

In the Court of Appeal for the Northwest Territories

Citation: *R v Durocher*, 2023 NWTCA 4

Date: 2023 06 02

Docket: A1-AP-2016-000005

Registry: Yellowknife, N.W.T.

Between:

His Majesty the King

Respondent

- and -

Cody Durocher

Appellant

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that could identify the complainant must not be published, broadcast, or transmitted in any way.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

The Court:

**The Honourable Justice Frans Slatter
The Honourable Justice J.D. Bruce McDonald
The Honourable Justice Kevin Feehan**

Memorandum of Judgment

Appeal from the Sentence by
The Honourable Chief Justice L.A. Charbonneau
Dated the 3rd day of September, 2019
(Docket: S-1-CR-2014-000062)

Memorandum of Judgment

The Court:

I. Overview

[1] Cody Durocher appeals an order of a sentencing judge designating him a dangerous offender and imposing a sentence of 14 years' custody followed by 10 years' long-term supervision. The predicate offence was a sexual assault on January 11, 2014, contrary to s 271 of the *Criminal Code*, RSC 1985, c C-46. He was also convicted of sexual interference for the same event, contrary to s 151 of the *Criminal Code*, for which he received four years' concurrent incarceration.

[2] The reasons for the decision below were comprised of a Ruling on Similar Fact Application, March 4, 2016, 2016 NWTSC 16; Ruling Regarding the Consequences of Premature End to Cross-Examination, March 4, 2016, 2016 NWTSC 17; Ruling as to Factual Basis for Sentencing, August 30, 2016, 2016 NWTSC 49; Oral Reasons for Decision, September 3, 2019, S-1-CR-2014-000062; and Ruling on Dangerous Offender Application, October 1, 2019, 2019 NWTSC 37. Mr Durocher's conviction appeal was dismissed by this Court on May 10, 2022: 2022 NWTCA 1.

[3] Between 2010 and 2014, Mr. Durocher committed four major sexual assaults. Two of the complainants were children, including the complainant in the predicate offence, and two were adult women. Three sexual assaults involved violent forced sexual intercourse.

[4] Mr Durocher also brings a new evidence application with respect to his completion of an in-custody Indigenous Integrated Correctional Program Model – High Intensity course.

[5] For the reasons below the new evidence application is dismissed, and the appeal is allowed in part.

II. Facts

[6] On January 11, 2014, the complainant was 13 and Mr Durocher was 28 years old. On that evening, the complainant had been at a friend's house in Hay River consuming alcohol and marijuana. She telephoned the number of a man she knew who lived in an apartment building in Hay River and Mr Durocher answered the telephone. He invited her to come over and offered to pay her cab fare. She accepted the invitation and when she arrived at the apartment building, Mr Durocher was waiting for her in the lobby. He paid for the cab and they went inside the apartment. Mr Durocher provided her with vodka and she became more intoxicated.

[7] As they were sitting on the couch, Mr Durocher kissed her on the lips and called her "baby". She told him not to touch her, but he persisted kissing her on the lips. Mr Durocher

then pulled down his pants and the complainant's pants and underwear. She told him to stop and punched him. She tried to leave but as she left the room, he slammed the door on her thumb. There is a contest as to whether he then placed her back on the couch and had anal intercourse with her. The Crown argues the jury's finding of sexual assault involved forced anal intercourse, which was the complainant's trial evidence. Mr Durocher argues the jury's finding was only based on his pulling down the complainant's pants, but not sexual intercourse.

[8] As the complainant left the apartment, she was seen on video to be highly intoxicated and could not walk straight. She returned to her friend's place where she lay down on the bed and passed out.

[9] The complainant was on court-ordered curfew at the time. Police officers conducted a curfew check that night and located her at the friend's house, arresting her for breach of curfew. They found her to be very intoxicated, extremely upset, and sobbing. She disclosed to the police that Mr Durocher had sexually assaulted her.

