressed a desire to seek treatment for substance abuse and to achieve great education."

[35.] And then at page 36 of the same Report the writer makes some recommendations:

> "In order to resolve the current situation in the most restorative manner, considering Stephen Richard Rose's offences, history and

current needs, the following recommendations and treatment plans are respectfully submitted to the court:

- That Stephen Richard Rose continues to pursue his education in the current GED program offered at the institution facility.
- That he attends the substance abuse programs they offer at the institution, such as AA meetings conducted by local volunteer community members. That he attends the relapse prevention program conducted by facility members.
- That Stephen Richard Rose attends the Options to Anger program offered at the institution by facility members.
- That Stephen Richard Rose attends the Parent program that the institution offers conducted by the Cape Breton Resource Centre employees.
- That Stephen Richard Rose attends cultural programs that relate to his Mi'kmaq ancestry, such as, the sweat and elder guidance. These programs will be conducted by local Mi'kmaq elders who are community members.
- That Stephen Richard Rose seeks counseling within the institution about life circumstances through talking and learning how to deal with future situations properly.
- That Stephen Richard Rose continues to work on current needs when he re-enters society through counseling, substance addictions support, and to seek employment, and also to continue programs in parenting and anger management.

[36.] Mr. Rose's family members support him and say he needs to get counseling for various issues including his addictions, grief, mental health (depression), parenting and also attend AA.

[37.] A program assistant with the Mi'kmaq Legal Support Network advised the court of numerous programs upon Mr. Rose's release including, counseling, education, cultural programming and employment. However, there is no information about any "culturally relevant alternatives" to incarceration which can be put in place to assist Mr. Rose.

Credit for Remand Time

[38.] In ***R. v. Johnson*** 2011 Carswell Ontar 1136, Green, J., provided a lengthy analysis and eventual refutation of the ***Truth In Sentencing Act***:

> The punishment imposed on those convicted of criminal offences frequently includes a period of incarceration. Sometimes offenders are detained in custody pending their trial and, if found guilty, sentencing. Where a period of detention precedes sentencing the question inevitably arises as to what credit, if any, towards the appropriate sentence should be assigned to the offender's pre-sentence custody? Put otherwise: what period of time should be deducted from an otherwise fit sentence for the offender's crime or crimes by virtue of the period he or she has already spent in custody pending the imposition of that sentence? In consideration of lost remission and parole opportunity and the often congested and otherwise onerous conditions of remand custody, the answer generally provided by Canadian courts before the enactment of Bill C-25 was a somewhat flexible two days of credit for every day of pre-sentence detention. The Applicant says that Parliament's answer to this same question, as expressed in the TIS amendments, runs afoul of his Charter-guaranteed rights. The Respondent says, in effect, that TIS is no more than one policy choice among an array of constitutionally compliant alternatives.

[39.] Later at para. 16:

> Persons sentenced to jail almost always receive some credit for any time - "dead time" as it is often called - they spend in pre-sentence custody. Pursuant to remission legislation and parole board decisions, they are almost invariably released from prison prior to the formal expiration of their sentences. It is these three elements - the amount of credit assigned pre-sentence custody (if any) on sentencing, the length of a judicially imposed sentence of imprisonment, and remission and parole legislation and policy - that together compose the interdependent scheme governing the duration of the period of custody actually served by offenders sentenced to jail in Canada.

[40.] Then at paras. 26-28:

> The purpose of pre-trial detention is the preservation of community safety and the integrity of the judicial process - not punishment. This distinction, although of analytical importance, is likely too fine or abstract to be fully appreciated by most inmates experiencing any form of custody. It is not without some irony that remand prisoners, all of whom are legally if not factually innocent, generally endure the most onerous of penal conditions in Canada. In *R. v. McDonald* (1998), 127 C.C.C. (3d) 57 (Ont. C.A.), at para. 48, Rosenberg J.A. commented, that, "to pretend that pre-sentence imprisonment does not occasion a severe deprivation and that it is not punitive would result in a triumph of form over substance". Justice Arbour adopted much of Rosenberg, J.A.'s reasoning in *McDonald* on behalf of a unanimous Supreme Court in *R. v. Wust*, [2000] 1 S.C.R. 455. She added, at para. 41, that,
>
> - To maintain that pre-sentencing custody can never be deemed punishment following conviction because the legal system does not punish innocent people is an exercise in semantics that does not acknowledge the reality of pre-sentencing custody ...
> - ... while pre-trial detention is not intended as punishment when it is imposed, it is, in effect, deemed part of the

punishment following the offender's conviction, by the operation of s. 719(3). [Emphasis in original.]

