PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Denny*, 2016 NSPC 83

Date: 2016-07-14
Docket: 2922350, 2922352, 2922353, 2922354, 2922355, 2958277, 3011619
Registry: Pictou

Between:

Her Majesty the Queen

v.

Hope Denny

SENTENCING DECISION

Judge:	The Honourable Judge Del W. Atwood
Heard:	14 July 2016 in Pictou, Nova Scotia
Charge:	Sections 145, 266, 264.1, 279, 733.1, *Criminal Code of Canada*
Counsel:	Jody McNeill for the Nova Scotia Public Prosecution Service Stephen Robertson, Nova Scotia Legal Aid, for Hope Denny

By the Court:

Circumstances of the offences

[1] When I gave my sentencing decision in court, I said that I would read only a brief summary; quite understandably, Ms. Denny finds court very stressful, and I felt it was more important to make the main points right away and confine the finer details to written reasons.

[2] Hope Denny is a twenty-year-old female from the Pictou Landing Mi'kmaw First Nation. Her life story is rife with unhappiness and struggle, alike in many ways to the stories of First-Nations peoples who have had to deal with the effects of systemic discrimination in Canada.

[3] Ms. Denny pleaded guilty to a number of offences which occurred between 21 October 2015 and 8 July 2016. The charges and the facts read into the record pursuant to ss. 723 and 724 of the *Criminal Code* at Ms. Denny's sentencing hearing are that:

- On 21 October 2015, Ms. Denny—who was serving a term of probation at the time—became enraged at a former intimate partner; she threatened and attacked this person, and forcefully prevented her flight; as a

result, Ms. Denny was charged with one summary count of assault (case 2922350), two summary counts of unlawful confinement (case numbers 2922352-3), and two indictable-absolute-jurisdiction counts of breach of probation (case numbers 2922354-5);

- On 7 February 2016, Ms. Denny was found by police near a shopping plaza in Truro; she was alcohol impaired and incoherent; at the time, Ms. Denny was subject to bail which prohibited her from consuming alcohol; Ms. Denny was arrested and charged with a summary count of breaching a recognizance (case number 2958277);

- On 1 April 2016, Ms. Denny was arrested at a residence in Bible Hill after police had responded to a complaint of a domestic disturbance; Ms. Denny was highly intoxicated by alcohol; she resisted arrest, and struck one police officer in the face with a closed fist; she had to be medically evacuated to hospital; while handcuffed to a hospital bed, she tried to bite the officer whom she had struck; this time, Ms. Denny found herself charged with summary counts of assaulting a peace officer (case number 2973350) and breaching a recognizance (case number 2973353);

- On 8 July 2016, Ms. Denny was found to be under the influence of alcohol by a police patrol at the Pictou Lobster Carnival; she was arrested

without incident and charged with a summary count of breaching a recognizance (case number 3011619).

Submissions of counsel

[4] The prosecution has advocated for a 10-12-month term of imprisonment, not served in the community. Defence counsel seeks an intermittent sentence of ninety days or less and a term of probation.

The impact of the Canadian criminal-justice system upon Aboriginal persons and the lasting effects of systemic discrimination

[5] Ms. Denny's personal and family biographies, as laid out in the pre-sentence report and the very detailed Gladue report, are tragic. Her upbringing was chaotic, transient and traumatic, and provided her with little stability, security or nurturing. She witnessed horrific family violence during her childhood and adolescence, and she was the victim of physical child abuse, child sexual abuse, and sexual exploitation. Ms. Denny experienced substance abuse as a family norm.

[6] Family dysfunction landed Ms. Denny in the care of child-protection authorities on a number of occasions which, in turn, resulted in her intermittent involuntary institutionalization as a youth when she required emergency treatment for behaviour that endangered her safety.

[7] Ms. Denny experienced discrimination and humiliation in school and in the communities where she lived when away from Pictou Landing.

