P-380

CITATION: *R. v. McGill*, 2016 ONCJ 138

ONTARIO COURT OF JUSTICE

Old City Hall – Toronto

2016 ONCJ 138 (CanLII)

BETWEEN:

HER MAJESTY THE QUEEN — **A. Chamberlain**, **For the Crown**

— AND —

ROBERT McGILL — **J. Erickson**, **For the Defendant**

Heard: June 5 and November 23, 2015 and January 19 and February 11, 2016

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REASONS for SENTENCE

MELVYN GREEN, J.:

A. INTRODUCTION

[1] The police executed a search warrant at the home of Robert McGill on November 17, 2013. They seized approximately 300 grams of cocaine and $3,000 in cash. Some 17 months later, on June 5, 2015, McGill pled guilty to single count of possession of cocaine for the purpose of trafficking. Eight months further on, at the conclusion of a contested hearing on February 11, 2016, McGill was finally sentenced. Brief oral reasons (considerably less dense than those that populate much of this reserve judgement) accompanied the imposition of sentence.

[2] McGill is a 40-year-old Aboriginal man. He has prior convictions for crimes of violence, but they are very dated. He is in a settled and supportive relationship and is the caring father of an eight-year-old son. McGill and his son both suffer from the same chronic, debilitating heart condition. As a child, McGill was subject to emotional and physical abuse, parental alcoholism, extreme poverty, routine exposure to criminality and drugs, and the scarring effects of racism. Since his arrest in November 2013, he has secured employment, diligently pursued his schooling, abstained from illicit drug use, attended regular counseling programs with respected members of the Indigenous community, and garnered educational certificates, an award and several commendatory attestations. In short, he has turned his life in a very positive direction.

[3] What now, well more than two years after his arrest, is a fit sentence for this offender for this offence?

[4] The offender's circumstances clearly invoke the sentencing guidance emanating from the Supreme Court's decisions in *R. v. Gladue,* [1999] 1 S.C.R. 688 and *R. v. Ipeele*e, [2012] 1 S.C.R. 433. Front-loading these considerations, and attributing, he says, due weight to them, Crown counsel maintains that the paramountcy of deterrence and denunciation nonetheless command a maximum reformatory-length sentence of two years less a day. Defence counsel's position is markedly at odds. To maintain McGill's employment, education and dependent family, the defence urges the imposition of a maximum-length intermittent prison sentence of 90 days followed by a lengthy period of probation.

[5] The Crown's position can fairly be described as marginally within or somewhat below the range of sentence generally endorsed by the Court of Appeal for the

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offence of possessing close to a third of a kilogram of cocaine for the purpose of trafficking. McGill's antecedents help situate and to some degree mitigate the circumstances of his offence. They also fall squarely within the matrix of concerns to which *Gladue* and *Ipeelee* invite a more creative approach to restorative justice than that too often honoured merely by way of a nominal tariff discount. McGill's sincere and laudable efforts to advance his own rehabilitation within a culturally nourishing environment must be both acknowledged and encouraged. At the same time, trafficking in "hard" drugs like cocaine must be condemned. How the "*Gladue* principles" and McGill's own positive steps towards productive social re-integration are to be reconciled with the conventional punitive demands that accompany "hard" drug trafficking is the neat if, sadly, all-too-common question at the centre of this case.

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B. EVIDENCE

(a) Introduction

[6] The evidence bearing on the offence itself can be surveyed in very brief compass. That salient to the broader context of the offence, the circumstances of the offender, his antecedents and his post-offence conduct require more granular attention. Consistent with the direction of the governing authorities, McGill is the subject of a thorough "*Gladue* Report". He also participated in a culturally rich and sometimes emotionally charged "sentencing circle", only the second conducted in the 15-year history of Toronto's "Aboriginal Persons' Court", more commonly styled the "*Gladue* Court".

(b) The Offence

[7] As noted, members of the Toronto Police Service executed a search warrant at McGill's home on November 17, 2013. They seized some 139 grams of powder cocaine and 167 grams of crack cocaine (almost eleven ounces of cocaine in total) from a bedroom he shared with his partner, Sarah. The drugs were valued at approximately $15,000. The police also seized $2930 in cash, which money has since been forfeited, on consent, to the Crown.

[8] No Crown evidence was tendered of prior trafficking by the offender or of his dealing patterns. Nonetheless, Crown counsel's characterization of McGill as a "mid-level" trafficker is likely accurate. The volume and value of the seized drugs place him above the "street level seller" but below what is sometimes described as the "distributor" in the hierarchy of drug dealing: see *R. v. Barkow*, 2008 ONCJ 84 and *R. v. Haye*, [2013] O.J. No. 6493 (Sup. Ct.). It is a fair

inference, and one not challenged by defence counsel, that McGill was directly supplying street-level dealers or those who performed that intermediary role, or perhaps both.

[9] It is difficult to overestimate the harm attributable to the prolonged or indiscriminate use of the drugs in which McGill was trafficking. As I said in *R. v. Okash*, 2010 ONCJ 93, at para. 11:

> Cocaine, particularly crack cocaine, is judicially acknowledged as a hazardous drug that wreaks personal and social havoc, both directly and through the ancillary crime associated with its abuse: *R. v. Pearson* (1992), 77 C.C.C. 124, at para. 60 (S.C.C.); *Pushpanathan v. Canada* (M.C.I.), [1998] 1 S.C.R. 982, esp. at paras. 83-106; *R. v. Cunningham* (1996). 104 C.C.C. (3d) 542, at para. 21; and *R. v. Scott* (1996), 93 O.A.C. 235, at paras. 4 and 6. One need only spend a few hours observing the parade of truly pathetic defendants in downtown Toronto's resolution courts to appreciate the drug's legacy of misery. Some indeterminable portion of this collateral damage is almost certainly a product of the criminalization of dependence-producing drugs. However imperfect or misguided that policy choice, it cannot excuse or even mitigate the exploitation of that policy for commercial ends.

There is a live question, to which I shall return, bearing on McGill's personal history of drug use and dependence. He readily concedes, however, a commercial motivation and acknowledges the harm necessarily flowing from his cocaine dealing.

[10] McGill pled guilty to the single count of constructive trafficking in cocaine. Although hardly immediate, his plea was entered before a date was fixed for a preliminary inquiry or trial. Significantly, McGill entered his plea despite, as Crown counsel fairly concedes, there being viable trial issues, particularly respecting the constitutional validity of the search warrant here essential to an effective prosecution. McGill's plea reflects not only his acceptance of responsibility for the offence but, as well, his genuine remorse. Further, well more than two unblemished years have passed since the occurrence of the offence at issue.

(c) The Offender's Criminal Record

[11] McGill's prior criminal record is limited to a narrow two-year band stretching from the time he was 20 until he was 22. In March 1995 he was convicted of possessing an unregistered restricted firearm. The equivalent of a two-week sentence for possession of a narcotic followed in October of the same year. And in March 1997 he received an effective penitentiary sentence of about 4½ years for aggravated assault, possession of an unregistered restricted weapon and use of

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a firearm. He was released in November 1999. There is no record of his having any further conflict with the criminal justice system until the arrest, some 14 years later, which brings him before me. That is not to say, however, that his life was crime-free in that interim.

[12] McGill was granted bail, by way of a surety-backed recognizance, the same day he was arrested. There have been no criminal infractions during the 27 months he has been on judicial interim release awaiting disposition of this charge. Nor is there any suggestion that he has done other than fully comply with his bail conditions.

(d) The Offender's Circumstances

(i) The Early Years: Until 1999

[13] Robert McGill – or Robert, as I refer to him during this survey of his personal antecedents – is now 40. His mother and father are Aboriginal, Algonquin and Mi'kmaq respectively. Robert's father, Raymond, was raised in an orphanage in New Brunswick. His maternal grandmother was sent to a residential school in Ontario when she was six. She did not leave until she was 16. Her first marriage failed. The second produced Robert's mother, Linda, but it too ended badly as she descended into alcoholism and abusive parenting. The CAS intervened and Linda and her brother were placed in separate homes. Judges who routinely preside in Gladue Court are all too familiar with the destructive intergenerational impact of residential schools recently canvassed in the reports of the Truth and Reconciliation Commission.

[14] Linda met Raymond when she was 16. She gave birth to Robert a year later, in 1975. Robert was a born with a rare and complex congenital heart defect, Tetralogy of Fallot. He required surgery when he was two and again when he was eight. The further replacement of a valve inserted during the seven-hour second procedure is long overdue. Robert's only sibling, his sister Amanda, is about five years his junior. For a time, both were in CAS care when their mother Linda had a "breakdown" and had to be hospitalized. Throughout, Robert's father became a progressively "nasty" drunkard. As all the family members attest, he routinely humiliated Robert, telling him he "would never be a hockey player because of [his] heart condition".

[15] Robert's family moved to Regent Park, one of the most impoverished and then crime-infested residential projects in Toronto, in 1979. From the time he was a young child, Robert was exposed on a daily basis to drugs, dealing, addiction, and violence both random and organized. His family had grown increasingly

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dysfunctional, with Raymond drinking heavily each day while Linda was severely depressed. Robert came to "hate" his father, but he was devoted to his sister Amanda. In her words: "Rob was the one who raised me. He protected me from day one. Rob would take me to school and pick me up. He would make sure we had food and clothes."

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[16] Robert knew he was "Native" but his parents "weren't attached to anything" tied to their cultural ancestry. He learned nothing about his heritage from them. Being Aboriginal was a liability in Regent Park where "everyone thought Natives were drunks, and even the kids got beat up". The racism was widespread and deeply seated. As summarized by the Gladue Report writer:

> Robert's exposure to his Native culture while growing up was a negative experience. All he witnessed were the negative stereotypes, without an understanding of the systemic factors.

[17] Robert did not fit well into school. He was bullied, got into fights and was labelled a behavioural problem. He took on part-time jobs from the time he was 11, but he was robbed by his peers and pressured into thefts by his father that cost him his employment. By the time he was in high-school, Robert had joined a gang and begun drinking and using and sometimes selling drugs. "Many of his friends", says Amanda, were "shot, stabbed, killed".

[18] For Robert, "things got really bad" when he was about 18:

> I don't think people understand what it's like to grow up in Regent Park unless they've lived there. Your choice was be tough or be a victim. I saw terrible things, and things happened to my friends. A lot of them are dead, kids dead or addicted. Many of the people I was associated with carried guns. I chose to also get a gun. It was for protection.

The criminal conduct that led to Robert's earlier convictions soon followed. It was while he was in prison that his drug use considerably ramped up. Reflecting on these experiences to the author of his Gladue Report, Robert commented:

> There were a lot of guys from Regent [Park] in there. We all did the same stuff and ended up in the same place. Sad when I think about it. I never thought about it until now that I'm piecing it all together. What a big waste of years my life has been.

No one visited Robert during the years he was in prison. He resolved, when released, to stay away from guns and violence, a vow he has since honoured.

(ii) The Interim Years: 1999-2013

[19] Robert maintained a small apartment following his release on parole. He had no skills, no training, and no job. He was dependent on drugs and supported himself

by dealing. His father died in 2006, soon after he met Sarah, the woman who has remained his partner and primary support for the past decade. Their son, Heyden, was born in 2007. Heyden, now eight, suffers from the same rare heart disorder as his father. He required open heart surgery when he was six months old and will almost certainly require further surgical intervention. By all accounts (and there are many in this regard), Robert is a model, dedicated father. When Sarah began full-time work in 2009, Robert became his son's primary caregiver. Sarah also attributes her return to school and now full-time employment to Robert's encouragement and support. It is not too far a stretch to infer that Robert's protective devotion to his son is inspired by the neglect and abuse he suffered at the hands and tongue of his own father.

