COURT OF APPEAL OF YUKON

Citation: *R. v. Charlie,* 2020 YKCA 6

Date: 20200302
Docket: 18-YU839

Between:

Regina

Appellant

And

Franklin Junior Charlie

Respondent

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Willcock
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Territorial Court of Yukon, dated December 12, 2018 (*R. v. Charlie*, 2018 YKTC 44, Whitehorse Dockets 17-00191; 17-00191B; 17-00488A).

Counsel for the Appellant:	N. Sinclair
Counsel for the Respondent:	V. Larochelle
Place and Date of Hearing:	Vancouver, British Columbia February 18, 2020
Place and Date of Judgment:	Vancouver, British Columbia March 2, 2020

Written Reasons by:
The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Mr. Justice Willcock

Summary:

The Crown appeals against a sentence of 14 months' jail and 30 months' probation for aggravated assault. Held: Leave to appeal from sentence is granted; however, the appeal is dismissed. The Crown has not shown that the judge committed a material error that had an impact on the sentence. Nor has it established that the sentence is demonstrably unfit. The judge fashioned a sentence that took into account the seriousness of the offence, but also the respondent's diminished moral culpability. Applying the deferential standard of review to appeals from sentence, there is no basis on which to intervene with the judge's exercise of discretion.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Overview

[1] The respondent received a global sentence of 18 months' imprisonment and 30 months' probation for aggravated assault, two counts of driving while disqualified, driving with a blood alcohol concentration over the legal limit, and breach of a recognizance. The Crown appeals the sentence imposed for the aggravated assault. It says the judge committed material errors that affected that sentence and, had the errors not occurred, the jail term for aggravated assault would have been much longer. Even without the errors, the Crown says the sentence is demonstrably unfit and this Court should substantially increase the length of the prison term.

[2] The offence was serious, the respondent has a significant criminal history, and on a previous appeal involving Mr. Charlie, this Court opined that if he continued to re-offend, there may be little option but to impose significant jail terms for his crimes because "society cannot continue to be compromised by his conduct": *R. v. Charlie,* 2015 YKCA 3 at para. 43.

[3] However, sentencing is an individualized exercise and the outcome is necessarily determined case-by-case, including for repeat offenders. Mr. Charlie is an Indigenous offender whose ongoing personal struggles and conflicts with the law are directly attributable to the intergenerational impact of his parents' experiences in residential school. Knowing that, the judge appropriately considered Mr. Charlie a person with diminished moral blameworthiness. Taking that into account, as well as the other factors before him, the judge fashioned a sentence that sought to respect

the principles of denunciation and deterrence through a prison term, but also leave room for critical post-release support by attaching a lengthy probation order to accompany Mr. Charlie's return to the community.

[4] The respondent is a recidivist offender with a substantiated capacity for offending that puts the public at risk. However, I do not see a legal basis for interfering with the judge's exercise of discretion. Although on the low-end, the sentence for aggravated assault gives meaningful effect to the fundamental principle of proportionality, as well as the remedial direction provided in *R. v. Gladue*, [1999] 1 S.C.R. 688, *R. v. Ipeelee*, 2012 SCC 13, and like decisions. It was reasonably open to the judge to consider a non-penitentiary term in the circumstances of this case.

Background

[5] Following a trial in the Territorial Court of Yukon, the respondent was found guilty of aggravated assault contrary to s. 268(1) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[6] The assault occurred on June 18, 2017. The victim attended or passed by a residence at which Mr. Charlie and a co-accused were present. The victim engaged in a verbal confrontation with the two men outside of the home. Matters escalated into a physical confrontation, with the victim as the initial aggressor. He knocked Mr. Charlie to the ground and began fighting with the co-accused. The co-accused hit the victim and threw him to the ground. The trial judge found that the acts of the co-accused were legally justified. Mr. Charlie then kicked the victim twice, striking him in the head and causing serious and debilitating injuries to the area surrounding his left eye. The judge found that although Mr. Charlie may have been justified in using force when responding to the victim's initial attack, the force applied to the victim's head was not reasonable. By that time, any risk to Mr. Charlie's safety had dissipated. The co-accused testified that Mr. Charlie was intoxicated at the time of the offence.