III. Decision of the Sentencing Judge

[10] The defence conceded the Crown had established that a sexual assault had been committed against the complainant, it was a serious personal injury offence, it was part of a broader pattern of violence and sexual offences, and there was a likelihood of harmful recidivism. The sole defence offered by Mr Durocher was that the Crown had not proven his conduct was intractable, behaviour that he is incapable of overcoming. This turned on his treatability and the challenges he may expect to face. He submitted that he should be designated a long-term offender and sentenced to a determinate sentence of imprisonment followed by a long-term supervision order. The Crown sought a dangerous offender designation with an indeterminate sentence.

[11] The sentencing judge held Mr Durocher should be designated a dangerous offender. She said "Mr. Durocher could not have come any closer to being sentenced today to an indeterminate term of imprisonment", but decided to impose a determinate sentence of 14 years' incarceration, followed by a 10-year long-term supervision order. She also sentenced him to a four-year concurrent sentence on the sexual interference charge.

IV. Grounds of Appeal

[12] Mr Durocher says the sentencing judge erred in:

- a) her application of the test from *R v Ferguson*, 2008 SCC 6, [2008] 1 SCR 96, in determining the facts upon which the jury reached its verdict;
- b) finding that Mr Durocher's behaviour was intractable, an unreasonable conclusion given the denial of the opportunity to attend treatment prior to sentencing;

- c) finding that s 11(i), *Canadian Charter of Rights and Freedoms*, Part 1, *Constitution Act, 1982*, Schedule B to *Canada Act 1982 (UK) 1982*, c 11, permitted a maximum determinate sentence of 14 years; and
- d) failing to apply restraint, properly consider rehabilitation, and consider other sentencing factors pursuant s 718.2, *Criminal Code*, and the factors set out in *R v Gladue*, [1999] 1 SCR 688, 133 CCC (3d) 385.

V. Standard of Review

[13] The standard of review on questions of law is correctness, on questions of fact is palpable and overriding error, and on questions of mixed law and fact is palpable and overriding error unless there is an extricable error of law: *Housen v Nikolaisen*, 2002 SCC 33, paras 7-37, [2002] 2 SCR 235. Application of the *Ferguson* factors is a question of mixed fact and law reviewable on a deferential standard. Application of s 11(i) of the *Charter* is a question of law reviewable on the standard of correctness: *Housen*, paras 8, 36-37.

[14] A dangerous offender has the right to appeal the designation and sentence “on any ground of law or fact or mixed law and fact”: s 759(1), *Criminal Code*. On a dangerous offender appeal, the appellate standard of review applies; questions of law are reviewed on a correctness standard, and questions of fact or mixed fact and law are reviewed on a reasonableness standard, although appellate review may be “somewhat more robust”: *R v Sipos*, 2014 SCC 47, para 26, [2014] 2 SCR 423; *R v Boutilier*, 2017 SCC 64, para 81, [2017] 2 SCR 936.

[15] An adjournment application to allow completion of a high intensity correctional program is a trial management issue, to be examined in the context of the trial as a whole and reviewable on a deferential standard. Absent error in principle or unreasonable exercise, such a discretionary decision deserves deference: *R v Lacasse*, 2015 SCC 64, para 44, [2015] 3 SCR 1089; *R v Samaniego*, 2022 SCC 9, para 26, 412 CCC (3d) 7.

[16] Application of the principles set out in *Gladue* is reviewable on the standard of correctness: *R v Ipeelee*, 2012 SCC 13, para 87, [2012] 1 SCR 433.

VI. *Criminal Code* provisions on dangerous offenders

[17] The relevant provisions of the *Criminal Code* as to dangerous offender designation and penalty are:

752. . . *serious personal injury offence* means

. . .

- (b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault) . . .

753 (1) On application made under this Part after an assessment report is filed under subsection 752.1(2), the court shall find the offender to be a dangerous offender if it is satisfied

...

(b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 752 and the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses.

(1.1) If the court is satisfied that the offence for which the offender is convicted is a primary designated offence for which it would be appropriate to impose a sentence of imprisonment of two years or more and that the offender was convicted previously at least twice of a primary designated offence and was sentenced to at least two years of imprisonment for each of those convictions, the conditions in paragraph (1)(a) or (b), as the case may be, are presumed to have been met unless the contrary is proved on a balance of probabilities.

...