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[20] Robert was less than forthcoming with the Gladue Report writer respecting his drug use. While he conceded dealing to make ends meet, he left the impression that his son's birth had prompted him to give up the consumption of drugs other than marijuana and alcohol. Asked directly at the sentencing circle, Robert acknowledged relying on drugs as a "crutch" for "pretty much [his] whole life" and that he had a "cocaine addiction" at the time of his arrest in November 2013. His mother Linda, seated directly across the table from Robert, appeared visibly shocked – not that he had been dealing but that she had remained ignorant of the extent of his personal drug use. The exchanges that followed – among family, counsel and counsellors and, of course, Robert – was a moving and sometimes raw exercise in the dynamic of shame, denial and candour, and a tribute to the value of sentencing circles built on trust and shared respect. As said directly to McGill at the circle by the ALST Gladue Caseworker (herself a former addictions counsellor) who had drafted the Gladue Report:

> There has been a level of denial around your addiction and that you have disclosed this in this setting is admirable. So there's a step here.
>
> A lot of the people I work with many times think that the Gladue process is a get-out-of-jail-free card when in fact this process is much more difficult, much more difficult, than standing in court, pleading "I'm guilty", getting your time and off you go. So I have to honour you around this Robert because I know this is difficult, but it's also transformative and it's what we do as First Nations People. This is part of your culture, my culture. This is how we heal.

[21] Robert made clear that he had not used drugs since he was arrested and that he "will continue to stay clean". I accept Robert's assertions of his abstention from drug use over the past two-plus years. He was slow to acknowledge his earlier dependency, but I see no tactical advantage in his advancing it at the late stage he did. Irrespective of any dependence at the time of his arrest, Robert does not

present as a stereotypical "addict trafficker" and the amount found in his possession belies such characterization. He has conceded from the time of his plea that he was a commercial trafficker. While his unlawful income may have supported his own habit, he was, in the end, in the business of selling dangerous drugs. That said, and as I shall soon discuss, the changes Robert has engineered in his life, the insights he has developed and the counselling network now in place leave me confident that he has the resolve and support to effectively resist backsliding.

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[22] Robert's response to his arrest is telling. In his words:

> When my place was raided and I got arrested it was the biggest wake-up call of my life. I realized I could lose my family, and I hate what I put them through. After this happened there were times I didn't want to live. I'm sorry I've done this to them. I decided to get help.

Almost immediately following his release, Robert pursued a path of healing.

(iii) The Bail Years: 2013-2016

[23] Robert's partner Sarah provides a succinct account of his trajectory once on bail:

> Rob decided to change his life around. Rob never had a support system or anyone to guide him. I really credit his turnaround to all the Native organizations that have been helping him. He went for counselling and they helped him go back to school. I can't believe the kinds of things he didn't know how to do, simple things like going in to the bank.

Aboriginal Legal Services of Toronto (ALST) helped Robert apply for disability support. They referred him to an Aboriginal service agency, Anishnawabe Health, where he was introduced to a Traditional Counsellor, Julian Bubb, with whom he still meets regularly. ALST also referred Robert to a Spiritual Elder from whom he received his Spirit name and colours. This was, in Robert's words, the "first time ever that I felt Native and accepted. It was a motivational boost. I wanted to keep going and learning as much as I can".

[24] Julian Bubb began meeting with Robert within a month of his arrest in late-2013. He attended the sentencing circle and described Robert as a "model client". "He has made", he continued, "a complete 180 degree change in his life". Robert also attended at Miziwe Biik Aboriginal Employment and Training program where he sought direction from a guidance counsellor, Osborne Farrell, who also supported Robert at the sentencing circle. With Osborne's encouragement, Robert returned to school and obtained his Secondary School Diploma in mid-2014. He also received an award for "Outstanding Results in Social Science", a source of

particular pride to him, Sarah and their son Hayden at his graduation. In Osborne's assessment:

> Robert had never realized how smart he is, and it really helped his self-esteem. It also helped him to realize that the lifestyle he had lived wasn't necessary. I pushed Rob toward education. I would like to see him go to university, and he's certainly got what it takes.
>
> When he first came to see me he was really beating himself up over what he had done. He had a hard time lifting his head. His identity was an issue. He felt he wasn't Native enough because he never went to ceremonies or Pow Wows. I explained that just because we're not raised in the culture does not make us less Aboriginal. I suggested he immerse himself in the culture and find his identity. Now he's a proud Aboriginal man.

His sister Amanda also spoke of Robert's search for identity: "Rob finally feels he belongs somewhere. He's embracing the culture, and the culture is embracing him".

[25] Robert enrolled in a Pre-Business course at Centennial College after graduating from high-school. He successfully completed the course and was formally certificated in April 2015. He is now mid-way through a Business Administration program at the same College. He attends classes for half the day and works at a manufacturing company the other half of each day. Very positive letters from his instructors and employer were filed on the sentencing hearing.

[26] Robert maintains a close relationship with his mother and sister. He continues his Aboriginal counselling and remains devoted to Sarah and his son.

(e) <u>External Assessments</u>

[27] McGill attended a forensic psychologist's office for purposes of preparing a clinical risk assessment in June 2015. The clinicians were satisfied with the validity of the psychometric test results, although, in retrospect, it is clear that, as with the Gladue Report writer, McGill downplayed his historical involvement with drugs. "Minimal levels" of anxiety and depression were identified, but no major mental health or other problematic areas. While McGill's intellectual functioning was in the "average range", his problem-solving abilities were "above" or "very much above" average. Based on clinical interviews, observations and psychometric testing, McGill was assessed "overall" as having a "moderate risk for future legal involvement". In the clinician's opinion, in light of McGill's risk factors, acceptance of responsibility and positive life changes since his arrest, "he could be managed in the community" under conditioned supervision.

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[28] Subject to appropriate comments regarding McGill's somewhat muted disclosure respecting his earlier drug use, Crown counsel took no objection to the admissibility of or reliance on the clinical report.

C. ANALYSIS

(a) Introduction

[29] The circumstances of this case, including those provoking *Gladue* and *Ipeelee* scrutiny, invite a close review of three important sentencing constructs: the available sentencing options, as defined by statute; the principle of sentencing "ranges"; and, finally, the doctrine of "exceptional circumstances".

[30] In the end, and for the reasons I soon develop, I conclude that the fit sentence in this case is a suspended sentence followed by a lengthy term of probation for the purpose, as directed by s. 732.1(h), of "protecting society and for facilitating the offender's successful reintegration into the community". Viewed through the prism of the conventional sentencing range assigned to offences such as that committed by McGill, a non-custodial disposition is only justifiable on a mitigative theory of "exceptionality". When informed by *Gladue*-driven considerations, I am amply satisfied that McGill's circumstances meet this threshold.

[31] The same outcome results from an alternative orientation to sentencing that is neither grounded in nor chiefly mediated by sanctioned ranges. With respect, there is a risk of injustice in relying on a sentencing model premised on judicially-created fixed ranges of imprisonment from which the sole reprieve is resort to an uncertain doctrine of exceptionality. By way of analogy only, ranges relieved only by exceptional circumstances is akin to the methodology of fixed-rules-and-narrow-categorical-exceptions that defined the law of hearsay prior to the Supreme Court's development of a "principled approach" in *R. v. Khan* [1990] 2 S.C.R. 531, *R. v. Smith*, [1992] 2 S.C.R. 915 and *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740. The fairer and, in the end, more "principled approach" to the law of sentencing – as repeatedly mandated by the Supreme Court – is that of individualized proportionality. On this model, the distance between the sentence I here impose on McGill and that ordinarily directed for the offence of cocaine trafficking of this gravity is "exceptional" only in a descriptive sense, not a normative one. Put differently, based on an individualized assessment of McGill and his offence, a non-carceral disposition by way of a suspended sentence is the proportionate response. While I am mindful of and have carefully considered the

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range endorsed by appellate authority for similar offences, application of the full breadth of s. 718.1, the "fundamental principle" of Canadian sentencing law, leads here to a result outside its parameters. Both approaches reach the same sentence destination in the instant case, but the test of the sentence's integrity is ultimately its proportionality and not whether it meets the amorphous criteria of exceptionality to an approved range.

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[32] I begin, then, by returning to the building blocks of sentencing.

(b) The Statutory Sentencing Options

(i) Introduction

[33] The case-specific array of penal options does not ordinarily attract detailed judicial discussion on sentencing. This case is somewhat different than most. First, as a result of relatively recent amendments, an intermediate sanction for cocaine trafficking – that of a "conditional sentence" – is no longer part of a judge's sentencing toolbox. This leaves, in practice, two blunt options: incarceration or a non-custodial disposition by way of a "suspended sentence". The stark differences between these alternatives tend to sharpen judicial focus, particularly in the absence of the "halfway-house", as it is sometimes described, of a conditional sentence. Second, the offender's First Nations ancestry (and, in particular, the close nexus between his Indigeniety and both his personal history and his rehabilitative efforts) align with both the codified principles of restraint and restorative justice that inform the sentencing calculus and, in particular, s. 718.2(e) of the Criminal Code which 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" (emphasis added). And third, there is an evolving appreciation of the importance of rehabilitation in addressing the individual and societal concerns presented by drug consuming and dependent offenders and, accordingly, refreshed consideration of dispositions that further such ends.

(ii) An Historical Review

[34] As just noted, the variants of non-custodial sanctions for trafficking in Schedule I drugs are considerably narrower now than they were but a few years ago.

[35] Section 5(3) of the *Controlled Drugs and Substances Act* (the "*CDSA*") directs that anyone who, *inter alia*, possesses cocaine for the purpose of trafficking "is guilty of an indictable offence and liable to imprisonment for life". Several sub-clauses mandate the imposition of a minimum sentence if particularized conditions obtain. None of those conditions here obtain. Accordingly, while

McGill faces a maximum sentence of life imprisonment there is, in his case, no statutory minimum sentence.

[36] Until relatively recently, a "conditional sentence" of imprisonment, to be served in the community rather than a brick-and-mortar institution, was available to persons convicted of actual or, as here, constructive cocaine trafficking so long as certain statutory criteria were satisfied. Conditional sentences, as set out in s. 742.1 of the Code, were introduced into the Canadian sentencing armoury as part of the *Sentencing Reform Act* (*Bill C-41*) in 1996. The statutory pre-conditions for the imposition of a conditional sentence, as then prescribed, were, first, the absence of a minimum term of imprisonment; second, the imposition of a sentence of imprisonment of less than two years; and third, the sentencing court's satisfaction "that such sentence would not endanger the safety of the community and would be consistent with the codified purpose and principles of sentencing". On behalf of the Court, in *R. v. Proulx*, [2000] 1 S.C.R. 61, at para. 90, Lamer C.J. directed sentencing judges to give "serious consideration … to the imposition of a conditional sentence in all cases where the[se] statutory prerequisites are satisfied".