[7] The kicks delivered by Mr. Charlie caused a one-centimetre laceration over the victim's left eye, a fracture of the orbital floor and inferior orbital rim in the area of the left eye, facial bruising and an abrasion to his right shoulder. The orbital fracture carries a long-term prognosis of increased risk for high blood pressure, glaucoma, and possible permanent damage to the victim's vision: *R. v. Charlie*, 2018 YKTC 44 at para. 4 ("RFJ").

[8] The Crown also charged Mr. Charlie with uttering threats against the victim and unlawfully confining him. However, the judge acquitted Mr. Charlie of those offences: *R. v. Charlie*, 2018 YKTC 26 at para. 77.

[9] On completion of the trial, the Crown applied to have Mr. Charlie remanded for a dangerous and long-term offender assessment under s. 752.1(1) of the *Code.* The trial judge dismissed that application in July 2018, and the matter proceeded to a conventional sentencing: *R. v. Charlie*, 2018 YKTC 30.

[10] On December 12, 2018, Mr. Charlie received a custodial sentence of 14 months' imprisonment for the aggravated assault, followed by 30 months' probation. He was also sentenced for other offences: namely, two counts of driving while disqualified, driving with a blood alcohol concentration of over .08, and breach of a recognizance. One of the driving while disqualified offences occurred the same night as the aggravated assault. The remainder of the offences were committed *ex post facto.* Mr. Charlie received a consecutive four months' imprisonment for the additional offences, bringing the global custodial term to 18 months. In addition to the prison term and probation, the judge issued various ancillary orders: a DNA sample, a firearms prohibition, a $700 victim surcharge, and a three-year driving prohibition. The Crown does not take issue with those orders.

[11] Once Mr. Charlie received credit for time spent in pre-sentence custody, he had 11 months' imprisonment left to serve, specific to the aggravated assault.

[12] At sentencing, the Crown sought a global sentence of 41–43 months' jail for Mr. Charlie. Specific to the aggravated assault, the Crown said that offence should

attract a 36-month prison term. The defence submitted that 12 months' imprisonment would be a fit sentence for the aggravated assault.

[13] The Crown's position of 41–43 months was intended to facilitate a prison term of sufficient length to give Mr. Charlie access to the "substantial programming options" available through the federal correctional system. This includes in-custody rehabilitative programs said to be specific to persons with cognitive limitations, as well as post-custody resources and supervision. Crown counsel submitted that the territorial correctional system and Mr. Charlie's home community do not have the services necessary to meet his needs as an offender or address the ongoing risk he presents to the public.

[14] After sentence was imposed, Mr. Charlie filed an appeal from conviction. He did not succeed in having the conviction set aside: *R. v. Charlie*, 2019 YKCA 13. From March 14 to June 20, 2019, Mr. Charlie was on bail pending that appeal. On dismissal of the appeal, he was re-incarcerated. There is no indication that Mr. Charlie failed to comply with the terms of his bail while awaiting his appeal.

[15] The Crown filed its application for leave to appeal from sentence in January 2019. At the same time, it sought to appeal the dismissal of its request to have Mr. Charlie remanded for an assessment under s. 752.1(1) of the *Code*. In October 2019, this Court ruled that the latter aspect of the Crown's appeal was filed out of time. An application for an extension of time was subsequently dismissed: *R. v. Charlie*, 2019 YKCA 17; *R. v. Charlie*, 2019 YKCA 18 (Chambers). A hearing for the remaining component of the Crown's appeal was scheduled for February 18, 2020. By the time of the hearing, more than 14 months had passed since the date of sentence. For three of those months, Mr. Charlie was on bail pending appeal.

[16] Mr. Charlie reached parole eligibility in November 2019. He has been released from prison and is living in the community, subject to the terms of his probation order. There is no indication that Mr. Charlie is not complying with the probation order, which I understand will be in place until May 2022.

[17] At the hearing of the appeal, the Crown advised the Court (without objection), that while in custody, Mr. Charlie completed a ten-session program on living without violence. He also met with a drug and alcohol counsellor 18 times and completed 12 sessions focused on substance abuse management. Mr. Charlie continues to express a desire for residential treatment for substance abuse, although he recently checked himself out of a residential placement after only two days in the program. The reasons for his doing so are not known to the Court.

