COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Davis,*
2025 BCCA 113

Date: 20250407
Docket: CA50251

Between:

Rex

Respondent

And

Isaac Harrison Davis

Appellant

Before: The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Grauer
The Honourable Justice Riley

On appeal from: An order of the Provincial Court of British Columbia, dated November 4, 2024 (*R. v. Davis*, Courtenay Docket 43832-1).

Counsel for the Appellant:	S. Runyon
Counsel for the Respondent:	E. Purtzki
Place and Date of Hearing:	Vancouver, British Columbia March 5, 2025
Place and Date of Judgment:	Vancouver, British Columbia April 7, 2025

Written Reasons by:
The Honourable Madam Justice Fenlon

Concurred in by:
The Honourable Mr. Justice Grauer

Dissenting Reasons by:
The Honourable Justice Riley (page 16, para. 48)

Summary:

Appeal from sentence for aggravated assault. Without warning or provocation, the appellant punched the victim once in the forehead causing devastating and life changing injuries. The appellant pleaded guilty and was sentenced to 21 months in jail followed by 12-months' probation. He seeks a conditional sentence order, arguing the judge did not give proper effect to Gladue principles or section 718.2(e) of the Criminal Code. Held: Appeal allowed. The judge erred by concluding that the impact of Gladue factors on the appellant's moral culpability should be given less weight because the appellant had achieved some success despite those factors. Sentencing afresh, a conditional sentence order of two years less a day followed by 12-months' probation is appropriate despite the need for denunciation and deterrence. The offence profoundly impacted the victim, but the appellant, as an Indigenous offender, must be sentenced in a way that gives effect to the marked impact of Gladue factors on his moral culpability. If sentencing judges are to play their part in reducing incarceration rates for Indigenous offenders, serious consideration must be given to conditional sentences when the statutory prerequisites for their imposition are met.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

[1] The appellant Isaac Davis pleaded guilty to aggravated assault and was sentenced to 21 months in jail followed by one year's probation. On appeal, he seeks the imposition of a conditional sentence, contending the judge failed to give effect to the principles in *R. v. Gladue*, [1999] 1 S.C.R. 688 [*Gladue*] and the requirement in s. 718.2(e) of the *Criminal Code*, R.S.C., 1985, c. C-46, that "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."

Background

[2] On January 13, 2023, the appellant was 20 years old. He was on the phone with his mother when she became involved in a motor vehicle accident with the victim, Mr. Stone. The appellant thought he could hear Mr. Stone yelling at his mother. Thinking that she was in danger, he rushed to the scene of the accident. On arrival, he spoke to his mother and then confronted Mr. Stone who was hurrying towards his mother, having just come from a store where he had purchased

cigarettes for her. Although Ms. Davis tried to stop her son, he walked briskly towards Mr. Stone and punched him in the middle of his forehead, causing him to fall to the ground unconscious.

[3] The judge described the assault and its devastating impact on the victim:

> [7] The punch was delivered without warning and without Mr. Stone having an opportunity to protect himself. The punch was a very serious assault. Mr. Stone suffered from a skull fracture and a severe brain injury. Once on the ground, Mr. Stone was bleeding from the head, unconscious, and throwing up. Mr. Stone was transferred immediately to a hospital in Victoria where he had emergency surgery to relieve pressure on his brain. Mr. Stone had two bleeds on the brain, he had multiple surgeries, he was in a coma for three weeks, and was paralyzed for two weeks. It was touch and go for a while as to whether Mr. Stone was going to survive or not.
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> [8] The assault was both life-threatening and life-altering for Mr. Stone. Mr. Stone suffered from speech aphasia, memory loss, and cognitive deficiencies, including memory loss. He has had to take speech therapy and now requires the use of a hearing aid. His voice is lower. Mr. Stone is not the person he was before the assault. He is now often irritable and short-tempered. He has two young children and he now finds it is a challenge for him to help raise his children as he finds he has no patience.
>
> [9] This incident was very hard on Mr. Stone's family as they waited by his bedside for weeks to see if he would recover. This very serious assault has had a significant financial impact on Mr. Stone as he was unable to return to work until this past summer. By my calculation then, he has missed roughly about one-and-a-half years of work. Mr. Stone says that he is a damaged person and he must work to become a good father and spouse.

On Appeal

[4] The appellant contends the sentence imposed by the judge is unfit because he erred:

(a) in concluding that "*Gladue* factors" played a limited role in the sentencing exercise; and

(b) in his evaluation of mitigating factors, which impacted his decision to refuse to impose a conditional sentence order.

[5] The standard of review on appeal from sentence is highly deferential. Sentencing judges are faced with the challenging task of applying the principles in

ss. 718, 718.1 and 718.2 of the *Criminal Code*, many of which raise competing objectives.

[6] Judges are given broad discretion in the imposition of a fit sentence. As a result, an appellate court can intervene to vary a sentence only when the sentence is demonstrably unfit, or the sentencing judge has made an error in principle that had an impact on the sentence: *R. v. Friesen,* 2020 SCC 9 at para. 26 [*Friesen*]; *R. v. Sellars,* 2018 BCCA 195 at para. 22; *R. v. Lacasse,* 2015 SCC 64 at paras. 41, 44.

[7] The particular sentencing principles in tension in this case arise from the requirement in s. 718.2(a)(iii.1) that a sentence shall take into account:

> **(iii.1)** evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,
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> [Emphasis added.]

and the requirement in s. 718.2(e), expanded upon in *Gladue*, that:

> **(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.
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> [Emphasis added.]

[8] In *Gladue*, at para. 66, the Supreme Court of Canada explained that s. 718.2(e) instructs the sentencing judge to pay particular attention to the circumstances of Aboriginal offenders because their circumstances are "significantly different from those of non-Aboriginal offenders":

> 67 The background factors which figure prominently in the causation of crime by aboriginal offenders are by now well known. Years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration. […]

[9] In the present case, the sentencing judge was alive to the importance of *Gladue* factors and his obligations under section 718.2(e), but he found these factors

had a “lesser impact,” in part because of Mr. Davis’s “success in life” as demonstrated by the fact that he had graduated from high school, was employed, had no negative peer associations, no addiction issues, and no criminal history: at para. 19.

