Citation: *R. v. James*, 2020 YKTC 7

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Docket: 18-00745
18-00746
18-00759
18-00760A
Registry: Whitehorse
Heard: Carcross

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

KASHIES CHARLES ANDREW JAMES

Appearances:
Sarah Bailey — Counsel for the Crown
Kelly Labine — Counsel for the Defence

REASONS FOR SENTENCE

[1] Kashies James has entered guilty pleas to having committed offences contrary to ss. 334(b), 430(4), 266, 267(b), and 129(a).

[2] The sentencing hearing commenced on February 4, 2020, and judgment was reserved until February 14, 2020. This is my judgment.

[3] The circumstances of these offences are set out in the Agreed Statement of Facts as follows:

18-00746

1. On November 4, 2018. Terry Lynn Lesh ("Lesh") informed the RCMP that Kashies James (her boyfriend) had used her bank card without her permission to make purchases and withdraw money.

2. Lesh gave a statement to police advising that she had been drinking at 409 Tlingit Ave. in Carcross the night before, and she fell asleep at the residence. She was alone in the residence with Kashies James ("James") when she fell asleep.

3. When Lesh woke up the next morning, her backpack, containing her bank card, was missing. Lesh returned to her residence and called her bank, who informed her of a number of recent transaction/withdrawals from Montana's Gas Station that she did not authorize. Lesh told police that James knew her PIN number as she had given him permission to use her card in the past, but these transactions were made without her knowledge or consent, and it was not a joint account.

4. Police attended Montana's Gas Station and spoke to the clerk Preet Singh, who stated that he recalled James recently making purchases with a debit card.

5. The unauthorized purchases/withdrawals totaled $886.92. James had recently deposited his paycheck into Lesh's account, which amounted to $330.09.

18-00759

6. On November 30, 2018, James and Lesh had an argument. James snapped Lesh's phone in half and broke her eyeglasses. He also bit her on the nose, causing bruising.

7. On December 24, 2019, James and Lesh were at a party and James became combative. At one point he had Lesh pinned against a wall. James broke Lesh's television, which she had purchased 5 days earlier for $531.29.

8. During another argument on January 20, 2019, James punched Lesh in the eye resulting in a black eye, and punched a hole in the wall of Lesh's home.

18-00745

9. On February 8, 2019, Lesh and James had an argument. James wanted to keep drinking alcohol and Lesh did not. Lesh kept asking James to leave as she did not want him in the house if he was intoxicated.

10. James told Lesh "if you make me come out there to get you, I swear on my mother's grave I'll kill you". Neighbours intervened and James left the area.

11. James kept returning to Lesh's residence through the day. Lesh turned all her lights off and pretended that she was not home.

12. Between 11pm and 12pm that evening, James returned to the residence, and banged and kicked on the door tying to get in. Lesh phoned the police.

13. Before the RCMP responded, James broke down the door and entered Lesh's residence. He began to assault Lesh.

14. James punched Lesh multiple times, picked her up, sat her on his lap and bit her scapula. Once James saw blood on Lesh's face, he tried to clean her up by holding a towel to her face. James turned off the lights in the house.

15. Police attended and knocked on Lesh's door. James answered the door. Lesh's face was red and there was blood near her nose. She explained the [sic] James had kicked down her door and assaulted her.

16. James refused to leave Lesh's residence. After 15 minutes of speaking to police, James was told he was under arrest, and pulled away from Cst. Rosseau several times. On the drive to the police station and then on the way to Whitehorse, James repeatedly kicked at the windows and silent patrolman of the police vehicle.

17. Lesh was taken to the hospital in Whitehorse. She was noted to have a bite mark on her right scapula and bruising on her face, arms and legs.

[4] The circumstances of the s. 266 and 334(b) offences were disclosed by Ms. Lesh during the investigation of the s. 267(b) and 430(4) offences.

Criminal Record

[5] Mr. James has a criminal record with the following convictions:

Youth Court

2009: 334(b), 430(4) and 264.1(1)(a)

2010: 145(3), 137 *YCJA* (x4), 266, and 430(4)

2013: 266

Adult Court

2014: 354(1)(a)

2015: 266

2016: 733.1(1)

2017: 733.1(1), 145(3) (x2), and 145(5)(b)

2018: 445

[6] The longest period of custody Mr. James has served is four months for the s. 354(1)(a) offence. His only other significant custodial disposition was 60 days for the s. 445 offence.

Positions of Counsel

[7] Crown counsel is seeking a total custodial disposition of 12 months jail, comprised of nine months for the s. 267(b) offence and three months consecutive for the s. 266 offence. From this, Mr. James is to be credited with 60 (now 75 after adjournment) days on remand. A probationary period of 18 months is requested.

Counsel submits that the Crown's original position of 17 months custody was reduced to 12 months, as a result of taking into account Mr. James compliance with strict bail conditions and his rehabilitative efforts.

[8] As the Crown has proceeded by Indictment on the s. 267(b) offence, counsel seeks a mandatory 10-year firearms prohibition. A s. 487.051 DNA order is also required for the s. 267(b) offence.

[9] Defence counsel submits that a three month sentence should be imposed for the s. 267(b) offence, less credit for time served, to be followed by consecutive conditional sentences totalling 105 days for the ss. 334(b), 266 and 430(4) offences. A concurrent sentence of 20 days time served should be imposed for the s. 129 offence. She submits that a probation order of between 12 to 18 months is appropriate.

