Court of Queen's Bench of Alberta

Citation: R v Lariviere, 2021 ABQB 432

Date: 20210601
Docket: 170249452Q1
Registry: St. Paul

Between:

Her Majesty the Crown

Crown

- and -

Eval Lariviere

Defendant

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.
By Court Order, information that could identify RI must not be published, broadcast, or transmitted in any way.
NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

Sentencing Judgment
of the
Honourable Madam Justice M.E. Burns

The following is a written version of a decision delivered orally on May 31, 2021. I reserved the right to make stylistic or grammatical changes, to add or complete authorities and citations, to complete quotations, and to make minor revisions. This written version is provided for readier accessibility; the oral judgment remains the official judgment of the Court.

1. Overview

[1] Mr. Eval Lariviere is a 75-year-old Indigenous man who was found guilty of a sexual assault on October 19, 2020 following a trial held before me on September 15, 2020. The assault occurred 44 years ago in the summer of 1977 and he was convicted under the rape provision found under s 143 of the *Criminal Code*. Sentencing was adjourned to allow for the preparation of a Gladue report. On February 9, 2021, via Webex, I heard an application by defence to refer this matter to a restorative justice process which I granted in a non-traditional form (as discussed below).

[2] On April 9, 2021, I received in court the report of the restorative justice process and heard from both circle keepers. In addition to hearing from them, I marked their report as a sentencing exhibit, along with a victim impact statement and a Gladue report. I heard representations from the Crown and Defence as to sentencing. This is my decision.

2. Principles of Sentencing

[3] Sentencing at the best of times is a difficult process. Where one is sentencing a 75-year-old man on a very serious offence he committed 44 years ago, it becomes even more important to remember the purpose of sentencing and to return to first principles in sentencing. The task is set out in s 718 of the *Criminal Code,* but included therein is a broad discretion on the court to balance all the factors in order to meet the objectives of sentencing, i.e. to reach a "fit" sentence. While individualized sentencing is important, the cardinal principle remains proportionality. The sentence must weigh both the seriousness of the consequences of the crime and the moral blameworthiness of the offender. This weighing must consider that any sentence should be similar to sentences imposed on similar offenders for similar offenses committed in similar circumstances.

[4] I must also consider that an offender should not be deprived of liberty if less restrictive sanctions may be considered in the circumstances and all available sanctions other than imprisonment that are reasonable in the circumstance and consistent with the harm done to victims or the community should be considered for all offenders with particular attention to the circumstances of Aboriginal or Indigenous offenders. The principle of restraint cautions sentencing judges to treat imprisonment as a sanction of last resort and limit any custodial period imposed to the lightest term reasonable in the circumstances: ***R v Holloway***, 2014 ABCA 87 at para 20. This principle recognizes that while denunciation and general deterrence are important principles, individual deterrence and rehabilitation cannot be forgotten.

[5] In ***R v Ipeelee***, 2012 SCC 13, the Supreme Court of Canada restated the methodology to be followed by a sentencing judge in giving effect to ***Gladue*** principles (at paras 72):

> ... The methodology set out by this Court in ***Gladue*** is designed to focus on those unique circumstances of an Aboriginal offender which could reasonably and justifiably impact on the sentence imposed. ***Gladue*** directs sentencing judges to

> consider; (1) the unique systemic and background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (2) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection. Both sets of circumstances bear on the ultimate question of what is a fit and proper sentence.

[6] In ***R v Okimaw***, 2016 ABCA 246, the Alberta Court of Appeal summarized the two-step process that arises from the methodology identified in ***Gladue/Ipeelee***. First, the sentencing judge is to consider whether ***Gladue*** factors bear on the offender's culpability. Second, the sentencing judge is to consider what types of sentencing sanctions are appropriate in the circumstances for the particular indigenous offender. Both steps require sentencing judges to consider the particular systemic and individual circumstances that have prevailed in the life of the indigenous person before the court. (See also ***R v Swampy*** 2017 ABCA 134).

[7] In ***R v Wolfleg***, 2018 ABCA 222, our Court of Appeal discussed the obligation to properly consider s 718.2(e) in respect of Indigenous offenders (at para 53):

> Section 718.2(e) of the *Criminal Code* directs that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders". This subsection was enacted as a remedial provision, to acknowledge and address the serious over-representation of Aboriginal people in Canada's prison population. Sentencing judges are to consider reasonable alternatives to imprisonment for all offenders, and special consideration must be given to the circumstances of Aboriginal offenders. This statutory edict does not alter a sentencing judge's duty to impose a fit sentence for the offence and the offender; what it "does alter is the method of analysis which each sentencing judge must use in determining the nature of a fit sentence for an aboriginal offender". Undertaking the "process of sentencing aboriginal offenders differently, [is necessary] in order to endeavour to achieve a truly fit and proper sentence in the particular case" *Gladue* at paras 33, 37-39; see also *R v Wells*, 2000 SCC 10, [2000] 1 SCR 207 [Wells].

[8] In ***R v MC***, 2019 ONCA 502, Watts JA summarized the approach to s 718.2(e) (at paras 71-3):

> The *Gladue* court concluded that s. 718.2(e) was more than simply a re-affirmation of existing sentencing principles. The *remedial* component of the provision has two aspects – codification of a sentencing principle and a direction to sentencing courts to undertake the sentencing of Aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case: *Gladue*, at para. 33.
>
> The inclusion of the words "with particular attention to the circumstances of Aboriginal offenders" means that sentencing judges must pay particular attention to those circumstances because they are unique and different from those of non-Aboriginal offenders, such that imprisonment may be a less appropriate or less useful sanction for Aboriginal offenders: *Gladue,* at para. 37.

> The purpose of s. 718.2(e) is to respond to the problem of overincarceration in Canada and, in particular, to the more acute problem of the disproportionate incarceration of Aboriginal peoples. Section 718.2(e) and other provisions of Part XXIII encourage sentencing judges to apply principles of restorative justice alongside or in lieu of other, more traditional sentencing principles when making sentencing decisions: *Gladue*, at para. 50.

[9] Section 718.2(e) is not to be taken as a means of automatically reducing the prison sentence of Indigenous offenders; nor should it be assumed that an offender is receiving a more lenient sentence simply because incarceration is not imposed: ***Ipeelee*** at paras 74, 83; ***R v Laboucane***, 2016 ABCA 176 at para 63. The section does not mandate better treatment for Indigenous offenders than non-Indigenous offenders. It simply recognizes that the sentence must be individualized and that there are serious social problems with respect to Indigenous people that require more creative and innovative solutions. This is not reverse discrimination. It is an acknowledgment that to achieve real equality, sometimes different people must be treated differently. The different approach and methodology for assessment of a fit sentence of an Indigenous offender does not necessarily mandate a different result: ***Gladue***, at para 88; ***Ipeelee*** at paras 71, 75; ***R v Wells***, 2000 SCC 10, [2000] 1 SCR 207.