(4) If the court finds an offender to be a dangerous offender, it shall

(a) impose a sentence of detention in a penitentiary for an indeterminate period;

(b) impose a sentence for the offence for which the offender has been convicted — which must be a minimum punishment of imprisonment for a term of two years — and order that the offender be subject to long-term supervision for a period that does not exceed 10 years; or

(c) impose a sentence for the offence for which the offender has been convicted.

(4.1) The court shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

VII. Analysis

(a) *New evidence application*

[18] Mr Durocher applies to admit his Certificate of Completion of the Indigenous Integrated Correctional Program Model – High Intensity, dated March 10, 2023. He asks this Court to consider his successful completion of that program in determining whether his behaviour is intractable.

[19] New evidence on appeal is allowed pursuant to s 683(1)(a) of the *Criminal Code* and its admission is determined on the well-known principles in *Palmer v The Queen*, [1980] 1 SCR 759, 775, 106 DLR (3d) 212, and *R v Lévesque*, 2000 SCC 47, paras 1, 14-22, [2000] 2 SCR 487:

- (1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial, provided that this general principle will not be applied as strictly in a criminal case as in civil cases;
- (2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
- (3) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (4) it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

The overriding consideration in application of these principles must be “the interests of justice”: *Palmer*, 775; *Lévesque*, paras 14, 17.

[20] In accordance with the procedure set out in *R v Stolar*, [1988] 1 SCR 480, 491-492, 40 CCC (3d) 1, we reserved our decision on the new evidence application and considered it with the appeal.

[21] In her reasons for decision, the sentencing judge acknowledged that Mr Durocher had been enrolled in three correctional programs while in the federal penitentiary at Bowden, Alberta: the Aboriginal Basic Healing Program, the High Intensity Sexual Offender Program, and the Aboriginal High Intensity Sexual Offender Program. She said in the first of those he “did not do well” and was suspended from the program. In a second of those she said he “maintained a victim stance, showed no empathy towards his victims and did not gain any insight into his conduct”. He was suspended from that program.

[22] An issue arose as to whether one of the causes for his suspension from the third program was his need to attend in Yellowknife for court, causing him to miss 11 sessions. At the time, the evidence before the court was that he would be offered make-up sessions, but that did not occur. The evidence was that the program facilitator had offered to do make-up sessions with Mr Durocher but her supervisor did not give her permission to do so. While the program facilitator thought that the missed sessions were important, “because they related to the

emotional component of the program”, she also indicated that the suspension was primarily due to Mr Durocher’s repeated involvement with prohibited tattooing, and his problematic behaviour in the institution for which he had accumulated a variety of institutional charges. She said, as summarized by the sentencing judge:

He was manipulative. He did not take responsibility for his offences and often portrayed himself as a victim. He was sometimes late for his sessions and he lied about why he was. He also lied about his counsel having given him the facilitator’s manual for the program.

[23] Because of his behaviour, Mr Durocher’s security classification “should have normally been upgraded to high”, but as this would have resulted in a transfer to a high security prison, the unusual recommendation was made to maintain Mr Durocher at the medium security level so he could continue the program. Mr Durocher was warned that any further institutional charges would jeopardize his ability to maintain his medium security classification and remain at the institution.

[24] Additionally, during a hearing into an institutional charge related to tattooing, the panel took the unusual step of adjourning its disposition of the matter until after the expected completion of this third program, again to assist Mr Durocher in his rehabilitation efforts.

[25] However, Mr Durocher’s behaviour did not improve, he was suspended from the program, his security classification was upgraded from medium to high and he was transferred to a maximum security institution.

[26] The sentencing judge concluded that on the evidence before her, Mr Durocher’s motivation to succeed and engagement in the programs “simply was not what it needed to be”. While his motivation should have been at the highest, Mr Durocher did not heed the warnings of those who were trying to help him and who took unusual steps to try to help him achieve gains in the programs. She concluded he was not able to change his destructive behaviour in the course of those programs despite being given warnings and last chances. As noted, his disruptive behaviour continued, he continued to breach institutional rules, his security classification was eventually upgraded to high, and he was unable to “make any progress towards his treatment targets”.