[37] Further, unless expressly excluded by statute, *R. v. Proulx* held that no category of offences was ineligible for disposition by way of a conditional sentence. Indeed, this latter proposition was articulated in direct response to the position advanced by the Attorneys General of Canada and Ontario who, as noted at para. 80, "argued … a presumption against conditional sentences for certain offences" and "that a conditional sentence would rarely be appropriate for offences such as … trafficking or possession of certain narcotics", undoubtedly including cocaine. The Chief Justice's reply, at para. 81, could not have been plainer (or more directly apposite to the matter before me): "Such presumptions", he said, "do not accord with the principle of proportionality … and the value of individualization in sentencing".

[38] Accordingly, and until certain recent amendments, a person convicted of trafficking in cocaine or, as here, possessing it for such purpose was not barred from receipt of a conditional sentence so long as the court determined that the fit sentence was less than two years, that such sentence would not endanger the community, and that a sentence served in the community was otherwise consistent with the principles and purpose of sentencing.

[39] *R. v. Proulx* and *R. v. Wells*, [2000] 1 S.C.R. 207, like *R. v. Gladue*, reflected the Supreme Court's seminal efforts to construe the purpose of the *Sentencing*

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Reform Act of 1996 and instruct Canadian courts as to the manner of its implementation. As précised in *R. v. Wells*, at para. 3, *Gladue*,

> … determined that the new sentencing amendments represented "a watershed, marking the first codification and significant reform of sentencing principles in the history of Canadian criminal law" (para. 39).

And, at para. 4 (here essentially repeating the language of *Gladue*):

> Parliament had two primary objectives in enacting this new legislation: (i) reducing the use of prison as a sanction, and (ii) expanding the use of restorative justice principles in sentencing. [Emphasis added.]

[40] The subsequent sentencing jurisprudence of the Supreme Court has reinforced these "primary objectives". Although typically framed as Charter violations or matters of statutory construction, the Court's rollback of some of Parliament's decade-long endeavour to extend carceral sentences may be fairly read as a consistent affirmation of these same policy goals. By way of example only, see: *Canada (Attorney General) v. Whaling*, [2014] 1 S.C.R. 392 (striking down the retrospective application of federal parole limitations), *R. v. Summers*, [2014], 1 S.C.R. 575 (respecting the extension of credit to pre-sentence custody), and *R. v. Nur*, [2015] 1 S.C.R. 773 (declaring unconstitutional a firearms-related mandatory minimum sentence). As a unanimous Court said in *R. v. Knott*, [2012] 2 S.C.R. 470, at para. 43: "The sentencing objectives set out by Parliament in ss. 718 to 718.2 of the *Criminal Code* are best achieved by preserving — not curtailing — a sentencing court's arsenal of non-custodial sentencing options".

[41] Independent of the Aboriginal focus of *R. v. Gladue* and *R. v. Wells*, these same themes of carceral restraint and restorative justice inevitably impact on the resolution of the sentencing challenge posed by the immediate case. Although by now trite law, it is bears repeating, as put in *Gladue*, at para. 36, that,

> As a general principle, s. 718.2(*e*) [directing restraint in sentencing] applies to all offenders, and states that imprisonment should be the penal sanction of last resort. Prison is to be used only where no other sanction or combination of sanctions is appropriate to the offence and the offender. [Emphasis added.]

(iii) The Current Sentencing Framework

[42] Commencing in 2007, amendments to both s. 742.1 and various offence-specific provisions of the Code significantly reduced the availability of conditional sentences. In some cases, like that involving the offence of sexual interference, the imposition of a relatively modest minimum sentence of 90 days effectively barred access to the conditional sentencing regime for such offenders. In other

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instances, such as those encompassing a broad range of drug offences, s. 742.1 was directly amended in 2012 to disqualify persons convicted of crimes "for which a maximum term of imprisonment is 14 years or life". As a result, persons found guilty of trafficking in any amount of cocaine may no longer serve a reformatory-length sentence of imprisonment in the community by way of a conditional sentence.

[43] Judges faced, as here, with the disposition of a single count of non-aggravated cocaine trafficking now have only three statutory sentencing options: a suspended sentence, coupled with a period of probation of up to three years; second, a term of incarceration; and third, a fine (which may be combined with probation or incarceration or, on some judicial constructions, both). A "fine", at least standing on its own, is a most unlikely outcome in such cases but for fact-patterns involving corporate offenders. This effectively leaves only two realistic alternatives: a non-custodial disposition by way of a suspended sentence and probation or a sentence of imprisonment of fit duration (followed, if no longer than two years and where deemed appropriate, by a probationary term of up to three-years length).

[44] As was the approach it adopted respecting persons convicted of the offence of sexual interference, by merely introducing a nominal minimum sentence for trafficking in "hard" drugs such as cocaine Parliament could readily have eliminated both conditional sentences and non-carceral dispositions for such offenders. The same initiative would also have abolished the possibility of suspended sentences for this category of offences as the pertinent Code provision, s. 730(1)(a), permits suspended sentences followed by probation only "if no minimum punishment is prescribed by law". Instead, Parliament appears to have recognized the potential utility of community sentences, by way of supervised probation, and expressly maintained trial judges' authority to impose them for cocaine trafficking offences in fit circumstances.

[45] Any doubt as to Parliament's intendment in this regard is readily erased by reference to the "Sentencing" provisions of the *Controlled Drugs and Substances Act*. Section 10(2) of the *CDSA* sets out a series of "relevant aggravating factors" a court is obliged to consider in formulating an appropriate sentence for drug offenders, including cocaine traffickers. Significantly, in s. 10(3) judges are instructed that even where they are "satisfied of the existence of one or more the[se] aggravating factors" they may still "decide not to sentence the person to imprisonment" so long as they provide "reasons for that decision". Restated, the judicial burden of transparency – of explaining the imposition of a community-based sentence rather than one of imprisonment – arises only where a statutorily-

defined aggravating factor obtains. Where, as in the instant case, none of these aggravating considerations apply, a sentencing court bears no such statutory burden. The failure to impose a sentence of imprisonment is, in such circumstances, so unremarkable or unexceptional that the *CDSA* does not mandate judicial explication.

[46] The weight of appellate authority clearly favours sentences of incarceration, and often lengthy ones, for cocaine trafficking. Non-custodial dispositions represent a departure from this general rule. Accordingly, and independent of any statutory direction, a court bears a common law obligation to demonstrate, through its reasons, that a community-supervised sentence honours the recognized purposes and principles of sentencing in the individual case.

[47] As the only realistic sentencing alternatives in the instant proceedings are custodial and non-custodial, it should be immediately observed that a suspended sentence is not a lawful substitute for a conditional sentence. To be very clear: a conditional sentence is a fixed-length sentence of imprisonment, but one served in the community and, generally, subject to onerous terms. A suspended sentence is not a sentence of imprisonment. Further, the conditions attached to the probation order that necessarily accompanies a suspended sentence are not as readily enforced as those attending a conditional sentence. Accordingly, the threshold question that must be addressed by any judge charged with sentencing a person convicted of trafficking in cocaine is whether the gravity of the offence and the moral responsibility and individual circumstances of the offender are such that, in the language of *Proulx, supra*, at para. 36, "no other sanction … is appropriate" other than a sentence of imprisonment. If so, a judge cannot impose a non-custodial disposition by way of a suspended sentence and probation. (See *R. v. Bankay*, 2010 ONCA 799 with respect to the legal impropriety of a "disguised conditional sentence", and, to similar effect, *R. v. Carrillo*, 2015 BCCA 192, at para. 30.) Put otherwise, a suspended sentence cannot be substituted for a conditional sentence where imprisonment is the only fit sanction. Conversely (and fines aside), where imprisonment is not warranted, there is but one correct alternative: a suspended sentence and associated period of probation: *R. v. Wu*, [2003] 3 S.C.R. 530.

[48] The enforcement of a breach of conditional sentence order is procedurally simpler than that associated with breaches of probation orders. However, both the array and severity of potential penal sanctions following proof of a breach of a probation order are much greater and, accordingly, suspended sentences are recognized as having a very significant deterrent element.

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[49] Where the terms of a conditional sentence are breached a court may, pursuant to s. 742.6(9), "change the optional conditions" of the order or direct the offender to custody for a portion or the entirety of his or her unexpired sentence – a sentence that, by statutory definition, can be no longer than two years less a day at the time it was initially imposed. A "suspended sentence", however, has no settled term or duration. As s. 731(1)(a) of the Code makes clear, a "suspended sentence" is one in which it is "the passing of sentence" that is suspended – not service of the sentence itself. Where a person bound by a probation order attaching to a suspended sentence is convicted of a breach of his or her probation order or (unlike the case with conditional sentences) *any other offence*, a court may, as with breaches of the terms attending a conditional sentence, amend the optional conditions of the order. However, unlike the case of conditional sentences, the court may instead extend the duration of the order for up to an additional year. Most radically, a court may, in the alternative, revoke the suspended sentence initially imposed and levy *any sentence* it could have imposed in the first instance "if the passing of sentence had not [then] been suspended".

[50] As concisely explained in *R. v. Galang*, 2014 BCPC 240, at para. 14, s. 732.2(5),

> … provides that if a person who is subject to a suspended sentence is convicted of another offence during the probation term, including a breach of the probation order, the court that made the order may revoke the order suspending sentence and "…impose any sentence that could have been imposed if the passing of sentence had not been suspended…". [Emphasis added.]

This formulation of the punitive reach of s. 732.2(5) echoes G.A. Martin J.A.'s construction of the provision for the Court of Appeal in *R. v. Oakes* (1977), 37 C.C.C. (2d) 84 (Ont. C.A.), at p. 89, which, in turn, was approved by the Supreme Court of Canada in *R. v. Clermont*, [1988] 2 S.C.R. 171, affg. 1986 CanLII 3727 (QC CA). For examples of the continuing utilization and efficacy s. 732.2(5), see the cases of *R. v. Moore*, [1982] S.C.J. No. 416 (C.A.) and *R. v. Patrick*, [2013] B.C.J. No.1552 (C.A.) in which suspended sentences were revoked and replaced with penitentiary-length terms of imprisonment – 5 years and 2 years, respectively.

[51] The British Columbia Court of Appeal has, within the past year, several times affirmed the deterrent value of suspended sentences. In *R. v. Voong*, 2015 BCCA 285, the Court, at para. 39, added:

> Because a breach of the probation order can result in a revocation and sentencing on the original offence, it has been referred to as the "*Sword of Damocles"* hanging over the offender's head.

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See also, *R. v. Carrillo, supra*, at para. 35; *R. v. Thompson* (1983), 58 N.S.R. (2d) 21, at 24 (C.A.); and *R. v. Scott* (1996), 152 N.S.R. (2d) 93, at 97 (C.A.).)

(c) Sentencing "Ranges"

(i) Introduction

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[52] The *CDSA* sets out the sentencing bracket following conviction for every drug-related offence. As noted, in the case of trafficking in Schedule I drugs, including cocaine, the maximum penalty is life imprisonment. Absent statutorily defined aggravating circumstances, no minimum penalty is prescribed. Accordingly, as in the case before me, a suspended sentence and probation is a lawful disposition.