[10] The application of s 718.2(e) does not mean an Indigenous offender must always be sentenced in a manner which gives greatest weight to the principles of "restorative justice" and less weight to goals such as "deterrence, denunciation, and separation". In the appropriate circumstances, a sentencing judge may give greater weight to restorative principles and community-based sanctions notwithstanding that an Indigenous offender has committed a serious crime. However, the more serious and violent the crime, the more likely it will be that the terms of imprisonment will be the same for similar offences and offenders, whether the offender is Indigenous or non-Indigenous. ***Gladue*** factors have a lesser impact when it comes to issues like protecting the safety of the public, and individual deterrence: ***R v Gladue***, 2018 ABCA 383 at para 3. Nonetheless, even when serious and violent offences are involved the courts *must* apply these principles and must avoid a formalistic approach which risks undermining the remedial purpose of s 718.2(e): ***R v Friesen***, 2020 SCC 9 at para 92; ***R v Okimaw***, 2016 ABCA 246 at para 69.

[11] The absence of alternative sentencing programs specific to an Indigenous community does not eliminate the ability of a sentencing judge to impose a sanction that considers principles of restorative justice and the needs of the parties involved. If there is no alternative to incarceration, the length of the term must be carefully considered.

3. The Facts

(a) Circumstances of the Offence

[12] In July 1977, RI went to Cold Lake, Alberta with a group of her friends to watch a ball tournament involving the Canoe Lake, Saskatchewan baseball team, of which Mr. Lariviere was a member. Although she thought she had a place to stay in the evening, those plans fell through and Mr. Lariviere invited Ms. I and her friend to stay in his tent with some teammates. Ms. I agreed and felt safe as she viewed Mr. Lariviere as an "uncle". Ms. I shared Mr. Lariviere's

sleeping bag and testified that she fell asleep or passed out almost immediately upon going into the tent and did not wake up at all during the night.

[13] In the morning, Ms. I felt like something was off and that her clothes were not the way they should be with her panties twisted. She felt tender and damp in her vaginal area. She was sore and the soreness persisted for the day. Upon returning to Canoe Lake, in the following weeks, Ms. I discovered she was pregnant. Subsequent DNA tests confirm the child is Mr. Lariviere's. I accepted Ms. I's evidence that she had not had sex with Mr. Lariviere either before or after the night in the tent and concluded that there was sexual intercourse that occurred that was not consented to by Ms. I supporting a conviction of rape.

(b) **Circumstances of Mr. Lariviere**

[14] Mr. Lariviere is 75 years old. He is a diabetic and has a heart condition.

[15] I have the benefit of a Gladue Report. That report identifies Mr. Lariviere as an Indigenous male who is a registered treaty member with Canoe Lake Cree First Nation. Canoe Lake came into existence when the leaders of their tribe signed Treaty Number 10 in September 1906. The First Nation currently has 1464 members with 755 residing on the reserve land. Canoe Lake Cree First Nation is an isolated and relatively remote Indigenous community in northern Saskatchewan, approximately 200 km west of La Ronge.

[16] Mr. Lariviere was born and raised in the community. Mr. Lariviere grew up with his five siblings and his parents in Canoe Lake. The Indian residential school connected to Canoe Lake operated from 1860 to 1995. Mr. Lariviere attended the residential school from 1953 to 1959 when it was run by the Roman Catholic mission. Both of his parents also attended Indian residential schools. Mr. Lariviere left the school at grade 10 to become employed. Later he went back to school and received his grade 12 diploma.

[17] Mr. Lariviere has been gainfully employed for most of his adult life. Mr. Lariviere advised that he drank quite a bit in the early 70s and 80s, but he quit drinking in 1988. "I was tired of being hung over." Mr. Lariviere sought help when he decided to quit and he attended an outpatient treatment center in Meadow Lake, Saskatchewan. Upon becoming clean and sober he worked in Edmonton helping other people struggling with addictions. He also managed the Loon Lake Rehabilitation Center from 1992 to 1997 and the Onion Lake Healing Lodge from 1995 to 1996. He now works as a bus driver in Canoe Lake.

[18] Mr. Lariviere's first relationship was with Clementine. They were married from 1968 to 1981. He attributes their separation to his drinking and physical violence. They had three children together and he still talks to his children on a daily basis. Mr. Lariviere is now in a long-term relationship with his spouse Doreen. They met in 1988 and were married in 2003. They had one child together, Kyle, who passed away from a tragic event in 2009.

[19] Mr. Lariviere is seen as an advisor, mentor, role model and elder within his community. He has been active in community sports, built the arena and started an organized ball team in the 1960s. Mr. Lariviere attended the Catholic Church for most of his early life, but today he is actively involved in indigenous spirituality and traditions. He attends sweat lodges and powwows. He is a pipe carrier and attends Sun dances, round dances and horse dances.

[20] Mr. Lariviere's record was not put before the court because it is old and dated. It is apparently related to drinking and driving related offenses and has nothing post 1984.

[21] Mr. Lariviere was unaware of the charge being brought against him or that he had another son until 2015. He does not deny his role in the offense and indicates he's reflecting on his life and feels remorse for the things he did while he was under the influence of alcohol.

(c) Victim Impact Statements

[22] I was provided with a victim impact statement from RI. The purpose in allowing victim impact statements into evidence is to bring information to the court about the impact of the crime for which the offender is to be sentenced. Through s 722 of the *Criminal Code*, Parliament has indicated the importance of treating victims with courtesy, dignity and respect and giving regard to the views and concerns of victims in order to craft a fit sentence by taking into consideration all relevant legal principles, and the circumstances of the offence and the offender.

[23] In her victim impact statement, Ms. I discloses that for many years she lived with the shame and fear of others finding out that she was raped and out of this her son was born. She went through feelings of degradation, suicide ideation, worthlessness and she struggled with why Mr. Lariviere would do this to her, his "niece". His use of alcohol at the time was no excuse.

[24] Ms. I did not share this "dark and ugly secret" with anyone, including her partner of 35 years. It was with the power of prayer and faith that she was able to keep herself together mentally. She attributes her moderate drinking to the fact that this happened when she had been drinking. It was only after her mother and father passed that she told her sister and went to the RCMP. She states she is grateful to the officer who listened to her with empathy. She is glad Mr. Lariviere was found guilty, but the teachings of her parents make her feel compassion and empathy for him. She knows he is being held accountable for his actions and justice has been served. In addition to the Victim Impact Statement, Ms. I was a key participant in the restorative justice process.