[27] The sentencing judge found his inability to complete the program, finalization of which is now sought to be placed into evidence on this application, was “not the reason he was suspended” from the program. It was his “anti-[social] personality traits” that made it “exceedingly difficult for him to engage meaningfully in a process of true change”. She said: “I have concluded that Mr. Durocher was suspended because of his behaviour, not because of the missed sessions”.

[28] As a result, while the proposed new evidence could not have been admitted at the time of the hearing, is relevant in the sense that it bears upon an important issue at the hearing, and is credible in that Mr Durocher’s completion of the program now is proven, it is not such that

if believed it could, when taken with the other evidence adduced, reasonably be expected to have affected the result.

[29] The new evidence is not admitted.

(b) *Facts upon which the jury reached its verdict*

[30] A judge sitting alone has a duty to give reasons for decision. A jury does not; it only delivers its ultimate verdict. The sentencing judge must therefore determine the facts necessary for sentencing from the issues that were before the jury and from the verdict. A sentencing judge is required to make those factual determinations “necessary for deciding the appropriate sentence in the case at hand”: *Ferguson*, para 16.

[31] In *Ferguson* the Supreme Court set out two principles governing the sentencing judge in that duty. First, the sentencing judge “is bound by the express and implied factual implications of the jury’s verdict”, must “accept as proven all facts, express or implied, that are essential to the jury’s verdict of guilty”, and not accept as fact any evidence consistent only with a verdict rejected by the jury. Second, where the factual implications of the jury’s verdict are ambiguous, the sentencing judge must come to his or her independent determination of the relevant facts. To rely upon an aggravating fact or previous conviction, proof must be made beyond a reasonable doubt, and otherwise a sentencing judge must make determinations on the balance of probabilities. The sentencing judge should find only those facts necessary to permit the proper sentence to be imposed in the case at hand; “[t]he judge should first ask what the issues on sentencing are, and then find such facts as are necessary to deal with those issues”: *Ferguson*, paras 17, 18.

[32] Mr Durocher says that in finding sexual assault, the jury came to its conclusion only on the basis that he pulled down the complainant’s pants. The Crown says the jury reached its conclusion on the complainant’s evidence of anal intercourse. The sentencing judge wrote a separate decision limited to that single issue: 2016 NWTSC 49.

[33] The sentencing judge posed the concern as follows:

The jury could have found Mr. Durocher guilty [of sexual assault] based on [the complainant’s] testimony that he pulled her pants down, even if the jury was left unsure about whether the alleged anal intercourse took place. The verdict could also have been based on a finding that forced anal intercourse took place.

[34] In addressing this issue, the sentencing judge reviewed the complainant’s evidence. She had given an initial statement to the police in which she had not disclosed there was sexual intercourse. At the preliminary inquiry she indicated that Mr Durocher had forced vaginal intercourse with her. At trial she said those were “deliberate lies” and asserted that Mr Durocher had anal intercourse with her.

[35] At the time of the initial police statement, she was observed to be crying and sobbing, and the investigating officer felt she was too intoxicated to give a statement.

[36] At defence counsel's request, the complainant's statements to the police and at the preliminary inquiry were made available to the jury both to assess her credibility and reliability, and also for the truth of those statements.

[37] The sentencing judge said that for a conviction for sexual assault there had to be a finding that Mr Durocher applied force of a sexual nature to the complainant. The only evidence of that came from her testimony. It was clear the jury did accept "at least some of [the complainant's] evidence", but the sentencing judge said she was unable to determine which parts of the complainant's evidence the jury accepted beyond a reasonable doubt. She therefore found there was ambiguity in the underlying factual basis and it was up to her, as sentencing judge, to independently determine the facts necessary for sentencing.

[38] She acknowledged inconsistencies in the complainant's evidence and noted the complainant's failure to return to continuation of cross-examination, addressed in an earlier decision: 2016 NWTSC 17. The sentencing judge acknowledged the complainant's admission that she had lied to the police and during the preliminary inquiry. She acknowledged that her function was to determine what impact these inconsistencies had on the weight to be attributed to the evidence of the complainant, assessed contextually. That assessment depends on several things, including the number and nature of the inconsistencies, the level of sophistication of the witness, how the questions were framed, and the subject matter being discussed. As to the lack of full disclosure with the police, the sentencing judge said it was not surprising that a 13-year-old girl would be uncomfortable advising a male officer of "all the details of a very intimate and traumatic event". With respect to her falsehood at preliminary inquiry, the complainant's evidence was that she was "too embarrassed to say" that Mr Durocher had anal intercourse with her.