Personal Antecedents

[18] At the time of sentencing, Mr. Charlie was 33 years old. He is a member of the Kaska Nation. For most of his life, he has lived in Ross River, an isolated rural community. Mr. Charlie's legal counsel described Ross River as the "only home he has". Mr. Charlie has a young son with whom he has occasional contact. As I understand it, his son lives in a different community.

[19] The trial judge had access to considerable background material on Mr. Charlie for the purposes of sentencing, including a previous *Gladue* report, a psychiatric assessment, and reasons for judgment from other sentencing hearings. I will not address the entirety of that material; rather, I will refer only to that which is necessary to provide an explanatory context for resolution of the appeal.

Criminal History

[20] Mr. Charlie has a lengthy criminal record. It spans from 1999 to 2018 and includes convictions as both a youth and adult. Prior to the sentencing hearing in December 2018, Mr. Charlie had over 40 convictions on his record. They consist primarily of property and driving offences and non-compliance with court orders. However, there are also convictions for offences involving violence; namely, two convictions for robbery, a conviction for common assault and one for assault of a peace officer. The longest custodial sentence Mr. Charlie had received prior to his sentence in this case appears to have been two years and nine months' imprisonment. That sentence was imposed for one of the robberies.

Psychosocial Factors

[21] Mr. Charlie is addicted to alcohol. He is also functionally illiterate. In 2011, he received a diagnosis of Fetal Alcohol Spectrum Disorder ("FASD").

[22] Material filed at sentencing described FASD as a "complex syndrome with varying deficits and degrees of severity". It can affect learning, memory, adaptive behaviour, attention, impulse control, speech and language abilities, motor development, reasoning, and problem solving. Without support, FASD-affected persons may experience social isolation, poor job performance, poverty, mental and physical health problems, homelessness, victimization, and involvement in the criminal justice system.

[23] Because of his FASD, Mr. Charlie has suffered "severe behavioural and learning issues since he was a child". In a letter filed at sentencing, his parents told the judge that their son "was always picked on during his childhood by older kids where he was growing up".

[24] In a previous sentence appeal involving Mr. Charlie, this Court described the effects of his FASD as "serious": 2015 YKCA 3 at para. 32 (the "Previous Appeal").

[25] A 2014 psychiatric assessment has affirmed prior determinations that Mr. Charlie suffers from "significant weaknesses and variability in executive functioning and higher-order thinking skills". These limitations impair his ability to "use past, present and future learning and experiences to guide decisions; to develop and alter strategies or rules based on feedback; and to manage time and space", and they lie at the heart of his past and ongoing conflicts with the law. Mr. Charlie "struggles to see the big picture, the present and long-term impact of decisions/behaviours". He has "severe and persistent problems with frustration tolerance and impulse control", both of which are aspects of executive functioning. Moreover, these problems "come to the fore when he is intoxicated".

[26] In the Previous Appeal, the Court accepted that Mr. Charlie's condition is "directly linked to his parents' forced placement in a residential school" (at para. 32).

Because of her experience in residential school, Mr. Charlie's mother consumed high levels of alcohol during pregnancy (at para. 32). Tragically, it resulted in Mr. Charlie sustaining an organic brain injury.

[27] In a show of tremendous strength, Mr. Charlie's mother later attended treatment programs and regained her sobriety. At a 2012 sentencing hearing involving her son, mention was made of the fact that Mr. Charlie's mother had by then abstained from alcohol for 25 years. Both of Mr. Charlie's parents are involved in his life and they are supportive of him. They reside in Ross River.

[28] Notwithstanding his FASD-related challenges, Mr. Charlie has completed grade 11 of high school. His employment has been sporadic, but he has successfully undertaken a training program for operating heavy equipment. He has obtained various industrial safety certificates in areas such as construction safety training and managing hazardous materials in the workplace. There is indication that he benefits from a practical, hands-on learning environment.

[29] Those who know and spend time with Mr. Charlie believe he has the capacity to do well when engaged in concrete, task-oriented endeavours, especially when connected to persons in his community who understand the issues he faces, appreciate the context in which they arise, and provide him with in-person support in managing his criminogenic factors. This includes his alcohol consumption, which exacerbates his offending proclivities. The psychiatric assessment, referred to earlier, concurred with prior determinations that Mr. Charlie requires "ongoing external supports and external controls" to compensate for his weaknesses in executive functioning.