(d) The Restorative Justice Process

[25] It is recognized that sentencing circles are not appropriate for all offenders. Effectiveness depends on the connection of the offender to the community, the sincerity and nature of the offender's efforts to be healed, the input of the victim, and the dedication of the offender support group. Upon canvassing case law and my colleagues, I could find no precedent for a sentencing circle in Alberta relating to a sexual assault charge.

[26] I directed that, given the request of Mr. Lariviere and the victim's consent, that a restorative justice process would be appropriate. However, I noted several hurdles to the process including: (i) Canoe Lake is in Saskatchewan and I was not comfortable that I should be attending in person; and (ii) we are in the middle of a pandemic and I was not comfortable directing that the Crown and defence travel. Balancing these factors, and hearing from Ms. I, I directed that a restorative justice process could be undertaken. It was to be impartial with outside guidance to assist the community, as Canoe Lake Cree First Nation had not undertaken such a process before. As noted by the Circle Keepers, it was "an odd process", but it was the best we could do in these times and in these circumstances. I advised that I would receive a report from the process and consider it in addition to the Gladue Report for the purposes of sentencing.

[27] At the continuation of the sentencing hearing on April 9, 2021, I was presented with a Sentencing Circle Report by the Circle Keepers - Stacy Harrison and Ramona Cardinal. They are

both circle keepers associated with the Saddle Lake Restorative Justice Program. Saddle Lake Restorative Justice has done over 500 sentencing circles.

[28] In presenting the Sentence Circle Report, the Circle Keepers reported that half the circle was conducted in Cree and half the circle was conducted in English. They indicated that having much of the process in their language was very powerful as the Cree language is more expressive than English. The Circle Keepers observed that the community was very strong with spirituality. There was a blend of traditional native spirituality as well as Christianity discussed in the circle. The Circle Keepers noted that their people are a relationship-based society, based on relationships with the creator, with the land and with each other. Those who participated saw this as the beginning of a larger process which would ultimately address the issues in their community including the implications from generations attending residential schools.

[29] The Circle Keepers noted that Ms. I was engaged in the process and indicated that she missed her "uncle". Mr. Lariviere participated and was very remorseful. He has changed since this occurred in 1977. Both the victim and the offender went through the residential school system back in the 50s and 60s. At the time of the offense, Mr. Lariviere was 32 years of age and Ms. I was 18. They noted that in the 70s the culture of shame around talking about sexual assault or abuse was in the forefront and that talking about such things was taboo, although it was unfortunately quite common place.

[30] The notes from the circle indicate that Ms. I has empathy for Mr. Lariviere and does not want him to spend time incarcerated and that is why she agreed to the circle. She wants the circle to be a teaching tool to unlearn bad behaviors and to show respect to women and acknowledge that sexual assault is not OK. She indicates that the community members make themselves sick if they do not first accept and forgive themselves. She notes that it is important to remember that not getting revenge is the number one thing. The Circle Keepers found Ms. I"s recommendations heartfelt and noted she does not want Mr. Lariviere going to jail. Ms. I wants education and awareness so that they can help other community members.

[31] In addition to Ms. I and Mr. Lariviere, the others participants in the sentencing circle included Ms. I's sister, a community addictions worker, the Canoe Lake Cree First Nation council member in charge of the justice portfolio, the Canoe Lake Justice Coordinator, the Chairman of the Elder Committee, two circle keeper support persons, a community member, Mr. Lariviere's stepdaughter and Mr. Lariviere's daughter.

[32] Those who commented were concerned about the boy born from the assault, who is now 44 years old and what he may need in this process. There was also concern expressed for Mr. Lariviere's children and grandchildren who would be negatively affected if the matter is not resolved. Mr. Lariviere's family talked about the trauma they felt and feel and how hurt they are by this and how angry they were at their father. They talked about forgiveness and they talked about the fear of never seeing Mr. Lariviere again if he goes to jail.

[33] Those around the circle commented about the courage it took for both the offender and the victim to be involved in the process and their willingness to talk forgiveness and about wanting to work together. They talked a lot about the need to teach their youth to respect the roles of males and females. They talked about the learned negative sexual behavior which was brought from the residential schools and was thought to be normal, but it was not normal at all. They noted that while there has been a lot of healing, there is still much more to be done. The

focus of the circle became how to heal the relationship between the victim and the offender, how to heal the community and how to keep Mr. Lariviere from jail.

[34] In the report, there are recommendations from the circle including the victim recommendation which was to continue with healing circles for community members to do education and awareness as to what is appropriate behavior for the youth of Canoe Lake. She would like the presentation and awareness workshops done jointly with Mr. Lariviere. She does not want Mr. Lariviere to go to jail as it would do more harm than good.

[35] Other participants noted that they agreed about not sending Mr. Lariviere to jail and wanted to have both Mr. Lariviere and Ms. I help with the process of healing the community. Most people within the community agreed to having additional healing circles in the future, to work on repairing the relationships that have been impacted by this situation.

[36] The circle keepers observed that the community recognized it would it would be a greater benefit for Mr. Lariviere and Ms. I to continue working on healing their relationship as "niece" and "uncle", as well as being guides for the rest of the community, working towards healing, and helping others who have been victimized to give them a voice and a chance to heal.

[37] The circle keepers reported that after the circle was complete they followed up with phone calls to Ms. I and Mr. Lariviere. Ms. I indicated she was feeling very refreshed and was feeling like a big weight has been lifted off her shoulders. She praised the process and indicated she would like to have another circle in the not too distant future. Mr. Lariviere echoed the same feelings, that he felt good about the process and that he would also like to have follow up circles in the future. The Justice Support Worker for Canoe Lake indicated she too was happy with the process and had gained a deeper understanding around healing through the circle process. She's looking forward to getting additional training so she can conduct future circles within the community

4. Positions of Crown and Defence

[38] The Crown is seeking two years incarceration. The Crown submits that, considering the circumstances, denunciation and deterrence remain the paramount principles of sentencing and a significant custodial sentence is appropriate. He notes that if the time is provincial time, it will have to be served in Alberta, away from the offender's home in Saskatchewan.

[39] The Defence argues that there should be a suspended sentence with probation conditions, such conditions to reflect the recommendations of the sentencing circle.

5. Analysis

[40] As noted above, it is important in cases such as these to return to first principles in sentencing while keeping in mind the purpose of sentencing.

