PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Moore*, 2018 NSPC 48

Date: 2018-11-29
Docket: 8192060, 8196759, 8196761
Registry: Pictou

Between:

Her Majesty the Queen

v.

Rose Bethany Moore

SENTENCING DECISION

Judge:	The Honourable Judge Del W. Atwood
Heard:	2018: 10 October, 15 October, 14 November in Pictou, Nova Scotia
Charge:	Para. 253(1)(b), sub-s. 268(1), sub-s. 145(5.1) *Criminal Code of Canada*
Counsel:	T. William Gorman for the Nova Scotia Public Prosecution Service Douglas Lloy QC for Rose Bethany Moore

By the Court:

Synopsis

[1] Rose Bethany Moore is to be sentenced for one summary count of operating a motor vehicle with a prohibited blood-alcohol concentration, para. 235(1)(b) of the *Criminal Code* (case 8192060), one straight-indictable count of aggravated assault, sub-s. 268(1) (case 8196759), and one summary count of breach of form 11.1 undertaking, sub-s. 145(5.1) (case 8196761).

[2] Counsel agree that the court ought to fine Ms. Moore and prohibit her from driving for the para. 253(1)(b) count. I shall deal with that one right away, as the outcome proposed by counsel is not controversial.

[3] The court sentences Ms. Moore to a $1000 fine, a $300 victim-surcharge amount, and a 15-month driving prohibition in relation to case 8192060. Ms. Moore's presumptive BAC was 170 mgETOH/100ml bld, a statutorily aggravating reading in virtue of s. 255.1 of the *Code*. However, her means for paying anything other than the minimum fine are very limited; in applying the principles in *R. v. Topp*, 2011 SCC 43 at paras. 20-24, I find that any fine amount above the minimum would be beyond Ms. Moore's reach. The court will allow 18 months

for payment of the fine and surcharge. The court will not extend Ms. Moore's waiting period for interlock eligibility, so that the statutory term in para. 259(1.2)(a) shall apply, and the prohibition order will include a notation to that effect under "Remarks".

[4] The remaining two charges will require a more detailed analysis.

[5] This is because counsel are far apart on the outcome for the aggravated assault and breach: the prosecution seeks a prison sentence of 15-24 months, followed by probation; defence counsel proposes a suspended sentence. The parties agree that there should be ancillary DNA-collection and weapon-prohibition orders.

[6] For the reasons that follow, the court suspends the passing of sentence for case 8196759 and case 8196761; Ms. Moore will be placed on a 24-month probation order, which will apply to both charges. There will be the mandatory-minimum surcharges, along with a primary-designated-offence-DNA-collection order, and a 10 year/lifetime s. 109 order applicable to case 8196759 only.

Circumstances of the offences

[7] At the beginning of the sentencing hearing, the prosecution read into the record a statement of facts in accordance with ss. 723-724 of the *Code*. These facts

were admitted as accurate by defence counsel, and were pretty much in line with the summary of evidence in the defence sentencing brief of 27 August 2018.

[8] Ms. Moore is charged with wounding an acquaintance, JCW, by stabbing him with a knife. She had been drinking, and was on an undertaking which prohibited her from consuming alcohol.

[9] On 4 February 2018, Ms. Moore (then 18 years of age), MH and JCW were enjoying each-other's company at an apartment leased by a family member of Ms. Moore's. Their behaviour was described to police by those in attendance as "a group of friends teasing each other."

[10] JCW told police that he and MH had planned on having a few drinks, when Ms. Moore showed up. Ms. Moore had a room of her own at the apartment. Ms. Moore had been drinking and brought more liquor with her.

[11] According to JCW, he began to joke with Ms. Moore about a sexual relationship; he admitted to police he had said something to the effect that Ms. Moore "was the best whore he had had."

[12] Regardless of the specifics of this putative joke, Ms. Moore reacted badly to it. She retrieved a knife from a collection she kept in her room, and returned to JCW.

[13] JCW described to police what happened next:

> She give ‘er into me. I tried to get the knife. I knew it was bad. I saw blood coming out of me.

[14] Someone called the police, who made an immediate patrol to the scene. Officers found JCW with a stab wound to the abdomen; paramedics took him to the local emergency unit where he was sutured up by a physician. A medical examination determined that the blade wielded by Ms. Moore had glanced off a rib and caused a minor, non-life-threatening injury to JCW’s liver. JCW was left with no long-term injuries.

[15] Ms. Moore was found by police after some effort. She was placed under arrest and taken to cells. Officers who dealt with Ms. Moore described noticing a strong odor of alcohol in her cell area.

[16] Ms. Moore admitted to police owning six or seven knives. She acknowledged that she had been drinking with her brother all day, and felt she had developed a habit of drinking too much.

[17] At the time all this happened, Ms. Moore was subject to a form 11.1 undertaking arising from the para. 253(1)(b) charge. This undertaking prohibited Ms. Moore from consuming alcohol.

Circumstances of Ms. Moore

[18] Ms. Moore was 18 years old at the time she attacked JCW. She was awaiting arraignment on her para. 253(1)(b) charge, but had never been convicted of an offence.

[19] Ms. Moore elected trial in this court and pleaded guilty just over a month after she had been arrested.

[20] Ms. Moore has been subject to very stringent release terms since being admitted to bail on 5 February 2018, over nine months ago; she has complied with those terms.