[10] The Crown concedes the judge erred in principle in his approach to Mr. Davis’s circumstances as an Indigenous offender—the appellant’s success and his desire to better himself were not a principled basis to find that the impact of *Gladue* factors on his moral culpability should somehow be afforded less weight. In this regard, the Crown notes that the appellant’s paternal great-grandmother was a residential school survivor and, as the judge recognized, the appellant’s grandmother and father had clearly been impacted by the historical treatment of Indigenous Peoples: at para. 18. In short, these circumstances could not be ignored or minimized because the appellant had to some extent risen above the challenges he faced: *R. v. Kehoe*, 2023 BCCA 2 at paras. 42, 54.

[11] It is the Crown’s position on appeal that, despite this material error, the judge nonetheless imposed a fit sentence, one that was near the bottom of the range for an offence of this gravity. It is contended that the sentence of 21 months reflects the Crown’s position at trial that a sentence of 24 to 30 months was appropriate given the mitigating factors, including the appellant’s circumstances as an Indigenous offender.

[12] Because the judge’s error was a material one, this Court must consider the sentence afresh, without deference, while at the same time deferring to the judge’s factual findings and his identification of the aggravating and mitigating factors to the extent that they are not affected by the error: *Friesen* at paras. 27–28.

Analysis

[13] As set out above, the two principles in particular tension in this case are the requirement to take into account Mr. Davis’s circumstances as an Indigenous offender on the one hand, and on the other the significant impact of the offence on the victim, Mr. Stone. These principles, along with all of the other sentencing

principles in the *Criminal Code*, must be considered by a judge tasked with imposing a sentence that is, in the words of s. 718.1, "proportionate to the gravity of the offence and the degree of responsibility of the offender."

[14] Aggravated assault is the most serious category of assault because, however the offence is carried out, the victim is wounded, maimed, disfigured, or has their life endangered: *R. v. Quash*, 2019 YKCA 8 at para. 35 [*Quash*]. Not surprisingly, judges have tended to focus on the impact on the victim and the need for denunciation and deterrence, factors that tip the scales towards imprisonment. The usual sentence for aggravated assault is in the range of 16 months to six years in jail: *R. v. Finlay*, 2016 BCCA 299 [*Finlay*].

[15] The specific question to be addressed in this case is whether Mr. Davis, as an Indigenous offender, should be sentenced differently from the way a non-Indigenous offender would be sentenced for an aggravated assault of this nature. In my view, the answer to that question must be "yes."

[16] In *Gladue*, the Supreme Court of Canada considered the proper interpretation and application of s. 718.2(e), concluding that it is a remedial provision directing sentencing judges to undertake the process of sentencing Indigenous offenders differently "in order to endeavour to achieve a truly fit and proper sentence in the particular case": at para. 33.

[17] Sentencing judges are to pay "particular attention to the circumstances of Aboriginal offenders because those circumstances are unique, and different from those of non-[A]boriginal offenders": at para. 37. The Court continued:

> 37 The fact that the reference to aboriginal offenders is contained in s. 718.2(e), in particular, dealing with restraint in the use of imprisonment, suggests that there is something different about aboriginal offenders which may specifically make imprisonment a less appropriate or less useful sanction.
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> [Emphasis added.]

[18] It follows that s. 718.2(e) requires the sentencing judge to consider alternatives to the use of imprisonment: *Gladue* at para. 38. That is consistent with

the purpose of s. 718.2(e), which is intended to address the problem of over incarceration in Canada and, in particular, the more acute problem of the disproportionate incarceration of Indigenous people: *Gladue* at paras. 50–51.

[19] The Court in *Gladue* stressed that sentences must nonetheless be the result of an individualized assessment of "this offence, committed by this offender, harming this victim, in this community": *Gladue* at para. 80. It observed that where more violent and serious offences are involved, the more likely it will be that a term of imprisonment for an Indigenous and non-Indigenous offender "will be close to each other or the same, even taking into account their different concepts of sentencing": *Gladue* at para. 79.

[20] In *R. v. Ipeelee,* 2012 SCC 13 [*Ipeelee*], the Supreme Court again considered section 718.2(e), observing that, in the decade since *Gladue* was issued, "s. 718.2(e) of the *Criminal Code* has not had a discernible impact on the overrepresentation of Aboriginal people in the criminal justice system": *Ipeelee* at para. 63. While recognizing that sentencing cannot be the sole or even primary means of addressing Indigenous overrepresentation in penal institutions, the Court stressed that sentencing judges have an important role to play in achieving that objective: *Ipeelee* at paras. 69–70.

[21] Addressing the criticism that handing down different sentences for Indigenous and non-Indigenous offenders for the same offences is inconsistent with the parity principle—which requires that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances—the Court wrote:

> [79] In practice, similarity is a matter of degree. No two offenders will come before the courts with the same background and experiences, having committed the same crime in the exact same circumstances. Section 718.2(b) simply requires that any disparity between sanctions for different offenders be justified. To the extent that *Gladue* will lead to different sanctions for Aboriginal offenders, those sanctions will be justified based on their unique circumstances — circumstances which are rationally related to the sentencing process. Courts must ensure that a formalistic approach to parity in sentencing does not undermine the remedial purpose of s. 718.2(e) […] [Emphasis added.]

[22] The Court then turned to two errors in post-*Gladue* jurisprudence that "significantly curtailed the scope and potential remedial impact" of s. 718.2(e): at para. 80. The first error suggests that an offender must establish a causal link between background factors and the commission of the offence before being entitled to have those factors considered by the sentencing judge. The second and more significant error is noted to be "the irregular and uncertain application of the *Gladue* principles to sentencing decisions for serious or violent offences": *Ipeelee* at para. 84. In this regard, the Court observed:

> [84] […] The passage in *Gladue* that has received this unwarranted emphasis is the observation that "[g]enerally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing" (para. 79; see also *Wells*, at paras. 42-44). Numerous courts have erroneously interpreted this generalization as an indication that the *Gladue* principles do not apply to serious offences (see, e.g., *R. v. Carrière* (2002), 164 C.C.C. (3d) 569 (Ont. C.A.)).

[23] At para. 85, the Court quoted from the judgment of Iacobucci J. in *R. v. Wells*, 2000 SCC 10 at para. 50 [*Wells*]:

> The generalization drawn in *Gladue* to the effect that the more violent and serious the offence, the more likely as a practical matter for similar terms of imprisonment to be imposed on aboriginal and non-aboriginal offenders, was not meant to be a principle of universal application. In each case, the sentencing judge must look to the circumstances of the aboriginal offender.