[53] It is commonplace for provincial courts of appeal to approbate if not expressly direct offence-specific sentencing "ranges" (sometimes, if mistakenly, called, "tariffs") and, in some provinces, "starting points" for carceral dispositions. (As to the difference between "range" and "tariff", see *R. v. Lacasse,* [2015] S.C.J. No. 64, at paras. 56-57.) In the case of drug trafficking offences, as with others for which sentencing ranges have been endorsed, the orthodox sentencing exercise thus involves a judicial evaluation of the gravity of the offence and the moral blameworthiness of the offender so as to most reliably situate the latter along the continuum of penal sanctions that constitutes the judicially approved sentencing range for the offence category or sub-category at play. Aggravating factors, such as the pernicious nature or volume of the seized drugs or the related criminal antecedents of the offender, tend to drag the pointer towards the higher end of the range. Mitigating factors, such as extreme youth, remorse or a crime-free history, edge the marker in the opposite direction. As is well settled, the range for trafficking in "hard" drugs such as cocaine or possessing them for the purpose of trafficking reflects the substantial weight attributed to the principles of deterrence and denunciation in the sentencing calculus that governs such cases. In the result, sentences of imprisonment, frequently by way of penitentiary dispositions, are the norm.

(ii) The Sentencing Range for Cocaine Trafficking

[54] The Court of Appeal has, in effect, created graduated weight- or amount-based categories of cocaine trafficking and sentencing ranges for each of these categories. It is undoubtedly true, as recently said by K.L. Campbell J. in *R. v. Barraeiras,* (2015) ONSC 7196, at para. 39, that, "[l]engthy penitentiary terms of imprisonment are regularly imposed upon offenders that [sic] possess substantial amount of cocaine for the purposes of trafficking". Indeed, the Court of Appeal has several times expressed the view that five to eight years is the "proper range"

for adult offenders found in possession of approximately a half-kilogram (slightly more than a pound) of cocaine for the purpose of trafficking: *R. v. Bajada* (2003), 173 C.C.C. (3d) 255; *R. v. Bryan*, [2011] O.J. No. 1581 (C.A.); and *R. v. Haye*, *supra*; affd. [2014] O.J. No. 6575 (C.A.). Higher amounts are not infrequently dealt with by way of penitentiary sentences of greater than ten years: see, for example, the detailed survey of the approach taken by the Court of Appeal to multi-kilo cases, especially where aggravated by the element of importation, in *R. v. Duncan et al*, 2016 ONSC 1319, at paras. 25-37. As regards cases involving much more moderate amounts of the drug, *R. v. Woolcock*, [2002] O.J. No. 4927 (C.A.) is generally recognized as fixing the sentencing envelope for constructive possession of an ounce or less of cocaine at "6 months to 2 years less a day". Intermediate amounts (as is the immediate case) tend to attract sentences in an intermediate range of two to four- or five-years.

[55] There are conspicuous legal and policy concerns with respect to step-laddering the ranges of penalties for cocaine trafficking exclusively on the basis of the weight or amount of the drug involved. Some have argued that this approach jeopardizes the "fundamental" sentencing principle of proportionality and risks offending repeated injunctions of the Supreme Court.

[56] As to the first concern, s. 718.1, the "fundamental principle", directs that a "sentence must be proportionate to the gravity of the offence and degree of responsibility of the offender". A sentencing levy based on the weight or amount of a drug inevitably prioritizes the gravity of the offence over the moral culpability of the offender. Matters crucial to individualized sentencing – such as an offender's motivation, role in the offence, mental health, historical antecedents and other personal circumstances – are reduced to mere sliders along the continuum that runs between the bookends that define the outer limits of each quantum-based sentencing range. It is this offence-weighted bias that led Lamer C.J., on behalf of the full Supreme Court in *Proulx, supra*, at para. 83, to caution that,

> … such an approach focuses inordinately on the gravity of the offence and insufficiently on the moral blameworthiness of the offender. This fundamentally misconstrues the nature of the [fundamental sentencing] principle. Proportionality requires that <u>full consideration</u> be given to both factors. [Emphasis in original.]

Similarly, in *R. v. Wells, supra*, at para. 46, Iacobbuci J., again speaking for a unanimous Supreme Court, re-affirmed that an offence-based "categorical approach represents only a partial, and therefore unbalanced, application of the fundamental sentencing principle of proportionality contained in s. 718.1".

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[57] Secondly, it has repeatedly been held that the sub-classification of any offence category for penal purposes falls exclusively to Parliament, and not the courts. As said in *R. v. McDonnell*, [1997] 1 S.C.R. 948, at para. 33, with respect to the Alberta Court of Appeal's elaboration of a hierarchy of sexual assaults offences:

> …there is no legal basis for the judicial creation of a category of offence within a statutory offence for the purposes of sentencing. As has been true since *Frey v. Fedoruk*, [1950] S.C.R. 517, it is not for judges to create criminal offences, but rather for the legislature to enact such offences. By creating a species of sexual assault known as a "major sexual assault", and by basing sentencing decisions on such a categorization, the Alberta Court of Appeal has effectively created an offence, at least for the purposes of sentencing, contrary to the spirit if not the letter of *Frey*. [Emphasis added.]

The Supreme Court re-asserted the same general proposition in *R. v. Welles, supra*, at para. 45, in *R. v. Ipeelee, supra*, at para. 86, and, again and very recently, in *R. v. Lacasse, infra*, at para. 61, in disapprobating the judicial construction of graduated sentencing ranges for statutory offences: "[T]he power to create categories of offences, lies with Parliament, not the courts" (emphasis added).

[58] As regards offences under the *Controlled Drugs and Substances Act*, the only substance for which Parliament has created sub-categories of offences for sentencing purposes on the basis of the weight or amount of the drug at issue is cannabis. Accordingly, where, as here, no *CDSA*-prescribed aggravating circumstances are engaged, any person convicted of trafficking in any amount or weight of cocaine remains subject to the full gamut of statutory sentencing options, ranging from a suspended sentence to life imprisonment. No single sentencing factor is privileged in this assessment. Instead, as said in *R. v. Lacasse, supra*, at para. 58, "everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case." Proportionality, then, turns on the balanced and even-handed consideration of each and all of these facets. No single element dominates.

[59] Returning to the conventional sentencing framework, the quantity of cocaine seized from McGill is clearly not within the law's contemplation of "moderate". On an orthodox range-driven assessment, the nature of the drug and the amount here implicated would ordinarily call for a penitentiary-length disposition, if one towards the lower end. Accordingly, Crown counsel's suggestion of a maximum reformatory sentence of two years less a day can be properly understood as an effort to factor in, if modestly, considerations applicable to Aboriginal offenders. It is not, however, a result I find fully faithful to the remedial lessons I draw from

the wisdom of *Gladue* and *Ipeelee*, particularly as they apply to McGill's personal circumstances and rehabilitative initiative. Nor, in my view, does mechanical adherence to a sanctioned range here comport with the imperative of individualized sentencing.

(iii) <u>Sentencing Ranges: From Rules to Guidelines</u>

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[60] Before the late-2012 amendments to s. 742.1, Ontario trial and appellate courts occasionally imposed conditional sentences for trafficking in hard drugs, including cocaine and opiate narcotics, where the fit sentence was no longer than two years and the other statutory pre-conditions obtained. (See, for example, *R. v. Nault*, (2002), 59 O.R. (3d) 388 (C.A.); *R. v. Velkovic*, [2006] O.J. No. 1327 (C.A.); *R. v. Moore*, [2000] O.J. No. 2260 (Sup. Ct.); *R. v. Salazar*, [2000] O.J. No. 4974 (Sup. Ct); *R. v. Saikaley*, [1999] O.J. No. 5462 (Sup. Ct.); *R. v. Fedorak,* 2010 ONSC 40; *R. v. Burnett*, 2013 ONSC 5536; *R. v. Rebello*, 2010 ONCJ 43; and *R. v. Dormevil*, 2011 ONCJ 323.) As earlier canvassed, conditional sentences are no longer an available penal disposition for persons convicted of, as here, any species of cocaine trafficking.

[61] In retrospect, the infrequent conditional sentences imposed for cocaine trafficking read as reticent exceptions to the "approved ranges" for such offences. This judicial response seems somewhat at odds with the Supreme Court's unambiguous directives in *Proulx* respecting the objectives of Bill C-41 and the universal application and utility of conditional sentences. Similarly, despite the Ontario Court of Appeal's acknowledgement of the availability, if rare, of suspended sentences for trafficking in hard drugs (see, for example, *R. v. Ward* (1980), 56 C.C.C. (2d) 15, at p.18; and *R. v. Holt* (1983), 4 C.C.C. (3d) 32, at para. 7), it is difficult to locate a single reported instance of the Court actually suspending the sentence of a trafficker in drugs, such as heroin or cocaine, now listed in Schedule I to the *CDSA*. However, since the elimination of conditional sentencing as a result of the late-2012 amendments some Ontario trial courts have begun to suspend the passing of sentence in Schedule I trafficking cases. (See, by way of example, *R. v. Caputi*, unreptd., July 17, 2013 (M. McLeod, O.C.J.); *R. v. Azeez*, 2014 ONCJ 311; *R. v. Moniz*, unreptd., Nov. 4, 2015 (Hogan, O.C.J.); and *R. v. Duncan*, [2016] O.J. No. 25 (C.J.).)

[62] It is hardly surprising that the state of desuetude into which suspended sentences fell with the advent of conditional sentences has been replaced by something of a renaissance in their utilization since the statutory demise of conditional sentencing for drug trafficking offences. The courts of appeal in some other provinces, most notably British Columbia, positively integrated non-custodial

dispositions, achieved through suspended sentences, into the spectrum of appropriate dispositions for cocaine trafficking – both before and after the 16-year interval when conditional sentences were a viable option. Appellate affirmation of suspended sentences in British Columbia for "hard" drug trafficking, imposed before the introduction of conditional sentences, is illustrated by cases such as *R. v. Harding*, [1977] B.C.J. No. 830 (C.A.); *R. v. Preston* (1990), 79 C.R. (3d) 61 (B.C.C.A.); *R. v. Huang*, [1993] B.C.J. No. 1118 (C.A.); and *R. v. Yamanaka*, [1994] B.C.J. 521 (C.A.). I return to the recent re-invigoration of suspended sentences for such offences in British Columbia and elsewhere in due course.

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[63] As a matter of "practice and policy", the Supreme Court only very rarely considers appeals concerned with the fitness or quantum of sentence. "Nonetheless", as said in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 33, the Court does "entertain appeals involving the legal principles which ought to govern the pronouncement of sentence". (See also, *R. v. Gardiner*, [1982] 2 S.C.R. 368, at p. 404; *R. v. Chaisson*, [1982] 2 S.C.R. 368, at p. 404; and *R. v. Proulx, supra*, at para. 2.) In his recent article devoted to the Supreme Court's contribution to the law of sentencing over the past several decades, Justice W. Gorman identifies "two main themes" that emerge from this jurisprudence: "an individualized process" and appellate deference to a trial judge's exercise of his or her sentencing discretion: "The Impact of the Supreme Court on Sentencing in Canada" (2016), 72 *S.C.L.R.* 319, at p. 323. Inevitably, occasions arise when the offence-centric nature of range-sentencing is in tension with both the "fundamental" sentencing principle of proportionality (s. 718.1) and "the individualized process" that serves as its handmaiden.