[21] The court has received a Gladue Report prepared by the Mi'kmaw Legal Support Network and a presentence report prepared by the local community-corrections office. Defence counsel tendered as sentencing exhibit 1 a letter from Denise Teed, a clinical social worker who has been counselling Ms. Moore.

[22] In the presentence report, Ms. Moore revealed that she had once had an intimate relationship with the victim; however, it is clear that it had ended well before the date of the offence.

[23] Ms. Moore described struggling with anxiety; thanks to the lead taken by the probation officer, Ms. Moore has been meeting with a mental-health clinician and has participated regularly in a life-skills program.

[24] The Glaude report described Ms. Moore as being of Mi'kmaq ancestry, descended from the Glooscap First Nation. She is a non-status aboriginal person. She has never lived on reserve lands, but stayed with her grandmother there for a few months.

[25] The Glooscap First Nation is a Mi'kmaq community in Kings County, Nova Scotia; the report describes it as committed to the present and future prosperity of its members, and having strong leadership and infrastructure. It provides a wide array of commercial, recreational and social services to its members.

[26] Ms. Moore was born in Maitland, Nova Scotia in 1999. Her parents divorced when she was three years old; after that, she was cared for by her mother, but had regular contact with her father.

[27] Ms. Moore was raised by her mother in the Jehovah's-Witness tradition; as a result, she was not exposed to traditional teaching or culture.

[28] Ms. Moore's maternal grandmother lives in the Glooscap First Nation.

[29] Ms. Moore was home schooled until she was 12 years old. Other than her siblings, she had little contact with other children. Ms. Moore informed the author of the Gladue report that she had "huffed" nail-polish remover to get her mother to place her in school. She began attending public school in grade eight. She found the adjustment difficult because of her social isolation. She experienced bullying and was called an "Indian in the cupboard" by friends.

[30] Ms. Moore witnessed chronic alcohol abuse when she and her siblings visited her father.

[31] Ms. Moore struggles with depression and anxiety. She has attended one-on-one sessions with a clinical social worker, as well as a group life-skills program. The social worker described Ms. Moore as one who "lacks self confidence, and is very remorseful of the incident, this group is helping her"; furthermore, "she is respectful, gentle, kind, and an introvert, but when she says something, she puts thought into it". The statements attributed to the social worker in the Gladue report were confirmed in a letter from the social worker which was tendered by defence counsel as exhibit 1.

[32] Ms. Moore is attending community college in order to obtain certification in the plumbing trade.

Victim impact

[33] JCW declined to submit a formal s. 722 victim-impact statement; however, he was interviewed for Ms. Moore's presentence report. He stated that he is not afraid of Ms. Moore, but does not intend to have contact with her. JCW was of the view that alcohol had affected Ms. Moore's behaviour negatively at the time of the offence; he observed that Ms. Moore tended to drink more than the average person and that she did not make good choices when drunk.

[34] JCW filed with the court a request for restitution in the amount of $295.55. Ms. Moore does not dispute the amount.

Criminal Code provisions applicable to sentencing for aggravated assault

[35] Subsection 268(2) of the *Code* states:

> (2) Every one who commits an aggravated assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

[36] Aggravated assault is a primary-designated-DNA-collection offence under s. 487.04 of the *Code*. A 10-year/lifetime prohibition order is mandatory under para. 109(1)(a) of the *Code*. It is not eligible for a conditional sentence, given paras. 742.1(c) and (e), nor is it eligible for a discharge, given s. 730 of the *Code*. However, it is eligible for a number of purely non-custodial sentences: a fine alone

(s. 734); a suspended sentence (para. 731(1)(a)); a fine and probation (para. 731(1)(b)).

Criminal Code provisions applicable to breach of form 11.1 bail

[37] Subsection 145(5.1) of the *Code* states:

> (5.1) Every person who, without lawful excuse, the proof of which lies on the person, fails to comply with any condition of an undertaking entered into pursuant to subsection 499(2) or 503(2.1)
>
> (a) is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years; . . . .

[38] This count is eligible for the full array of sentencing outcomes under the *Code*, ranging from a discharge (s. 730), suspended sentence (para. 731(1)(a)), stand-alone fine (s. 734), fine with probation (para. 731(1)(b)), prison term of up to two years (ss. 718.3, 787), prison term with probation (para. 731(1)(b)), prison term with fines (s. 734), intermittent sentence with probation (s.732), and conditional sentence (s. 742.1).

[39] Subsection 718.3(4) of the *Code* states:

> (4) The court that sentences an accused shall consider directing
>
> (b) that the terms of imprisonment that it imposes at the same time for more than one offence be served consecutively, including when

. . .

(ii) one of the offences was committed while the accused was on judicial interim release, including pending the determination of an appeal, or

. . . .

General sentencing principles

[40] Part XXIII of the *Code* identifies the fundamental purpose of sentencing in s. 718, and the fundamental principle to be applied in advancing that purpose in s. 718.1.

[41] Section 718 states:

> 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.

[42] Section 718.1 states:

> 718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[43] As the *Code* assigns high priority to proportionality, it is important that the court recognize that sentencing is a highly individualized process: *R. v. M. (C.A.),* [1996] 1 S.C.R. 500 at para. 80; *R. v. Ipeelee* 2012 SCC 13 at para. 38; *R. v. Scott*, 2013 NSCA 28 at para. 7; *R. v. Redden*, 2017 NSSC 172 at para. 28; *R. v. MacBeth*, 2017 NSPC 46 at para. 8. "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": *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 533.