[8] I make these observations not to condemn or shame Ms. Denny or her family, but to underscore the fact that Ms. Denny's experience is typical, and distressingly so, of the experiences of so many First-Nations' families. It arises from generations of formal and informal discrimination, suppression, subjugation and segregation of First-Nations' communities in Canada. As described in the comprehensive Gladue report prepared by the Mi'kmaw Legal Support Network, members of Ms. Denny's family were victims of residential schooling. Residential schools were state-sponsored institutions designed to eradicate the cultures, languages and community integrity of First Nations. Acts carried out in these institutions caused serious bodily harm and mental harm to members of First-Nations' communities confined there, were calculated to bring about the destruction of those communities, and were made possible only by the forcible transfer of children of those communities into confinement in residential institutions run by colonizing powers.[1] These offences against humanity have multigenerational effects.

[1] For an historical account of residential schooling, *see* Canada, Truth and Reconciliation Commission of Canada, *The Final Report of the Truth and Reconciliation Commission of Canada: Canada's Residential Schools: The*

[9] Courts must resist any sort of self-congratulation or triumphalism in making these sorts of findings. This is because these injustices were readily obvious to all but the wilfully blind.

[10] And, in many cases, courts were implicated in them.

[11] One of the systemic effects of formal and informal policies and practices of discrimination against First Nations is the overrepresentation of First-Nations' members in Canada's prison population, as described by the Supreme Court of Canada in 1999 in *R. v. Gladue*.[2] Over a decade later, the Court observed in *R. v. Ipeelee* that the problem had become worse.[3] Recently released statistics on adult corrections show no improvement to date. Specifically, Aboriginal adults are overrepresented in admissions to provincial/territorial correctional services, as they accounted for one-quarter of admissions in 2014/2015 while representing only about 3% of the Canadian adult population. The findings for custodial admissions (26%) were similar to community admissions (24%) in the provinces and territories. With regard to federal correctional services, Aboriginal adults accounted for 22% of admissions to sentenced custody in 2014/2015. Of

---

History, Volume I, Parts. 1-2 (Ottawa: The Commission, 2015). For the legal classification of such injustices, *see* Convention on the Prevention and Punishment of the Crime of Genocide, 28 November 1949, Can TS 1949/27, arts 2-4.

[2][1999] S.C.J. No. 19 at paras. 58-65, 87 and 93.

[3] 2012 SCC 13 at paras. 57-59, 62, 65, 69, 70, and 75.

significance in Ms. Denny's case is the fact that the overrepresentation of Aboriginal adults was more pronounced for females than males: Aboriginal females accounted for 38% of female admissions to provincial/territorial sentenced custody, while the comparable figure for Aboriginal males was 24%. In federal corrections, Aboriginal females represented 31% of admissions, while Aboriginal males accounted for 22% of admissions to sentenced custody.[4]

[12] I take most seriously the very recent binding authority of the Court of Appeal in *R. v. C.N.T. [B.M.S.]* that a judge not rely on social studies or literature or scientific reports unless they have been accepted after having been properly introduced and tested by the parties.[5]

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

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

---

[4] Julie Reitano, *Juristat: Adult correctional statistics in Canada, 2014/2015—Statistics Canada Catalog No. 85-002-X* (Ottawa: Minister of Industry, 2016) at 4-5. Retrieved from Statistics Canada http://www.statcan.gc.ca/pub/85-002-x/2016001/article/14318-eng.pdf. For a full discussion of earlier but similar data, *see* Gillian Balfour, "Sentencing Aboriginal Women to Prison", in Jennifer M. Kilty, ed., *Within the Confines: Women and the Law in Canada* (Toronto: Women's Press, 2014) at 95-116.

[5] 2016 NSCA 35 at para. 17, *var'g*. 2015 NSPC 43.

> Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society (see, e.g., *R. v. Laliberte*, 2000 SKCA 27, 189 Sask. R. 190). To be clear, courts *must take judicial notice of such matters* as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, *and of course higher levels of incarceration for Aboriginal peoples*.[6] [Emphasis added]

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

[16] Significantly, *Juristat*—which is my source of information in this case—has been cited on a number of occasions in the Supreme Court of Canada.[7] One case of particular note is *R. v. Summers*, in which the Court relied upon a *Juristat* report dealing with the changing profile of adults in custody.[8] What is conspicuous about *Summers* is that an examination of the record reveals that *Juristat* was not cited in

---

[6] *Supra*, note 2, at para. 60.
[7] A keyword search for "Juristat" of the Quicklaw SCC database returned 8 hits.
[8] 2014 SCC 26 at para. 67.

the court of originating jurisdiction;[9] nor was it cited in the first-stage appeal from sentence.[10] In the appeal to the Supreme Court of Canada, *Juristat* was pleaded by neither the appellant nor the respondent; rather, it was the subject of a brief reference in the factum of an intervener.[11] And so it would seem that official, inherently reliable statistics are able to get before courts in non-traditional ways when the interests of justice might require it.[12]

[17] Finally, I would observe that there is really no alternative to the court fulfilling its judicial-notice obligation as outlined in *Gladue* and *Ipeelee,* other than conducting its own research, when the information which must be noticed is not put before the court by counsel. Indeed, inherent in the principle of judicial notice is the acceptance by the court of some material fact without there having been offered or tendered a formal proof by the parties.[13]

---

[9] [2011] O.J. No. 6377 (S.C.J.).
[10] 2013 ONCA 147.
[11] Factum of the Intervener The John Howard Society of Canada para. 8, *Summers*, *supra*, note 7. Retrieved from Supreme Court of Canada http://www.scc-csc.ca/WebDocuments-DocumentsWeb/35339/FM070_Intervener_John-Howard-Society-of-Canada.pdf.
[12] Novel approaches to judicial notice in the information age have been explored by a number of academics and jurists: see, e.g., *Rowe v. Gibson*, 798 F. 3d 622 (7th Cir. 2015); M. Cristina Martin, "Googling Your Way to Justice: How Judge Posner was (Almost) Correct in His Use of Internet Research in *Rowe v. Gibson*" (2015) 11 Seventh Cir. Rev. 1; and Jeffrey Bellin & Andrew Guthrie Ferguson, "Trial by Google: Judicial Notice in the Information Age" (2015) 108 Northwestern Law Rev.1137.
[13] Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *The Law of Evidence in Canada*, 4th ed. (Markham: Lexis Nexis, 2014) at para. 19.15.

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

[19] Giving legal effect to systemic and background factors requires an approach that is more analytical than merely observational. The analysis done by Rosinski J. in the unrelated case of *R. v. Denny* is instructional—and authoritative:

> 65 In *R. v. Gladue*, [1999] 1 S.C.R. 688, the Supreme Court of Canada set out the principles that should guide courts in relation to the application of the then extant s. 718.2(e). More recently, in *R. v. Ipeelee*, 2012 SCC 13 (at paras. 56 - 87), the Supreme Court revisited and reformulated those principles, particularly as applicable in the context of aboriginal offenders who were subject to long-term offender supervision orders.
>
> 66 The majority opinion made the following observations:
>
> > ... s. 718.2(e) of the *Code* is a remedial provision designed to ameliorate the serious problem of overrepresentation of aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing... [It] directs sentencing judges to pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique and different from those of non-aboriginal offenders... *When sentencing an aboriginal offender, a judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the*

> *courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection*... Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people generally, but additional case specific information will have to come from counsel and from the presentence report...
>
> ... to be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, high rates of substance abuse and suicide, and of course higher levels of incarceration for aboriginal peoples. These matters, on their own, and do not necessarily justify a different sentence for aboriginal offenders. Rather, they provide the necessary context for understanding and evaluating the case specific information presented by counsel... In current practice, it appears the case specific information is often brought before the court by way of a Gladue Report, which is a form of presentence report tailored to the specific circumstances of aboriginal offenders. Bringing such information to the attention of the judge in a comprehensive and timely manner is helpful to all parties at the sentencing hearing for an aboriginal offender, as it is indispensable to a judge in fulfilling his duties under s. 718.2(e) of the *Criminal Code*." -- Paras. 59 - 60.

...

> *Both sets of circumstances bear on the ultimate*
>
> *question of what is a fit and proper sentence.*

...