[64] As noted, the Supreme Court has for many years cautioned about the limits on penal sub-categorization, sentencing ranges and "starting-point" sentences and, in particular, how these judicial constructions must not suffocate the imperative of an individualized approach to each unique sentencing project. (See, by way of example only, *R. v. McDonnell*, [1997] 1 S.C.R. 948; and *R. v. Proulx, supra*.) The Court of Appeal, while affirming the value of ranges, has similarly spoken of how "trial judges must retain the flexibility needed to do justice in individual cases": *R. v. D.(D.)* (2002), 163 C.C.C. (3d) 471, at para. 33. (See, also, *R. v. Wright* (2006), 216 C.C.C. (3d) 54, at para. 16 (Ont. C.A.).) As eloquently said by Watt, J.A. in *R. v. Jacko* (2010), 256 C.C.C. (3d) 113, at para. 90:

> Sentencing "ranges" … are not immovable or immutable. They are and represent guidelines, of greater or lesser utility depending upon the breadth of the range. Individual cases may fall within or outside the range. To consider a range of sentence as creating a de facto minimum sentence misses the point [and] ignores the fundamental principle of proportionality … . Individual circumstances matter.

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[65] Despite these intermittent reminders of the necessary plasticity of sentencing ranges, their overall, and indeed intended, impact is to restrain the scope of trial courts' sentencing latitude, thereby risking nuance, rehabilitative effort and individual circumstances for parity and procedural efficiency. The Supreme Court has lately had occasion to re-instruct trial judges about the compass of their discretion and appeal courts about the limits of their intervention. In *R. v. Nasogaluak*, [2010] 1 S.C.R. 206, at para. 44, LeBel J., writing for the entire Court, observed:

> [I]t must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.

And very recently, in *R. v. Lacasse*, *supra*, at paras. 57-58 and 60-61:

> Sentencing ranges are nothing more than summaries of the minimum and maximum sentences imposed in the past, which serve in any given case as guides for the application of all the relevant principles and objectives. However, they should not be considered "averages", let alone straitjackets, but should instead be seen as historical portraits for the use of sentencing judges, who must still exercise their discretion in each case …
>
> There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. Once again, everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case.
>
> …

> In other words, sentencing ranges are primarily guidelines, and not hard and fast rules: *Nasogaluak* [*supra*]. As a result, a deviation from a sentencing range is not synonymous with an error of law or an error in principle. …

The minority opinion in *Lacasse* is effectively identical. As said by Gascon J. for himself and McLachlin C.J., at para. 143:

> I agree … that the ranges established by appellate courts are in fact only guidelines, and not hard and fast rules. A judge can therefore order a sentence outside the established range as long as it is in accordance with the principles and objectives of sentencing.

[66] *R. v. Lacasse* speaks powerfully to the importance of two essential case-specific "exercises" that govern the process of sentencing: the "highly individualized exercise" that ultimately determines "a just and appropriate sentence" and the "exercise [of judicial] discretion in each case". As prescribed by Parliament in s. 718.3(1) of the Code:

> Where an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence.

An appeal court's approved "range" for the offence, or a sub-category of its creation, helps inform each of these two "exercises", but it cannot itself determine the result. Any "inquiry" on an appeal against sentence, as said in *Lacasse*, at para, 53, "must be focused on the fundamental principle of proportionality", not on the whether the sentence falls within a sanctioned range. "Furthermore", as put at paras. 51 and 52,

> the choice of sentencing range or of a category within a range falls within the trial judge's discretion and cannot in itself constitute a reviewable error. An appellate court may not therefore intervene on the ground that it would have put the sentence in a different range or category. It may intervene only if the sentence the trial judge imposed is demonstrably unfit.
>
> … [A] very high threshold … applies to appellate courts when determining whether they should intervene after reviewing the fitness of sentence.

Clearly, the approach directed by *Lacasse* has broad implications for sentencing, both at the trial and appellate levels. Professor Tim Quigley concisely captured this in the "Comment" that accompanies the publication of *R. v. Lacasse* in the *Criminal Reports* (24 C.R. (7th) 225): "For good or ill, this will lead to more sentencing flexibility at the trial level and less intervention at the appellate level".

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[67] Even post-*Lacasse*, the Court of Appeal has continued to measure, and find wanting, the propriety of a sentence imposed at trial on the basis of its distance from the Court-imposed range. For example, in *R. v. DiBenedetto*, 2016 ONCA 116, at para. 9, the Court, by way of a brief Endorsement, held that a constellation of mitigating factors "support[s] a sentence at the lower end of the appropriate range" for trafficking in "sinister" drugs; it does not redraw the boundaries of the range nor "amount to circumstances justifying … a significant departure from the range". In other cases, however, the circumstances of the offence or the offender, or both, have been held to properly warrant a material digression from the customary range, either above the ceiling (as occurred in *Lacasse* and, more recently still, in *R. v. Hawley*, 2016 ONCA 143, at paras. 6-9) or, if more dated, below the floor (as, for example, in *R. v. Jacko, supra*). In the latter situations, the deviation from the sentencing norm is typically founded on the doctrine of "exceptional circumstances".

[68] Before turning to the meaning of "exceptional circumstances", I repeat: conditional sentences are sentences of imprisonment. Suspended sentences are not. Satisfaction of the statutory terms for a conditional sentence may have justified the imposition of a non-custodial disposition when that option was available. Not so, however, a suspended sentence for constructive trafficking in cocaine – particularly where, as here, some 300 grams and admitted commerciality are involved. The appellate "guidelines" directing a sentence of imprisonment for an offence of this gravity can, on conventional reasoning, only be distinguished or displaced where one or both of two situations prevails: first, a demonstration of sufficiently "exceptional circumstances" to warrant a sentence outside the ranges approved by appellate authority or, second, appropriate conditions for incorporation of a sentencing model that prioritizes a non-custodial form of restorative justice over incarceration. Drawing on both these paradigms, the case for departure from a sentence of imprisonment is here made out. The same outcome, to be clear, is warranted upon application of the doctrine of individualized proportionality as most recently re-affirmed in *R. v. Lacasse*.

(d) "Exceptional Circumstances"

(i) Introduction

[69] In the mainstream sentencing framework, "exceptional circumstances" is the analytical device by which sentences below an approved range find lawful purchase. Functionally, the doctrine serves as a means for preserving the continuing authority of the sanctioned range while allowing for more lenient treatment of "exceptional", "rare", "unusual" or "extraordinary" cases that,

through such legal characterizations, can be fairly and sympathetically addressed without jeopardizing the sentencing norm for any given class of cases. "Exceptional circumstances" is a concept of somewhat uncertain contours that, in the end, seems rooted as much in equity as settled legal principle. The elasticity of the doctrine's boundaries is understandable given the vicissitudes of human experience. Said otherwise, the categories of cognizable "exceptional circumstances" are far from closed.

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(ii) Drug Trafficking and "Exceptional Circumstances"

[70] Apart from sentences of imprisonment served by way of conditional sentence orders, non-custodial dispositions for drug-trafficking, even in "soft" drugs cases, have typically depended on a finding of exceptionality. In *R. v. D'Souza*, 2015 ONCA 805, for example, the Court of Appeal substituted a one-year conditional discharge for the conviction and fine imposed at trial on a trafficker of a quarter-pound of marijuana in light, as said at para. 4, of the appellant offender's "remarkable steps to change his way of life". Discharges are statutorily unavailable for offences that, like trafficking in Schedule I drugs, may attract life sentences. However, there are reported cases, and since the late-2012 amendments, of suspended sentences for cocaine and heroin trafficking. When imposed, they have rested almost exclusively on the doctrine of exceptional circumstances. Some recent trial level decisions in Ontario have already been noted. Moving further afield, in *R. v. Carrillo, supra*, for example, the British Columbia Court of Appeal affirmed a suspended sentence and two years probation meted out to a "mid-level" cocaine dealer arrested in possession of three ounces of cocaine for the purpose of trafficking. After reviewing the offender's perilous health and significant rehabilitation the Court found no reason, as said at para. 33, to "disturb the [trial] judge's determination of Mr. Carrillo's highly distinctive personal circumstances as exceptional", which "characterization justified the judge's departure from the typical or usual range of sentence".

[71] Two months later, in June 2015, the same Court released its judgement in *R. v. Voong*, *supra*, a compendious decision involving four Crown appeals from suspended sentences and probation imposed by trial judges in "dial-a-dope operations", a particularly "insidious" form of trafficking in which dealers make home deliveries of cocaine and heroin with the same complacency as they would a pepperoni pizza. In the end, the Court affirmed, with some modification, the suspended sentences awarded three of the four respondents joined in the *Voong* appeal. Two of these three were "drug addicts" who had trafficked to support

their dependencies and had made sincere and tangible rehabilitative efforts since their arrests. The third was a relatively young first offender for whom the offence was ostensibly out-of-character. A sentence of six months imprisonment and a year's probation was substituted for the suspended sentence initially imposed on the fourth respondent, a man whose efforts to address his addiction issues were, at best, of only halting industry or success. All four respondents worked close to the bottom of the distribution hierarchy. While some had lengthy histories of participation in drug trafficking, and records consistent with such criminality, their immediate offences involved relatively small amounts of cocaine or heroin, measurable in grams rather than, as here, ounces.

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[72] In the immediate context, the importance of *R. v. Voong* lies less in the individual results than in the Court's effort to both flesh out the meaning of "exceptional circumstances" and explain the purpose and scope of a suspended sentence, particularly in light of the distinction drawn by the Supreme Court in *Proulx, supra*, between, on the one hand, a suspended sentence and probation and, on the other, a conditional sentence. The former, said Lamer C.J. for the *Proulx* Court, at para. 23, "is <u>primarily</u> a rehabilitative sentencing tool" (emphasis added) while "Parliament intended a conditional sentence to address both punitive and rehabilitative objectives". Accordingly the question for the British Columbia Court of Appeal was whether a "primarily rehabilitative tool" could serve the sentencing goals of deterrence and denunciation accorded precedence in drug trafficking cases.

[73] As amended in 1996 (concurrent with the inauguration of conditional sentences), the provision governing the imposition of optional conditions in a probation order now reads:

> **732.1** (3) The court may prescribe, as additional conditions of a probation order, that the offender do one or more of the following:
>
> > …
> >
> > (*h*) comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under subsection 738(2), <u>for protecting society and for facilitating the offender's successful reintegration into the community</u>. [Emphasis added.]

Placing reliance on the qualified nature of the Chief Justice's characterization in *Proulx* and the language of s. 732.1(3)(h), Bennett J.A., writing for the Court in *Voong*, concluded, at para. 37, that,

> A probation order has primarily a rehabilitative objective, however, as the statutory terms refer to the purposes of "protecting society" and "reintegration into the community", it is not limited to this objective.

[74] Invoking the deterrent impact of a suspended sentence and the authority of *R. v. Shoker*, [2006] 2 S.C.R. 399 respecting the broad discretion of sentencing judges to craft appropriate probationary conditions, Bennett J.A., at para. 43, reasoned that,

> … imposing conditions for the protection of the community may have a deterrent and denunciatory effect in addition to a rehabilitative effect. Put another way, <u>a condition need not be punitive in nature in order to achieve deterrence or denunciation</u>. In *D.E.S.M.* [(1982), 80 C.C.C. (3d) 371] (and affirmed in *R. v. Sidhu* (1998), 129 C.C.C. (3d) 26 (B.C.C.A.)), this Court concluded that "home confinement" was an appropriate term of a probation order for the purpose of the maintenance of rehabilitation. The court concluded, at p. 381:
>
>> It should not be thought that home confinement, if we may call it that, should readily be substituted for regular imprisonment. Such a disposition is suitable, in our judgment, only where *very special circumstances* are present such as where the accused demonstrates that he has rehabilitated himself prior to arrest, where he is not a danger to anyone, where others are dependent upon him, and where there are no factors that make it necessary in the public interest that punishment should be by conventional imprisonment. [Underscoring added. Emphasis in *D.E.S.M.* added by Court in *R. v.Voong*.]