[10] Counsel seeks a s. 113 exemption with respect to the s. 109 firearms prohibition.

Circumstances of Mr. James

[11] Mr. James is a 24-year-old member of the Carcross Tagish First Nation.

[12] A ***Gladue*** Report and Pre-Sentence Report ("PSR") were ordered. Mr. James decided not to participate in the preparation of these two Reports, despite repeated opportunities being offered to him. As such, neither Report is available.

[13] A letter authored by Mark Stevens of Kwanlin Dun First Nation Justice was provided. This letter is dated December 2, 2019 and was prepared for the sentencing hearing originally scheduled for December 3. Mr. Stevens is a well-known author of ***Gladue*** Reports in the Yukon, and was to have prepared Mr. James' ***Gladue*** Report.

[14] Mr. Stevens wrote the letter on behalf of Mr. James' support team in Carcross. The support team includes: Ms. Lesh, Mr. James' sister Suzannah, his grandmother, Louise Johns, CTFN Health and Wellness Outreach worker, Eileen Wally, Circle Keeper, Harold Gatensby, and RCMP member Cst. David Lavalee.

[15] Mr. Stevens suggests that the trauma Mr. James endured growing up is an underlying issue behind Mr. James' decision not to divulge personal information, and may be a reason for his not participating in the preparation of the ***Gladue*** Report and PSR, stating:

> Kashies initially requested a *Gladue* Report for this sentencing hearing, but when he discovered that he would have to talk about his childhood circumstances, he declined to be interviewed. I would respectfully suggest that his refusal to participate in the *Gladue* process speaks volumes about some of the difficulties he has endured…

[16] Mr. Stevens stated that, prior to the last court sitting in December 2019, he participated in a Circle process with Mr. James and the support team. He stated that there was lots of honesty within this Circle, and recognition of both the good and the bad. He noted that Mr. James, while struggling with communication and trust issues, also recognizes that he needs a lot of support, and that there is support in the community for him.

[17] Harold Gatensby is also well known in the Carcross and Yukon communities for his work in Restorative Justice. He has known Mr. James for Mr. James' entire life, although they have not been close. He believes that Mr. James has "good" in him and that he has something to contribute to the community.

[18] Mr. Gatensby also knows Ms. Lesh, what she desires from this process, and he has been a support person for her.

[19] He also expressed his understanding about why Mr. James may not have wanted to discuss his life for the purposes of the preparation of the ***Gladue*** Report or PSR.

[20] Mr. Gatensby stated that he will continue to work with the family of Mr. James and Ms. Lesh, and to be a support for them. He will also participate in setting up a working group to continue to support Mr. James.

[21] Mr. James' father abandoned him when he was two years old. His mother died when he was 10 years old. Mr. James said that while he was growing up, his family was busy struggling with their own addictions and related issues. He lacked support within the family and has struggled with low self-esteem. Although he made it to Grade 8, he cannot read or write. He said that he was really essentially left alone to grow up.

[22] Mr. James likes to work with his hands and to be on the land. He will do anything that he can to work.

[23] Mr. James said that he has learned that he could lose everything. He is thankful for the support that he has in his life right now. He stated when he addressed the Court:

> It would just mean the world to me to have another chance, to come back and prove, not just to myself and her and our baby and other people that are supporting me, but to the courts that I can be responsible, and leave one of the biggest things in my life that I was so dependent on, alcohol, behind me, to have a better future for our daughter, cause, its all I ever did was drink all my life and do drugs until I met her. She got pregnant and really gave me a big chance and a step again in life of keeping my family strong and bringing both our families

> together. This would mean the world to me to go back home with anything I could take to the table to keep showing that I'm a responsible person and I'm not going to drink no more; I'm not going to do drugs no more; I'm going to do everything I need to do to prove to her and baby and you guys that I can keep my word; I can promise that.

[24] With respect to his s. 445 conviction, Mr. James regrets that he took out his anger and his childhood pain on an animal. He said that his sister has forgiven him for what he did. He says that he is sorry every day for his actions in this regard.

[25] When questioned by me, Mr. James said that he is willing to talk to a counsellor about the things that he did not want to talk about for the preparation of the ***Gladue*** Report and PSR. He acknowledged that he needs help through counseling to let go of the things he has carried within him throughout his life. He stated that he needs to learn to love himself again.

[26] Ms. Lesh addressed the Court. She spoke with emotion, and with conviction. She stated as follows:

> Okay. Sorry I had to write it down because I'm very, very nervous today.
>
> I just wanted to say good morning and thank you for allowing me to stand up and say my piece, something I should have done a long time ago.
>
> Please bear with me, as I may be a little nervous because this does determine our future right now, and it all rests in your hands.
>
> I want to thank everybody that has helped Kashies and I to this point. We've really relied on a lot of people, and it's not been an easy go, either.
>
> Kashies can be very difficult to communicate with and very stubborn who he trusts and lets into his life. In the end, it's just Kashies and I who really need to deal with this reality.
>
> Kashies and I started going together over a year and a half ago. We actually never really liked each other and we never wanted to be around one another. But a short period of time — Kashies and I developed a relationship like no other. We became friends, lovers, and soulmates. We

both liked our drink, partying, and having a good time, but that also led to a dangerous time, a dark time for the two of us which became very violent and angry.