> *First*, systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness... The *second* set of circumstances -- the types of sanctions which may be appropriate -- bears not on the degree of culpability of the offender, but on the effectiveness of the sentence itself... s. 718.2(e) does not create a race-based discount on sentencing. -- Paras. 72-75.

[Emphasis added by Rosinski J.]

67 Furthermore, the court reiterated that it would be extremely difficult for an Aboriginal offender to ever establish a direct causal link between his circumstances and his offending. Section 718.2(e) does not logically require such a connection:

> Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. That is not

> to say that those factors need not be tied in some way to the particular offender and offence. *Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.*(para. 83) [Emphasis added by Rosinski J.][14]

[20] A cautionary note: this does not require proof of a causal link between systemic factors and the offending behaviour which brings the First-Nations' person before the court. This was underscored by the Court in *Ipeelee* in the portion of its judgment immediately prior to the passage cited by Rosinski J. in *Denny*:

> 80 An examination of the post-*Gladue* jurisprudence applying s. 718.2(e) reveals several issues with the implementation of the provision. These errors have significantly curtailed the scope and potential remedial impact of the provision, thwarting what was originally envisioned by *Gladue*.
>
> 81 First, some cases erroneously suggest that an offender must establish a causal link between background factors and the commission of the current offence before being entitled to have those matters considered by the sentencing judge. The decision of the Alberta Court of Appeal in *R. v. Poucette*, 1999 ABCA 305, 250 A.R. 55, provides one example. In that case, the court concluded, at para. 14:
>
> > It is not clear how Poucette, a 19 year old, may have been affected by the historical policies of assimilation, colonialism, residential schools and religious persecution that were mentioned by the sentencing judge. While it may be argued that all aboriginal persons have been affected by systemic and background factors, *Gladue* requires that their influences be traced to the particular offender. Failure to link the two is an error in principle.
> >
> > (*See also R. v. Gladue*, 1999 ABCA 279, 46 M.V.R. (3d) 183; *R. v. Andres*, 2002 SKCA 98, 223 Sask. R. 121.)
>
> 82 This judgment displays an inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples. It also imposes an evidentiary burden on offenders that was not intended by *Gladue*.

[14] 2016 NSSC 76 at paras. 65-67.

As the Ontario Court of Appeal states in *R. v. Collins*, 2011 ONCA 182, 277 O.A.C. 88, at paras. 32-33:

> There is nothing in the governing authorities that places the burden of persuasion on an Aboriginal accused to establish a causal link between the systemic and background factors and commission of the offence....
>
> As expressed in *Gladue, Wells and Kakekagamick*, s. 718.2(e) requires the sentencing judge to "give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts": *Gladue* at para. 69. This is a much more modest requirement than the causal link suggested by the trial judge.
>
> (See also *R. v. Jack*, 2008 BCCA 437, 261 B.C.A.C. 245.)

83 As the Ontario Court of Appeal goes on to note in *Collins*, it would be extremely difficult for an Aboriginal offender to ever establish a direct causal link between his circumstances and his offending. The interconnections are simply too complex. The *Aboriginal Justice Inquiry of Manitoba* describes the issue, at p. 86:

> Cultural oppression, social inequality, the loss of self-government and systemic discrimination, which are the legacy of the Canadian government's treatment of Aboriginal people, are intertwined and interdependent factors, and in very few cases is it possible to draw a simple and direct correlation between any one of them and the events which lead an individual Aboriginal person to commit a crime or to become incarcerated.[15]

Analysis of customary sentencing factors

[21] Sentencing must be regarded as a highly individualized process: *R. v. Ipeelee*.[16]

[22] In determining a fit sentence, a sentencing court ought to consider any relevant aggravating or mitigating circumstances; that is prescribed by para. 718.2(a) of the *Criminal Code*. The court must consider also objective and

---

[15] *Supra*, note 2, at paras. 80-83.
[16] 2012 SCC 13 at para. 38.

subjective factors related to the offender's personal circumstances and the facts pertaining to the particular case: *R. v. Pham*.[17]

[23] Assessing an offender's moral culpability is an extremely important function in the determination of any sentence. This is because a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender; that fundamental principle is set out in s. 718.1 of the *Criminal Code*.