[44] In determining a fit sentence, a sentencing court ought to take into account any relevant aggravating or mitigating circumstances: para. 718.2(a) of the *Code*. The court must consider also objective and subjective factors related to the offender's personal circumstances and the facts pertaining to the particular case: *R. v. Pham* 2013 SCC 15 at para. 8; *R. v. Boutilier*, 2018 NSCA 65 at para. 21; *R. v. Skinner*, 2015 NSPC 28 at para. 33, varied by 2016 NSCA 54.

[45] Assessing a person's moral culpability is an extremely important function in the determination of any sentence. This is because a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. That fundamental principle is set out in s. 718.1 of the *Code*. In *Ipeelee* at paragraph 37, the Supreme Court of Canada noted that proportionality is tied closely to the objective of denunciation. Proportionality promotes justice for victims, and proportionality seeks to ensure public confidence in the justice system; it was characterised in *Ipeelee* as a *sine qua non* of a just sanction.

[46] In *R. v. Lacasse* 2015 SCC 64 at para. 12, the Supreme Court of Canada confirmed that proportionality is a primary principle in considering the fitness of a sentence. The severity of a sentence depends upon the seriousness of the consequences of a crime and the moral blameworthiness of the individual offender. A consequential analysis requires the court to consider the harm caused by criminalised conduct. *Lacasse* recognized that determining proportionality is a delicate exercise, because both overly lenient and overly harsh sentences imposed upon an offender might have the effect of undermining public confidence in the administration of justice.

[47] Proportionality and retribution are linked very closely. As the Supreme Court of Canada stated in *R. v. C.A.M.*, [1996] 1 S.C.R. 500 at para. 80:

> [T]he meaning of retribution is deserving of some clarification. The legitimacy of retribution as a principle of sentencing has often been questioned as a result of its unfortunate association with "vengeance" in common parlance. See, *e.g., R. v. Hinch and Salanski, supra,* at pp. 43-44; *R. v. Calder* (1956), 114 C.C.C. 155 (Man. C.A.), at p. 161. But it should be clear from my foregoing discussion that retribution bears little relation to vengeance, and I attribute much of the criticism of retribution as a principle to this confusion. As both academic and judicial commentators have noted, vengeance has no role to play in a civilized system of sentencing. See Ruby, *Sentencing*, *supra*, at p. 13. Vengeance, as I understand it, represents an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person. Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more. As R. Cross has noted in *The English Sentencing System* (2nd ed. 1975), at p. 121: "The retributivist insists that the punishment must not be disproportionate to the offender's deserts."

See also *R. v. E.M.W.*, 2011 NSCA 87 at paras. 18-19.

[48] Pursuant to para. 718.2(b) of the *Code,* this court is governed by the principle that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. This is the principle of sentencing parity. In *R. v. Christie*, 2004 ABCA 287 at para. 43, the reviewing court held that:

> [w]hat we must strive for is an approach to sentencing whereby sentences for similar offences committed by similar offenders in similar circumstances are understandable when viewed together . . . .

[49] This is the penalty analog of the principle of legality: not only must members of the public know what type of conduct is criminalised—see, *e.g., R. v.*

Lohnes [1992] 1 S.C.R. 167 at para. 27—they must know also the penalties that might be imposed for engaging in that conduct. The theory is that knowledge of both the risk of liability and the extent of liability will help those contemplating illegal conduct to make informed choices. See Clayton C. Ruby, Gerald J. Chan & Nader R. Hasan, *Sentencing*, 9th ed (Markham: LexisNexis, 2017) at para. 1.25.

[50] The court must apply the principle that an offender not be deprived of liberty if less restrictive sanctions might be appropriate in the circumstances. Furthermore, the court must consider all available sanctions other than imprisonment that are reasonable in the circumstance. These restraint criteria are found in paras. 718.2 (d) and (e) of the *Code*.

[51] In *R. v. Gladue*, [1999] S.C.J. 19 at paras. 31 to 33, and 36, the Supreme Court of Canada stated that the statutory requirement that sentencing courts consider all available sanctions other than imprisonment was more than merely a codification of existing law. Rather, the provision was to be seen as a remedy whereby imprisonment was to be a sanction of last resort.

[52] The application of restraint criteria does not oust consideration of the other principles of sentencing in ss. 718-718.2; there is no such thing as a restraint-at-all-costs principle: *R v. Proulx*, 2000 SCC 5 at para. 96. All principles and objectives

of sentencing must be considered in arriving at a fit sentence: *R. v Howell*, 2013 NSCA 67 at para. 16.