First Principles

[41] The Supreme Court of Canada in ***Ipeelee*** at paras 35-37 reminds us that:

> According to s. 718, the fundamental purpose of sentencing is to contribute to "respect for the law and the maintenance of a just, peaceful and safe society".
>
> This is accomplished by imposing "just sanctions" that reflect one or more of the

> traditional sentencing objectives: denunciation, general and specific deterrence, separation of offenders, rehabilitation, reparation to victims, and promoting a sense of responsibility in offenders and acknowledgement of the harm done to victims and to the community.
>
> ...
>
> The fundamental principle of sentencing is that the sentence must be proportionate to both the gravity of the offence and the degree of responsibility of the offender.
>
> ...
>
> The fundamental principle of sentencing (i.e. proportionality) is intimately tied to the fundamental purpose of sentencing – the maintenance of a just, peaceful and safe society through the imposition of just sanctions
>
> ...
>
> In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

Gravity

[42] In ***Ipeelee,*** the SCC recognized that having the sentence reflect the gravity of the offence is closely tied to the objective of denunciation. As noted by the Crown, this was a major sexual assault involving vaginal intercourse, a sleeping or unconscious victim, and a child as a result. It was a serious sexual assault which invites both unequivocal denunciation and deterrence.

Moral Blameworthiness

[43] With respect to moral blameworthiness, in ***Ipeelee*** at para 37, the Supreme Court of Canada stated that "the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender".

[44] The Court must... "focus on those unique circumstances of the aboriginal offender which would reasonably and justifiably impact on the sentence imposed". One must consider "the unique systemic and background factors which may have played a part in bringing the accused before the Court". That means considering whether such factors as colonialism, displacement and residential schools influenced the accused's life in terms of educational attainment, lower income, higher unemployment, substance abuse, violence and the like. If that is the case, then the accused's moral culpability is reduced because it may be said that his freedom to choose has been compromised by his heritage.

[45] The sexual assault in this case was fueled by alcohol and resulted in a pregnancy. It is clear that the greater the degree of recklessness or wilful blindness, the greater moral culpability: ***Arcand*** at para 363.

[46] On the other hand, even in cases of "extremely grave" sexual violence against children (which is not present here), the *Gladue* principles can serve to reduce an offender's moral blameworthiness: ***Friesen*** at para 92. I note that, after *Gladue* considerations were taken into account, non-custodial sentences have been imposed on Indigenous offenders who committed serious sexual assaults: ***R v RS***, 2021 ONSC 2263; ***R v Pecoskie***, [2000] OJ No 1421 (SupCtJ), aff'd (2002), 170 OAC 396; ***R v Paulin***, 2011 ONSC 5027; ***R v WJN***, 2012 ONSC 5917.

[47] It is self-evident that the factors in Mr. Lariviere's background had a significant effect on him and contributed to bringing him to the place he was in when he committed this offence. As will be discussed below, the *Gladue* factors lower his moral culpability and must be considered in determining the appropriate sentence.

Starting Point

[48] The Alberta Court of Appeal in ***R v Arcand*** 2010 ABCA 363, set a starting point in Alberta for a major sexual assault at 3 years. This starting point assumes a person with no record and of ordinary or average good character with no guilty plea.

[49] The Court of Appeal stated in ***Arcand*** that the starting point sentence is not a minimum sentence, but simply a starting point, subject to application of all relevant considerations, which may result in the ultimate sentence being either higher or lower than the starting point sentence. This principle was reiterated in ***Friesen*** where the SCC held that sentencing ranges and starting points are primarily guidelines, as opposed to hard and fast rules from which courts may at times need to depart in order to achieve a proportionate sentence (at paras 37-8). See also ***R v Stewart***, 2021 ABCA 79 at para 41.

[50] Further, regardless of appellate-made starting points and sentencing ranges, the particular sentence must always account for "mitigating factors", "collateral consequences", and "exceptional circumstances": ***R v Godfrey***, 2018 ABCA 369 at para 15; ***R v Currie***, 2016 BCCA 404 at para 49; ***R v Schneider***, 2019 BCCA 310.

[51] It is also worth noting that the complainant is an Indigenous woman. The vulnerability of Indigenous women in Canadian society was recognized in ***R v Barton***, 2019 SCC 33, where the SCC stated (at para 198):

> ... There is no denying that Indigenous people – and in particular Indigenous women, girls, and sex workers – have endured serious injustices, including high rates of sexual violence against women. The ongoing work of the National Inquiry into Missing and Murdered Indigenous Women and Girls is just one reminder of that painful reality (see Interim Report, *Our Woman and Girls are Sacred* (2017)).

[52] It is appropriate to consider both the nature of the victim, and the effect of the crime on the broader Indigenous community: ***R v AD***, 2019 ABCA 396 at paras 24-9.

Aggravating and Mitigating Factors

[53] With this starting point in mind, to arrive at a proportional sentence, I must consider the aggravating and mitigating factors as found in s718.2(a) of the *Criminal Code* that will impact both the gravity of the offence and the moral culpability of Mr. Lariviere.

[54] The Crown cites the fact that the complainant was asleep or passed out and that the complainant became pregnat as aggravating factors.

[55] The Crown suggests that Mr. Lariviere's age in and of itself is not mitigating, but concedes that insofar as his age and state of health would render incarceration particularly difficult, they can be considered. Further, the Crown properly concedes the presence of Gladue factors that bear on Mr. Lariviere's moral culpability.

[56] The Defence indicates mitigating factors include:

- Mr. Lariviere's full cooperation with the police, facilitating the prosecution of this offence;
- Mr. Lariviere's judgement during the the offence was impaired by alcohol;
- The antiquity of the offence, and his good behaviour in the 40 years thereafter;
- Mr. Lariviere's advanced age and impaired health, making him at risk in an institutional setting;
- Mr. Lariviere's exemplary character, performing community service over the years, and respected role in the community as an Elder and advisor/mentor; and
- Mr. Lariviere lost his job as a result of the prosecution and conviction.

[57] I am not persuaded by Defence's submission that Mr. Lariviere's cooperation with the police can be considered akin to a guilty plea. One of the reasons a guilty plea is considered mitigating is because it relieves the complainant of the need to testify about traumatic events: ***R v Johnston and Tremayne***, [1970] 2 OR 780 at 783 (CA), citing ***R v de Haan***, [1967] 3 All ER 618 (CA). Mr. Lariviere contested the allegation, compelling Ms. I to testify. Contesting the allegation is not an aggravating factor; it merely negates the mitigating effect of a guilty plea.

[58] Yet, this submission merits further comment. A guilty plea is also considered mitigating because it demonstrates that the accused acknowledges responsibility for his conduct and expresses remorse: ***R v SLW***, 2018 ABCA 235 at para 32. In this case, the Defence explains that Mr. Lariviere did not remember the events at issue and thus did not plead guilty to something he did not remember. Importantly, after his conviction, Mr. Lariviere expressed remorse and demonstrated his insight into the offence. Remorse, coupled with insight and evidence of rehabilitation, is a relevant mitigating factor (***Friesen*** at para 165).