[24] In *Ipeelee*, the Supreme Court of Canada noted that proportionality is tied closely to the objective of denunciation.[18] Proportionality promotes justice for victims and it seeks to ensure that the public will have confidence in the justice system.

[25] In *R. v. Lacasse*, the Supreme Court of Canada confirmed that proportionality is a primary principle in considering the fitness of a sentence.[19] The severity of a sentence depends upon the seriousness of the consequences of a crime and the moral blameworthiness of the individual offender. The Court recognized that determining proportionality is a delicate exercise, because both

[17] 2013 SCC 15 at para 8.
[18] Note 16, *supra*, at para. 37.
[19] 2015 SCC 64 at para. 12.

overly lenient and overly harsh sentences imposed upon an offender might have the effect of undermining public confidence in the administration of penal justice.

[26] In determining an appropriate sentence, the court is required to consider, pursuant to para. 718.2(b) of the *Code*, that a sentence should be similar to sentences imposed on similar offenders for similar offences, committed in similar circumstances. This is the principle of sentencing parity. Parity promotes the principle of equal justice, and allows rational decision makers who contemplate illegality to make intelligent risk assessments before they engage in illegal conduct.

[27] The court must apply the principle that an offender not be deprived of liberty if less restrictive sanctions might be appropriate in the circumstances; furthermore, the court must consider all available sanctions other than imprisonment that are reasonable in the circumstances. The court must consider the unique circumstances of Aboriginal persons. These important principles of restraint are set out in paras. 718.2(d) and (e) of the *Code*. In *R. v. Gladue*, the Supreme Court of Canada stated that this statutory requirement—that sentencing courts consider all available sanctions other than imprisonment—was more than merely a codification of existing law; rather, the

> provision was to be seen as a remedy whereby imprisonment was to be a sanction of last resort.[20]

[28] In assessing the seriousness of Ms. Denny's offences, I observe with respect to the offences of 21 October 2015 that Ms. Denny was charged with assault of her former partner—not assault causing bodily harm or aggravated assault—and the charge was prosecuted summarily; this fixes a maximum penalty of six-months' imprisonment pursuant to s. 787 of the *Code*. Accordingly, it is difficult for the court to accept the portrayal of Ms. Denny's conduct as asserted by the prosecution, specifically that it was an act of "extreme" violence.

[29] The victim was an intimate partner of Ms. Denny's, which is an aggravating factor under sub-paras. 718.2(a)(ii) and (iii) of the *Code*.

[30] In each of the cases before the court, Ms. Denny's conduct was spontaneous—a sudden outpouring of emotion.

[31] Ms. Denny's criminal history does not exhibit a pattern of escalating intimate-partner violence.

---

[20] [1999] S.C.J. No. 19 at paras. 31-33 and 36.

[32] I have reviewed the victim-impact statement, in which Ms. Denny's former partner describes poignantly how she was hurt, physically and emotionally, by Ms. Denny's actions. However, this is not a case of Ms. Denny calculating a reprisal against an intimate partner, and so I distinguish this case from, say, *R. v. Fraser*.[21] In *Fraser*, the Court of Appeal upheld a three-year sentence imposed upon a conditional-sentence violator who broke into the home of a former intimate partner, demolished it, and then made chilling threats against her after he had been arrested. To be sure, Ms. Denny's conduct does not resemble the serial savagery of the offender in *R. v. C.V.M.*[22] In that case, the Court of Appeal quashed a two-year conditional sentence imposed in the originating court, and substituted a term of imprisonment of twenty-two months; the offender's conduct was prolonged, extremely violent, and injured seriously an intimate partner whom he had victimized only a few years before.

[33] Ms. Denny's breach charges pertain to her consuming alcohol after having been admitted to bail with conditions prohibiting her from doing so. In an unrelated bail decision involving Ms. Denny, I commented on the problems inherent in imposing substance-prohibiting conditions on persons such as Ms.

---

[21] 2012 NSCA 118.
[22] 2003 NSCA 36.