[24] I return then to my conclusion that, in sentencing Mr. Davis as an Indigenous offender, he must be sentenced differently from a non-Indigenous offender. But how is that to be put into practice? It is evident that a conditional sentence may be imposed for aggravated assault. Section 742.1 as amended in November 2022 now reads:

> **742.1** If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if
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> > **(a)** the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and

> would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2;
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> **(b)** the offence is not an offence punishable by a minimum term of imprisonment;
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> **(c)** the offence is not an offence under any of the following provisions:
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> **(i)** section 239, for which a sentence is imposed under paragraph 239(1)(b) (attempt to commit murder),
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> **(ii)** section 269.1 (torture), or
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> **(iii)** section 318 (advocating genocide); and
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> **(d)** the offence is not a terrorism offence, or a criminal organization offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years or more.

[25] Aggravated assault is not an offence punishable by a minimum term of imprisonment, nor does it fit into any of the other exclusionary provisions. Further, the judge in this case determined that a sentence of imprisonment of less than two years (21 months) would be appropriate and that Mr. Davis's presence in the community would not be a risk to the public. There was thus no statutory barrier to the imposition of a conditional sentence order.

[26] I turn then to the challenging question facing this Court as we sentence anew: when the *Gladue* factors are given appropriate weight, does Mr. Davis's lessened moral culpability tip the scales sufficiently to warrant a conditional sentence despite the serious consequences of his actions, and the need to deter others and denounce such conduct?

[27] *Ipeelee* is clear that an Indigenous offender who has committed a violent, serious offence may, in appropriate cases, receive a lesser term of imprisonment than a non-Indigenous offender, without contravening the parity principle. But *Ipeelee* does not expressly address whether a non-carceral sentence for an Indigenous offender, in circumstances in which a non-Indigenous offender would be imprisoned, would similarly avoid that contravention.

[28] A review of the jurisprudence confirms that offenders convicted of aggravated assault causing serious injury to the victim can expect to be imprisoned. The parties

pointed to no case in which a CSO has been imposed in similar circumstances, even when the offender was Indigenous: see for example *Finlay*; *R. v. E.O.* 2019 YKCA 9; *R. v. Kruger-Allen*, 2021 BCSC 445; *R. v. Elliott*, 2015 BCCA 295 and *R. v. Tom,* 2024 BCCA 239 [*Tom*]. However, prior to the November 2022 amendments to s. 742.1 of the *Criminal Code*, conditional sentences were not available for aggravated assault—or any other offence carrying a maximum sentence of 14 years in jail. I note that in *Tom,* decided after the amendments, Mr. Tom was sentenced to jail, but his co-accused, who was a full participant in striking a helpless victim with a baseball bat in an unprovoked attack, was said to have received a CSO.

[29] In conducting the individualized assessment, I conclude that, in contrast to the offenders in the cases considered by the sentencing judge and relied on by the respondent Crown, Mr. Davis's moral blameworthiness is markedly diminished by his circumstances as an Indigenous offender.

[30] Mr. Davis is a member of the K'ómoks First Nation. His role in the family was described as that of a "protector" to his mother and female cousin. Reports filed at sentencing confirmed that his father abused his mother and sexually abused his cousin. Mr. Davis's upbringing was marked by poverty, domestic violence, and substance misuse by both parents. Mr. Davis felt compelled to shield family members from "bad experiences" and "take care of everyone." Mr. Davis was 20 years old at the time of the offence, and a first-time offender with no involvement with the police prior to that date. Despite a diagnosis of dyslexia and ADHD, Mr. Davis had graduated high school, was gainfully employed, and was described by his employer at sentencing as empathetic and compassionate.

[31] It bears repeating that Mr. Davis grew up on a reserve witnessing chronic abuse of his mother by his father. Although it is not necessary to establish a direct causal link between systemic and background factors and the offence at issue, Mr. Davis's circumstances provide the necessary context for understanding his actions on the day of the offence. Mr. Davis perceived Mr. Stone as an aggressor and his mother as in need of protection. That perception, although flawed, caused

him to overreact and deliver a single blow to Mr. Stone with devastating consequences. Mr. Davis's reaction to Mr. Stone was undoubtedly shaped by socio-political factors, including the systemic and background factors identified in *Gladue* and *Ipeelee*.

[32] Mr. Davis's reaction when he realized what he had done is telling. He tried to help Mr. Stone, rolling him onto his side, apologizing profusely as overheard by witnesses at the scene. Mr. Davis waited for paramedics and police to arrive and immediately accepted responsibility for the injury caused to Mr. Stone. In the aftermath of the offence he was suicidal and has been haunted by the assault. Writers of various reports presented at the sentencing hearing emphasized Mr. Davis's remorse.

[33] In assessing Mr. Davis's moral culpability, I do not lose sight of the aggravating factors identified by the judge. He described the assault as unprovoked. That is correct. Mr. Stone did nothing to provoke Mr. Davis, indeed he was engaged in an act of kindness to Mr. Davis's mother, who was upset by the accident and wanted a cigarette. Nonetheless, the unprovoked nature of the attack must be considered in the context of Mr. Davis's background, which caused him to perceive Mr. Stone as an aggressor towards his mother. In this sense, the assault did not "come out of nowhere" as was the case in *Finlay* or *Tom*.

[34] The judge also identified as an aggravating factor "some elements of premeditation," given that Mr. Davis's actions took place about five to ten minutes after the accident. Defence counsel submitted that the judge erred in this assessment, contending the accident occurred at 16:40, and that Mr. Davis arrived at the scene at 16:42. I cannot confirm on the record before the Court whether the judge's estimate of five to ten minutes was a misapprehension. In any event, the Crown concedes that "premeditation" is not an accurate description of what occurred in this case, acknowledging that it is more apt to say that there was some time between Mr. Davis hearing the accident during the call and arriving at the scene.

[35] In my view, the brief period of time between the accident and Mr. Davis's arrival did not provide him with an opportunity to consider his response to the situation. It was Mr. Davis's arrival at the scene and his continued perception of his mother being in distress that caused him to assault Mr. Stone. It is evident that Mr. Davis's perception was skewed. The judge observed that Mr. Davis's description of his mother sitting against the car curled up in a ball with her head in her hands was not consistent with video footage that showed she was "not curled up in a ball at any point": at para. 30. The judge went so far as to suggest that Mr. Davis's description could be seen as making an excuse to justify punching Mr. Stone. Again, however, the judge's discounting of Mr. Davis's background coloured this aspect of his reasoning.