Additional Considerations

[59] In addition to the mitigating and aggravating factors to consider I am faced with two additional factors to consider: Mr. Lariviere's age and health and the effect of the restorative justice process on any sentence.

Age & Health

[60] In ***R v LW***, 2018 ONCJ 399, the Ontario Superior Court noted the incongruity in Parliament clearly turning its mind to how to deal with young offenders, but failing to enact similar measures respecting elderly offenders.

[61] An offender's advanced age, particularly when combined with poor health, is a legitimate sentencing consideration. There are two reasons for this: first, the older a person is, the harder it is to serve a prison term; and second, the older a person is, the less likely he will be able outlive the sentence: ***R v M(CA)***, [1996] 1 SCR 500.

[62] In ***R v McNamara (No. 2)*** (1981), 56 CCC (2d) 516 at 520 (OntCA), the Ontario Court of Appeal stated that the age of an offender, particularly once he is passed 60, is a serious factor to be considered in mitigation, especially where it is combined with evidence of previous good character. See also Clayton Ruby, et al, *Sentencing*, *9th ed.* (Toronto: LexisNexis Canada, 2017), at p 293.

[63] However, our Court of Appeal in, ***R v Cromwell***, 2006 ABCA 365, took a more nuanced approach to those just over the threshold of 60 years of age, and was not convinced that a 62 year old offender, without evidence of poor health, should require special treatment.

[64] Regardless, courts across Canada have accepted that age is a relevant consideration. In ***R v O(JN)*** (1993), 103 Nfld & PEIR 256, 326 APR 256 (CA), the Nfld Court of Appeal explained that the age of an accused is a relevant factor in attempting to arrive at a fit and proper sentence: if the accused is youthful, the court is inclined to be as lenient as possible; and if the accused is considered elderly, the court must pay particular attention to the state of health and, to the extent it can be inferred, the life expectancy of the aging offender.

[65] In ***R v R(A)*** (1994), 88 CCC (3d) 184 (ManCA), the Manitoba Court of Appeal dealt with an elderly (71 years) and infirm (muscular dystrophy) offender convicted of a historic sexual assault against his underage daughter. The offender argued that his age and poor state of health, together with the antiquity of the offence, all counted as special circumstances which made a prison term an unfit sentence. The Court of Appeal accepted that advanced age is usually a mitigating factor, though it does not entitle a sexual offender to a non-custodial sentence. Ultimately though, the Court of Appeal accepted that the combination of all three factors together warranted a non-custodial sentence, concluding (at paras 45-47):

> There is an old Chinese proverb: "In making laws, severity; in administering laws, clemency." (William Scarborough, *Chinese Proverbs,* 1875). Justice without clemency, in appropriate circumstances, is injustice.
>
> The accused has suffered the stigma of a conviction for a repugnant offence. Ordinarily that would not be enough. But he already suffers in his old age, through the force of destiny, from a debilitating illness. Prison for this man would be a far worse punishment than for others. And, from a public point of view, one may well ask whether there is any purpose to be served in paying for him to be hospitalized for the duration of his sentence.
>
> In all the circumstances, I think a prison term unfit. What ordinarily would be a just disposition becomes an unjust one when the absence of a need for public protection, the age of the accused and his state of health are combined. His circumstances constitute punishment enough.

[66] In ***R v Nezic***, [1976] BCJ No 1154 (CA), a 77-year-old offender was convicted of assault causing bodily harm following a brawl in a pub. The Court of Appeal substituted a conditional discharge for the sentence of 6 months imprisonment, stating (at para 4):

> I think this is a case where reasonable men may differ as to what is an appropriate penalty. I see no useful purpose in putting this appellant at the age of seventy-seven in jail for six months. The evidence before us is that he is indeed very remorseful. He does not need anything more to deter him, and I have grave doubts that a sentence of six months is going to deter anybody from getting involved in a drunken brawl in a beer parlour.

[67] Similarly, see ***R v W(AG)*** (2000), 130 OAC 78, where the Ontario Court of Appeal upheld a non-custodial sentence for a 78-year-old offender convicted of historic incest and sexual assault charges.

[68] Obviously, where an elderly offender's age did not stop him from committing the offences, then it will not have a mitigating impact: see ***R v O'Keefe***, 2018 NLCA 11; Further, middle age, rather than old age, is not a mitigating factor: ***R v Schmitt***, 2014 ABCA 105 at para 12. Finally, egregious (historic) sexual offences may warrant the incarceration of elderly offenders: ***R v FJS***, 2005 ABQB 992; ***R v Swope***, 2015 BCCA 167; ***R v RP***, 2018 QCCA 21; ***GB v R***, 2013 QCCA 276; ***R v LJS*** (1997), 116 CCC (3d) 477 (OntCA).

[69] Meanwhile, it seems indisputable that if an offender suffers from a serious physical illness, the term of imprisonment that might otherwise be a proportional sentence may have a disproportionate adverse impact and thereby warrant a reduced or non-custodial sentence (***R v TLB***, 2007 ABCA 61 at para 34; ***R v Nuttall***, 2001 ABCA 277.

[70] However, the fact of illness or significant physical challenge does not, *by itself*, necessitate punishment deviating from the punishment otherwise proportional to the gravity of the offence and the degree of blameworthiness of the offender: ***R v Myette***, 2013 ABCA 371 at paras 35-37.

[71] Mr. Lariviere is an elderly offender with diabetes and a heart condition, albeit he does not suffer from a life-threatening illness and his health is not fragile. No evidence was presented to suggest that a correctional institution could not adequately provide for his medical needs. It seems indisputable that Mr. Lariviere's age and health conditions are mitigating factors. I accept that a sentence of imprisonment that might otherwise be appropriate would have a disproportionate adverse impact and that a person in Mr. Lariviere's shoes would experience greater hardship in a custodial setting.

Restorative Justice Consideration

[72] In ***Gladue***, the SCC addressed the meaning of s 718.2(d)-(f) as a whole, stating that they (at para 43):

> ... focus upon the restorative goals of repairing the harms suffered by individual victims and by the community as a whole, promoting a sense of responsibility and an acknowledgment of the harm caused on the part of the offender, and attempting to rehabilitate or heal the offender... as a general matter restorative justice involves some form of restitution and reintegration into the community. The need for offenders to take responsibility for their actions is central to the sentencing process: ... Restorative sentencing goals do not usually

> correlate with the use of prison as a sanction. In our view, Parliament's choice to include (*e*) and (*f*) alongside the traditional sentencing goals must be understood as evidencing an intention to expand the parameters of the sentencing analysis for all offenders. The principle of restraint expressed in s. 718.2(*e*) will necessarily be informed by this re-orientation.