With the New Year of 2019, we made a plan to love each other forever and agreed to sober up and try for a child. Three hundred and sixty-one days ago, Kashies and I started a day like no other. But this day turned out to be different. Kashies couldn't handle the sobriety and the drugs and alcohol got the better of him and he fell off and came home aggressive. I wouldn't allow him into the house, which enraged him even more, thus he broke down the door and came in and assaulted me.

Until the news of our baby girl, which neither of us knew about until the night in question, we were sobering up and trying for our daughter today Roseanne.

No one has been able to help Kashies 'til now. I'm the only one to stick it out. And he has opened up to me and trusted me — no counsellor, cop, lawyer, friend, family member, judge, man, or woman.

He grew up alone and essentially on the streets. He learned how to survive. He learned how to lie, cheat, steal, and manipulate. He learned how to hurt, anger, rejection, neglect, and denial and abuse whether sexually, physically, mentally, or emotionally.

He grew up with nothing but women and watching them — women and sisters, mothers, and aunts — get abused by the men they loved. His father left him about the same age as Roseanne is now.

Alcohol and drugs has been in his life since day one and it's only inevitable that he turn to it as well. Of course he would fight for those few things that he could rely on only in his life.

Three hundred and sixty-one days later, Kashies is a sober, clean father, husband. He has possessions and passions. He has plans and a future to rise up to.

We've agreed that we would break our inherent cycle of residential school and be better parents and role models for our precious innocent gift we have been blessed with by this Creator. Roseanne Aurora James was born on October 9, 2019, at 3:45 in the afternoon. She was delivered into this world by her father. He was the first one to touch her and hold her and look at her. When he handed her to me and together we looked at each other and cried with joy and happiness, the purity and innocence that she brings to our lives has made us better people, better parents, and better husband and wife.

If you look at both our pasts and Kashies' record and history after what we

have been through, we probably should be far apart from each other. But all of this has only made us stronger and pushed us closer together. We have learned to work together, talk together, and be dedicated together for the love of this child and for the love that we have each other.

Please don't dictate anymore whether he can be a father. Allow him to prove this to his daughter legally. Allow him to be the father he never had legally. Legally, she doesn't even know her father yet. But instead, she is a daddy's girl and has nothing but unconditional love for Kashies and needs him, as I know how it feels not to have a father growing up either.

If you allow Kashies to come home, we do have a plan to do family treatment together, counselling together, and help Kashies deal with his anger and his addictions. We will agree to do a two to three check-in time a week with the RCMP. And we just want to get Kashies back into the community and home so he can work and prove that he can be the family man at home.

Thank you for listening.

Analysis

[27] The relevant portions of section 718 to 718.2(e) are as follows:

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.
>
> …
>
> 718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating 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…
>
> …
>
> shall be deemed to be aggravating circumstances;
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (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.

[28] As stated in ***R.*** v. ***Ipeelee,*** 2012 SCC 13, at para. 37

> The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing - the maintenance of a just,

> peaceful and safe society through the imposition of just sanctions. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the *Code*, the resulting sentence must respect the fundamental principle of proportionality. Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. As Wilson J. expressed in her concurring judgment in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 533:
>
> > It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; 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 "deserved" the punishment he received and feel a confidence in the fairness and rationality of the system.
>
> Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral 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.

[29] Mr. James comes before me as a 24-year-old Indigenous offender, convicted of two offences of violence against his intimate partner, and two property offences in which his intimate partner was the victim, along with the s. 129(a) offence.

[30] The aggravating factors are Mr. James' criminal record, and the fact that Ms. Lesh was in an intimate relationship with Mr. James, and that there are multiple offences of violence in which she was the victim. The offences of violence against Ms. Lesh constitute a breach of the trust relationship between them in which she should have been able to feel safe and protected. She certainly should not have had to fear violence done to against her at the hands of Mr. James. His acts of violence are serious, and their impact should not be understated.

[31] The mitigating factors are Mr. James' guilty pleas and acceptance of responsibility, as well as the positive rehabilitative steps that he has taken since the last of these offences was committed, including his compliance with strict bail conditions.

[32] While I do not have a ***Gladue*** Report or much in the way of information about Mr. James' family history, childhood, and upbringing, I have enough information to recognize that all-too-familiar pattern of abuse and neglect that is so often associated with the systemic discrimination against Indigenous peoples, and the subsequent inter-generational traumatization and loss of community and cultural identity that follows.

[33] As stated further stated in ***Ipeelee***:

> 56 Section 718.2(*e*) of the *Criminal Code* directs that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders". This provision was introduced into the *Code* as part of the 1996 Bill C-41 amendments to codify the purpose and principles of sentencing. According to the then-Minister of Justice, Allan Rock, "the reason we referred specifically there to aboriginal persons is that they are sadly overrepresented in the prison populations of Canada" (House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No. 62, 1st Sess., 35th Parl., November 17, 1994, at p. 15).
>
> 57 Aboriginal persons were sadly overrepresented indeed. Government figures from 1988 indicated that Aboriginal persons accounted for 10 percent of federal prison inmates, while making up only 2 percent of the national population. The figures were even more stark in the Prairie provinces, where Aboriginal persons accounted for 32 percent of prison inmates compared to 5 percent of the population. The situation was generally worse in provincial institutions. For example, Aboriginal persons accounted for fully 60 percent of the inmates detained in provincial jails in Saskatchewan (M. Jackson, "Locking Up Natives in Canada" (1989), 23 U.B.C. L. Rev. 215, at pp. 215-16). There was also evidence to indicate that this overrepresentation was on the rise. At Stony Mountain penitentiary, the only federal prison in Manitoba, the Aboriginal inmate population had been climbing steadily from 22 percent in 1965 to 33 percent in 1984, and up to 46 percent just five years later in 1989

(Commissioners A. C. Hamilton and C. M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (1991), at p. 394). The foregoing statistics led the Royal Commission on Aboriginal Peoples ("RCAP") to conclude, at p. 309 of its Report, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (1996):

> The Canadian criminal justice system has failed the Aboriginal peoples of Canada - First Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural - in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.