- Significantly, Justice Arbour employs the word "punishment" rather than "sentence" in discussing the effect of s. 719(3). Her reasoning throughout these passages is in no way affected by the Bill C-25 amendments.

There are several important distinctions between pre-trial custody and the imprisonment that follows the imposition of a sentence. They fall into two broad categories, one quantitative and the second qualitative. The first, the quantitative dimension, reflects the fact that, in Canada, the various statutory and administrative mechanisms that almost always result in significant abbreviation of a prisoner's custodial sentence do not apply to or incorporate the inmate's period of pre-sentence custody. One near universal mechanism is sentence remission. A second is parole, whereby prisoners may be released into the community to there complete their sentences subject to conditions imposed by parole boards. Not even nominal remission attaches to pre-sentence custody, nor is such custody considered in calculating parole eligibility. By way of simple illustration, a convicted offender sentenced to six months in a provincial reformatory is effectively credited with a half-day of remission for every day of served sentence and, as a result, will be released upon having served no more than four months (that is, two-thirds) of his or her custodial disposition. On the other hand, an accused who spends six months in pre-trial custody serves every day of those six months. If convicted and then immediately sentenced to "time served" or a single further day in jail, he will have served a 50% longer sentence of imprisonment than that ultimately served by an offender with identical antecedents who is granted bail and later sentenced to six months incarceration for the very same offence.

The second distinction between pre- and post-sentence custody rests on the nature or quality of the detention. Prisons, be they provincial or federal, have a variety of educational, counselling, treatment, training and educational programs. Similar programs are conspicuously absent or severely rationed in "remand centres" or "remand units" in mixed jails, the terms applied to those provincial

> facilities in which defendants denied bail are detained. Remand centres are also notoriously overcrowded and, unlike prisons, lack recreational and athletic programs and afford only very limited access to the outdoors and related amenities. Remand custody is notoriously "hard time" and, in light of the paucity of facilities and programs, rightly described as "dead time".

[41.] The rationale for the rule for crediting pre-trial detention are:

(1.) The absence of a statutory scheme to credit this time;

(2.) The absence of programmes of rehabilitation; and

(3.) Conditions at jails are difficult.

[42.] Justice Green in ***Johnson*** *(supra)* also considered systemic issues and that impact on defendants. In particular, he references Aboriginal offenders at paras. 62-64:

> Professor Doob did not directly address the plight of native Canadians caught up in the criminal justice system. The Applicant is of Aboriginal heritage. More than a decade ago, in the seminal case of *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 59, the Supreme Court observed that the "serious problem of aboriginal overrepresentation in Canadian prisons is well documented". After reviewing the available data through the mid-1990s, the Court, at para. 64, characterized the dramatic overrepresentation of Aboriginal peoples in prisons as "a crisis in the Canadian criminal justice system" and "a sad and pressing social problem". The Court gave very clear directions to sentencing judges to reduce their reliance on incarceration in response to Aboriginal criminality. And some courts, at least in Ontario, were re-organized to expressly implement and apply the lessons of *Gladue*: see, for example, Justice Brent Knazan's article "Time for Justice: One Approach to *R. v. Gladue*", [2009] *Criminal Law Quarterly*, 431.
>
> Despite these initiatives, the disproportionate representation of Aboriginal offenders in the prison population has only continued to

increase. Native persons constitute only about 3% of the Canadian population. Yet, as Jonathan Rudin reports in "Addressing Aboriginal Over-representation Post-*Gladue*: A Realistic Assessment of How Social Change Occurs", [2009] *Criminal Law Quarterly* 447, at 451, the 2006/2007