[36] Taking into account the full weight of Mr. Davis's circumstances as an Indigenous offender, we are required to do more than pay lip service to *Gladue* and *Ipeelee*, mindful that section 718.2(e) creates a judicial duty to give its remedial purpose full force: *Gladue* at para. 34.

[37] Incarceration rates for Indigenous offenders will not be reduced significantly if sentencing judges simply reduce the term of imprisonment they would otherwise have imposed in order to account for *Gladue* factors. Serious consideration should always be given to the imposition of a conditional sentence in all cases where the statutory prerequisites are satisfied: *R. v. Proulx*, 2000 SCC 5 at para. 90 [*Proulx*]. If a CSO cannot be considered a fit sentence in the circumstances of this case, I cannot help but ask whether a CSO could ever be imposed on an Indigenous offender for a serious offence.

[38] The devastating injury suffered by Mr. Stone and the impact of those injuries on his life loom large in the sentencing assessment, as they must. But consideration of those serious consequences as mandated by section 718.2(a)(iii.1), and the need for deterrence and denunciation, must not be allowed to negate the importance of considering the offender's moral culpability.

[39] Mr. Davis's circumstances can be distinguished from those in *Finlay*, where this Court upheld an Indigenous offender's three-year custodial sentence for aggravated assault. As with Mr. Davis, Mr. Finlay pleaded guilty, had a difficult childhood, and was impacted by systemic *Gladue* factors, including his grandmother's attendance at a residential school: at para. 12. However, unlike Mr. Davis, Mr. Finlay was 38 years old, had a criminal record, including assault and trafficking, and had breached the terms of his release in relation to the subject offence.

[40] This case is also unlike *Quash*, where the Court increased Mr. Quash's custodial sentence for aggravated assault from ten months to two years. Mr. Quash was impacted by *Gladue* factors and there were other mitigating circumstances, but, unlike Mr. Davis, he started a senseless argument with a stranger and, out of anger, cut a 15 centimeter long wound across the victim's face with a pocketknife: at para. 6.

[41] In considering whether a conditional sentence order could sufficiently address denunciation and deterrence in this case, it is helpful to turn again to *Proulx*. In that case, the Supreme Court recognized that incarceration will usually provide more denunciation than a conditional sentence because a conditional sentence is generally a more lenient one than a jail term of equivalent duration. However, the Court went on to say:

> 102 […] That said, a conditional sentence can still provide a significant amount of denunciation. This is particularly so when onerous conditions are imposed and the duration of the conditional sentence is extended beyond the duration of the jail sentence that would ordinarily have been imposed in the circumstances. […]
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> […]
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> 105 The stigma of a conditional sentence with house arrest should not be underestimated. Living in the community under strict conditions where fellow residents are well aware of the offender's criminal misconduct can provide ample denunciation in many cases. In certain circumstances, the shame of encountering members of the community may make it even more difficult for the offender to serve his or her sentence in the community than in prison.

[42] As for deterrence, *Proulx* recognizes that incarceration is a harsher sanction, and therefore may provide more deterrence than a conditional sentence. It cautioned, however, that judges should be wary of placing too much weight on deterrence when choosing between a conditional sentence and incarceration. The Court noted that a conditional sentence can provide significant deterrence if sufficiently punitive conditions are imposed and the public is made aware of the severity of these sentences: at para. 107.

[43] Although recognizing that punitive objectives such as denunciation and deterrence in cases where there are aggravating circumstances will generally result in incarceration being the preferable sanction (at para. 114), the Court said:

> 115 Finally, it bears pointing out that a conditional sentence may be imposed even in circumstances where there are aggravating circumstances relating to the offence or the offender. Aggravating circumstances will obviously increase the need for denunciation and deterrence. However, it would be a mistake to rule out the possibility of a conditional sentence *ab initio* simply because aggravating factors are present. I repeat that each case must be considered individually.
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> [Emphasis added.]

[44] We are confronted in this case with a situation in which some principles of sentencing militate in favour of a conditional sentence, while others favour incarceration. In these circumstances, we are called upon to weigh the various objectives in fashioning a fit sentence, aware that the weight given to each principle must vary according to the nature of the crime and the circumstances of the offender: *Proulx* at para. 116. Conducting the assessment in accordance with these directions, I conclude that significant weight should be placed on the lessened moral culpability of the offender given his circumstances as an Indigenous person. These factors, along with the other mitigating factors identified by the judge, and the effectiveness of a strict conditional sentence order in achieving denunciation and deterrence, lead me to conclude that a conditional sentence is a fit sentence in this case.

[45] In light of the decision I have reached on the first ground of appeal, it is not necessary to consider the second ground, which asks whether the judge gave sufficient weight to the guilty plea in assessing a fit sentence.

Disposition

[46] I would grant leave to appeal, allow the appeal, set aside the sentence of 21-months in custody, and replace it with a conditional sentence of two years less a day followed by 12-months' probation on the same terms imposed by the judge.

[47] Mr. Davis has been incarcerated since November 2024. By operation of law, the time served in custody will be counted as part of the 24-month conditional sentence order. The remainder of the first 18 months of the conditional sentence is to be served under house arrest. Mr. Davis will not be permitted to leave his residence except for work or medical emergencies. For the last six months of his sentence (less a day), Mr. Davis must be in his residence between the hours of 7:00 pm and 6:00 am except for medical emergencies. Throughout the period of the conditional sentence, he is to abstain from alcohol and non-prescription drugs, to have no contact with Mr. Stone except through court documents or a court proceeding, and is to engage in such counselling as may be recommended by his probation officer.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Grauer"

Reasons for Judgment of the Honourable Justice Riley:

Introduction

[48] I have had the advantage of reading the draft judgment of my colleague. With respect, I am unable to agree with her proposed disposition of this appeal. Accepting that the sentencing judge erred in principle in failing to give due consideration to s. 718.2(e) and *Gladue* principles, I conclude that the 21-month jail sentence imposed by the judge was nonetheless a fit and proper sentence. The sentence is near the low end of the applicable sentencing range, and takes into account the effect of *Gladue* principles on the offender's degree of moral culpability, as well as all of the other mitigating circumstances. A conditional sentence is not appropriate on the particular facts of this case, because it would not be consistent with the fundamental purpose and principles of sentencing. In view of the aggravating features—most notably the unprovoked nature of the assault, the use of significant violence against a defenceless victim, and the serious impacts on the victim—a sentence of actual incarceration is required to give effect to the principle of proportionality, and to denounce the offender's conduct.