58 The overrepresentation of Aboriginal people in the Canadian criminal justice system was the impetus for including the specific reference to Aboriginal people in s. 718.2(*e*). It was not at all clear, however, what exactly the provision required or how it would affect the sentencing of Aboriginal offenders. In 1999, this Court had the opportunity to address these questions in *Gladue*. Cory and Iacobucci JJ., writing for the unanimous Court, reviewed the statistics and concluded, at para. 64:

> These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(*e*), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process.

59 The Court held, therefore, that s. 718.2(*e*) of the *Code* is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing (*Gladue*, at para. 93). It 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).

60 Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society (see, e.g., *R. v. Laliberte*, 2000 SKCA 27, 189 Sask. R. 190). To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. 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. In current practice, it appears that case-specific information is often brought before the court by way of a *Gladue* report, which is a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders. Bringing such information to the attention of the judge in a comprehensive and timely manner is helpful to all parties at a sentencing hearing for an Aboriginal offender, as it is indispensable to a judge in fulfilling his duties under s. 718.2(*e*) of the *Criminal Code*.

61 It would have been naive to suggest that sentencing Aboriginal persons differently, without addressing the root causes of criminality, would eliminate their overrepresentation in the criminal justice system entirely. In *Gladue*, Cory and Iacobucci JJ. were mindful of this fact, yet retained a degree of optimism, stating, at para. 65:

> It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system. The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty,

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

62 This cautious optimism has not been borne out. In fact, statistics indicate that the overrepresentation and alienation of Aboriginal peoples in the criminal justice system has only worsened. In the immediate aftermath of Bill C-41, from 1996 to 2001, Aboriginal admissions to custody increased by 3 percent while non-Aboriginal admissions declined by 22 percent (J. V. Roberts and R. Melchers, "The Incarceration of Aboriginal Offenders: Trends from 1978 to 2001" (2003), 45 *Can. J. Crim. & Crim. Just.* 211, at p. 226). From 2001 to 2006, there was an overall decline in prison admissions of 9 percent. During that same time period, Aboriginal admissions to custody increased by 4 percent (J. Rudin, "Addressing Aboriginal Overrepresentation Post-*Gladue*: A Realistic Assessment of How Social Change Occurs" (2009), 54 *Crim. L.Q.* 447, at p. 452). As a result, the overrepresentation of Aboriginal people in the criminal justice system is worse than ever. Whereas Aboriginal persons made up 12 percent of all federal inmates in 1999 when *Gladue* was decided, they accounted for 17 percent of federal admissions in 2005 (J. Rudin, "Aboriginal Over-representation and *R. v. Gladue*: Where We Were, [page471] Where We Are and Where We Might Be Going", in J. Cameron and J. Stribopoulos, eds., *The Charter and Criminal Justice: Twenty-Five Years Later* (2008), 687, at p. 701). As Professor Rudin asks: "If Aboriginal overrepresentation was a crisis in 1999, what term can be applied to the situation today?" ("Addressing Aboriginal Overrepresentation Post-*Gladue*", at p. 452).

63 Over a decade has passed since this Court issued its judgment in *Gladue*. As the statistics indicate, s. 718.2(*e*) of the *Criminal Code* has not had a discernible impact on the overrepresentation of Aboriginal people in the criminal justice system. Granted, the *Gladue* principles were never expected to provide a panacea. There is some indication, however,

from both the academic commentary and the jurisprudence, that the failure can be attributed to some extent to a fundamental misunderstanding and misapplication of both s. 718.2(*e*) and this Court's decision in *Gladue*. The following is an attempt to resolve these misunderstandings, clarify certain ambiguities, and provide additional guidance so that courts can properly implement this sentencing provision.

64 Section 718.2(*e*) of the *Criminal Code* and this Court's decision in *Gladue* were not universally well received. Three interrelated criticisms have been advanced: (1) sentencing is not an appropriate means of addressing overrepresentation; (2) the *Gladue* principles provide what is essentially a race-based discount for Aboriginal offenders; and (3) providing special treatment and lesser sentences to Aboriginal offenders is inherently unfair as it creates unjustified distinctions between offenders who are similarly situated, thus violating the principle of sentence parity. In my view, these criticisms are based on a fundamental misunderstanding of the operation of s. 718.2(*e*) of the *Criminal Code*.