Aggravating and Mitigating Circumstances

[30] At sentencing, the judge found the following aggravating circumstances: (1) use of force on a vulnerable victim while on the ground; (2) serious injuries to the victim; and (3) an extensive criminal record (RFJ at para. 51).

[31] He also identified mitigating circumstances: (1) Mr. Charlie was responding to an initial act of aggression when engaged with the victim; and (2) the presence of *Gladue* factors, including the respondent's FASD diagnosis and "associated cognitive issues" (RFJ at para. 52).

[32] To the judge's list of mitigating factors, I would add the following considerations that emerge from the record:

- on the night of the offence, Mr. Charlie did not head out with the intention of committing an offence of violence (RFJ at para. 48);
- Mr. Charlie pleaded guilty to the additional offences of driving while disqualified, driving while over .08, and breach of recognizance, for which he was also sentenced in December 2018;
- since 2015, Mr. Charlie "has made some limited progress in moderating his violent behaviours" (at para. 32);
- as at the date of sentencing, he had attended four one-on-one counselling sessions, with two more scheduled (at para. 36);
- Mr. Charlie has expressed interest in and applied to attend residential treatment (at para. 37);
- prior to his sentencing, he enrolled in a substance abuse management program at the Whitehorse Correctional Centre (at para. 38);
- since 2012, he has been involved with the Fetal Alcohol Syndrome Society Yukon (at para. 39);
- Mr. Charlie has support from both parents, who attended the sentencing hearing;
- he has expressed a desire for things to change: "I am getting tired of this system. I've been in it since I was 12 years old, and I'm not proud of it"; and,
- in addition to his parents, Mr. Charlie has support from other members of the Ross River community. For example, Cecil Jackson, a Justice Court Worker, spoke at the sentencing hearing. He told the judge that he wanted Mr. Charlie to help him build a healing camp to assist the community, and, in exchange, he would help Mr. Charlie with his "treatment".

[33] The victim of the aggravated assault declined to file a victim impact statement, ordinarily facilitated through s. 722(1) of the *Code.*

Range of Sentence for Aggravated Assault

[34] The judge identified the range of sentences for an assault of the nature that occurred here as six months' to six years' imprisonment (RFJ at paras 42–47). Since then, this Court has clarified that the generally accepted range of sentences for aggravated assault carries a substantially higher starting point:

> [44] … the jurisprudence shows that there is a very broad sentencing range for the offence of aggravated assault, but the starting point is not six months ….
>
> [45] In our view, the weight of authority—which includes Yukon authorities—demonstrates that the starting point for sentences for aggravated assault is 16 months' imprisonment, absent exceptional extenuating circumstances.
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> *R. v. Quash*, 2019 YKCA 8, per Stromberg-Stein and Fisher, JJ.A. (emphasis added).

See also *R. v. Craig*, 2005 BCCA 484 at para. 10.

[35] Where a particular sentence will fall in that range depends on the circumstances surrounding the commission of the offence, the moral blameworthiness of the offender, and myriad other factors that logically inform the mandated search for proportionality. Moreover, "sentencing ranges are guidelines, not hard and fast rules …. The fact that a judge deviates from a sentencing range will not alone justify appellate intervention unless the sentence imposed is demonstrably unfit": *Quash* at paras. 46–47. Sentencing ranges "do not displace an individualized approach to sentencing": *R. v. Sesay*, 2020 BCCA 41 at para. 32.

[36] Having said that, while each case is different, "an unprovoked attack with a weapon tends to result in the imposition of a sentence at the higher end while a consensual fight that has escalated with resulting injury tends to result in a sentence at the lower end" of the range: *Craig* at para. 10.

Standard of Review and Parties' Positions

[37] Appeals from sentence attract a deferential standard of review. Appellate intervention is only available where it has been shown that the judge committed a

material error that affected the sentence (such that the sentence would have been different but for the error) or that the sentence is demonstrably unfit: *R. v. Agin*, 2018 BCCA 133 at paras. 56–57.