[53] While principles of denunciation and deterrence must be considered in all sentencing hearings, there is a granularity to those criteria. Consequently, in applying the principle of deterrence, a sentencing court must bear in mind that all-important criterion of proportionality; the sentencing judge in *R. v. Matheson*, 2007 NSPC 43 discussed the tension between deterrence and individualization:

> 26 The Crown's submission that the right message needs to be sent by the sentence in this case essentially encapsulates what is intended by the concept of general deterrence. General deterrence supposes that others, with similar inclinations to the offender will be deterred, once they learn about the sentence, from committing a comparable offence. A sentence emphasizing general deterrence is intended to "deter those of like-mind who may be lured into the [drug] business with the hope of easy gain." (*R. v. Butler*, [1987] N.S.J. No. 237 (N.S.S.C., App. Div.).) The purpose of general deterrence is to "discourage potential offenders from becoming actual offenders." It has been referred to as the "punishment of the offender for what others might do." (*R. v. McGinn* (1989), 49 C.C.C. (3d) 137 (Sask. C.A.).) Judges, such as Vancise J.A. in dissent in *McGinn*, have expressed serious reservations about the effectiveness of general deterrence. Vancise J.A. did so with the following comments at page 157:
>
> Contending that longer sentences, for example, six months, would have a greater deterrent effect than a shorter sentence, for example one month, is to contend that: (1) the public will know of the sentence (a dubious proposition); (2) the potential offender will perceive the likelihood of apprehension (a more dubious proposition); and (3) the potential offender knowing he will likely be apprehended would commit the offence for the lower penalty of one month but not for the higher penalty of six months. Viewed in this way it is small wonder that an upward variation in sentences appears to have no effect on the crime rate.
>
> 27 The degree of publicity a case receives has also been remarked upon as relevant to the deterrent value of the sentence. Nunn J. in *R. v. Clarke*, [1990] N.S.J. No. 427 (N.S.S.C.), observed about Mr. Clarke's case: "If it receives no publicity then there is no general deterrence, other than the several people who may be in court at the time the sentence is given."

[54] To be sure, in light of the clear language of para. 718(b) of the *Code*, the court is obligated statutorily to consider the principle of deterrence in fixing every sentence: see *R. v. Tran*, 2010 ABCA at paras. 8-15. However, it is clear equally from the language of the preamble of the section—which requires a sentencing court to impose just sanctions that "have one or more of the following objectives"—that there might be times when deterrence might need to be softened a bit. I think that this is one of those cases. Recall that general deterrence is intended to dissuade those of inclination similar to the person being sentenced from committing similar offences. In this case, Ms. Moore's inclination was brought on to a large measure by her excessive consumption of alcohol. It is questionable whether someone similarly inclined—and impaired— as Ms. Moore was, would be deterred very much, on the spur of a drunken moment, by a punishment that might come to the attention of only a very few.

[55] The abuse of alcohol as a contributing factor in the commission of an offence does not excuse the offence, and does not mitigate necessarily its seriousness or the culpability of the person who committed it. When substance misuse leads to dangerous behaviour, courts may treat it as an aggravating factor, especially when an offender decides to oppose indicated counselling: *R. v. Head*,

[1970] S.J. No. 266 (CA); *R. v. Letourneau*, 1991 ABCA 309 at para. 6; R. v. *Pitkeathly* (1994), 69 O.A.C. 352 at para. 13.

[56] However, that is not the case the court is dealing with now. Ms. Moore is remorseful, she has accepted responsibility for her actions, and, far from being refractory about counselling, she embraces it.

[57] Ms. Moore has no criminal record. In *R. v. Stein*, [1974] O.J. No. 93 at para. 4 (CA), the Court stated in an appeal from sentence in a property-offence case:

> In our view before imposing a custodial sentence upon a first offender the sentencing Court should explore the other dispositions which are open to him and only impose a custodial sentence where the circumstances are such, or the offence is of such gravity that no other sentence is appropriate.

See also: *R. v. Masters*, 2017 NSPC 75 at para. 61.

[58] Sometimes, a violent offence will be serious enough to warrant a prison term for a first offence, as violent offences generally call for terms of imprisonment: *R. v. Perlin*, [1977] N.S.J. No. 548 at para. 8 (CA), *R. v. G.A.M.*, [1996] N.S.J. No. 52 at para. 32 (CA), *R. v. Hawkins*, 2009 NSSC 410 at para. 9, varied on other grounds, 2011 NSCA 7, leave to appeal refused [2011] S.C.C.A. No. 102, and *R. v. MacNeil*, 2009 NSSC 310 at para. 31. One case of first-offence imprisonment was *R. v. Cormier*, [1994] N.S.J. No. 150 (CA) a sentence appeal involving a targeted,

calculated gang attack upon a bystander; however, this is most certainly not one of those cases.

[59] Ms. Moore has been subject to stringent terms of bail for almost a year: included in her recognizance is a house-arrest condition. This may be treated as a mitigating factor: *R. v. L.P.*, [2003] O.J. No. 251 at para. 26 (CA), and *R. v. Spencer*, [2004] O.J. No. 3262 at para. 43 (CA).

Ms. Moore's aboriginal status

[60] An issue was raised by the prosecution at the sentencing hearing whether Ms. Moore is an Aboriginal person. The prosecution asserts that Ms. Moore is "four generations removed from the reserve." My analysis of this issue should not be taken as a dismissal of the position taken by the prosecution, or a belittling of it. The role of public counsel in litigation with Aboriginal parties was examined very insightfully in a journal article from two years ago: Kerry Wilkins, "Reasoning with the Elephant: The Crown, Its Counsel and Aboriginal Law in Canada" (2016) 13:1 *Indigenous LJ* 27 at para. 39 *et seq*. In any event, I am the last one to criticise anyone on this point, as I know some of my own decisions in this area of the law have been wrong.