65 Professors Stenning and Roberts describe the sentencing provision as an "empty promise" to Aboriginal peoples because it is unlikely to have any significant impact on levels of overrepresentation (P. Stenning and J. V. Roberts, "Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders" (2001), 64 Sask. L. Rev. 137, at p. 167). As we have seen, the direction to pay particular attention to the circumstances of Aboriginal offenders was included in light of evidence of their overrepresentation in Canada's prisons and jails. This overrepresentation led the Aboriginal Justice Inquiry of Manitoba to ask in its Report: "Why, in a society where justice is supposed to be blind, are the inmates of our prisons selected so overwhelmingly from a single ethnic group? Two answers suggest themselves immediately: either Aboriginal people commit a disproportionate number of crimes, or they are the victims of a discriminatory justice system" (p. 85; see also RCAP, at p. 33). The available evidence indicates that both phenomena are contributing to the problem (RCAP). Contrary to Professors Stenning and Roberts, addressing these matters does not lie beyond the purview of the sentencing judge.

66 First, sentencing judges can endeavour to reduce crime rates in Aboriginal communities by imposing sentences that effectively deter criminality and rehabilitate offenders. These are codified objectives of sentencing. To the extent that current sentencing practices do not further these objectives, those practices must change so as to meet the needs of Aboriginal offenders and their communities. As Professors Rudin and Roach ask, "[if an innovative] sentence can serve to actually assist a person in taking responsibility for his or her actions and lead to a reduction in the probability of subsequent re-offending, why should such a sentence be precluded just because other people who commit the same offence go to jail?" (J. Rudin and K. Roach, "Broken Promises: A Response to

Stenning and Roberts' 'Empty Promises'" (2002), 65 Sask. L. Rev. 3, at p. 20).

67 Second, judges can ensure that systemic factors do not lead inadvertently to discrimination in sentencing. Professor Quigley aptly describes how this occurs:

> Socioeconomic factors such as employment status, level of education, family situation, etc., appear on the surface as neutral criteria. They are considered as such by the legal system. Yet they can conceal an extremely strong bias in the sentencing process. Convicted persons with steady employment and stability in their lives, or at least prospects of the same, are much less likely to be sent to jail for offences that are borderline imprisonment offences. The unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail. This is systemic discrimination.
>
> (T. Quigley, "Some Issues in Sentencing of Aboriginal Offenders", in R. Gosse, J. Y. Henderson and R. Carter, eds., *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (1994), 269, at pp. 275-76)

Sentencing judges, as front-line workers in the criminal justice system, are in the best position to re-evaluate these criteria to ensure that they are not contributing to ongoing systemic racial discrimination.

68 Section 718.2(*e*) is therefore properly seen as a "direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process" (*Gladue*, at para. 64 (emphasis added)). Applying the provision does not amount to "hijacking the sentencing process in the pursuit of other goals" (Stenning and Roberts, at p. 160). The purpose of sentencing is to promote a just, peaceful and safe society through the imposition of just sanctions that, among other things, deter criminality and rehabilitate offenders, all in accordance with the fundamental principle of proportionality. Just sanctions are those that do not operate in a discriminatory manner. Parliament, in enacting s. 718.2(*e*), evidently concluded that nothing short of a specific direction to pay particular attention to the circumstances of Aboriginal offenders would suffice to ensure that judges undertook their duties properly.

> 69 Certainly sentencing will not be the sole - or even the primary - means of addressing Aboriginal overrepresentation in penal institutions. But that does not detract from a judge's fundamental duty to fashion a sentence that is fit and proper in the circumstances of the offence, the offender, and the victim. Nor does it turn s. 718.2(***e***) into an empty promise. The sentencing judge has an admittedly limited, yet important role to play. As the Aboriginal Justice Inquiry of Manitoba put it, at pp. 110-11:
>
> > To change this situation will require a real commitment to ending social inequality in Canadian society, something to which no government in Canada has committed itself to date. This will be a far-reaching endeavour and involve much more than the justice system as it is understood currently... .
> >
> > Despite the magnitude of the problems, there is much the justice system can do to assist in reducing the degree to which Aboriginal people come into conflict with the law. It can reduce the ways in which it discriminates against Aboriginal people and the ways in which it adds to Aboriginal alienation.

[34] We are now almost eight years beyond the decision in ***Ipeelee***. Recent statistics from the Government of Canada show that, rather than seeing a decrease in the representation of Indigenous offenders in Canadian jails, this number continues to increase. As seen in this excerpt from the recent press release issued by the Government of Canada Office of the Correctional Investigator:

> Ottawa, January 21, 2020 - Today, the Correctional Investigator of Canada, Dr. Ivan Zinger, issued a news release and supporting information indicating that the number and proportion of Indigenous individuals under federal sentence has reached new historic highs.
>
> In his release and comments, Dr. Zinger provided this context: “Four years ago, my Office reported that persons of Indigenous ancestry had reached 25% of the total inmate population. At that time, my Office indicated that efforts to curb over-representation were not working. Today, sadly, I am reporting that the proportion of Indigenous people behind bars has now surpassed 30%...

[35] So where does this leave me in deciding a just and appropriate sentence for Mr. James?

[36] I can accede to the submission of Crown counsel and incarcerate Mr. James for an additional nine plus months, after granting him credit for his time on remand.

[37] If Mr. James serves the generally applicable two-thirds of this sentence in custody, he will be released in just over six months. A conditional sentence is not available for the s. 267(b) offence, as the Crown has proceeded by Indictment on this charge. Therefore, Mr. James would serve any custodial sentence imposed for this charge at the Whitehorse Correctional Centre ("WCC").