- ... figures from Statistics Canada show that Aboriginal people make up 20% of the jail population in provincial facilities, up from 16% in 2001. Currently, over 1 in 5 inmates in federal and provincial jails are Aboriginal. For women, almost one in three women in jail is Aboriginal. And the figures are even worse for youth.
- The disparity is starkly and succinctly captured in a recent Annual Report produced by the Office of the Correctional Investigator, 2008-2009 (http://www.oci.bec.gc.ca/rpt/annrpt/annrpt20082009-eng.a spx): "Abo-riginal rates of incarceration are now almost nine times the national average". (See, also, the 2009 Report of the *Public Safety Canada Portfolio Corrections Statistics Committee, supra*, at pp. 47-48, 57-58 and 67-68. Additionally, at pp. 81-82 and 87-88, the Report notes that, as regards prisoners in federal penitentiaries, "the percentage of time served until full parole supervision was lower for non-Aboriginal offenders than for Aboriginal offenders" and that, consistent with historical data, the "parole grant rate" for Aboriginal prisoners in 2008-2009 was 29.6% while that for non-Aboriginal offenders was 46.3%.)

Predictably, the composition of remand populations closely reflects the woeful overrepresentation of native persons in the correctional system more generally. Justice Marc Rosenberg addressed these circumstances in the course of his acceptance speech upon receiving the G. Arthur Martin Criminal Justice Award in November 2009 (31(1) *For The Defence* 12, at 14):

- The pre-trial remand situation is even worse for some of the most marginalized of our society. Aboriginal adults represent three per cent of the population but almost 20 percent of the remand population. Aboriginal youth represent six per cent of the population and 25 per cent of admissions to remand.

[43.] The focus of s. 719(3.1) are the words “if the circumstances justify it” Justice Green stated:

> “Apart from the few statutory bars to enhanced credit, [these words are] the only difference between detained offenders entitled to a maximum of 1:1 credit (s. 719(3)) and those entitled to a maximum of 1.5:1 credit (s. 719(3.1))….

[44.] After a lengthy analysis of the meaning of the above phrase, Justice Green concluded at para. 182:

> The ambiguity surrounding the relationship between sub-ss. (3) and (3.1), and, in particular, the words "if the circumstances justify it", mandate consideration of appropriate cannons of construction. But for the expressly excluded categories of remand offenders, I am satisfied that, properly interpreted, these provisions empower sentencing judges to grant pre-sentence custody credit at a ratio of between 1:1 and 1.5:1 whenever the case and offender specific circumstances properly warrant the exercise of such discretion *and* reasons for doing so are enunciated. In my view, and but for those situations where the common law has long-recognized enhanced credit disqualification, a ratio in excess of 1:1 (and ordinarily 1.5:1) is both fair and apposite in every remand offender sentencing case warranting compensation for the loss of remission. In so far as the regime set out at sub-ss. 719(3) and (3.1) is intended to compensate fairly for the correctional systems' failure to account for the incarceration of offenders prior to the commencement of their sentences, Parliament did *not* "get the arithmetic wrong".

[45.] Judge A. Derrick adopted Justice Green’s reasoning in ***Johnson*** in ***R. v. Dann*** [2011] N.S.J. No. 217, paras. 30-40, and also in ***R. v. L.C.***, 2011 NSPC 35 (paras.38-59). The latter case now known and reported as ***R. v. Level Aaron Carvery***, 2012 NSCA 107 was upheld on appeal. (Paras.57-67).

[46.] Beveridge, J., stated at para. 77 of ***Carvery***:

> An interpretation that would lead to the imposition of sentences that offend the mandated principles of sentencing set out in the *Criminal Code* seems wrong. Parliament is of course at liberty to change the law and, if the intent of Parliament is clear in the language it used in an enactment, courts must, subject to a properly pleaded and successful constitutional challenge, give effect to it. The problem with the language of s. 719(3.1) is that the circumstances a court may properly take into account are not defined specifically or even generally. The courts are left to discern what Parliament intended. In my opinion, an interpretation that is in accord with the legislative framework is the correct one, unless some other conclusion is dictated by other interpretative considerations.