Denny who might be substance dependent.[23] Ms. Denny assaulted the police officer in Truro while she was under the disinhibiting effects of a high level of alcohol in her body. Ms. Denny does not appear to be a police hater; when she was arrested at the Pictou Lobster Carnival, she went along peaceably.

[34] I would situate the seriousness of Ms. Denny's offences at the lower end of the scale of severity.

[35] In assessing Ms. Denny's moral culpability, I take into account her guilty pleas, her very young age, and factors inherent in her Aboriginal history which are linked directly to her offending behaviour. When peoples of a Nation have their concepts of self-worth disparaged, when their right to linguistic expression is suppressed and penalized, when their basic dignitary human rights are ignored by institutions of the dominant, colonizing culture, it is to be expected that there will be multigenerational manifestations of anger, resistance, and other forms of instilled and imprinted dysfunction. Ms. Denny represents the injustice that Canada has inflicted upon First Nations. It might not excuse her conduct—but it explains plainly.

---

[23] *R. v. Denny*, 2015 NSPC 49.

[36] I would place Ms. Denny's moral culpability at the lower end of the scale of seriousness. I shall explain.

[37] A leading academic on restorative justice developed what I consider to be a highly useful checklist of biographical factors in situating the moral responsibility of a First Nation's person facing a sentencing hearing:

- Has the person been affected by substance abuse in the community?
- Has the person been affected by poverty?
- Has the person faced overt racism?
- Has the person been affected by family or community breakdown?
- Has the person been affected by unemployment, low income and a lack of employment opportunity?
- Has the person been affected by dislocation from an Aboriginal community, loneliness and community fragmentation?[24]

[24] M.E. Turpel-LaFond, "Sentencing within a Restorative Justice Paradigm: Procedural Implications of *R. v. Gladue*", (2000), 43 C.L.Q. 34 at 40. And see Gillian Balfour, "Sentencing Aboriginal Women to Prison", in JM Kilty, ed, *Within the Confines: Women and the Law in Canada* (Toronto: Women's Press, 2014) at 100.

[38] The answer to each of these in Ms. Denny's case is an unqualified "yes". The very detailed and comprehensive Gladue report prepared by the Mi'kmaw Legal Support Network for Ms. Denny examines in detail Ms. Denny's history. I consider the report to be highly reliable and probative; although it contains what the prosecution characterised correctly as hearsay evidence, I observe that hearsay evidence is admissible in a sentencing hearing in virtue of sub-s. 723(5) of the *Code*. The report includes a health-status report on Ms. Denny prepared by Philippa Pictou which informs the court that Ms. Denny has been tested and diagnosed with fetal-alcohol spectrum disorder, attention-deficit disorder and oppositional-defiance disorder. When I consider the entirety of the report, along with the pre-sentence report, it is clear that these are permanent and irreversible mental-health conditions that affect profoundly and intermittently Ms. Denny's ability to make good choices about her own well being and that of others. [25] These factors diminish Ms. Denny's moral culpability significantly.

[25] Although it has no bearing on this case, it is worthwhile notice that evidence on the prevalence and incidence of FASD in First-Nations' communities remains clouded, in large part due to the lack of commitment of resources to study the problem: see, e.g., Michael Pacey, *Fetal Alcohol Syndrome & Fetal Alcohol Spectrum Disorder among Aboriginal Peoples: A Review of Prevalence* (Prince George, BC: National Collaborating Centre for Aboriginal Health, 2009) at 8, 14, and 22.

Effects of imprisonment

[39] What would imprisoning Ms. Denny accomplish? Not much in the way of specific deterrence, as her actions were uncalculated, spur-of-the moment reactions to stressful life situations; with some very positive exceptions which have come from the concerted help from her community, she has seen grief following grief. I do not believe that forensic experience would allow Ms. Denny to reason from the adverse consequences of incarceration that she should avoid law-breaking behaviour in the future. Incarcerating Ms. Denny is unlikely to improve her ability to make good decisions.

[40] Imprisonment would certainly separate Ms. Denny from society, which might afford some limited, temporary degree of public safety.