In short, "house arrest" and analogous restraints on physical liberty are, as acknowledged in *R. v. Shoker, supra*, at para. 15, lawful, if exceptional, probationary conditions that may be imposed so long as their purpose is to facilitate a "nexus between the offender, the protection of the community and his reintegration in to the community": *Shoker*, at para. 13.

[75] *Voong* did not disturb the settled "range of six to eighteen months imprisonment" for dial-a-dope traffickers. The core issue, rather, was the meaning and compass of the "exceptional circumstances" that may warrant a departure from that range. Bennett J.A. explained, at para. 59:

> Exceptional circumstances may include a combination of no criminal record, significant and objectively identifiable steps towards rehabilitation for the drug addict, gainful employment, remorse and acknowledgement of the harm done to society as a result of the offences, as opposed to harm done to the offender as a result of being caught. This is a non-exhaustive list, but at the end of the day, there must be circumstances that are above and beyond the norm to justify a non-custodial sentence. There must be something that would lead a sentencing judge to conclude that the offender had truly turned his or her

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> life around, and that the protection of the public was subsequently better served by a non-custodial sentence. However, Parliament, while not removing a non-custodial sentence for this type of offence, has concluded that CSO [conditional sentence order] sentences are not available. Thus, it will be the rare case where the standard of exceptional circumstances is met.

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[76] Monnin J.A. adopted this passage in his reasons written on behalf of the Manitoba Court of Appeal in *R. v. Tran (A)*, 2015 MBCA 120, at para. 16, one of a trilogy of Crown appeals the Court concurrently entertained respecting non-custodial sentences – two conditional sentences (predating the 2012 amendments) and one suspended sentence – for cocaine trafficking. (The two companion cases are styled *R. v. Peters*, 2015 MBCA 119 and *R. v. R*acca, 2015 MBCA 121.) Like McGill, the respondent in *R. v. Tran (A)* had been arrested with eleven ounces of cocaine. In the course of affirming Tran's conditional sentence, Monnin J.A., at paras. 17-22, conducted a detailed survey of authorities bearing on "exceptional circumstances" and the doctrine's capacity to relieve from the general rule instructing trial judges "to impose a custodial sentence for trafficking in narcotics". The vintage of the authorities on which he relies makes clear that application of the doctrine is not restricted to conditional sentencing. His review also makes clear that the meaning of "exceptional circumstances" is, as put in one cited case (*R. v. M.F.D.* (1991), 75 ManR (2d) 21 (C.A.)), "not susceptible to definition" and, accordingly, the disposition of such "cases must then be left to judges exercising their discretion judicially". In Monnin J.A's words:

> The reliance on "exceptional circumstances" in dealing with sentences is not a new concept, but it is one that remains somewhat nebulous and devoid of a precise definition. …
>
> …
>
> I am no more inclined to provide a detailed definition of "exceptional circumstances" than other courts dealing with the issue have done in the past, but do glean from previous decisions the elements that courts have considered in finding that "exceptional circumstances" existed in a particular case.
>
> The overriding factor that applies to this finding is that "exceptional circumstances" invariably involve multiple mitigating factors. [Monnin J.A. then set out the passage earlier reproduced from *R. v. Voong*].
>
> …
>
> Other cases have demonstrated that, while rehabilitation remains the most commonly articulated factor, appellate courts have referred to many other considerations in the cocktail of factors. Depending on the facts, compliance with strict bail conditions, guilty pleas, co-operation

> with authorities, health issues, personal characteristics, family concerns, *Gladue* and *Ipeelee* considerations, etc., have all had their role to play in the case law ...
>
> However, in this canvass of factors warranting a consideration of "exceptional circumstances", the aspect of demonstrated rehabilitation over a period of time might be the most persuasive of those factors. [Emphasis added.]

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[77] The standard of "exceptional circumstances" developed in *R. v. Voong* was re-affirmed by the British *Columbia Court of Appeal in R. v. Pepper,* 2015 BCCA 476 and applied by way of suspended sentences in *R. v Lo*, [2015] B.C.J. 2169 (S.C.) and *R. v. Madison*, [2015] B.C.J. 2528 (P.C.), both "dial-a-dope" cases.

(iii) "Exceptional Circumstances" After *Lacasse*

[78] The majority's reasons in *R. v. Lacasse* almost inevitably invite reconsideration of sentencing courts' reliance on "ranges" and "exceptional circumstances". Canadian sentencing jurisprudence treats "exceptional circumstances" as rare occurrences, perhaps exceedingly rare. To acknowledge any greater frequency would, of course, risk the exception swallowing the rule or, more paradigmatically correct, the expansion of an approved sentencing range so as accommodate cases that were once treated as exceptions to the rule. Too many exceptions threaten boundary maintenance.

[79] Appellate construction of sentencing ranges is largely founded on the principle of parity: like cases should be treated alike. This common law principle was codified as s. 718.2(b) of the Code in the 1996 sentencing reforms. However, as applied in Canadian sentencing law, the element of identity for cases captured by any sentencing range is exclusively the nature of the offence and, with respect to drug trafficking offences, the amount or quantum of the drug at issue. Other features bearing on the gravity of a drug crime (such as the purity of the drug, the sophistication of the enterprise and the use of violence in its perpetration) and, especially, the moral culpability of the trafficking offender are rendered subservient to this single offence-centric factor unless they, typically in combination, are of such "exceptional" quality to exempt the case from the restraints on sentencing discretion effectively imposed by an approved range.

[80] The tension between the principle of parity and that of proportionality figures prominently in Wagner J.'s reasoning for the majority of the Supreme Court in *Lacasse*. As framed at para. 53:

> Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar

> offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate. [Emphasis added.]

The authorized reconciliation, however, is one that grants prominence to proportionality, as made clear in the very next paragraph of Wagner J.'s reasons:

> The principle of parity of sentences … is secondary to the fundamental principle of proportionality. [Emphasis added.]

This theme is immediately reinforced. Importing language from the Court's decision in *R. v. L.M.*, [2008] 2 S.C.R. 163, Wagner J., at para. 55, underscores that, absent legal error or patent unreasonableness,

> Th[e] exercise of ensuring that sentences are similar could not be given priority over the principle of deference to the trial judge's exercise of discretion.

[81] What, then, of the principle of parity? The Saskatchewan Court of Appeal, on reviewing these passages from *Lacasse*, ventured an answer in *R. v. Peyachew*, [2016] S.J. No. 65, at para. 21:

> [B]ecause individualization and parity of sentences must be reconciled for a sentence to be proportionate …, the range of sentences previously imposed in respect of similar offences committed by similar offenders in similar circumstances remains a relevant consideration in sentencing. [Emphasis added.]

More instructive, however, is the reconciliation earlier provided by Wagner J. on behalf of a unanimous Supreme Court in *R. v. Pham*, [2013] 1 S.C.R. 739, at para. 9:

> As a corollary to sentence individualization, the parity principle requires that a sentence be similar to those imposed on similar offenders for similar offences committed in similar circumstances (s. 718.2(b) of the Criminal Code). In other words, "if the personal circumstances of the offender are different, different sentences will be justified" (C. C. Ruby, G. J. Chan and N. R. Hasan, *Sentencing* (8th ed. 2012), at §2.41). [Emphasis added.]

Restated: individual differences justify different sentences. The more substantial the differences, and the more salient they are to the recognized objectives and principles of sentencing, the greater the justification for principled disparity. What the principle of proportionality demands is individualized parity, not class parity.

[82] Individualization, then, is the key to the multi-factorial methodology employed in *Lacasse*. It defines the meaning of parity in the exercise of assessing a fit sentence in individual cases. Heed must be paid to the provision of similar

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sentences for like offences and offenders, but the value of any comparison to general "guidelines" turns largely on their proximity to an offender's personal circumstances in his or her unique case. What follows is that sentences that fall outside conventional ranges are not presumptively suspect, nor need their fate on appeal be determined by an inquiry into whether their circumstances are truly or adequately "exceptional". Indeed, exceptionality is the wrong question to ask as it inevitably privileges an offence-centric approach to parity and compels a defence of extraordinary mitigation to escape its orbit. Again, the right question, as is directed by *Lacasse*, at para, 53, "must be focused on the fundamental principle of proportionality". The resulting sentence may be "exceptional" in the sense of "unusual", but that characterization does not impair its integrity so long as it abides the rule of individualized proportionality. Exceptionality, then, is better understood as description of a sentence's remoteness from a settled range than as a presumptive measure of its legal correctness. The distance may sharpen any appellate review, but does it not itself negatively determine the issue.

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[83] Two related points follow.

[84] First: textual support for a reduced threshold to departure from an approved range may be found in *Lacasse* and the immediately precursor cases emanating from the Supreme Court. *Lacasse* deals expressly with the propriety of a sentence that falls significantly outside a range sanctioned by a provincial court of appeal. In the ordinary course, such sentences, when affirmed, are upheld as unusual but justified exceptions to the conventional sentencing range. Indeed, as the preceding discussion endeavours to make clear, appellate debates as to correctness of an outlier sentence typically turn on the meaning, reach and fulfillment of the doctrine of exceptionality in the circumstances of the individual case.

[85] Accordingly, it is of more than passing interest that the language of "exceptional circumstances" appears nowhere in the 183 paragraphs that constitute the Court's judgement in *Lacasse*. The Supreme Court does not restore the trial judge's sentence in *Lacasse* because of its justified exceptionality but, rather, because of its proportionality – irrespective of the range previously endorsed by the Quebec Court of Appeal. The Supreme Court does use the word "exemplary" to characterize the sentence imposed by the trial judge but, in both the majority and dissenting opinions, solely as an express synonym for "denunciatory". Again, it was not the "exceptional" circumstances of the offender Lacasse or his offence that warranted his aggravated sentence but, rather, the proportionality of that disposition in light of community conditions and the perceived need for related public censure.

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[86] *R. v. Nasogaluak*, *supra*, a case dedicated to post-conviction remedies for police misconduct, reflects a similar disregard for the language of "exceptionality" in the context of sentencing. The Court's analysis of appropriate responses to such incidents and its canvass of cases in which anticipated sentencing ranges were significantly reduced to accommodate state misconduct rely on the doctrine of proportionality rather than exceptionality. Ultimately, the Court's rare use of the word "exceptionality" arises not with respect to mitigation but, rather, solely as a threshold basis for a constitutionally-grounded departure from an otherwise mandatory minimum sentence. And in *R. v. Summers, supra,* the Court was at pains to establish that exceptional circumstances were not required to grant "enhanced" pre-sentence custody credit to offenders who had been detained pending their sentencing. Said otherwise, it may well be that appropriate attention to the principle of individualized sentencing necessarily translates into a standard of review for deviation from an approved range that is considerably more forgiving than that conveyed by the concept of "exceptional circumstances". Such an approach more closely reflects the now-authoritative characterization of sentencing ranges as guidelines rather than rules.