[73] The SCC went on to explain that in enacting these provisions, Parliament empowered sentencing judges to craft sentences in a manner *which is meaningful to Indigenous peoples* (at para 93).

[74] In ***Wells***, at para 50, Iacobucci J left open the possibility that, *in the appropriate circumstances*, a sentencing judge may give greater weight to restorative principles and community-based sanctions, notwithstanding that an Aboriginal or Indigenous offender has committed a serious crime.

[75] I already determined that it was appropriate to have a restorative justice process. The law and judicial practice regarding sentencing circles are not as robust in Alberta as in some other jurisdictions, and therefore it is useful to review the fundamental principles. A useful, initial survey is found in ***R v BL***, 2002 ABCA 44.

[76] The notion of healing is at the heart of the sentencing circle restorative approach: ***R v Taylor*** (1997), 122 CCC (3d) 376 at para 70, 15 CR (5th) 48 (SaskCA); ***R v Morin*** (1995), 101 CCC (3d) 124 at para 80, 42 CR (4th) 339 (SaskCA); ***Gladue*** at para 93. The sentencing circle is not only about the rehabilitation of the offender, but it is also about seeking justice for the victim: ***R v Lavergne***, 2018 ONCJ 901 at para 35; see also ***R v JJ***, 2004 NLCA 81 at para 82.

[77] There is no point to have a sentencing circle if its input is not carefully considered, and to the greatest extent possible, implemented. Acceptance of the recommendations from a sentencing circle is done in an effort to further the perspective of aboriginal justice and foster rehabilitation, restoration, reconciliation, and restitution. As the Ontario Court of Appeal stated in ***R v Macintyre-Syrett***, 2018 ONCA 706 at para 19, where sentencing circles exist, they can further the remedial purpose of s 718.2(e) and restorative sentencing objectives, and can be used to craft a fit and effective sentence that is proportionate to the appellant's offence and the degree of his responsibility (at para 9). Further, as CJ Bayda of the Saskatchewan Court of Appeal stated in ***Taylor*** (at para 84):

> ... for the judge to second guess the circle participants who, in the end, recommended a balance or blend of restorative and retributive measures with a nod to the restorative and to tell them, in effect, that he knows better than they what is good for them, would be to exhibit an unacceptable degree of presumptuousness and insensitivity where judiciousness and responsiveness are in order....

[78] Nonetheless, caution regarding the use of a sentencing circle's recommendations was expressed in ***BL***, where our Court of Appeal found that a suspended sentence for aggravated assault imposed following a sentencing circle was unfit. But, the sentencing circle process in that case was flawed in several ways, which all undermined its recommendations; those flaws included concerns relating to the composition of the circle since no independent members of the community participated, the disabled complainant had no support, his spouse declined to participate, and there were concerns about the parties' input. The Court of Appeal also found that

the sentencing Judge had taken an overly broad view of ***Gladue*** and had failed to give appropriate weight to denunciation and deterrence.

[79] I recognize that restorative justice processes or sentencing circles and their recommendations are not appropriate in circumstances where the need for denunciation and deterrence is such that incarceration is the only suitable way to express society's condemnation of the offender's conduct: ***R v Morris***, 2004 BCCA 305; ***JJ***.

[80] In ***Morris***, the BCCA overturned a suspended sentence for a prolonged and brutal spousal assault as well as pointing a firearm at another person, in the context of a community where spousal abuse was epidemic, because it sent the wrong message to the victim, the offender and the community (at para 62). In ***Morris***, the community was divided over how to address the epidemic of spousal abuse. The complainant had had reservations about participating in the process, and after the talking circle had taken place, the local Aboriginal Women's Society wrote a latter complaining about its lack of impartiality, and warning that it could cause retaliation against those who came forward with complaints of domestic violence and would "only further ostracize, isolate and subject our families to further oppression" at para 27. Finch CJ also noted that the community lacked the capacity to actually give effect to traditional aboriginal justice and restorative objectives (at para 65).

[81] In ***JJ***, the NfldCA overturned a conditional sentence imposed following a sentencing circle since the sentencing Judge had failed to properly consider whether a sentencing circle was even appropriate. The NfldCA held that it was not because i) clear evidence indicated that the complainant had been pressured into participating, and ii) the offence was a serious sexual assault against the complainant, whom the accused had assaulted on 17 previous occasions, and it had been committed while he was on probation arising from a sentencing circle recommendation relating to a previous assault on the complainant.

[82] In my view, in assessing whether a restorative justice approach, involving alternatives to incarceration, is appropriate, the court must consideration the following:

> a) Does the complainant accept, or can the complainant be expected to accept the penalty to be imposed as one that fits within the range of penalties that could be imposed?
>
> b) Does the community, having regard to the accused's moral culpability and the fact that this legacy is the communities' responsibility, accept the penalty to be imposed as one that fits within the range of penalties that could be imposed?
>
> c) Is the penalty likely to prevent the accused from reoffending?
>
> d) Are there sufficient resources available to assist the accused and thus reduce the risk of recidivism?

[83] I am satisfied that, in this case, all of these questions are answered in the affirmative.

[84] I am also satisfied that the concerns identified in the appellate authorities regarding the sentencing circle process are not present in this case. Mr. Lariviere was a suitable candidate; the complainant freely participated in the process and was supported by her sister; respected elders, circle keepers and community members involved with the justice system and addictions issues plus outside facilitators participated; no fetters were put on the parties' participation; and the community has the capacity and willingness to give effect to its recommendations.

Sentence options

[85] The courts have few options other than imprisonment where deterrence and denunciation are paramount objectives: ***Lacasse*** at para 6. Yet the key consideration in sentencing is always proportionality, in which the determination of a just and appropriate sentence is a highly individualized exercise: ***Proulx*** at paras 82-3; ***Lacasse*** at para 58.

[86] The *Criminal Code* sets out a number of sentencing tools as alternatives to custodial sentences: conditional sentencing orders; intermittent sentences; conditional or absolute discharges; and suspended sentences.

[87] The SCC in ***R v Poulin***, 2019 SCC 47, definitively held that an offender is not entitled to the benefit of a temporary easing in punishment in the interval between the commission of the offence and sentencing. In such circumstances, a conditional sentence order is not available. This is exactly the situation in this case – the option of a conditional sentence was introduced long after Mr. Lariviere's commission of the sexual assault and it was eliminated before trial.