[61] The context of this issue is the application of para. 718.2(e) of the *Code*, which states:

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

[62] This provision was added to the *Code* in S.C. 1995, c. 22, s. 6, in force 3 September 1996 by SI/96-79. I mentioned earlier the element of retribution in sentencing. This amendment to the *Code* was intended to adjust the traditionally dominant legal culture of punishment and retribution, and integrate elements of restorative justice in the sentencing process: *Gladue* at paras. 70-74 and *passim*; and see Kent Roach & Jonathan Rudin, "Gladue: The judicial and political reception of a promising decision", (2000) Can J Criminology 355-388. Restorative justice seeks to bring together the community and the person to be sentenced; this helps both to understand better the harm that has been done and the ways that the sentenced person can be reintegrated into community life. If\t has a strong connection to the culture of Aboriginal justice.

[63] Ms. Moore is an Aboriginal person.

[64] She is described in the Gladue report as a female of Mi'kmaq ancestry and a non-status aboriginal person. Her maternal grandmother lives in the Glooscap First Nation.

[65] Non-status Aboriginal persons are Aboriginal persons: *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para. 19. In *R. v. Powley*, 2003 SCC 43 at para. 24, the Court stated that Aboriginal rights are communal rights: They must be grounded in the existence of a historic and present community, and they may be exercised only in virtue of an individual's ancestrally based membership in the present community.

[66] In this case, Ms. Moore self-identifies being a member of a First Nation; she aspires to developing a personal and cultural connection with her community. She has an identifiable ancestral connection to her community. Her status is recognized by the Mi'kmaw. She has lived most of her life in Mi'kma'ki.

[67] Whether one is an Aboriginal person is not based on blood-purity or resort to a Warren-inspired DNA identification test kit: Kim Tallbear, *Native American DNA: Tribal Belonging and the False Promise of Genetic Science* (Minneapolis: University of Minnesota Press, 2013) Chapter 1, and see especially the heading: "Our Ancestors Didn't Know About Genes and Why That Matters." As in *Powley*,

it is based on an autonomous decision of the person to self-identify as Aboriginal; it is based on the exercise of sovereignty of the First Nation to accept the person as a member; and it is confirmed by the person having an identifiable ancestral connection to the community. All of this is evident in Ms. Moore's biography. She does not have to claim it: a person's identity is not based on a forensic claim.

[68] One of the systemic effects of formal and informal policies and practices of discrimination against First Nations is the overrepresentation of First-Nations' members in Canada's prison population, as described in *R. v. Gladue*, [1999] S.C.J. No. 19 at paras. 58-65, 87 and 93. Over a decade later, the Court observed in *R. v. Ipeelee* that the problem had become worse: 2012 SCC 13 at paras. 57-59, 62, 65, 69, 70, and 75. Recently released statistics on adult corrections show further deterioration: Canada, Statistics Canada, *Adult and youth correctional statistics in Canada*, 2016/2017, by Jamil Malakieh, Catalogue No 85-002-X (Ottawa: Statistics Canada, 19 June 2018). These are the key points:

- In 2016/2017, Aboriginal adults accounted for 28% of admissions to provincial/territorial correctional services and 27% for federal correctional services, while representing 4.1% of the Canadian adult population, based on population counts from 1 July 2017. In comparison to 2006/2007, the proportion of admissions of Aboriginal peoples to correctional services was 21% (not

including PEI or NWT) for provincial and territorial correctional services and 19% for federal correctional services.

- Aboriginal adults accounted for 30% of admissions to custody and 25% of admissions to community supervision among the provinces and territories in 2016/2017. Aboriginal adults accounted for 27% of admissions to custody and 26% of admissions to community supervision in federal correctional services.

- The proportion of Aboriginal admissions to adult custody has been trending upwards for over 10 years. It has increased steadily from 2006/2007 when it was 21% for provincial and territorial correctional services and 20% for federal correctional services.

- Aboriginal males accounted for 28% of admissions to custody in the province and territories, whereas non-Aboriginal males accounted for 72%, in 2016/2017.

- Of particular significance in this case, Aboriginal females made up a greater proportion of custody admissions than their male counterparts, accounting for 43% of admissions, while non-Aboriginal females accounted for 57%.

[69] Compare these data to 2014/2015: Canada, Statistics Canada, *Adult and youth correctional statistics in Canada, 2014/2015*, by Julie Reitano, Catalogue No

85-002X (Ottawa, Statistics Canada, 22 March 2016). For a full discussion of earlier but similar data, see Gillian Balfour, "Sentencing Aboriginal Women to Prison", in Jennifer M. Kilty, ed., *Within the Confines: Women and the Law in Canada* (Toronto: Women's Press, 2014) at 95-116.

[70] This comparison leads me to the conclusion that First-Nations' females seem to be the fastest-growing demographic profile in Canada's prison population. What effect does this have, on those Aboriginal women who are imprisoned, on their children and families, on their communities, and on the policy priority of ending the overincarceration of Aboriginal peoples?

[71] I take most seriously the binding authority of the Court of Appeal that a judge not rely on social studies or literature or scientific reports unless they have been accepted after having been properly introduced and tested by the parties: *R. v. C.N.T. [B.M.S.]*, 2016 NSCA 35 at para. 17, var'g 2015 NSPC 43.

[72] However, there is a key distinction to be made in this proceeding.