[38] As noted, the Crown's appeal focuses on the sentence imposed for aggravated assault. The Crown says the judge committed two material errors on that sentence: (1) he did not give sufficient weight to the permanent nature of the victim's injuries; and (2) he applied an incorrect range of sentence for aggravated assault. The Crown contends that without these errors, the judge would have imposed a lengthier prison term for that offence.

[39] If this Court does not agree that the judge committed material errors, it is the Crown's position that appellate intervention with the sentence is nonetheless warranted on the ground that the sentence is demonstrably unfit:

> … the extant aggravating factors support a sentence well into penitentiary time given the respondent's extensive record for offences of violence, his violent behaviour involving repeated kicks to the vulnerable victim's head, the seriousness of the harm to the victim, the respondent's unsatisfactory post-offence behaviour and his complete lack of remorse for his behaviour.
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> Appellant's Statement on Sentence at para. 51. [Emphasis added.][1]

[40] The Crown contends that a 14-month prison term with 30 months of probation does not adequately protect the public; nor does it achieve parity with sentences imposed in like circumstances.

[41] The respondent asks that this Court deny the Crown leave to appeal Mr. Charlie's sentences, based on the amount of time it has taken to move the appeal forward.

[42] Alternatively, the respondent submits there is no basis on which to interfere with the global sentence. It reflects a "delicate balancing" by the trial judge that took into account all of the relevant aggravating and mitigating factors, including the

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[1] I note, in passing, that lack of remorse is generally not considered an aggravating factor for the purposes of sentencing: *R. v. J.C.S.*, 2017 BCCA 87 at para. 88.

serious nature of the victim's injuries. The judge correctly focused on the principle of proportionality and, in the context of an Indigenous offender who faces significant personal challenges, determined that a global 18-month prison term, followed by lengthy community supervision, best achieved the objectives of sentencing. The fact that the sentence for aggravated assault fell below the bottom end of the established range for that offence does not mean the judge must have erred or that the sentence is demonstrably unfit.

[43] Finally, the respondent submits that if this Court finds interference with the sentence is warranted and the prison term must be increased, the Court should nonetheless decline to re-incarcerate Mr. Charlie given the considerable additional burden that determination would place on the respondent: *R. v. Frisch*, 2013 YKCA 3 at para. 14, citing *R. v. Nelson*, [1992] Y.J. No. 171, 17 W.C.B. (2d) 561 (C.A.) at para. 36.

Discussion

[44] I do not consider it necessary to address the respondent's arguments on the Crown's lack of timeliness in moving the appeal forward, or the issue of re-incarceration. This is because I am of the view that the appeal should be dismissed on the merits, in any event.

[45] I hasten to add that declining to address the issue of timeliness should not be taken as an endorsement of the pace at which the Crown advanced its appeal from sentence. The respondent has raised legitimate concerns about the steps taken in that regard, especially in light of Smith J.A.'s conclusion that the Crown did not exercise due diligence when challenging the dismissal of its application for a dangerous offender assessment: 2019 YKCA 18 at para. 25. As emphasized in *Frisch*, as well as other cases, the Crown has a positive obligation to proceed with dispatch on appeals from sentence (at para. 12). The failure to do so can result in a denial of leave.

[46] At sentencing, the Crown acknowledged that the aggravated assault was provoked and "spontaneous". However, it argued that Mr. Charlie is someone with "complex needs" who "struggles very significantly with alcohol" and past efforts to effect his rehabilitation have not achieved behavioral change. In fact, from the Crown's perspective, the public safety risk presented by Mr. Charlie has escalated over time, with demonstrated recidivism for violent offending. On that basis, the Crown took the position that a 41–43 month global sentence was necessary to "take it up a notch" and put Mr. Charlie in touch with rehabilitative programming that is only available through the federal system.

[47] The judge understood this submission, but saw the case differently.

[48] He was alive to the seriousness of the injuries sustained by the victim of the aggravated assault and their long-term impact (RFJ at paras. 17, 51). He also appreciated that Mr. Charlie has a lengthy criminal record, including convictions for violent offences (at paras. 19–22, 51). The judge understood that Mr. Charlie "continues to commit offences that put the public at risk" and "has a long way to go" before that risk will be ameliorated (at paras. 34–35).