[88] The Defence submits that I should distinguish ***Poulin*** on the grounds that i) it did not concern an Indigenous offender, and ii) there was a strong dissent by Justice Karakatsanis. The Defence submits that it is counter-intuitive to hold that a conditional sentence order is not an available option for an Indigenous offender, given that one of the objectives of the conditional sentence order regime was to address the over-incarceration of Indigenous people. I sympathize with this argument since the cancellation of conditional sentences by s 742.1(f)(iii) removes a tool that would otherwise allow sentencing judges to give greater effect to the mandate of s 718.2(e). Nonetheless, until *Sharma*-type reasoning striking down 742.1(f)(iii) [***R v Sharma***, 2020 ONCA 478, leave to appeal granted, [2020] SCCA No 311] is adopted in Alberta or it is endorsed by the SCC, I am bound by ***Poulin***.

[89] I do not need to dwell on intermittent sentences or conditional or absolute discharges since none of them were suggested by the parties. An intermittent sentence would not be optimal as such a sentence would be served away from Mr. Larivere's home community. Meanwhile, a discharge for a major sexual assault would be contrary to the public interest and thus inappropriate (see ***R v MacFarlane***, 1976 ALTASCAD 6).

[90] Our Court of Appeal has indicated that where Parliament has removed the availability of a conditional sentence, imposing a suspended sentence would undermine Parliament's intention by imposing a "disguised conditional sentence": ***R v Scott***, 2015 ABCA 99 at paras 8-9; ***R v Geiger***, 2016 ABCA 337 at paras 10-13. In other words, the court should not impose a suspended sentence where the possibility of a conditional sentence has been removed by Parliament due to the seriousness of the offence. In ***Scott*** and ***Geiger***, our Court of Appeal intervened to set aside clearly unfit sentences which "lack[ed] a punitive component and fail[ed] to provide an adequate measure of denunciation and deterrence" (see ***R v Foster***, 2017 ABCA 66 at para 47, citing ***R v Peters***, 2010 ONCA 30 at para 53, per Watt JA dissenting).

[91] Yet, a suspended sentence is not necessarily simply a "disguised conditional sentence". After all, suspended sentences were available as a sentencing option long before the introduction of conditional sentence orders. As the SCC explained in ***Proulx*** at paras 32-36, suspended sentences are intended to promote rehabilitation and are normally imposed where deterrence and denunciation are not needed for the particular offender in the particular circumstances, or where exceptional circumstances are present. (In fact, conditional sentences may be available even in

cases where deterrence and denunciation are the paramount sentencing objectives: ***Proulx*** at para 35.)

[92] In ***Sharma***, at paras 113-4, the Ontario Court of Appeal accepted that the case law demonstrates that suspended sentences are far more difficult to obtain than conditional sentences for Aboriginal or Indigenous and other marginalized offenders. Courts are resorting to prison sentences even when they are not required and courts treat the most sympathetic circumstances as ineffective in the calculation of exceptional circumstances for suspended sentences.

[93] In my view, suspended sentences are available as a sentencing option even for cases of serious sexual assault in appropriate, and especially, in exceptional circumstances. As I will discuss below, the circumstances in this case are indeed exceptional. Considering the observations in ***Sharma,*** the unique circumstances of Indigenous offenders may warrant a more sympathetic reception than they ordinarily receive when seeking suspended sentences.

6. Sentence

[94] In determining a fit and just sentence, I must first consider denunciation and deterrence. Denunciation is at play in any case involving a major sexual assault. It is indisputable that all Canadians, Indigenous or not, are entitled to the protection of the law, and are subject to the control of the law. Women must be protected and must not be afraid to come forward to pursue charges of sexual assault, and when they do so, the law must be seen to respond effectively.

[95] Further, sexual assault is volitional, not accidental conduct. Therefore, deterrence is an important objective for any sexual offences (***Arcand*** at para 275). Deterrence is to be both specific and general; the former is directed at deterring the offender, while the latter is directed at deterring others in the community from committing similar offences.

[96] As our Court of Appeal stated in ***Okimaw*** at para 90, even where denunciation and deterrence are crucial considerations, those sentencing objectives "cannot be allowed to obliterate and render nugatory or impotent other relevant sentencing objectives. Instead, those objectives must be carefully, and mercifully, balanced with the sentencing objectives of restraint and rehabilitation, after giving adequate and proper attention to *Gladue* factors."

[97] Importantly, imprisonment is not necessarily the preferred option for the purpose of meeting these dual objectives, and I must consider "all available sanctions, other than imprisonment", that are reasonable in the circumstances: ***Lacasse*** at para 132, per Gascon J dissenting. Further, deterrence can work through alternative sanctions such as conditions tailored to the fit the offender or the circumstances of the offender: ***Lacasse*** at para 134.

[98] Turning to Mr. Lariviere's circumstances and the factors which brought him before this Court, I find that his personal circumstances do reflect family and community breakdown. Mr. Lariviere has experienced significant tragedy through the unfortunate loss of a number of his family members. Although the Gladue report does not indicate the presence of intergenerational trauma or a history of physical or substance abuse in his family, I note that Mr. Lariviere attended residential school, as did his both of his parents. This was undoubtedly traumatic and I am prepared to infer that the legacy of the residential schools on Mr. Lariviere, his parents and his siblings adversely affected him.

[99] Although the Gladue report does not mention it, I am also prepared to infer that Mr. Lariviere's home community of Canoe Lake Cree First Nation is not immune to the ravages of

substance and alcohol abuse and social and economic deprivation which tends to be all too common in First Nation communities, specially isolated northern reserves. The effects of the residential school system was discussed in the restorative justice process and a victims support worker noted that residential schools brought much learned negative sexual behaviour, and what was thought to be normal was not normal at all.

[100] Finally, given the systematic anti-Indigenous racism exposed in the final report of the Truth and Reconciliation Commission of Canada: *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: 2015), I am prepared to infer that Mr. Lariviere experienced and was adversely affected by racial bias.

[101] The Gladue report does not mention when Mr. Lariviere first turned to the use of alcohol, but he had a troubled relationship with it in the 1970s and 1980s, the period during which this offence was committed. Mr. Lariviere committed this offence under the influence of alcohol. Mr. Lariviere sought counselling for his alcohol abuse and quit drinking in 1988. He subsequently rehabilitated himself and began working to help others who were struggling with addictions, first at the Loon Lake Rehabilitation Center and then the Onion Lake Healing Lodge. He has embraced Indigenous spirituality and cultural traditions and is now a respected Elder, mentor, and pipe carrier. Meanwhile, Canoe Lake Cree First Nation, the home community of both the complainant and Mr. Lariviere, has an active Justice Committee and its sentencing circle set out alternatives to incarceration; moreover, it has the capacity to give effect to its sentencing recommendations.