[73] In considering statistical factors regarding rates of incarceration of members of First Nations, the court is not taking improper notice of facts not before it. Rather, the court is doing what it is obligated to do in virtue of law and principle. As the Court in *Ipeelee* directed at para. 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*. (emphasis added)

[74] Furthermore, raw statistical data are quite different to the sorts of inferential and deductive material I relied on erroneously in *C.N.T. [B.M.S.]:* statistical summaries profiling prisoners in prisons or penitentiaries are nothing more than aggregates of biographical and forensic data; there is no complex hypothesis to be proven or refuted, and there is no requirement for deductive or inferential logic to be employed in reaching a conclusion. Finally, statistics deal with the numerical, not the normative. Statistics are merely a tally sheet.

[75] Significantly, *Juristat*--which is my source of information in this case--has been cited on a number of occasions in the Supreme Court of Canada. One case of particular note is *R. v. Summers*, 2014 SCC 26 at para. 67, in which the Court relied upon a *Juristat* report dealing with the changing profile of adults in custody. What is conspicuous about *Summers* is that an examination of the record reveals that *Juristat* was not cited in the court of originating jurisdiction: see [2011] O.J. No. 6377 (S.C.J.); nor was it cited in the appeal to the Court of Appeal: see 2013 ONCA 147. In the appeal to the Supreme Court of Canada, *Juristat* was pleaded

by neither the appellant nor the respondent; rather, it was the subject of a brief reference in a factum of an intervener: Factum of the Intervener The John Howard Society of Canada para. 8, *Summers* (retrieved from Supreme Court of Canada http://www.scc-csc.ca/WebDocuments-DocumentsWeb/35339/FM070_Intervener_John-Howard-Society-of-Canad a.pdf). And so, it would seem that official, inherently reliable statistics are able to get before courts in non-traditional ways when the interests of justice might require it. Novel approaches to judicial notice in the information age have been explored by a number of academics and jurists: see, *e.g., Rowe v. Gibson*, 798 F. 3d 622 (7th Cir. 2015); M. Cristina Martin, "Googling Your Way to Justice: How Judge Posner was (Almost) Correct in His Use of Internet Research in *Rowe v. Gibson*" (2015) 11 Seventh Cir. Rev. 1; and Jeffrey Bellin & Andrew Guthrie Ferguson, "Trial by Google: Judicial Notice in the Information Age" (2015) 108 Northwestern Law Rev.1137.

[76] Finally, I would observe that there is really no alternative to the court fulfilling its judicial-notice obligation as outlined in *Gladue* and *Ipeelee*, other than conducting its own research, when the information which must be noticed is not tendered in evidence. Indeed, inherent in the principle of judicial notice is the acceptance by the court of some material fact without there having been offered or

tendered a formal proof by the parties: Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *The Law of Evidence in Canada,* 5th ed (Markham: Lexis Nexis, 2018) at para. 19.16.

[77] To sum up, if a sentencing court were to confine its notice in a case involving First-Nations' justice to only those facts actually put before it by counsel in accordance with ss. 723 and 724 of the *Code*, it would fail in its legal duty to take into account systemic factors that have a bearing on a First-Nations' person coming into conflict with the law, and would fail in its duty to consider the overrepresentation of Aboriginal persons in Canada's prison population. There is nothing in this proposition contrary to what the Court of Appeal stated in *C.N.T.*, a case which did not involve the sentencing of an Aboriginal person, and so did not put into effect the mandatory-judicial-notice provisions of *Ipeelee* and *Gladue*.

[78] It is clear that the phenomenon of overincarceration of Aboriginal persons exists, even absent a causal link between a person's Aboriginal status and that person's harmful conduct. This is part of the reason why strict proof of a causal link is not required: *Ipeelee* at paras. 81-83.

[79] Although *Ipeelee* and *Gladue* have been analysed in many subsequent decisions—see, e.g., *R. v. Okimaw*, 2016 ABCA 246, *R. v. F.L.*, 2018 ONCA 83,

R. v. J.S., 2018 NLPC 1317A00339, *R. v. Denny*, 2016 NSSC 76—they stand on their own as the best guides.

[80] *Ipeelee* at para. 72:

> [F]ocus on those unique circumstances of an Aboriginal offender which could reasonably and justifiably impact on the sentence imposed. Gladue directs sentencing judges to consider: (1) the unique systemic and background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (2) 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. Both sets of circumstances bear on the ultimate question of what is a fit and proper sentence.

[81] *Gladue* at para. 69:

> While background and systemic factors will also be of importance for a judge in sentencing a non-aboriginal offender, the judge who is called upon to sentence an aboriginal offender must give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts. In cases where such factors have played a significant role, it is incumbent upon the sentencing judge to consider these factors in evaluating whether imprisonment would actually serve to deter, or to denounce crime in a sense that would be meaningful to the community of which the offender is a member. In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means.

[82] Based on the body of evidence before the court, there is ample proof of Ms. Moore having been affected profoundly by her experience as an Aboriginal person; this, in turn, influenced her actions on 4 February 2018.

[83] Ms. Moore was, by parental choice, separated from her community. That this should have been so is not surprising. Separating Aboriginal children from

their culture and their ancestors was a national policy of Canada, assisted by agencies of the state: Canada, Truth and Reconciliation Commission of Canada, *Final Repor*t (Toronto: James Lorimer & Company, 2015) 325 *et seq*. This policy might have ended, notionally; and, yes, more recently, Canada removed its objector status to the *UN Declaration on the Rights of Indigenous Peoples*: G.A. Res. 61/295 (Sept. 13, 2007), objector status rescinded A/RES/61/295; and see (2017) 51 ABA/SIL YIR 595-598. But it will take more than governments and civil authorities saying "we're going to stop doing this now and really live up to our duties" for the multigenerational impacts of systemic discrimination and cultural, economic, social and communal elimination to end.