The Sentencing Judge's Reasons

[49] The sentencing judge first reviewed the circumstances of the offence and the circumstances of the offender, which have been aptly described by my colleague.

[50] The sentencing judge went on to consider the objective seriousness of the offence of aggravated assault, which requires proof that the offender committed an assault that wounded, maimed, disfigured, or endangered the life of the victim, and carries a maximum penalty of 14 years in jail: reasons at para. 20.

[51] The sentencing judge next canvassed the relevant sentencing principles and objectives. These included the fundamental principle that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender as contemplated in s. 718.1 of the *Criminal Code*, and the objectives of denunciation, deterrence, and "to a much lesser extent", rehabilitation as provided

for in s. 718. The judge also summarized the relevant principles enumerated in s. 718.2, notably: that a sentence should be increased or decreased to account for relevant aggravating and mitigating circumstances (per s. 718.2(a)), with one such aggravating feature being evidence that an offence has had a significant impact on the victim (per s. 718.2(a)(iii.1)); that a sentence should be similar to sentences imposed on like offenders in like circumstances (per s. 718.2(b)); the notion that an offender should not deprived of liberty if less restrictive options are appropriate (per s. 718.2(d)); and the need to consider all available sanctions other than imprisonment, paying particular attention to the circumstances of Aboriginal offenders (per s. 718.2(e)): reasons at paras. 21–23.

[52] The judge then turned his attention to the sentencing range. The judge noted the Crown's position that the applicable range for aggravated assault in cases such as this is 16 months to six years, as set out in *Finlay* at para. 48, a range which the defence did not dispute. Within that range, the Crown argued for a sentence of 24 to 30 months in jail, and the defence submitted that a fit sentence was 18 months to be served by way of a conditional sentence order: reasons at paras. 24–25.

[53] The judge identified the following aggravating features: (a) the unprovoked nature of the attack; (b) Mr. Davis targeted a vulnerable part of the victim's body, namely his head; (c) the victim was defenceless and had no time to protect himself; (d) there were "some elements of premeditation" in that there was some five to ten minutes between the collision and Mr. Davis's interaction with the victim, and while Mr. Davis claimed to have been trying to protect his mother, she was under "no immediate threat" and in fact tried to stop Mr. Davis from moving toward the victim; and (e) the serious harm to the victim, which as noted is a statutory aggravating factor per s. 718.2(a)(1.iii): reasons at paras. 26–27.

[54] The sentencing judge also enumerated the mitigating features, as follows: (a) the fact that Mr. Davis had no criminal record and no prior involvement with the police; (b) Mr. Davis's status as a youthful offender, who was "impacted by *Gladue* factors", although not significantly, in the judge's view; (c) Mr. Davis's remorse, as

reflected in his guilty plea (although the judge took the view credit for the guilty plea was "attenuated" by the strength of the Crown's case), and as indicated by his admission of responsibility and co-operation with the police at the scene; (d) Mr. Davis's good behaviour since the date of the offence; and (e) the fact that Mr. Davis had a solid employment record, had taken steps to upgrade his skills, and had a good work ethic: reasons at para. 28.

[55] The sentencing judge did not appear to accept as a separate mitigating feature that Mr. Davis had "insight into his actions". The defence position on this point was based in part on a passage in the *Gladue* report, in which Mr. Davis related to the author that he felt triggered when he saw his mother sitting against her car, curled up in a ball. However, the video of the incident did not show Mr. Davis's mother in that position at any point. The Crown did not seek to characterize the statement in the *Gladue* report as a deliberate lie, but did point out that it suggested a self-serving recollection of the incident, allowing Mr. Davis to characterize his actions in a more sympathetic light. The sentencing judge questioned the veracity of Mr. Davis's statement, suggesting that it could be taken as a disingenuous after-the-fact attempt to justify his conduct based on some perceived threat to his mother, but the judge made no affirmative finding to that effect: reasons at paras. 29–30.

[56] After an extensive review of comparator cases, the judge moved into his analysis. He determined that a sentence of less than two years was appropriate, such that he had to consider the imposition of a conditional sentence. He found that a conditional sentence would not endanger the safety of the community because there was little risk of reoffence, and any such risk could be appropriately addressed by supervisory conditions. However, the judge determined that a conditional sentence would not be consistent with the principle of proportionality, or the objectives of denunciation and deterrence. He reasoned that there was "no significant reduction" in Mr. Davis's moral blameworthiness, considering the time available to reflect as he drove to the location of the accident, spoke to his mother, and disregarded her effort to hold him back, along with the absence of any impairment by drugs or alcohol. The judge held that the unprovoked nature of the

attack enhanced Mr. Davis's moral blameworthiness. He concluded that a conditional sentence order would not adequately address the relevant principles of sentencing, taking into account both the aggravating and mitigating circumstances, and in particular the significant harm to the victim: reasons at paras. 48–52.

The Alleged Errors

[57] On appeal, Mr. Davis argues that the sentencing judge: (i) "erred in concluding that '*Gladue* factors' played a limited role in the sentencing exercise"; and (ii) "erred in his evaluation of mitigating factors which impacted his decision to decline a conditional sentence order".

Analysis

Standard of Review

[58] Although I take no issue with my colleague's summary of the standard of review governing sentence appeals, I find the following passage from *R. v. Knauf*, 2023 BCCA 174, helpful in not only in articulating the standard, but also explaining how the appeal court determines whether an error is material to the result, and the process that the appeal court must undertake when a material error is found:

> [23] It is well established that an appellate court can only intervene to vary a sentence if the sentence is demonstrably unfit or if the sentencing judge made an error in principle that had an impact on the sentence: *R. v. Lacasse*, 2015 SCC 64 at paras. 41, 43–44; *R. v. Friesen*, 2020 SCC 9 at paras. 25–26; *R. v. Agin*, 2018 BCCA 133 at paras. 56–57. Erroneously characterizing something as an aggravating factor is an error in principle.
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> [24] An error in principle will be an impactful (or material) one if it appears from the reasons that the sentence imposed would have been different had the error not been made: *Lacasse* at paras. 44, 46; *Agin* at para. 52; *R. v. Stampp*, 2022 BCCA 408 at para. 13. The materiality of the error may "be apparent from the reasons or arise either by necessary implication or reasonable inference from the reasons as a whole": *Agin* at para. 49.
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> [25] As this Court noted in *Agin* at para. 37, "[w]hile discretionary decisions like sentencing are generally afforded deference by appellate courts, a sentence that has been impacted by an error is, by definition, not a judicial exercise of discretion. That is why it is not shielded by the deferential standard of review contemplated by the phrase 'demonstrably unfit'". In these circumstances, an appellate court must perform its own sentencing analysis to determine a fit sentence. It will apply the principles of sentencing afresh to the facts, without deference to the existing sentence, even if that sentence