[47.] Later at para. 88:

> The authorities are clear that a trial judge's decision as to how much, if any credit, beyond 1:1 for pre-sentence custody, is a discretionary one. Absent an error in principle, an appellate court is not to intervene (see *R. v. Vermette*, [1988] 1 S.C.R. 985; *R. v. A.N.*, 2011 NSCA 21; *R. v. LeBlanc*, *supra*).

Conclusion on Sentence

[48.] Mr. Rose has been involved with the criminal justice system since 1995. His last offence occurred on December 15, 2007, and he was sentenced on the 8th of February, 2008 to approximately 14 months custody for a robbery and several breaches. He has amassed 72 convictions, an extremely lengthy record, many of which he blames on being drunk (p. 26 – Gladue Report). Mr. Rose admitted when testifying he had a problem with drinking and drugs, a fact brought home to him after reading the Gladue Report.

[49.] Even though he says he did attend Addictions Services in Sydney in the past as required by a Conditional Sentence Order, there is no indication he continued to seek further assistance from any agency between November of 2008 and September 10, 2011, the date of the break and enter.

[50.] Upon his release Mr. Rose testified he would seek help from NADACA (Halifax). He spoke with a worker there who would help him with taking steps to get a trade (welding) and a place to live.

[51.] Mr. Rose has earned some tickets for welding already. He has also had a history of gainful long term employment and can be a productive citizen if he remains clean and sober.

[52.] But these goals are not enough. He must make a commitment to abstain from alcohol and seek counseling.

[53.] Besides the principles of denunciation and deterrence, I must also consider proportionality, parity and restraint.

[54.] The most serious offence before me is the break and enter into a dwelling house (September 11). This is a "life time imprisonment" offence. There has been no Victim Impact Statement filed with the court, but I think it is safe to say the complainants felt violated. An unknown person disrupting the sanctity of their

home, damaging their property and stealing personal possessions could be nothing short of unsettling.

[55.] The following April of 2012 Mr. Rose uttered threats to his spouse who he was separated from at the time. She made it clear in the report she did not want to be around the defendant when he was drinking. S.P. has a right to feel safe and be free from abuse by her spouse. Domestic violence is only too prevalent in our communities. And although S.P. testified she wants the defendant back in their children's lives, she stated: "He needs counseling. We have to talk about our marriage."

[56.] Despite being released on another order, Mr. Rose continued to abuse alcohol and in October of 2012 he was arrested for refusing to leave S.P.'s home. The police officer noted signs of intoxication.

[57.] What is a fit sentence?

[58.] In ***R. v. Gladue***, 133 C.C.C. (3d) 385 the Supreme Court of Canada (Cory and Iacobucci, JJ) stated at para. 75:

> The role of the judge who sentences an aboriginal offender is, as for every offender, to determine a fit sentence taking into account all the circumstances of the offence, the offender, the victims, and the community. Nothing in Part XXIII of the Criminal Code alters this fundamental duty as a general matter. However, the effect of s.

> 718.2(e), viewed in the context of Part XXIII as a whole, is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders. Section 718.2(e) requires that sentencing determinations take into account the unique circumstances of aboriginal peoples.

[59.] Then at para. 78 and 79:

> In describing the effect of s. 718.2(e) in this way, we do not mean to suggest that, as a general practice, aboriginal offenders must always be sentenced in a manner which gives greatest weight to the principles of restorative justice, and less weight to goals such as deterrence, denunciation, and separation. It is unreasonable to assume that aboriginal peoples themselves do not believe in the importance of these latter goals, and even if they do not, that such goals must not predominate in appropriate cases. Clearly there are some serious offences and some offenders for which and for whom separation, denunciation, and deterrence are fundamentally relevant.
>
> Yet, even where an offence is considered serious, the length of the term of imprisonment must be considered. In some circumstances the length of the sentence of an aboriginal offender may be less and in others the same as that of any other offender. Generally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing.