[41] However, Ms. Denny does not pose a danger to the general public. Those who are at risk are those few family members and intimates with whom she might come into conflict, particularly when she is substance impaired. In any event, imprisonment as a risk-management tool tends to have the effect of merely deferring risk until the time of release. I recognize that custodial sentences seek not only to punish and protect, but also to rehabilitate; however, none of the sentencing submissions before me informs the court of the type of culturally

appropriate programming that would be available to Ms. Denny were she to be imprisoned.

[42] Everyday experience assures me that sentences of imprisonment may have dramatic adverse consequences for the ones doing time—consequences which go beyond the punitive and may militate against rehabilitation. Someone who has served a prison sentence will find it harder to find a job. Lack of employment will limit housing choices, crimp income, make accessing appropriate health care more difficult; it may lead to family dysfunction and disintegration, and to bare-sustenance crime. Most seriously, it may result in former prisoners being drawn into exploitive criminal enterprises such as sex work and drug trafficking, which can lead to lethal consequences. On 8 December 2015, the Government of Canada announced the launching of an independent inquiry into the high number of missing and murdered Indigenous women, girls, including two-spirited, lesbian, bisexual, transgendered and queer in this country. Just a couple-months' ago, the government released a report summarizing submissions that had been received during the pre-inquiry design process. One of the issues identified in the preliminary report as meriting the attention of the inquiry was "institutional racism within law enforcement agencies and the links to the overrepresentation of

Indigenous people in the correctional system."[26] The connection between missing-and-murdered and Canada's corrections system is an important matter that needs to be studied in detail.

[43] I do agree with the prosecution that a purely community-based sentence would not be appropriate in this case; this is because a sentence must speak, not only to the person being sentenced, but also to the community at large. Violence—except when justified as the proportionate use of protective force, or excused because of mental disorder—is intolerable in a society that values life, liberty and security of the person. People may resort to violence for many reasons: thrill, gain, anger, revenge; violence might be a learned behaviour; or it might be induced by the disinhibiting effects of substances. The reasons might be interconnected and complex. And there will be some that be more easily understood than others. But violence is not an acceptable means of solving interpersonal disputes. Going back almost forty years, our Court of Appeal in *R. v. Perlin* decided that crimes of violence result almost always in jail terms.[27] Furthermore, Ms. Denny's record—although it runs a span of only three years—includes six prior findings of guilt for

[26] Canada, "Full summary of what we heard: Final report of the pre-inquiry engagement process", online: https://www.aadnc-aandc.gc.ca/eng/1463677554486/1463677615622.
[27] [1977] N.S.J. No. 548 at para. 8. *And see R. v. G.A.M.*, [1996] N.S.J. 52 at para. 32 (C.A.).

offences involving violence or threats of violence, and seven findings of guilt for bail or probation violations.

[44] In imposing a first prison term, particularly upon a youthful offender, a sentencing court ought to consider a sentence which is as short as reasonably possible.[28] Furthermore, much in the criminal law has changed since *Perlin*. Conditional sentencing is an available outcome in this case. This is because none of the offences before the court is conditional-sentence ineligible under the exclusionary list in paras. 742.1(b)-(f) of the *Code*. Furthermore, the range of penalty in Ms. Denny's case would be less than two years.

[45] Applying the principles set out by the Supreme Court of Canada in *R. v. Proulx*[29]--in which the Court described the punitive effect of conditional sentences, and the deterrence effect of immediate and consequential enforcement of conditional-sentence-order violations—and applying the principle of restraint (warranted in this case when the court is dealing with a youthful, unsophisticated offender of First-Nation ancestry whose conduct is linked closely to systemic discrimination), as set out in paras. 718.2(d)-(e), it is appropriate that I consider a conditional sentence in this case.