[87] The second and somewhat obvious point is that the contributions of the British Columbia and Manitoba Courts of Appeals in, respectively, *R. v. Voong* and the *R. v. Tran (A)* trilogy were made *before* the Supreme Court rendered its decision in *Lacasse*. The notion of "exceptional circumstances" is no more clear or refined after the release of *Lacasse*. This reflects the conspicuous omission of any discussion of the concept in the Court's judgement. However, the same silence speaks, at least arguably, to the attenuated value of the doctrine as a preferred means of achieving proportionality.

(e) Restorative Justice

[88] "Restorative justice" is an important and evolving principle in Canadian sentencing law. Its statutory footing is found in ss. 718(d), (e) (f) and s. 718.2(e) of the Code, further products of the 1996 Bill C-41 amendments. The latter provision bears repeating:

> [A]ll 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. [Emphasis added.]

As said in the foundational case of *R. v. Gladue, supra*, at para. 93,

> Section 718.2(*e*) is not simply a codification of existing jurisprudence. It is remedial in nature. Its purpose is to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to

> encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision's remedial purpose real force.

[89] In the *Tran (A)* trilogy, only one case, that of *R. v. Peters, supra*, involved an Indigenous offender. It was also the only one of the three Crown appeals taken from a suspended sentence. The respondent Peters' circumstances and those situating his offence share similarities with those that define the case before me.

[90] As here, the respondent Peters pled guilty to a charge of possession of cocaine for the purpose of trafficking. He admitted possessing approximately a half-ounce of cocaine divided into quarter-gram portions for commercial sale. Although the quantity seized was but a fraction of that found in McGill's possession, Peters' criminal antecedents reflected a history of entrenched criminality. He was only about 30 at the time of his arrest, yet Peters had by then amassed some 54 prior convictions, the most recent of which was an identical offence for which he had received an effective penitentiary-length sentence of some 26 months. The accompanying pre-sentence report described Peters as at very high risk to re-offend.

[91] Due to an oversight, the Crown failed to serve notice of its intention to seek a greater punishment due to Peters' prior trafficking conviction. Accordingly, Peters was not subject to the one-year minimum sentence of imprisonment mandated by s. 5(3)(a)(i)(D) of the *CDSA*. Shortly after his arrest, Peters left Winnipeg. He had lived there for most of his life and had become deeply immersed in gang culture. He relocated to his First Nation reserve where he cared for his children (infant twins and a third child under two) who had been awarded to his sole custody by Child and Family Services following a contested hearing. He was deemed a good parent who presented no risk to his children. Although it was not suggested that he was an addict-trafficker, Peters had been a drug user who remained abstinent for the nineteen months between his arrest and his sentencing. He also completed a treatment program that addressed issues of domestic violence, anger management and parenting. He had, in the trial judge's words, "changed considerably".

[92] The trial judge declined to follow the Crown suggestion of a sentence of three years imprisonment. She reasoned that a carceral sentence would neither deter Peters nor other Aboriginal offenders and would have little meaningful denunciatory effect in his community. Relying largely on the "*Gladue-Ipeelee* principles", she concluded that a "restorative sentence" would best further "the prevention of crime, as well as individual and social healing". In support of this approach, she quoted extensively from the seminal Aboriginal sentencing

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jurisprudence premised on s. 718.2(e), including one passage (reproduced at para. 11 of the Court of Appeal's judgement), from *R. v. Ipeelee, supra*, at para. 66, in which the Supreme Court, under the heading "Making Sense of Aboriginal Sentencing", approvingly cites the following rhetorical question:

> "[if an innovative] sentence can serve to actually assist a person in taking responsibility for his or her actions and lead to a reduction in the probability of subsequent re-offending, why should such a sentence be precluded just because other people who commit the same offence go to jail?" (J. Rudin and K. Roach, "Broken Promises: A Response to Stenning and Roberts' 'Empty Promises'" (2002), 65 *Sask. L. Rev.* 3, at p. 20).

In the end, Peters' sentence was suspended and he was made subject to a three-year period of probation.

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[93] The Manitoba Court of Appeal, as it had in the companion case of *Tran (A)*, reviewed, at para. 21, the British Columbia Court of Appeal's analysis in *Voong* of suspended sentences, the deterrent potential of probation, and the applicable range of sentences for offenders like the respondent Peters, including the role of "exceptional circumstances" in conducting the ultimate calculus. Moving on from *Tran (A)*, Monnin, J.A., for the Court, then wrote, at para. 22:

> However, in addition to considering the existence of "exceptional circumstances" to warrant the imposition of a suspended sentence, because of the accused's Aboriginal background, the sentence imposed on this offender must be considered in light of what LeBel J. stated in *Ipeelee*. [Emphasis added.]

He then, at paras. 22-24, set out a number of now familiar passages from *Ipeelee,* including the following:

> The Court [in *R. v. Gladue, supra*] held, therefore, that s. 718.2(*e*) of the *Code* … does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders. Section 718.2(*e*) 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 (*Gladue*, at para. 37). 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 (*Gladue*, at para. 66). 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 pre-sentence report (*Gladue*, at paras. 83-84). [*Ipeelee*, para. 59.]
>
> … 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. These matters, on their own, 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. Counsel have a duty to bring that individualized information before the court … often … by way of a *Gladue* report, which is a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders. [*Ipeelee*, para. 60.]
>
> …
>
> Section 718.2(*e*) does not create a race-based discount on sentencing. … [S]entencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case. This has been, and continues to be, the fundamental duty of a sentencing judge. *Gladue* is entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them. ... Section 718.2(*e*) … direct[s] judges to craft sentences in a manner that is meaningful to Aboriginal peoples. [*Ipeelee*, para. 75.]
>
> …
>
> The sentencing judge has a statutory duty, imposed by s. 718.2(*e*) of the Criminal Code to consider the unique circumstances of Aboriginal offenders. <u>Failure to apply *Gladue* in any case involving an Aboriginal offender</u> runs afoul of this statutory obligation. As these reasons have explained, such a failure <u>would also result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality.</u> [*Ipeelee*, para. 87.]

[94] Monnin J.A. went on to note, at para. 26, that Peters' post-arrest reformation made him a "good candidate for a conditional sentence". However, Parliament's eradication of such sanctions for drug trafficking in 2012 did not conclude the inquiry. Consistent with Parliament's direction in s. 718.2(e), Monnin J.A. observed that the removal of this sentencing alternative meant that the trial judge had no "choice but to consider what other options were available to her, short of incarceration". He concluded, at para. 29, that,

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> This accused's conduct, since the time of his arrest, justifies the sentencing judge's recourse to a restorative approach to sentencing. It is an unusual sentence, but it is not an unfit one.

Accordingly, the Crown appeal was dismissed.

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[95] The passages from *Ipeelee* set out at length by Monnin J.A. in *R. v. Peters*, and largely repeated in these Reasons, bear directly on the matter before me. The crafting of a fit sentence for McGill is not only an individualized exercise but one that must take into account his Indigenous ancestry and the wretched consequence of colonialism that have substantially contributed to his circumstances and those of many other First Nations persons who appear before the courts. Failure to do so jeopardizes achievement of a proportionate sentence.

(f) <u>Deterrence, Denunciation and Rehabilitation</u>

(i) <u>Introduction</u>

[96] The relatively severe sentences reflected in the approved ranges for trafficking in Schedule 1 drugs are rationalized by the need for deterrence and denunciation. As said at length earlier, drugs like heroin and cocaine are hazardous substances that sow personal and social misery. The policy response to their dangers is chiefly expressed through the effort to reduce, on one hand, the demand for these drugs and, on the other, their supply. Part of the latter strategy involves criminalizing the sale of drugs and deterring traffickers by, in effect, making the cost of business unsustainable through the imposition of harsh sentences.

[97] *Deterrence*, then, is understood as having two facets, specific and general. The first, *specific deterrence*, captures the idea that sentences need to be sufficiently meaningful to inhibit offenders from recommitting the offences or offences that brought them into conflict with the criminal law. The second, that of *general deterrence*, is directed to the larger community and, in particular, others who may be inclined to engage in similar misbehaviour. In sentencing theory, the associated carceral jeopardy broadcast by any individual sanction will serve to dissuade at least a portion of this at-risk group from pursuing such criminality. Both aspects of deterrence are of ancient pedigree as sentencing objectives, and both are now codified in s. 718(b) of the Code. The purpose of each facet may be seen as instrumental – to positively deter persons from trafficking in dangerous drugs.

[98] *Denunciation* serves a more symbolic than instrumental sentencing function. Lamer, C.J. in *R. v. Proulx, supra*, at para. 102, observed that, "[d]enunciation is

the communication of society's condemnation of the offender's conduct". And as put earlier, in *M. (C.A.), supra*, at para. 81:

> [A] sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law

Proulx dealt with the newly introduced conditional sentence regime. "Incarceration", the Chief Justice there explained, "will usually provide more denunciation" than a conditional sentence". Nonetheless, and in words I take to apply generally to non-custodial dispositions, he went on to say that such sentences "can still provide a significant amount of denunciation … particularly so when onerous conditions are imposed".

[99] Like deterrence and denunciation, the *rehabilitation* of offenders is an important objective of sentencing, both at common law and as now codified: s. 718(d). This sentencing goal takes on added weight in the calculation of an appropriate disposition in the instant case by virtue of its conceptual kinship with the doctrine of restorative justice and because the supplementary "purpose of sentencing" set out in s. 10 of the *CDSA* with respect to drug offences expressly includes the objective of "encouraging rehabilitation". As Rosenberg J.A. said for the Court of Appeal in *R. v. N.H.(C.)* (2002), 170 C.C.C. (3d) 253, at para. 31:

> [T]he importance of s. 10 is to encourage courts to recognize the particular problem that in many cases persons convicted of drug offences are themselves victims of the drug culture and dependent upon drugs as addicts or users. [Emphasis added.]

[100] Like deterrence, rehabilitation has an instrumental purpose: clearly, the repudiation of criminal activity and a transition to a pro-social lifestyle offers the best assurance of continuing societal protection. But, like denunciation, rehabilitation also has a symbolic role, one that through its encouragement expresses shared normative principles. As said in the introductory passages to *R. v. Lacasse*, at para. 4:

> One of the main objectives of Canadian criminal law is the rehabilitation of offenders. Rehabilitation is one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world, and it helps the courts impose sentences that are just and appropriate.

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(ii) Deterrence, Examined and Applied

1. *Specific Deterrence*

[101] An assessment of the likely efficacy of specific deterrence often turns on a close examination of an offender's interaction with the criminal justice system. A history of repeated criminality, defiance of court orders and difficulties while on bail may argue for deterrent sanctions. So might the risk that an offender's circumstances and the social environment in which his or her criminality thrived will remain unchanged when he or she is ultimately released. Doubts about the earnestness of any expressions of remorse may, of course, also ground concern.