[39] The sentencing judge said the complainant was a reluctant and somewhat defiant witness but she struggled with recounting the actual assault, crying and covering her face with her hands. She appeared genuinely upset and hurt.

[40] While acknowledging that credibility should never be based on demeanor alone, the sentencing judge found that the complainant's "overall narrative of the evening" was corroborated by other evidence, several instances of which she reviewed. None of that corroboration went directly to the proof or nature of the sexual assault, but only generally to the unfolding events of the evening, and the overall credibility of the complainant.

[41] The sentencing judge concluded:

Considering the overall circumstances, it makes far more sense to me that [the complainant's] initial disclosure . . . was not entirely truthful, and that as time went on she became more able to divulge that she had been sexually assaulted in a far more intrusive manner than what she originally disclosed.

[42] The sentencing judge said the complainant's previous inconsistent accounts of what happened were "understandable and plausible" and it was less plausible that she would fabricate an allegation of anal intercourse if that had not in fact happened. The sentencing judge said "[t]hat allegation was more embarrassing for her to talk about than anything else she had disclosed previously. It makes no sense that she would fabricate it at that point". After her lengthy review of the law, the facts, the inconsistencies, and her observations of the complainant, the sentencing judge determined the complainant was truthful about the instance of anal intercourse and "she told the truth to the jury about what Mr. Durocher did to her". She was satisfied beyond a reasonable doubt of the forced anal intercourse.

[43] In that determination, a question of mixed fact and law, the sentencing judge is accorded deference. This ground of appeal is dismissed.

(c) *Mr Durocher's intractability*

[44] In rejecting the new evidence application, we exclude from consideration of Mr Durocher's intractability, his later completion of the in-custody Indigenous Integrated Correctional Program Model – High Intensity course. When taken with the other evidence adduced at the hearing, it cannot reasonably be expected to have affected the result.

[45] The sentencing judge accepted the evidence of the Crown experts, Dr Choy, a forensic psychiatrist, and Dr Van Domselaar, a forensic psychologist. She said both doctors were aware of the inherent bias in some risk assessment instruments for Indigenous offenders and adjusted their use of those instruments accordingly. Dr Van Domselaar used one of the instruments only to identify treatments, and both experts said they used risk assessment instruments with caution as they were aware of their potential shortcomings. The sentencing judge said Dr Choy reviewed the *Gladue* report once it was available and indicated the information in that report did not alter his opinion. She said both experts were aware of the difference between proven and unproven allegations in the materials provided to them.

[46] In Dr Choy's opinion Mr Durocher minimized or denied his responsibility, shifted blame towards his victims and expressed little empathy and limited remorse. He found that Mr Durocher had an anti-social pattern of behaviour and placed him in the "highest category of risk of recidivism". That would make him unmanageable in the community until his late 50s or 60s. Dr Van Domselaar said Mr Durocher tended to minimize his responsibility and was inclined to engage in impression management, externalizing blame and responsibility for his behaviour. She said Mr Durocher presented a "high risk of re-offense, both sexually and violently".

[47] The sentencing judge said "[o]pinion evidence is not to be accepted by the Court simply as a matter of course; it has to be weighed just like any other evidence". She said both experts explained how they arrived at their conclusions and were thoroughly cross-examined and challenged on some of those conclusions and on some of the processes they followed.

[48] Taking into account the defence's concession of the risk of harmful recidivism, she focused on intractability. She found the evidence that Mr Durocher's conduct is intractable to be compelling:

He has committed several serious, sexual assaults in the span of a few years and has committed some of them while he was on process for similar charges. He has had access to relevant and culturally appropriate programs and has not made any meaningful gains towards reducing his risk. He has not been able to change his disruptive behaviour in the course of those programs despite being given warnings and last chances.