---

[28] Clayton C. Ruby, Gerald J. Chan & Nader R. Hasan, *Sentencing*, 8th ed., (Toronto: Lexis Nexis, 2012) at para. 13.16.
[29] 2000 SCC 5 at para. 38

[46] I agree with the prosecution that the more serious and violent the offence, the more likely that the range of sentence for Aboriginal persons and non-Aboriginal persons will merge; however, this does not relieve a sentencing court of the duty to apply para. 718.2(e) of the Code, and to consider the unique situation of an Aboriginal offender. This value was affirmed in *R. v. Ipeelee*.[30] I find the approach of the Manitoba Court of Appeal in *R. v. Pangman*[31] of assistance to the court. It was not the intention of Parliament to prefer Aboriginal persons in conflict with the law to other offenders. However, para. 718(e) does recognize that a sentence must be individualized, and that there exist serious social problems for First Nations' peoples which require innovative and creative solutions being adopted by sentencing courts.

[47] What has impressed me most of all about Ms. Denny is that, although she experienced intermittent difficulty with some of her bail conditions, she has accomplished a good level of success in managing her life effectively since the date she was admitted to bail on her recognizance on 28 October 2015. Furthermore, when Ms. Denny was taken into custody 8 July 2016, there was no

[30] Note 2, *supra*, at paras. 84-87.
[31] 2001 MBCA 64 at paras. 39-40.

evidence of Ms. Denny lashing out at police. By all accounts, she admitted breaking her bail by drinking and went with police peaceably.

[48] Ms. Denny has never served a conditional sentence. She has the support of her Mom; also important is the back-up Ms. Denny has received from the Pictou Landing First Nation, which arranged out-of-province counselling and treatment for Ms. Denny. The very helpful evidence which the court heard from representatives of the Department of Community Services and the Department of Health and Wellness who were invited by the court to be present today satisfies me that Ms. Denny will have available to her services that will assist her in locating housing and counselling that will promote her safety and security.

[49] With these supports in place, I believe that a conditional-sentence order would be consistent with the fundamental principles and purposes of sentencing, and would not endanger community safety.

[50] The sentence of the court will be as follows:

- Case number 2922350—assault—one-month conditional sentence order;

- Case number 2922352—applying *R. v. Skinner*[32] in relation to the imposition of concurrent sentences, in which our Court of Appeal discouraged the slavish application of consecutive sentencing—the first unlawful-confinement count—a one-month CSO to be served concurrently;

- Case number 2922353—the second unlawful-confinement count—a one-month CSO to be served concurrently;

- Case number 2922354—breach of probation—a one-month CSO to be served concurrently;

- Case number 2922355—the second count of breach of probation—a one-month CSO to be served concurrently;

- Case number 2973350—assault peace officer—a one-month CSO to be served consecutively to the preceding sentences;

- Case number 2973353—breach of bail—a one-month CSO to be served concurrently.

[51] This results in a total CSO of two months with the following conditions: [list of conditions redacted].

[32] 2016 NSCA 54 at paras. 37-44.

[52] In relation to all counts before the court, including case number 2958277, the second count of breach of bail, there will be a 12-month term of probation. The court expressly orders and directs that the probation order not commence immediately; it will commence immediately upon the expiration of the CSO in accordance with para. 732.2(1)(c) of the *Code*. It will contain the following conditions: [list of conditions redacted].

[53] There will be the mandatory minimum $100 victim-surcharge amounts in relation to each count, except for case numbers 2922354-5, which proceeded indictably and attract surcharges of $200; Ms. Denny will have 24 months to pay those amounts.

[54] The CSO will include a return-to-court date of 31 August 2016 at 9:30 a.m., with a post-sentence report update to be prepared.

[55] I considered the advisability of a s. 110 order and a secondary-designated-offence DNA collection order; I find a s. 110 order unnecessary, as Ms. Denny's bail included a weapons prohibition. The *Firearms Act*[33] stipulates that a bail-based prohibition has the same effect as a prohibition under ss. 109 or 110 of the *Code*; the result is that Ms. Denny would not be entitled to a firearms licence, even

[33] S.C. 1995, c. 39, s. 5, sub-s. 7(3).

now that her bail has come to an end. Further, Ms. Denny is already the subject of a prohibition order from an earlier proceeding. Given the proportionality assessment which I made earlier, I find that I am not persuaded that it would be best interests of the administration of justice that Ms. Denny be required to submit a DNA sample.

Atwood, JPC