> falls within the applicable range. In doing so, the appellate court will defer to the sentencing judge's factual findings and the judge's identification of aggravating and mitigating factors to the extent they are not affected by the error: *Lacasse* at para. 43; *Friesen* at para. 27.
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> [26] It will often be the case that an appellate court sentencing afresh will fashion a sentence different from the one imposed by the sentencing judge. But this will not inevitably be so. Where an appellate court determines that a fit sentence is the same as the one imposed by the sentencing judge, the appellate court may affirm the sentence despite the error: *Friesen* at para. 29. As this Court put it in *Agin* at para. 53, "[a] finding that an error had an impact on sentence at this stage of the analysis means only that appellate intervention is justified, and not the sentence should be necessarily varied". *R. v. J.C.S.*, 2017 BCCA 87 is an example of a case in which this Court found an impactful error in principle in the reasons for sentence, but declined to vary the sentence.

(i) Sentencing Judge Erred in Consideration of Gladue Principles

[59] I agree that the sentencing judge committed a reviewable error in his consideration of *Gladue* principles. The Crown was right to concede this point. I agree in particular with my colleague's reasoning that Mr. Davis's Indigenous heritage and its relevance to sentencing could not be ignored, or minimized, merely because he had "to some extent risen above the challenges he faced".

[60] As my colleague points out, s. 718.2(e) applies without any need to establish a direct causal link between disadvantages tied to the offender's Indigenous heritage and the offending conduct. The following passage from *Kehoe* makes this point, and goes on to explain the relevance and "critical importance" of "systemic and background factors" pertaining to an offender's Indigenous heritage in the reasoning process contemplated in s. 718.2(e):

> [41] In considering systemic and background factors, the judge must take account of all the surrounding circumstances, including "the unique circumstances of the offender as an aboriginal person," and display sensitivity to and understanding of the "difficulties aboriginal people have faced with both the criminal justice system and society at large": *Gladue* at para. 81; *Ipeelee* at paras. 59–60, 75.
>
> [42] It is not necessary to establish a direct causal link between systemic and background factors and the offence at issue. How the complex interplay of historical factors impacted a particular Indigenous offender may be difficult or impossible to establish. Nevertheless, the specific systemic or background factors at play are critically important. They may help the court assess the

> moral blameworthiness of the offender or identify appropriate sentencing objectives: *Ipeelee* at paras. 81–83; *Hamer* at para. 98.

[61] In this particular case, the *Gladue* report identified a number of "intergenerational and contemporary" impacts of Mr. Davis's Indigenous heritage, operating in "concentric circles" of Mr. Davis's community, family, and personal life. Among other things, Mr. Davis's home life was marred by trauma, alcoholism, emotional abuse, and family dysfunction. Both Mr. Davis and his extended family also experienced racism associated with their mixed-race identity, and disconnection from their Indigenous culture. The pre-sentence report documented how, in light of his father's absence from the home in his adolescent years, Mr. Davis was burdened by a sense of responsibility, feeling that he needed to "take care of" the family, and serve as a protector for his mother. He also experienced the loss of an extended family member through suicide. He had trust and anger issues, particularly toward older male figures, given his family history and his observations of how men have mistreated his mother. He described his teen years as stressful and dramatic.

[62] I agree with my colleague that the sentencing judge improperly discounted the role of s. 718.2(e) and *Gladue* principles simply because Mr. Davis had managed to overcome adversity by obtaining a high school diploma, staying out of trouble with the law, securing gainful employment, and aspiring toward success. In doing so, the sentencing judge failed to have proper regard to Mr. Davis's Indigenous heritage when assessing his moral culpability.

[63] I would, however, frame the impact of *Gladue* principles on Mr. Davis's degree of moral culpability somewhat differently than my colleague. On the sentencing judge's factual findings that are untainted by the error, the judge clearly found that Mr. Davis did not have any legitimate reason to react the way he did, after driving to the scene, speaking with his mother, and disregarding his mother's effort to hold him back, before walking briskly toward the victim with the intent to confront him. Thus, the judge found that in view of these events, there were "elements of premeditation" in Mr. Davis's conduct. The Crown acknowledges on appeal that it would not be fair to characterize this as a planned a deliberate course of action, but

that is clearly not what the sentencing judge meant. The judge reasoned that Mr. Davis had time to reflect on what he was doing and did not merely act on impulse when he briskly walked toward the victim with the intent to confront him. Mr. Davis proceeded to deliver an unprovoked forceful blow to the head of the defenceless victim. Further, the sentencing judge did not accept Mr. Davis's assertion in the *Gladue* report that he saw his mother curled up in a ball and felt he needed to act to protect her. Although he made no affirmative finding that Mr. Davis's statement was intentionally false or misleading, the judge certainly did not accept the statement as an accurate reflection of Mr. Davis's state of mind at the time of the assault. In his statement to the police at the scene, Mr. Davis said he "got angry" and was "full of stress" from his mother's divorce, or words to that effect.

[64] Still, the sentencing judge's assessment of Mr. Davis's moral culpability failed to take into account systemic and background factors bearing on his state of mind at the time of the offence. The act itself, considered without regard to Mr. Davis's background, might reasonably be characterized as one of gratuitous or wanton violence. However, the trauma and dysfunction in Mr. Davis's family life, his perceived role as his mother's protector, and his troubled and complicated history with his own father provide context for his behaviour. The broader context gives a more complete understanding of why Mr. Davis acted out the way he did. He acted in anger, but his reaction cannot be viewed in isolation from the struggles and adversity he had faced due to his Indigenous heritage. Thus, although Mr. Davis's resort to violence was completely unjustified and without any lawful excuse, his culpability is not the same as a person who simply got angry and chose to react by resorting to gratuitous violence.