[84] Ms. Moore's biography is the very outcome which that disgraced policy sought to achieve: non-autonomous assimilation into the dominant culture, accompanied by social isolation, all of which resulted in overwhelming challenges in developing a healthy way of life.

And so Ms. Moore coped poorly with stress and misused alcohol as a sedative analgesic. She reacted badly in cases of interpersonal conflict. This manifested itself extremely on 4 February 2018; however, it was an isolated event.

Seriousness of the offence and the moral culpability of Ms. Moore

[85] Ms. Moore stabbed JCW as a result of what she considered to be an offensive and insulting comment he had made to her. The injury was not life threatening.

[86] The prosecution characterised aggravated assault as being one step down from manslaughter. In my view, that description is a disproportionate abstraction. Abstraction allows an analyst to connect two or more circumstances with common factors. A wrong level of abstraction or analogy can lead to the development of unjust principles.

[87] Aggravated assault might be characterised as one step down from manslaughter only if one compares penal outcomes or statutory-offence hierarchies: aggravated assault carries a maximum penalty of fourteen-years' imprisonment; manslaughter, up to life. Aggravated assault is regarded typically as being one step down from aggravated assault in the hierarchy of offences against the person, as there are no intermediate offences under the *Code* when one analyses the ordinal of offences against the person in Part VIII.

[88] However, when one analyses the elements of these two offences, there is a vast gulf. Manslaughter consists in a non-murderous wrongful act or criminally negligent act that causes the death of a human being; aggravated assault, as alleged in this case, consists in a wounding with a corresponding, lower-grade intent. A wounding may be a mere breaking of the skin: *R. v. Roach*, 2010 NSSC 342 at para. 74. And so of that one step between manslaughter and aggravated assault—it is a doozy.

[89] The prosecution does not allege that Ms. Moore endangered the life of JCW; to the contrary, the court was informed that his injuries were not life threatening, and his recovery was uncomplicated.

[90] Yes, Ms. Moore used a knife, and the use of a weapon in the commission of an act of violence will render the act more serious; however, courts have recognized that some weapons will be more dangerous than others: see *R. v. Pigeon*, [1969] Q.J. No. 19 at para. 4 (CA). The court was not provided with a detailed description of the knife wielded by Ms. Moore; there is no evidence that it was a switchblade or a butterfly knife or any of those well known bladed instruments designed for violence.

[91] Ms. Moore was alcohol impaired. She was provoked verbally. It led her to uncharacteristic violence.

[92] The court must be cautious in assessing offence seriousness in this case, for reasons underscored in *Ipeelee* at para. 86:

> 86 In addition to being contrary to this Court's direction in *Gladue*, a sentencing judge's failure to apply s. 718.2(e) in the context of serious offences raises several questions. First, what offences are to be considered "serious" for this purpose? As Ms. Pelletier points out: "Statutorily speaking, there is no such thing as a 'serious' offence. The *Code* does not make a distinction between serious and non-serious crimes. There is also no legal test for determining what should be considered 'serious'" (R. Pelletier, "The Nullification of Section 718.2(e): Aggravating Aboriginal Over-representation in Canadian Prisons" (2001), 39 Osgoode Hall L.J. 469, at p. 479). Trying to carve out an exception from *Gladue* for serious offences would inevitably lead to inconsistency in the jurisprudence due to "the relative ease with which a sentencing judge could deem any number of offences to be 'serious'" (Pelletier, at p. 479). It would also deprive s. 718.2(e) of much of its remedial power, given its focus on reducing overreliance on incarceration. A second question arises: Who are courts sentencing if not the offender standing in front of them? If the offender is Aboriginal, then courts must consider all of the circumstances of that offender, including the unique circumstances described in *Gladue*. There is no sense comparing the sentence that a particular Aboriginal offender would receive to the sentence that some hypothetical non-Aboriginal offender would receive, because there is only one offender standing before the court.

[93] I would situate this offence toward the lower end of the spectrum of offence seriousness and moral culpability.

[94] The breach charge in this case involved violation of a police-imposed undertaking not to drink. Additionally, Ms. Moore was under the legal drinking age. Someone with a substance-use problem used a substance she was not

supposed to use. I discussed the problematic nature of these sorts of conditions in *R. v. Denny*, 2015 NSPC 49 at para. 14. I regard the breach as a lower-level one.

Sentence parity

[95] I have considered the following cases in determining a range of penalty:

- *R. v. Willis*, 2013 NSCA 78: 4-year sentence for aggravated assault varied to three years; life-threatening injuries; retaliatory violence; appellant had a criminal record with two convictions for violence;
- *R. v. Slaunwhite*, 2014 NSSC 41: home-invasion-drug-robbery aggravated assault with masks and knives; victim suffered serious, life-threatening stab wound; elevated victim impact; 18-year-old offender; 4-year joint submission accepted;
- *R. v. MacDonald* (12 June 2003), Case 1263407 (SC): charge of assault causing bodily harm; victim made sexualized comments to offender, who responded with uncharacteristic violence; victim suffered life-threatening injuries, required artificial ventilation, gastric intubation and reconstructive surgery; suspended sentence with a two-year term of probation imposed following a contested sentencing hearing;

- *R. v. Pottie,* 2013 NSCA 68: charge of para. 267(b); serious assault upon a co-worker which resulted in victim suffering a swollen eye, sore chest, and three separate fractures of facial bones; 16-month suspended sentence affirmed on appeal;

- *R. v. Chickness*, 2011 NSSC 225: illegal 21-month conditional sentence for summary-offence para. 267(b) reduced on appeal to a 7-month conditional-sentence term. Offender assaulted the victim with a hunting knife in the victim's home; victim required 100 stitches.