[38] I can also sentence Mr. James to a shorter period of custody for the s. 267(b) offence, such as the three months suggested by his counsel, in addition to several conditional sentences for those offences for which a conditional sentence is available, which would leave him only approximately 15 days left to be served at WCC.

[39] In my opinion, a custodial disposition of any length for the s. 267(b) offence is not the appropriate sentence that should be imposed in the circumstances of this case. I am satisfied that a suspended sentence, attached to a period of probation, is the fair and just sentence, and one that balances all of the principles, purposes and objectives of sentencing.

[40] In ***R.*** **v.** ***Voong***, 2015 BCCA 285, in which the Court heard the Crown appeals of the suspended sentences and probation orders imposed upon four offenders for drug

trafficking, the Court stated the following with respect to the deterrent effect of a suspended sentence and probation, as follows, in paras 39-43:

> 39 A suspended sentence has been found to have a deterrent effect in some cases. Because a breach of the probation order can result in a revocation and sentencing on the original offence, it has been referred to as the "*Sword of Damocles"* hanging over the offender's head. For example, in *R. v. Saunders*, [1993] B.C.J. No. 2887 (C.A.) at para. 11, Southin J.A. said:
>
> > Deterrence is an important part of the public interest but there are other ways of deterring some sorts of crime than putting someone in prison who has no criminal record as this appellant did not. The learned trial judge did not turn her mind to whether the deterrence which is important might be effected by certain terms of a discharge or a suspended sentence such as a lengthy period of community service.
>
> 40 This Court, in *Oates*, recently confirmed that *Saunders* stands for the proposition that deterrence might be effected with a suspended sentence (*Oates* at para. 16).
>
> 41 In *Shoker*, at para. 15, the Court concluded that supervised probation is a restraint on the probationer's freedom.
>
> 42 Other Courts have confirmed the deterrent effect of a suspended sentence and a probation order in certain circumstances. See, for example, *R. v. George* (1992), 112 N.S.R. (2d) 183 (C.A.) at 187 (and a number of cases following, including *R. v. Martin*, 154 N.S.R. (2d) 268 (C.A.); *R. v. R.T.M.*, 151 N.S.R. (2d) 235 (C.A.)) and *R. c. Savenco* (1988), 26 Q.A.C. 291 (C.A.).

[41] In imposing a suspended sentence for an Indigenous offender convicted of the s. 268 offence of aggravated assault, in ***R.*** v. ***Mianscum***, 2019 QCCQ 3829, Lortie J.C.Q. stated:

> 64 In this case, imprisonment is not necessary given the specific context and the mitigating factors analyzed in light of *Gladue* and *Ipeelee*. Sending Mr. Mianscum to prison would undermine the remedial objective, might hinder rehabilitation and would deprive the community of a young leader.

> …
>
> 68 According to the Court of Appeal in *Harbour*, [translation] "a suspended sentence imposed pursuant to s. 731(1)(*a*) Cr. C. includes a mechanism allowing the Court to revoke the suspension at the Crown's request if the offender commits a new offence, including the failure to comply with a probation order within the meaning of s. 733.1 Cr. C., and impose any sentence that could have been imposed on the offender had the passing of sentence not been suspended: s. 732.2(5) Cr. C. It is an effective remedy (***R.*** v. ***Harbour***, 2017 QCCA 204)

[42] In sentencing Mr. James, as an Indigenous offender, I am required to consider all other reasonable options to a custodial disposition, so long as these options are consistent with the harm done to Ms. Lesh and to the community.

[43] Ms. Lesh is connected with and supported by Victim Services. She has stated that she feels safer with Mr. James now than she ever has. In her statement to the Court, she showed that she possessed insight into the underlying factors that have contributed to the violence that Mr. James has committed against her.

[44] Since, in particular, learning of Ms. Lesh's pregnancy and the birth of their daughter, she and Mr. James have been working together to create a strong and stable home environment. Positive steps forward have been taken by them both. They have developed a plan.

[45] The community is supportive of Mr. James, and of him being allowed to serve his sentence in the community.

[46] I appreciate that, in particular in cases of domestic violence, the wishes of a particular victim should not derail the sentencing process. The sentencing judge must look beyond such expressed wishes, which are at times often naive, misguided and

under-informed, to the larger picture. This larger picture includes not only the future risk of harm to the present victim, or to a future partner of this offender, but also the need to denounce domestic violence and, in doing so, deter others from committing such offences of violence. At the same time, when a victim of domestic violence speaks out, that victim must be listened to and heard by the Court.

[47] While Ms. Lesh's wishes, and those of Mr. James' support team, are informative, they only comprise a portion of what I must consider in imposing a just and fair sentence on Mr. James.

[48] In order to sentence Mr. James to a sentence to be served in custody at WCC for the s. 267(b) offence, I must first be satisfied that such a jail sentence is necessary. In this case I am not so satisfied.

[49] I am of the opinion that a suspended sentence, as permitted by s. 731(1)(a) best balances all the contextual factors in this case, in particular when operating in conjunction with the sentences I am able to impose for the other offences.

[50] If Mr. James receives a jail sentence attached to probation, the remedy for a breach of the probation order is a charge under s. 733.1(1). However, if the probation order is attached to a suspended sentence, the Crown can, pursuant to s. 732.2(5)(d), apply for the suspended sentence to be revoked and for Mr. James to be sentenced again for the s. 267(b) offence. This possibility provides an additional motivational factor for Mr. James to continue his positive rehabilitative efforts.