[49] The sentencing judge found that Mr Durocher's disruptive behaviour continued during the time of his incarceration to sentencing and he continued to breach institutional rules, causing his security classification to be upgraded from medium to high. She found that his anti-social personality traits made it exceedingly difficult for him to engage meaningfully in a process to change.

[50] She concluded:

On the whole, I am satisfied beyond a reasonable doubt that Mr. Durocher's conduct is intractable and that he meets all the criteria to be designated a dangerous offender pursuant to section 753 of the *Criminal Code*.

The sentencing judge's factual determinations, her acceptance of expert evidence, and her determinations on questions of mixed law and fact with respect to Mr Durocher's intractable behaviour are entitled to deference. We do not disturb the sentencing judge's determination that his behaviour was intractable, leading to his designation as a dangerous offender.

(d) *Section 11(i) of the Charter*

[51] Section 11(i) of the *Charter* reads:

Any person charged with an offence has the right

...

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

[52] At the time of the offence, January 11, 2014, s 271(a) of the *Criminal Code* provided for a maximum term of imprisonment, on indictment, not exceeding ten years. In 2015, Parliament amended the *Criminal Code* raising the maximum sentence to 14 years' imprisonment when the victim was under the age of 16: *Tougher Penalties for Child Predators Act*, SC 2015, c 23, ss 2, 14, in force July 17, 2015.

[53] In imposing a sentence of 14 years' imprisonment for the sexual assault followed by long-term supervision for 10 years, the sentencing judge acknowledged defence counsel's concession that simply imposing the maximum determinate sentence was inadequate to protect the public from risk. She said Crown and defence counsel agreed the "maximum determinate sentence that [she] can impose is 14 years, and not 10, even if the maximum sentence was increased to 14 years after the commission of this offence." She said the reasoning in *R v Cosman*, 2018 ABCA 388, 367 CCC (3d) 407 and *R v Spilman*, 2018 ONCA 551, 362 CCC (3d) 415, left it open to her to impose a longer determinate sentence than otherwise would have been proportionate under the usual sentencing regime, if she concluded that such a sentence would achieve the goal of protecting the public, and leaving the imposition of an indeterminate sentence "truly [as] a measure of last resort".

[54] We do not agree. Neither *Cosman* nor *Spilman* directly addressed the issue posed in this appeal: whether the finding that a person is a dangerous offender allows a determinate sentence for the predicate offence to be greater than the maximum sentence set out in the *Criminal Code* at the time of the offence.

[55] In *Cosman* the predicate offence was sexual assault causing bodily harm. In 2012 at the time of the offence, the maximum term of imprisonment was 14 years: s 272(2)(b). Unlike with s 271, at the time of the offence at issue there was not a maximum term of ten years later increased to 14 years. In *Cosman*, the sentencing judge had concluded that a fit and proper global sentence, if determinate, would be nine years. However, she was satisfied there was no reasonable expectation that any sentence other than an indeterminate one would adequately protect the public against the risk Mr Cosman would reoffend in the future, designated him as dangerous and imposed an indeterminate term of imprisonment.

[56] The issue on appeal was whether the sentencing judge should have imposed a more significant determinate sentence for the predicate offence, up to the 14-year maximum sentence, plus a ten-year long-term supervision order. There was no issue of exceeding the statutory maximum sentence as it stood on the date of the offence.

[57] In *Spilman*, the predicate offence was assault causing bodily harm which had occurred in February 2011. At all times the maximum sentence for the offence was ten years: s 267(b), *Criminal Code*. The sentencing judge imposed a term of imprisonment of ten years and a long-term supervision order for a further ten years. Mr Spilman appealed submitting the ten-year maximum imposed was unfit and should be reduced. There was never an issue as to whether the ten-year maximum should be exceeded. In answering the question of whether a sentencing judge in a dangerous offender proceeding should be "restricted to the range of sentence that would be appropriate for the offender upon conviction of the predicate offence, but in the absence of any dangerous offender proceedings", para 31, the court found that "the length of the custodial term in a composite sentence in dangerous offender proceedings [need not] mirror that in stand-alone proceedings for the predicate offence", para 37. But the court stated, para 52:

Any custodial sentence imposed as a component of a composite sentence under ss. 753(4)(b) or as a standalone disposition under s. 753(4)(c), cannot exceed the maximum term of imprisonment for the predicate offence.