[49] At the same time, the judge was familiar with Mr. Charlie's personal background, including the presence of *Gladue* factors and the FASD diagnosis (RFJ at paras. 23–29). The judge had sentenced Mr. Charlie before. Based on that experience, and the material before him, he understood that without community support, Mr. Charlie struggles with controlling his alcohol consumption and that his behavioural impulses are intensified. He also saw Mr. Charlie as a person of "diminished moral culpability to whom the objectives of denunciation and deterrence are of somewhat limited applicability" (at paras. 27–29). The FASD affects the choices made by Mr. Charlie, his criminal behaviour, and his "commitment to follow through with his rehabilitative steps" (at para. 33).

[50] In that context, the judge was reluctant to sentence Mr. Charlie to a penitentiary term simply on the basis that to do so may give him access to better programming (RFJ para. 59). He also noted there are no guarantees that any such

access would, in fact, be facilitated, as *actual* programming availability while incarcerated can be affected by institutional funding, timeliness and prioritization (at paras. 56–58). He furthermore had before him information to the effect that Mr. Charlie's "longstanding pattern" of not integrating the consequences of his behaviour when choosing his course of conduct "persists even within the structured environment of a correctional institution" (emphasis added). A previous penitentiary sentence did not lead to improvement in Mr. Charlie's behaviour, as the programs accessed there did not "recognize and build on his strengths" (at para. 25, citing *R. v. Charlie*, 2012 YKTC 5 at para. 40).

[51] As I read the reasons for sentence, the judge's primary goal in sentencing Mr. Charlie was to tailor a sentence that included a custodial term, but also allowed for a lengthy probation order to ensure the opportunity for ongoing support for Mr. Charlie when released back into the community where he feels most at home:

> [61] He continues to require structured support in his day-to-day living situation. While he will receive some benefit from in-custody counselling and other programming, it is when Mr. Charlie returns to live in his community that the necessary structures and supports need to be available, if Mr. Charlie is to avoid continuous contact with the criminal justice system.
>
> [Emphasis added.]

[52] The global sentence he imposed gave effect to that goal, and, in fact, was five months longer in its cumulative duration than the length of sentence sought by the Crown. The judge imposed a combined 48 months of custodial and non-custodial monitoring, supervision and programming (before pre-sentence credit). While on probation, Mr. Charlie is subject to reporting and residency requirements, as well as a daily curfew for the first 15 months of the order. The probation order also facilitates access to assessment and counselling for substance abuse, alcohol abuse, and anger management, as well as educational or life-skills programming.

[53] Judges have considerable latitude at sentencing. In the circumstances of this case, I do not see a basis for interfering with the sentence. I do not agree that the judge gave inadequate effect to the seriousness of the victim's injuries. He was

alive to the extent of the injuries, and their impact, and he made explicit mention of that.

[54] Furthermore, although the impact of the offence on the victim forms an important part of the proportionality analysis, it is not a determinative factor. *R. v. O.*, 2012 BCCA 129, involved a Crown appeal from a conditional sentence imposed for the aggravated assault of a child. There, Bennett J.A. noted that notwithstanding the intentional infliction of serious and debilitating injuries, judges remain duty-bound in the search for a proportionate sentence to "examine the other circumstances in the context of all of the sentencing principles, including the unique systemic and background factors of an Aboriginal offender" (at para. 45).

[55] Although the judge misstated the general range of sentence for aggravated assault, he was aware of appellate commentary to the contrary, which endorsed 16 months as the appropriate starting point for this offence (RFJ at para. 43). It is also apparent from his reasons that he took more than simply "range" into account in deciding the issue of quantum, correctly noting that ranges are guidelines only. The Crown has not persuaded me that without the misstatement on range, the sentence would have been different.

[56] Finally, I do not find the sentence on the aggravated assault demonstrably unfit.

[57] In *Quash,* this Court allowed a Crown appeal from sentence and increased a 10-month jail sentence for aggravated assault to two years' imprisonment. The Crown cited *Quash* in support of its appeal. However, I find that case distinguishable.