[51] This is not a case where Ms. Lesh, through the imposition of a lengthy jail sentence on Mr. James and consequent separation of him from the community, would receive a significant period of time of actual physical protection from any acts of violence that could be committed by him in the future; any such protection is measured in months at best.

[52] Ms. Lesh is best protected from future acts of violence committed by Mr. James through his rehabilitation. Allowing Mr. James to continue on his present rehabilitative track serves to protect Ms. Lesh and the community, and to also enhance both her and her daughter's lives, as well as the fabric of the community.

[53] I say this in the context of Mr. James being at a diminished risk for future violence, based upon his recent compliance with court-ordered conditions, his pro-active and positive rehabilitative steps, and the present level of support, both from within his relationship and his community.

[54] I recognize that it cannot be said that Mr. James does not present a risk; such certainty is not capable of being guaranteed. The question is whether it can be said that in this case the risk, when set against the potential for a pro-social and non-violent life, has been diminished to the point that accepting this diminished risk is the right thing to do in all the circumstances, and in the prevailing legal landscape.

[55] The cycle of intergenerational trauma that so many Indigenous individuals suffer from and struggle to be free of, requires intervention at appropriate times when the opportunity presents itself. This is such a time. Mr. James is a young man and presently has both the motivation and the support to break the cycle in his own life, and,

looking forward, in the life of his young daughter, and from what I have heard from Ms. Lesh, also in the cycle of her life.

[56] If intervention does not occur now, then when? Certainty is an elusive creature when trying to assess and predict the future behaviours of any human, and particularly so when the individual being assessed is marred by factors set in place long before his or her birth. This is the case with respect to the impact of the residential school system and the systemic discrimination against the Indigenous Peoples in Canada, in particular by institutional governmental policies.

[57] Sentencing judges cannot give lip service to what the Supreme Court of Canada stated in ***Gladue*** and ***Ipeelee***, espousing the correct principles while still imposing jail sentences that are not necessary, and that do not properly consider all reasonable alternatives to custody.

[58] As I stated previously in ***R.*** v. ***Quock***, 2015 YKTC 32, in paras. 117 - 119, after referencing in paras. 113 – 116 both the apology offered by Prime Minister Stephen Harper on June 11, 2008 and the *Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, released May 31, 2015:

> 117 The Summary Report does not, of course, have any binding legal effect. It is nonetheless an extremely comprehensive and considered study of the circumstances of Aboriginal peoples in Canada. It is clearly an error, in sentencing an Aboriginal offender, to not take into account the special circumstances of the particular Aboriginal offender before the Court. It would also be an error to not take into account the circumstances of Aboriginal peoples in general in Canada. Certainly the Summary Report provides relevant information about these circumstances.

> 118 With respect to the Apology, while also not legally binding, it is a recognition of the significant harm caused by the actions of the Government of Canada to the Aboriginal peoples of Canada and an acceptance of responsibility for having been the cause of this harm. The resultant dysfunction in many Aboriginal individuals, families and communities has been a significant factor underlying the involvement of Aboriginal offenders in criminal activity and has contributed to the well-documented over-representation of Aboriginal individuals in custody in Canadian jails. This is only one result, and does not even touch on the other resultant harms, such as the number of Aboriginal victims of crime, the number of Aboriginal children in care, and substance abuse and poverty within Aboriginal families and communities.
>
> 119 As I have previously stated in several decisions, it is not enough to apologize for having caused harm without then taking steps to try to repair the harm. Such inaction would make the Apology hollow and meaningless…..

[59] In my opinion, in the circumstances of this case, I am afforded an opportunity in sentencing Mr. James, to not only recognize the harm caused to him, and subsequently to Ms. Lesh and Mr. James' community, but to further impose a sentence that provides an opportunity for Mr. James, and therefore also Ms. Lesh, their daughter, and their community, to move out of and far from the cycle of intergenerational trauma continuing in their lives.

[60] By imposing a period of custody in the form of conditional sentence orders for those offences where such a disposition is available to me and otherwise appropriate, Mr. James can continue his life with his family in the community on a graduated level of supervision and intervention, to make the transition as safe and supportive as possible.

[61] Therefore the sentences to be imposed on Mr. James are as follows:

- For the s. 266 offence, three months to be served conditionally in the community. For the s. 430(4) offence, one month concurrent to be served conditionally.

- For the s. 334(b) offence, one month to be served conditionally in the community, consecutive.

- For the s. 267(b) offence, while being cognizant of the fact that Mr. James has 75 days in remand that is available to be credited to him, and considering this as a factor, yet choosing not to have this time reflected in the sentence, I sentence him to a suspended sentence attached to a probation order of 20 months.

- For the s. 129(a) offence, the sentence shall be one day deemed served.

[62] The terms of the Conditional Sentence Order are as follows:

1. Keep the peace and be of good behaviour;

2. Appear before the court when required to do so by the court;

3. Report to a Supervisor immediately upon your release from custody and thereafter, when required by the Supervisor and in the manner directed by the Supervisor;

4. Remain within the Yukon unless you have written permission from your Supervisor or the court;

5. Notify the Supervisor, in advance, of any change of name or address, and, promptly, of any change of employment or occupation;

6. Have no contact directly or indirectly or communication in any way with Terry Lynn Lesh, within a 24 hour period if you have consumed alcohol or consumed illegal drugs, or otherwise if Ms. Lesh tells you that she does not wish to have contact with you.