[65] I also have no difficulty concluding that the error in failing to properly consider *Gladue* principles in the assessment of Mr. Davis's moral culpability had a material impact on the sentence the judge imposed. Near the end of his decision, the sentencing judge reasoned that there was "no significant reduction" in Mr. Davis's moral blameworthiness, and indeed that the unprovoked nature of the attack "enhanced" his blameworthiness. While I accept the sentencing judge's finding that

the unprovoked nature of the attack was an aggravating feature, in my view his comments about Mr. Davis's moral blameworthiness are tainted by error, and clearly impacted on his conclusion that a conditional sentence would not be consistent with the sentencing principles in the *Criminal Code*.

(ii) Sentencing Judge Committed No Independent Error in his Evaluation of the Mitigating Circumstances

[66] In view of my proposed disposition, I found it necessary to fully consider the merits of this ground of appeal. For the reasons that follow, I do not accept the submission that the sentencing judge erred in his consideration of the mitigating circumstances, independent of the above-noted error with respect to his consideration of *Gladue* principles.

[67] One of the five mitigating circumstances identified by the sentencing judge was that Mr. Davis was a "youthful offender who was impacted by *Gladue* factors", although the latter point was "not, in [the judge's] view, significant in this case". I have already determined above that the judge erred in his consideration of *Gladue* principles. In my view, this error is properly assessed as a failure to appreciate the effect of "systemic and background factors" on Mr. Davis's moral culpability. Quite apart from that error, the sentencing judge acknowledged that Mr. Davis was a youthful offender, which was an important and duly-considered mitigating factor.

[68] Mr. Davis argues on appeal that the sentencing judge erred by discounting the mitigating effect of the guilty plea, because Mr. Davis pled guilty in the face of a very strong Crown case. I do not agree that the judge committed any error in making this observation. Absent extricable error or demonstrable excess or deficiency in weight, it is not for the appeal court to revisit the weight that a sentencing judge assigns to aggravating or mitigating circumstances. In any event, aside from his consideration of the guilty plea, the sentencing judge duly noted and appropriately considered other indicia of Mr. Davis's genuine and heartfelt remorse. In particular, the judge acknowledged the evidence of Mr. Davis's immediate expression of regret

and concern for the victim's well-being, as reflected in both his actions toward the victim himself, and his statement to the police.

[69] Nor do I accept the submission that the sentencing judge erred in his recognition of Mr. Davis's gainful employment, efforts to upgrade his skills, and his generally positive work ethic. The judge made no error in reasoning that all of this was to Mr. Davis's credit. It helped to demonstrate, among other things, Mr. Davis's generally pro-social character, steps toward rehabilitation, and low likelihood of reoffending. It is true that the judge erred by using these same points to improperly discount the effect of systemic and background factors as contemplated in s. 718.2(e), but that discrete error has already been recognized above, and its consequences will be assessed below.

Determining a Fit Sentence

[70] Having determined that the sentencing judge committed a material error by failing to properly consider *Gladue* principles in the assessment of Mr. Davis's moral culpability, it is necessary to conduct a fresh sentencing analysis. Although no deference is owed to the judge's determination of the sentence itself due to the judge's material error, the analysis requires continuing deference with respect to all factual findings and characterizations of relevant aggravating and mitigating circumstances that are not tainted by error.

[71] The sentencing judge characterized the offence as objectively serious and determined that the applicable sentencing range is 16 months to six years. That was the range put forward by the Crown and accepted by the defence in the court below and on appeal. It finds support in *Finlay* at para. 48, relying in turn on *R. v. Craig*, 2005 BCCA 484 at para. 10. I would add only that in the latter case, Justice Kirkpatrick offered some further guidance by explaining that, "[i]n determining an appropriate sentence within this broad range, 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": *Craig* at para. 10.

[72] Even accounting for systemic and background factors that serve to diminish Mr. Davis's moral culpability in the manner I have described above, and the other mitigating factors at play in this case, I would not place the sentence for this offence at the low end of the range. Mr. Davis committed an unprovoked act of serious violence upon a defenceless victim, who suffered life-threatening and life-altering head injuries that have caused him to suffer physically, financially, and emotionally. Were it not for the effect of Mr. Davis's background as an Indigenous person on his moral culpability, and the other notable mitigating features including his status as a youthful offender, the absence of any prior criminal record, the compelling evidence of genuine remorse, and his established work history and positive steps toward rehabilitation, Mr. Davis might have expected a sentence approaching the middle of the range. Considering the relevant *Gladue* principles together with the other significant mitigating features of the case, I conclude that a sentence of less than two years in jail would be appropriate.

[73] The key issue is whether the sentence must be an actual jail term, or a conditional sentence as provided for under s. 742.1 of the *Criminal Code*. A sentence of less than two years in jail is appropriate in this case, and I see no reason to depart from the sentencing judge's determination that allowing Mr. Davis to serve a conditional sentence order on appropriately fashioned conditions would not endanger the safety of the community. There is no mandatory minimum sentence at play, and aggravated assault is not a statutorily excluded offence under s. 742.1(c) or (d). What remains for consideration is whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2.

[74] In view of the aggravating features present in this case, I conclude that the principle of proportionality and the objective of denunciation both require a sentence of actual imprisonment. *Gladue* principles and the mitigating features found by the sentencing judge are relevant and worthy of considerable weight, but have been accounted for in the relative lenience of the sentence itself. Were it not for impact of systemic and background factors relating to Mr. Davis's Indigenous heritage on his

moral blameworthiness, and the other mitigating features of the case, the seriousness of Mr. Davis's offending conduct and its significant impacts on the victim would likely have warranted a jail sentence approaching the middle of the range.

[75] Aggravated assault is not subject to a mandatory minimum jail term, nor is it a statutorily excluded offence under s. 742.1(b) to (c). A conditional sentence order is therefore a legally available disposition for aggravated assault. By implication, one must accept that there may be instances where a properly crafted conditional sentence order would be truly proportionate to the gravity of the offence and the offender's degree of moral responsibility and could effectively denounce the offender's conduct. However, I am not satisfied that this is such a case, in view of the nature of the offence and the aggravating features. I conclude that the 21-month jail term imposed by the sentencing judge is a fit and proper sentence, and is required to address the fundamental purpose and principles of sentencing. This is a case-specific conclusion.

[76] I move on to address in more detail the role that s. 718.2(e) and *Gladue* principles have played in my conclusion. Section 718.2(e) has a "particular remedial purpose for aboriginal peoples, as it was intended to address the serious problem of overincarceration of aboriginal offenders in Canadian penal institutions": *Wells* at para. 37. This provision calls for "a different methodology" for determining a fit sentence in relation to an Indigenous offender, although the difference of approach will not necessarily mandate a different result: *Wells* at para. 44.