[58] The provisions of s 753(4)(b) are clear. A sentencing judge may “impose a sentence for the offence for which the offender has been convicted” and a long-term supervision order for a period not to exceed ten years. On the date Mr Durocher committed the offence of sexual assault, the maximum sentence for that offence was ten years. It was not 14 years, and nothing in *Cosman* nor *Spilman* allow for an interpretation to extend that sentence for the predicate offence at the time the offence was committed beyond ten years despite subsequent amendment. That is the purpose of s 11(i) of the *Charter*.

[59] In choosing a sentence for the offence for which the offender had been convicted, plus the long-term supervision order, the sentencing judge was statutorily restricted to a maximum ten-year sentence. We therefore alter the sentence for the predicate offence to the maximum allowable ten- year period, a reduction of four years. In review of the facts and expert opinions before the sentencing judge, we conclude there is a reasonable expectation that this lesser measure will adequately protect the public against the risk of Mr Durocher committing murder or a serious personal injury offence without resort to indeterminate detention: *Boutilier*, para 69. We keep in place the ten-year long-term supervision order and the four-year concurrent incarceration for sexual interference for the same event.

[60] This ground of appeal is allowed.

(e) *Restraint, rehabilitation, and Gladue factors*

[61] Mr Durocher says the sentencing judge should have applied restraint in the sentence imposed, considering his chance for rehabilitation and *Gladue* factors. However, she did exercise restraint in finding that a determinate sentence should be imposed, with a long-term supervision order, rather than an indeterminate sentence. As noted, she found that Mr Durocher “could not have come any closer” to an indeterminate sentence, but did not impose one. On the facts and her acceptance of expert evidence, she rejected the possibility of fundamental rehabilitation in the short term in finding Mr Durocher’s behaviour intractable. Those findings invite deference.

[62] The sentencing judge also had before her a *Gladue* report and evidence about Mr Durocher’s participation in programs with an Indigenous focus. She addressed his Indigenous history at length. She recognized that in sentencing Indigenous offenders, courts must consider the unique systemic or background factors that may have played a part in bringing the offender before the courts and the types of sanctions that may be appropriate in the circumstances: *Gladue*, para 66; *Ipeelee*, para 59. She acknowledged that courts must take judicial notice of 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 higher levels of incarceration for Indigenous people:

Ipeelee, para 60. She recognized those circumstances have a bearing on the offender’s level of blameworthiness, an important component of proportionality: *Ipeelee*, para 73. She also acknowledged that although consideration of these factors may not necessarily result in a reduction of sentence, they must be applied in every sentencing of an Indigenous offender including in dangerous offender proceedings: *R v Johnson*, 2003 SCC 46, para 29, [2003] 2 SCR 357; *Boutilier*, para 54.

[63] The sentencing judge acknowledged that restraint required the least restrictive sanction that can achieve the objectives of sentencing should be imposed. She was particularly sensitive to the issues of restraint and Mr Durocher’s Indigenous background; she applied a *Gladue* lens throughout her reasons. She said “restraint takes on particular importance when sentencing an Indigenous offender”.

[64] The sentencing judge made no errors with respect to restraint, potential for rehabilitation, or *Gladue* factors. This ground of appeal is dismissed.

VIII. Conclusion

[65] Mr Durocher’s new evidence application is dismissed. His appeal is allowed only to the extent of reducing the determinate portion of his sentence from 14 years to ten years. We uphold the ten-year long-term supervision order and the four years’ concurrent incarceration for sexual interference.

Appeal heard on April 18, 2023

Memorandum filed at Yellowknife, NWT
this 2nd day of June, 2023

Slatter J.A.

Authorized to sign for: McDonald J.A.

Feehan J.A.

Appearances:

B. MacPherson

For the Respondent

D.J. Royer

For the Appellant

A-1-AP-2016-000005

IN THE COURT OF APPEAL
FOR THE NORTHWEST TERRITORIES

Between:

His Majesty the King

- and -

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MEMORANDUM OF JUDGMENT