[102] The adverse impacts which Mr. Lariviere experienced in his upbringing and early adulthood all contributed to the type of behaviour demonstrated in the commission of this offence. I am satisfied that these *Gladue* factors substantially lower Mr. Lariviere's moral culpability.

[103] Further, even giving priority to the principle of denunciation, the punishment must fit the offender as well as the offence. Mr. Lariviere has a good character, has been employed throughout his life, and after he quit drinking, led an exemplary life and contributed to his community. Mr. Lariviere's criminal record is old and apparently relates only to offences committed before his abstinence. The offence was committed 40 years ago when he under the control of alcohol. Since then, he has made "a dramatic and sustained effort" at rehabilitation. He has become a role model for his community. He also has accepted full responsibility for his actions, expressed genuine remorse, and participated in a restorative justice process in order to gain insights into the root causes of his behaviour. This progress must be acknowledged and reinforced (see ***R v Wesslen***, 2015 ABCA 74 at para 41; ***R v Kerr*** (2001), 133 OAC 159 at paras 17-8). Frankly, Mr. Lariviere is no longer the same person he was when this offence was committed.

[104] Mr. Lariviere has been disgraced by the criminal prosecution and conviction, losing his employment, losing respect in the community; and causing trauma in his family. It is clear that suffering disgrace and humiliation is a factor that can favour the imposition of a non-custodial sentence in appropriate circumstances (see ***R v Bunn***, 2000 SCC 9 at para 23, [2000] 1 SCR 183; ***Pham*** at para 12). Importantly, when a person of previous good character and in a position of responsibility in the community suffers humiliation or stigmatization, this in itself will have a denunciatory or deterrent effect (***R v Schiegel*** (1985), 7 OAC 37 at para 6).

[105] In addition, Mr. Lariviere is an elderly offender with health conditions. He does not require specific deterrence and I do not believe that imposing a non-custodial sentence would undermine general deterrence. In fact, I do not know what purpose would be served by sending Mr. Lariviere at the age of 75 to jail.

[106] Finally, and most importantly, the principle of restorative justice must be respected, and the contribution and recommendations of Canoe Lake Cree First Nation's restorative justice process should be reflected in Mr. Lariviere's sentence. The complainant freely participated in this process and endorsed its recommendations – she feels justice has been served by the criminal conviction and does not want Mr. Lariviere to be sent to prison. This point was also expressly made in her victim impact statement. It is important to remember that a restorative justice process is not only about the offender, but also about helping the complainant obtain justice. For me to unilaterally dismiss the restorative justice process' recommendations and determine what is best for the community of Canoe Lake Cree First Nation would display an intolerable degree of presumptuousness. It would render nugatory the commitment and efforts of all the participants and it would undermine the circle keepers' goals of having the complainant and Mr. Lariviere continue to work on healing their relationship and act as guides for community members about appropriate behaviour and help other victims in the community heal. It would also undermine the community's confidence in the criminal justice system. I accept the restorative justice process' recommendation that Mr. Lariviere not be incarcerated. I accept the Defence suggestion that a suspended three year sentence with multiple conditions designed to continue the healing process a fit and proper sentence. In this context, it must be remembered that an aboriginal offender's community "will frequently understand the nature of a just sanction in a manner significantly different from that of many non-aboriginal communities" (***Gladue*** at para 77).

[107] In my view, the circumstances of this case and this offender, and of the needs and views of the complainant's and offender's community, are unique and exceptional and thereby warrant a departure from the sentencing starting point. Further, these exceptional circumstances warrant the imposition of a suspended sentence. In my view, this sentence best achieves a sense of balance to Mr. Lariviere, the complainant, and their community (***Gladue*** at para 65).

[108] Mr. Lariviere, I sentence you to a suspended sentence of three years. The terms of probation require you to

- keep the peace and be of good behavior;
- appear before the Court when required to do so by the Court;
- report to a Probation Officer within 7 days of this Order and thereafter as may from time to time be directed by the Probation Officer;
- notify your Probation Officer in advance of any changes of name or address;
- report to the Director of the Canoe Lake Cree Nation Justice Committee, or their designate, within 7 days of this Order and thereafter as required by the Canoe Lake Cree Nation Justice Committee;

- have no contact or communication with Ms. I, except as approved by your Probation Officer or the Director of the Canoe Lake Cree Nation Justice Committee, or their designate;
- attend and participate in such further Sentencing Circles as may be requested and arranged by the Canoe Lake Cree Nation Justice Committee;
- attend, participate and complete such assessments, programs of residential or other treatment or counselling as may be directed by your Probation Officer or the Director of the Canoe Lake Cree Nation Justice Committee, or their designate;
- attend and participate in such educational or counselling talks, presentations, panel discussion respecting addictions and/or abuse and respecting awareness as to what is appropriate behaviour at such community or school sessions or events as may be requested and arranged by the Canoe Lake Cree Nation Justice Committee;
- attend and participate in such healing or restorative meetings, discussions or other events as may be requested by Ms. I and arranged by the Canoe Lake Cree Nation Justice Committee;
- attend and participate in such talks with the Youth in the community, about sexual assaults and abuse not being acceptable, and about respect to women, traditional ways and spirituality as may be requested by Ms. I and arranged by the Canoe Lake Cree Nation Justice Committee;
- meet with such Elder or Elders as designated by the Director of the Canoe Lake Cree Nation Justice Committee, or their designate, for such spiritual healing as may be recommended and arranged by the Elders;
- perform 200 hours of Community Service Work within 18 months of this Order, as may be directed by your Probation Officer in consultation with the Canoe Lake Cree Nation Justice Committee; and
- provide both your Probation Officer and the Canoe Lake Cree Nation Justice Committee with signed releases allowing each of them to obtain records of participation, completion of all counseling, treatment, community service work or other requested services hereunder.

Ancillary Orders

[109] There are several ancillary orders which I must now make:

I order that Mr. Lariviere provide a DNA sample pursuant to CC s. 487.051

I order that Mr. Lariviere be subject to SORIA registration for 20 years pursuant to CC ss. 490.013(2)(b). and

I order pursuant to s.109 of the *Criminal Code*, that Mr. Lariviere is prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition for life and he is prohibited from possessing any firearm for a period commencing today and not ending earlier than ten years after his release from imprisonment.

Heard on the 9th day of April, 2021.
Dated at the City of Edmonton, Alberta this 1st day of June, 2021.

M.E. Burns
J.C.Q.B.A.

Appearances:

Jordan Kerr
for the Crown

Lionel Chartrand
for the Accused