[96] I recognize that *MacDonald*, *Pottie* and *Chickness* dealt with charges of assault causing bodily harm, a hybrid offence that attracts a maximum sentence of 18 months when prosecuted summarily, ten years when by indictment—lesser than the maximum of fourteen years for an aggravated-assault conviction. However, it is evident from the record in each of those cases that any one of them could have been tried as an aggravated assault; furthermore, each involved criminal conduct factually more serious than Ms. Moore's. In my view, the choice of charge made by the prosecution is merely one factor for the court to consider in assessing the circumstances of an offence. The choice of charge will affect the statutory range of penalty; however, the charge itself cannot be treated as an aggravating

circumstance; if it were, it would be aggravating in all cases: *R. v. Johnston*, 2011 NLCA 56 at paras 18-20.

[97] More weighty in assessing the seriousness of the offence and the culpability of the person to be sentenced will be that person's conduct and the harm caused by it. I have addressed those factors already.

[98] I would situate the range of penalty for the s. 268 count (as the boundaries of "range" were discussed in cases such as *R. v. Nasogaluak*, 2010 SCC 6 at para. 43; *R. v. S.D.L.*, 2017 NSCA 58 at paras. 14-16; *R. v. Oickle*, 2015 NSCA 87 at para. 40; *R. v. Phinn*, 2015 NSCA 27 at para. 67; *R. v. A.N.*, 2011 NSCA 21 at para 34; and *R. v. Naugle*, 2011 NSCA at paras. 40-43) as between a low-to-mid-range penitentiary term at the high end, to a lengthy community-based sentence with stringent terms as the lower end.

[99] Breach charges involving alcohol restrictions that come into this judicial centre result typically in the court imposing period of probation or small fines.

[100] Sentences served in the community are not cakewalks. I found *R. v. Barrons* 2017 NSSC 216 very influential on that point. *Barrons* was an original sentencing hearing in the Supreme Court of Nova Scotia; the facts of the case described a home-invasion break and enter which included intimate-partner assault. Home-

invasion break-ins with significant violence usually carry significant penitentiary terms—eight to ten years would not be uncommon: *R. v. Harris*, 2000 NSCA 7 at paras. 57-62. In imposing a three-year suspended sentence, the presiding judge in *Barrons* affirmed, at paras. 39-46, that suspended sentences may have a significantly deterrent effect; there is appellate level support for this: *see R. v. T.S.*, [1996] N.S.J. No. 242 (C.A.) at para. 28, *R. v. Bursey* (1991), 104 N.S.R. (2d) 94 at 97 (C.A.). This proposition has regained currency since the decision in *R. v. Rushton*, 2017 NSPC 2 at para. 95.

[101] To be doubly clear, a suspended sentence is not a get-out-of-jail-free card: a probationer who reoffends is subject to being re-sentenced pursuant to sub-s. 732.2(5) of the *Code*.

[102] When a court proceeds to make a judgment in the penalty phase, it will consider many questions. How will the sentence advance statutory and common-law purposes and principles? But also this: What could be the off-target effects? How will imprisoning a normally non-violent person promote that person's rehabilitation and reintegration into society? Will institutional life normalise and instill pro-social skills—or not? What effect will imprisonment have on the person's education, housing security or prospects for employment? Will the interruption of community-based counselling help or hinder the person's recovery

from mental illness or substance use? Will separating the person from her community advance or hinder the long-term good of cultural reconnection?

[103] In reflecting on these questions, I observe that a penalty at the lower end of the identified spectrum in this case is not a "discounted" sentence, as that term was discussed in *Ipeelee* at paras. 64, 70, and 75; rather, it seeks to comply with the statutory mandate in para. 718.2(e) of the *Code*, and is in line with similar sentencing cases in Nova Scotia.

Decision of the court

[104] I suspend the passing of sentence in relation to cases 8196759 and 8196761. I impose the mandatory-minimum $200 victim-surcharge amount for each count and allow 18 months for payment. I impose a primary-designated-offence DNA collection order in relation to case 8196759, and a 10-year/life s. 109 prohibition in relation to that case, as well. The court orders that the knife be forfeited, pursuant to s. 491 of the *Code*.

[105] I place Ms. Moore on probation for two years, beginning immediately.

[106] In addition to the statutory conditions, the order will include a condition that Ms. Moore pay restitution in favour of JCW in the amount of $295.55 within nine

months; there will be conditions for counselling in relation to substance use, anger management and mental health; a condition to have no contact with JCW; abstention conditions, and analysis conditions as per paras. 732.1(3)(c.1) and (c.2) of the *Code*; as well as the usual conditions regarding counselling participation and release of information. Ms. Moore is not to possess bladed instruments outside her residence, unless for educational or employment purposes. The probation conditions will be set out in the checklist.

[107] I am indebted to counsel for their very fulsome submissions made in this case.

[108] Ms. Moore, I wish you success as you pursue a career and a trade that are well within your reach; you will have the support of your counsellors, your friends and your community.

JPC