[58] Mr. Quash precipitated the altercation with the victim; used a knife during the assault; and left the victim with a "horrific, gaping and gruesome" wound that almost bisected his parotid gland (at para. 7). The sentencing judge had access to a victim impact statement that showed the victim had suffered "significant physical and emotional trauma" as a result of the assault and "permanent and debilitating physical

damage that includes visible scarring and nerve damage" (at para. 14). In overturning the sentence and increasing the prison term, the majority noted that the use of a weapon, particularly when it causes life-threatening or permanent injuries, moves the aggravated assault higher up the scale on the established range (at paras. 49–51).

[59] More importantly, Mr. Quash did not have a substantiated diagnosis of FASD. Although a psychological report revealed "mild intellectual disability" and "extremely low cognitive abilities", Mr. Quash had the "ability to manage his impulses" (at para. 13). Furthermore, there was no evidence that Mr. Quash's limitations "played a role in his criminal conduct" (at para. 52). As a result, the majority held that in finding diminished moral blameworthiness, the sentencing judge placed "undue emphasis" on Mr. Quash's cognitive limitations (at para 52).

[60] Like *Quash,* the assault in this case was provoked and spontaneous; however, it did not involve the use of a weapon; the sentencing judge had access to a psychiatric assessment confirming a FASD diagnosis for the offender; and the assessment also affirmed a link between Mr. Charlie's cognitive limitations and his criminal conduct, including the lack of impulse control. Given those factors, *Quash* and this case are distinguishable.

[61] At the hearing of the appeal, the Crown cited three additional cases that it says demonstrate the 14-month prison term for aggravated assault is too low: *R. v. Sidhu,* 2005 BCCA 178; *R. v. Wiebe,* 2006 YKTC 80; and *R. v. Derkson,* 2009 YKSC 66. I have reviewed those decisions. They are distinguishable on their facts and with reference to the antecedents of the offenders. Most importantly, those cases did not involve *Gladue* factors and a related finding of diminished moral blameworthiness. In any event, the Supreme Court of Canada has made clear that the principle of parity is "secondary to the fundamental principle of proportionality": *R. v. Lacasse*, 2015 SCC 64 at para. 54.

[62] The prison term imposed for aggravated assault in this case was two months below the low end of the range of sentences for that offence, now established at 16

months. As noted, provoked and consensual fight scenarios generally fall at the lower end of the range. The judge did not find that Mr. Charlie has taken "significant steps to turn his life around" since his last sentencing (RFJ at para. 32). In light of that fact, the serious nature of the assault, and Mr. Charlie's criminal history, a more substantial prison term may well have withstood appellate scrutiny. However, given the mitigating circumstances, already canvassed, and Mr. Charlie's background as an Indigenous offender, I cannot say that the 14-month prison term with 30 months' probation is clearly unreasonable.

[63] Section 718.2(e) of the *Code* mandates that sentencing judges pay particular attention to the circumstances of Indigenous offenders. In setting out this obligation, Parliament did not distinguish between first time and repeat offenders, or the type of crimes committed. Instead, the application of *Gladue* principles "is required in <u>every</u> case involving an Aboriginal offender … and a failure to do so constitutes an error justifying appellate intervention": *Ipeelee* at para. 87 (emphasis added). For Indigenous offenders, including those who already carry a lengthy criminal record, s. 718.2(e) forms a critical part of the sentencing analysis unless they expressly waive its consideration: *Gladue* at para. 83.

[64] Mr. Charlie continues to appear before the criminal courts. However, it is indisputable that colonialism and the resultant intergenerational trauma play an integral role in his offending behaviour. As poignantly stated by a Kaska elder who provided a letter at the sentencing hearing, the historical trauma of residential schools has been passed on to Mr. Charlie, and he will forever carry that burden. It affects his moral blameworthiness and is relevant to determining an appropriate sanction. It necessarily informs the search for a "truly fit and proper sentence": *Ipeelee* at para. 75.

[65] In my view, the judge was alive to that analytical reality and gave meaningful effect to s. 718.2(e) in this case, as well as the jurisprudential principles surrounding its application. I would not interfere with his determination.

Disposition

[66] For the reasons provided, I would allow the Crown leave to appeal from sentence, but dismiss the appeal.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Mr. Justice Willcock"