[60.] And finally at para. 88:

> But s. 718.2(e) should not be taken as requiring an automatic reduction of a sentence, or a remission of a warranted period of incarceration, simply because the offender is aboriginal. To the extent that the appellant's submission on affirmative action means that s. 718.2(e) requires an automatic reduction in sentence for an aboriginal offender, we reject that view. The provision is a direction to sentencing judges to consider certain unique circumstances pertaining to aboriginal offenders as a part of the task of weighing the multitude of factors which must be taken into account in striving

> to impose a fit sentence. It cannot be forgotten that s. 718.2(e) must be considered in the context of that section read as a whole and in the context of s. 718, s. 718.1, and the overall scheme of Part XXIII. It is one of the statutorily mandated considerations that a sentencing judge must take into account. It may not always mean a lower sentence for an aboriginal offender. The sentence imposed will depend upon all the factors which must be taken into account in each individual case. The weight to be given to these various factors will vary in each case. At the same time, it must in every case be recalled that the direction to consider these unique circumstances flows from the staggering injustice currently experienced by aboriginal peoples with the criminal justice system. The provision reflects the reality that many aboriginal people are alienated from this system which frequently does not reflect their needs or their understanding of an appropriate sentence.

[61.] A fit and proper sentence for Mr. Rose must balance the principles of proportionality, parity and restraint. And notwithstanding the principles of denunciation and deterrence, I cannot disregard his rehabilitation.

> "…the ***Gladue*** decision does not presume to provide a jurisprudential remedy for those systemic factors that perpetrate the overrepresentation of Aboriginal persons in the criminal justice system.… ***Gladue's*** focus is "sentencing"…." (***The Challenge of Gladue Courts***, 89 C.R. (6^{th}) 362).

[62.] There is no alternative to incarceration put forth by Mr. Rose in the Gladue Report so the length of any period of incarceration must be carefully considered.

[63.] I have endeavoured to ensure that systemic factors, the defendant's personal circumstances, the facts of the offences, the nature of the offences and the defendant's record have all been considered in arriving at my final decision.

[64.] I agree with Justice Green's conclusion in ***Johnson*** at para. 182 that:

> "…but for those situations where the common law has long-recognized enhanced credit disqualification, a ratio in excess of 1:1 (and ordinarily 1.5:1) is both fair and apposite in every remand offender sentencing case warranting compensation for the loss of remission."

[65.] In paragraph 39 Green, J., sets out some case law examples of disqualifications:

> "…where an offender has little prospect of parole (*R. v. Francis* (2006), 79 O.R. (3d) 551 (C.A.), at para. 25), has repeatedly violated his bail conditions (*R. v. Warren* (1999) 127 O.A.C. 193, at para. 7) or committed the offence at issue while on bail and probation (*R. v. Stewart* (2002), 163 O.A.C. 391, at para. 10), has not endured prison congestion (as in the just-noted case of *Davis*), has deliberately delayed the process in order to secure the benefit of credit for pre-trial custody (*R. v. Thornton* (2007), 224 O.A.C. 219, at paras. 31-33) or is unlikely to take advantage of rehabilitative programs …"

[66.] I have concluded a fit and proper sentence for Mr. Rose is:

(1.) September 10, 2011, s. 348(1)(b) – 24 months, less remand credit of 19 months;

(2.) April 3, 2012, s. 264.1(1)(a), 3 months consecutive; s. 145(3), 3 months concurrent on each;

(3.) October 3, 2012, s. 145(3) x 4, 2 months consecutive on the first count, and 2 months concurrent on each of the other three;

(4.) February 17, 2013, s. 145(3), 1 month consecutive.

[67.] On the issue of remand credit, although there are no statutory disqualifications preventing the defendant from receiving 1.5:1 credit, I find that he has repeatedly violated his bail conditions and committed offences while on bail and will receive 1:1 credit for 1½ months of remand time. The adjournments for a Presentence Report, a Gladue Report, etc., are not attributable to the defendant. Therefore he will receive 1.5:1 credit for 11½ months of his remand time. Total remand credit amounts to 19 months, which credit will be deducted from the 24 month sentence on the September 10th, 2011 incident. The total sentence is 30 months (24 + 3 + 2 + 1), less 19 months credit and therefore he will serve a further 11 months in custody. There will be a DNA order and a Restitution Order in the amount of $3,444.81 (on the break and enter.)

[68.] Further, there will a no contact with S.P. on the Warrant of Committal.

The Honourable Jean M. Whalen, JPC