[77] Under s. 718.2(e) and the principles articulated in *Gladue*, a sentencing court must consider systemic or background factors affecting an Indigenous offender, in order to properly assess the offender's moral blameworthiness, and identify appropriate sentencing options in light of the offender's heritage and Indigenous community: *Kehoe* at para. 40 citing *Gladue* at para. 66, and *Ipeelee* at para. 59.

[78] The Court reasoned in *Gladue* that as a general rule the more serious or violent the offence, the more likely it will be that the sentence for an Indigenous offender will be close to or the same as the sentence for a non-Indigenous offender:

Gladue at para. 79. My colleague rightly points out that in *Ipeelee*, the Court clarified that the above-noted passage from *Gladue* has received "unwarranted emphasis", which is one of several factors that have "significantly curtailed the scope and remedial impact of s. 718.2(e)": *Ipeelee* at paras. 80, 84. My colleague also rightly points out that sentencing judges have an important role to play in seeking out alternatives to incarceration in response to Indigenous overrepresentation in penal institutions: *Gladue* at para. 93(3).

[79] I have two responses to these concerns, as they pertain to this case.

[80] The first response is that sentencing is always an individualized process, which requires case-specific application of relevant sentencing objectives and principles to determine the fit sentence. I do not find it productive to consider in the abstract when and in what circumstances a conditional sentence order would be a fit sentence for an Indigenous offender who commits an aggravated assault when such a disposition would not be a fit sentence for a non-Indigenous offender. I simply say that on the particular facts of this case, a conditional sentence would not address the fundamental purpose and principles of sentencing, even after taking into account the impact of systemic and background factors relating to Mr. Davis's Indigenous heritage on his moral culpability.

[81] The second response is that a sentence of 21 months in jail is, in my respectful view, a lenient disposition considering the gravity of the offence and the aggravating features as found by the sentencing judge. Were it not for the impact of *Gladue* principles on Mr. Davis's moral culpability, albeit in conjunction with the other mitigating features of the case, Mr. Davis might have expected to receive a substantial penitentiary sentence. In this respect, Mr. Davis's sentence might well be materially different than the sentence a non-Indigenous offender would receive in similar circumstances, although it is difficult to undertake a direct comparison given the reality that factors pertaining to Mr. Davis's Indigenous background bear upon his moral culpability. It is, quite simply, a different proportionality analysis than the one that would apply to a non-Indigenous offender. As the case law instructs,

s. 718.1(e) calls for “a different methodology for assessing a fit sentence” for an Indigenous offender: *Wells* at para. 44.

[82] One way to achieve the remedial purpose of s. 718.2(e) is by resorting to “restorative justice” measures as an alternative to incarceration of Indigenous offenders. Restorative justice has been described as a “primary objective” within “traditional aboriginal conceptions of sentencing”: *Wells* at para. 37. In this case, the *Gladue* report identified various options that might be considered as part of a restorative justice “healing plan” for Mr. Davis. These included: (1) counselling and treatment for Mr. Davis’s unresolved childhood trauma; (2) measures to enhance the connection to his Indigenous culture; (3) restorative justice “conflict resolution” and “mediation” through a program offered by the Comox Valley Community Justice Centre; (4) attendance at Comox Valley Transition Society Men’s Group; and (5) *Gladue* “Aftercare and Healing Plan Support”. The author of the *Gladue* report noted Mr. Davis’s willingness to participate in some of these programs.

[83] At the sentencing hearing, Mr. Davis’s counsel reviewed various portions of the *Gladue* report at length. However, he skipped over the concrete proposals for specific restorative justice programming, stating that he did not intend to “delve into” that aspect of the report. Counsel went on to propose an 18-month conditional sentence, with terms requiring Mr. Davis to be under virtual house arrest for a specified duration of time, followed by a period of time under which he would be subject to a curfew. Counsel also appeared to adopt other somewhat generic terms imposed in one of the precedents he placed before the court. Counsel did not put forward any more specific restorative justice measures in Mr. Davis’s case.

[84] One of the most intriguing options suggested in the *Gladue* report was the “Restorative Justice” program offered by the Comox Valley Community Justice Centre. The author of the *Gladue* report had consulted with the managing director of the program, who explained that it was designed to provide “conflict resolution services” for youth and adults “in the form of mediation conferences assisted by trained facilitators”. The facilitator would initially meet separately with both the

"affected party" and the "responsible party" to ascertain whether there was a reasonable chance of successful mediation. If both parties were amenable, further meetings could be convened, involving the parties, community members, and K'ómoks Elders. The director opined that on her initial understanding of the "index offence", the program "could be a 'fantastic fit'" in Mr. Davis's case. It appears that this option was explored with the Crown and with Mr. Davis, but neither the Crown nor the defence said anything about it in the course of the sentencing proceedings.

[85] The *Gladue* report was completed on January 12, 2024. The first day of the sentencing hearing was on June 20, 2024, when Mr. Stone read his victim impact statement aloud in court. The sentencing hearing continued months later, with submissions of counsel on September 13, 2024.

[86] In the course of his sentencing submissions, counsel for Mr. Davis told the court that Mr. Davis was prepared to offer an apology to Mr. Stone, but was barred from doing so because of a no-contact term imposed as a condition of his release. Counsel said that Mr. Davis was willing to provide an apology in writing or in person, if Mr. Stone was agreeable. No mention was made of any formal efforts for Mr. Davis to obtain the permission necessary to make an apology, and no reference was made to the aforementioned program, or any of the other restorative justice programming outlined in the *Gladue* report.

[87] Of course, a restorative justice program that depends in part on the involvement of the victim would only be a viable option where the victim is amenable. No one could or should compel a victim to take part. There may be many instances where the victim feels unwilling or simply unable to participate. Nonetheless, where the victim is so inclined, and the offender is also a willing participant, successful completion of such a program could be a factor supporting a finding that a community-based sentence would be consistent with the codified objectives and principles of sentencing. In his particular case, the *Gladue* report suggested this as an option, but the record is silent as to whether or not it was pursued, and one can infer from the fact that the victim attended court in person to

deliver his victim impact statement that no such restorative justice initiative was ever successfully concluded, if it was even attempted.

Conclusion

[88] I would grant leave to appeal the sentence, but would dismiss the appeal on its merits.

"The Honourable Justice Riley"