7. Do not go to any known place of residence, employment or education of Terry Lynn Lesh, within a 24 hour period if you have consumed alcohol or consumed illegal drugs, or otherwise if Ms. Lesh tells you that she does not wish you to attend at any such place.

8. Reside as approved by your Supervisor and do not change that residence without the prior written permission of your Supervisor;

9. For the first three months of this order, at all times you are to remain inside your residence or on your property, except with the prior written permission of your Supervisor, except for the purposes of employment including travel directly to and directly from your place of employment, except for your attendance at counselling and programming, including travel directly to and from your place of counselling and programming, or expect in the actual presence of a responsible adult approved in advance by your Supervisor. You must answer the door or the telephone to ensure you are in compliance with this condition. Failure to do so during reasonable hours will be a presumptive breach of this condition;

10. For the final month of this order, abide by a curfew by being inside your residence or on your property between 10:00 p.m. and 6:00 a.m. daily except with the prior written permission of your Supervisor or except in the actual presence of a responsible adult approved in advance by your Supervisor. You must answer the door or the telephone for curfew checks. Failure to do so during reasonable hours will be a presumptive breach of this condition;

11. Not possess or consume alcohol and/or illegal drugs that have not been prescribed for you by a medical doctor;

12. Not attend any premises whose primary purpose is the sale of alcohol including any liquor store, off sales, bar, pub, tavern, lounge or nightclub;

13. Attend and actively participate in all assessment and counselling programs as directed by your Supervisor, and complete them to the satisfaction of your Supervisor, for the following issues: substance abuse, alcohol abuse, spousal violence, anger management, psychological issues, and any other issues identified by your Supervisor, and provide consents to release information to your Supervisor regarding your participation in any program you have been directed to do pursuant to this condition;

14. Participate in such educational or life skills programming as directed by your Supervisor and provide your Supervisor with consents to release information in relation to your participation in any programs you have been directed to do pursuant to this condition;

15. Make reasonable efforts to find and maintain suitable employment and provide your Supervisor with all necessary details concerning your efforts.

16. Not possess any weapon as defined by the *Criminal Code* except with the prior written permission of your Supervisor.

[63] The terms of the Probation Order are as follows:

1. Keep the peace and be of good behaviour;

2. Appear before the court when required to do so by the court;

3. Notify the Probation Officer, in advance, of any change of name or address, and, promptly, of any change in employment or occupation;

4. Have no contact directly or indirectly or communication in any way with Terry Lynn Lesh, within a 24 hour period if you have consumed alcohol or consumed illegal drugs, or if Ms. Lesh tells you that she does not wish to have contact with you.

5. Do not go to any known place of residence, employment or education of Terry Lynn Lesh, within a 24 hour period if you have consumed alcohol or consumed illegal drugs, or otherwise if Ms. Lesh tells you that she does not wish you to attend at any such place.

6. Remain within the Yukon unless you obtain written permission from your Probation Officer or the court;

7. Report to a Probation Officer immediately upon completion of your conditional sentence and thereafter, when and in the manner directed by the Probation Officer;

8. Reside as approved by your Probation Officer and not change that residence without the prior written permission of your Probation Officer;

9. Not possess or consume alcohol and/or illegal drugs that have not been prescribed for you by a medical doctor:

10. Not attend any premises whose primary purpose is the sale of alcohol including any liquor store, off sales, bar, pub, tavern, lounge or nightclub;

11. Attend and actively participate in all assessment and counselling programs as directed by your Probation Officer, and complete them to the satisfaction of your Probation Officer, for the following issues: substance abuse, alcohol abuse, spousal violence, anger management, psychological issues, or any other issues identified by your Probation Officer, and provide consents to release information to your Probation Officer regarding your participation in any program you have been directed to do pursuant to this condition;

12. Participate in such educational or life skills programming as directed by your Probation Officer and provide your Probation Officer with consents to release information in relation to your participation in any programs you have been directed to do pursuant to this condition;

13. Make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts;

14. Not possess any weapon as defined by the *Criminal Code* except with the prior written permission of your Probation Officer;

[64] Pursuant to s. 109, for the s. 267(b) offence there will be firearms prohibition for a period of ten years.

[65] Noting that the Crown is not opposed to this application, and further that Mr. James is an Indigenous individual with a close connection to the land, who may require a firearm for sustenance and/or employment, pursuant to s. 113(1), I authorize the chief firearms officer or the Registrar to issue Mr. James an authorization, licence or a registration certificate, as the case may be, to possess a firearm for employment and/or sustenance purposes. Such firearm must be stored at an authorized location other than where Mr. James resides, and shall only be possessed by him for purposes immediately connected to and necessary for his employment or participation in sustenance hunting, after which the firearm shall be returned to the authorized location. Mr. James shall notify the chief firearms officer, the RCMP in Carcross, or in any other community in which he may reside, and his Supervisor or Probation Officer, as the case may be, in advance of every occasion in which he intends to possess a firearm for such an authorized purpose.

[66] Pursuant to s. 487.051, for the s. 267(b) offence you will provide a sample of DNA for analysis.

[67] There will be no other ancillary orders.

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COZENS T.C.J.