[102] The antecedents of McGill, the offender before me, are very different. He has a very lengthy gap in his criminal record. He has no history of breaches of court orders. The Crown immediately consented to his release on bail and he has complied fully with its terms over a period of more than two years. The sincerity of his contrition is undisputed. Where available, the best evidence of the need for specific deterrence is the efficacy of an offender's efforts, if any, to positively reorient his or her life in the period between the granting of bail and the passing of sentence. In this way, the imperative of specific deterrence is ultimately, if inversely, linked to rehabilitation: the greater the evidence of self-directed and effective rehabilitation the less the need for severe sanctions to meet the ends of individual deterrence.

[103] Like the offender in *R. v. Peters*, *supra*, McGill has made productive use of this time – here, about 27 months. He has returned to and excelled at school. He has secured and maintained employment. He supports his family. He has embraced his cultural identity and pursues counseling with community Elders. He has severed relations with his criminal past and, for more than two years, stayed out of harm's way. There is, in my view, no need for imprisonment to deter McGill from future crime. Appropriate community supervision and probationary conditions, intended to foster his continued reformation, should secure this goal and, thereby, that set out as the "fundamental purpose of sentencing" in the opening words of s. 718 of the Code: "to protect society". If necessary, the prospect of being returned to court to have his suspended sentence revoked and replaced with one of imprisonment should serve to deter any breach of the terms of a probation order or the general law.

2. *General Deterrence*

[104] The underlying rationale for general deterrence is that harsh sentences imposed on offenders for any given class of offence will have deterrent impact on like-

minded others. This proposition has, at best, only tepid empirical support. (See, for but one example, my earlier review of this point in *R. v. Reis*, 2012 ONCJ 373, at para. 24.) The Supreme Court's recent discussions of the principle reflect a similar diffidence and, if somewhat tentatively, a strategic retreat from a fulsome embrace of the doctrine. In *R. v. Proulx*, *supra*, at para. 107, for example, a unanimous Court noted that, "[t]he empirical evidence suggests that the deterrent effect of incarceration is uncertain". More recently, in *R. v. Nur*, [2015] 1 S.C.R. 773, at para. 113, the same Court, citing several empirical studies, affirmed that, "[d]oubts concerning the effectiveness of incarceration as a deterrent have been longstanding". And most recently, in *R. v. Lacasse*, at para. 73, the Court endorsed only a selective approach to the doctrine, reasoning that application of the principle was most likely effective with "law-abiding people" rather than those in a hypothetical target audience who have a history of or propensity to anti-social behaviour:

> While it is true that the objectives of deterrence and denunciation apply in most cases, they are particularly relevant to offences that might be committed by ordinarily law-abiding people. It is such people, more than chronic offenders, who will be sensitive to harsh sentences. Impaired driving offences are an obvious example of this type of offence, as this Court noted in *Proulx*:
>
> > [D]angerous driving and impaired driving may be offences for which harsh sentences plausibly provide general deterrence. These crimes are often committed by otherwise law-abiding persons, with good employment records and families. Arguably, such persons are the ones most likely to be deterred by the threat of severe penalties. [Emphasis added.]

The offence at issue in the *Lacasse* appeal was impaired driving, aggravated by a resulting death.

[105] Deterrence, general and specific, remains part of the constellation of objectives to which any sentencing judge must pay heed. Where, as here, there is unquestioned evidence of rehabilitation, social reintegration and a continuing resolve to remain crime-free, deterrence and denunciation take on more muted roles in the final calculus than they might in other cases where these virtues have not been satisfactory established. Sentencing, in the end, is not about punishment for its own sake. It includes a communicative dimension, the subject to which I now turn.

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(iii) The Communicative Function of Sentencing: Denunciation and Rehabilitation

[106] As noted earlier, denunciation is primarily a symbolic rather than instrumental functionality of sentencing. Rehabilitation, at least in part, serves similar ends. Both convey values that inform the Canadian justice system and the Charter. As quoted earlier, denunciation, when essential to proportionate sentencing, "represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values" (*R. v. M. (C.A.), supra*, at para. 81). And similarly, "[r]ehabilitation is one of the fundamental moral values that distinguish Canadian society … and it helps the courts impose sentences that are just and appropriate" (*R. v. Lacasse*, at para. 4.)

[107] Recently, in *R. v. Nasogaluak, supra*, at para. 49, LeBel J., for a unanimous Supreme Court, addressed "the communicative function of sentencing". He wrote, at para. 49:

> A proportionate sentence is one that expresses, to some extent, society's legitimate shared values and concerns. As Lamer C.J. stated in *M. (C.A.)*:
>
> > Our criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated. In short, in addition to attaching negative consequences to undesirable behaviour, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the Criminal Code. [para. 81]
>
> … [And i]n the words of Professor Allan Manson:
>
> > The communicative function of sentencing is all about conveying messages. The messages are directed to the community. They are about the values which ought to be important to the community. ("Charter Violations in Mitigation of Sentence" (1995), 41 C.R. (4th) 318, at p. 323)

Denunciation is part of this communicative function, as is a sentencing court's endorsement of rehabilitation as a normative principle. Where, as in the instant case, rehabilitation is both evidenced and part of a restorative justice agenda, denunciation, at least as manifested in an exemplary sentence of imprisonment, serves little purpose – either instrumental or symbolic. In, as here, a restorative justice context, the principles of denunciation and rehabilitation are virtually inimical. As explained by the Supreme Court in *R. v. Gladue, supra*, at a para. 43, restorative justice,

> … focus[es] 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. … [A]s 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. [Emphasis added; citation omitted.]

(g) "Local" Conditions, Circumstances and Needs

[108] Variations in sentencing, including departures from any approved range, are sometimes justified on grounds of "local" conditions, needs or circumstances. In *R. v. M.(C.A.)*, for example, Lamer C.J. wrote, at para. 92:

> [S]entences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred.

Although the subject of strong dissenting comment, the majority in *R. v. Lacasse* affirmed this proposition in aid of the imposition at trial of a sentence substantially above the range endorsed by the Quebec Court of Appeal in a case in which the sentencing judge took judicial notice of the high frequency of similar offences in his community.

[109] I have no evidence before me of the frequency of cocaine trafficking in Toronto or as to whether the incidence of such crime is at all variable. Nor am I in a position to take judicial notice of any volatility in the phenomenon. Nor can I speculate about public attitudes. I do note that Toronto City Council formally endorsed the "Vienna Declaration" in 2010, favouring counseling, treatment and evidence-based policy making over what was seen as an imprisonment-based "war on drugs" (see http://www.viennadeclaration.com/2010/10/council-votes-to-decriminalize-drug-use/), but this expression of civic sentiment has no influence on the disposition of this particular case.

[110] In any event, I do not believe that sensitivity to local conditions or needs is restricted to evidence of this nature or that bearing solely on arguments favouring the imposition of "exemplary" sentences – that is, as applied in *Lacasse*, denunciatory sentencing that exceeds a sanctioned range. Nor can I accept that "community", in this context, must be limited to a geographical area or curial jurisdiction. Criminal conduct and a court's response may well be informed by and resonate in many different communities. One is particularly germane to the matter before me.

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[111] First, I bear in mind, as I must, that McGill is of Indigenous ancestry, that *Gladue* principles clearly apply to his circumstances and that a restorative justice approach to his sentencing is consistent not only with the governing jurisprudence but with the healing path on which he, of his own initiative, has embarked. One important community, then, is the Aboriginal community of which McGill is a dynamic part. However one slices the demographic pie, I profoundly doubt whether any community in Canada has experienced as much despair – personal, familial and social – as a result of the abuse of alcohol and drugs as have the communities of First Nations peoples. This is but one sad part of the inventory of oppression and suffering resulting from colonialism. The Supreme Court has repeatedly instructed judges that they must take judicial notice of this legacy and incorporate it into crafting a just and appropriate sentence.

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[112] Apart from matters subject to judicial notice, *Lacasse* permits me to draw on nine years of experience presiding in "Gladue Court". This exposure leads me to conclude that there is no community that is as collectively aware of the dysfunctionality caused by alcohol and drugs and as committed, through culturally rooted counselling and treatment programs, to remedying the terrible legacy of this historical trauma. An appreciation of the needs and sensibilities of *this* community, and of McGill's embrace of its support and guidance, is part of the restorative justice approach mandated by the Supreme Court.

[113] Disproportionately high rates of incarceration are a notorious part of the problem that defines the current state of Aboriginal Canadians. Perpetuating a sentencing model that favours imprisonment is not the solution. First Nations communities understand this. To the degree reasonably possible, their effort, individual and collective, to restore health, dignity and self-sufficiency should be respected and supported. This too is the lesson of *Gladue*.

(h) <u>Applying the Law: The Just and Appropriate Sentence</u>

[114] The preceding review of the governing law leads, in my view, to a single proportionate result, that of a non-custodial disposition. This flows from McGill's evident remorse, an appreciation of both the reality and consequences of his dreadful childhood and adolescence, his self-directed and demonstrable rehabilitation in the years since he was released on bail, his vibrant and salutary reclamation of his cultural identity and his immediate and ongoing investment in family, education and employment. Any concerns for specific deterrence can here readily be met by lengthy community supervision, appropriate probationary terms and the risk of resentencing for any future criminality. The sentencing objectives

reflected in the principles of general deterrence and denunciation, to the degree that they are community-directed, are far better met in this case by a sanction that rewards rehabilitation than one that perpetuates incarceration.

[115] Defence counsel, in a transparent effort to appease the hungry gods of deterrence and denunciation, has offered a sacrificial 90 days (served intermittently so as not to interrupt McGill's education or employment) by way of a custodial tribute. While I understand counsel's motivation, I am of the view that, in the circumstances of this case, 90 days (the outer limit of an intermittent disposition) is no more than rank tokenism. If a carceral sentence is the only proportionate outcome, then the period of imprisonment would have to be of a significantly longer duration than that proposed. On the other hand, if, as I find, a custodial sanction is not required to satisfy the principle of proportionality then a sentence of 90 days is a gratuitous embellishment.

[116] I am cognizant that the "offence" portion of the calculus of proportionality – here, some 300 grams of cocaine intended for commercial distribution – is of such gravity that, considered in isolation, it strongly favours a custodial disposition. The circumstances of the offence, however, are only one consideration fueling calibration of a proportionate disposition. In light of McGill's Indigenous ancestry I do not here have to decide whether, apart from this heritage, his personal constellation of mitigative factors would amount to a totality of such exceptional rigour as to not only justify a departure from the conventional range of imprisonment for offences such as his but from any imprisonment at all. I do, however, note that the doctrine of exceptionality, which is hardly of recent invention, certainly contemplates such dispositions. For example, more than 40 years ago, in *R. v. Doherty* (1972), 9 C.C.C. (3d) 115 (Ont. C.A.), the trial judge expressed frustration that there were "no guidelines set as to what constitutes exceptional circumstances". Gale, C.J.O., giving the judgment of the Court on appeal, responded, at p. 117:

> …Each case must be considered in the light of its own circumstances and if those circumstances are extraordinary, or rare, and suggest that a jail sentence is not appropriate, then a jail sentence should not be imposed.

[117] The 1996 amendments to the Code's sentencing provisions and the repeated instructions of the Supreme Court have only reinforced scope for non-custodial responses to even grave criminal conduct. As said by the Court in *R. v. Gladue, supra*, at para. 43,

> Parliament's choice to include [restorative sentencing goals] alongside the traditional sentencing goals must be understood as evidencing an

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> 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 reorientation. [Emphasis added.]

[118] While of universal application, it cannot be forgotten that s. 718.2(e) – the provision that commands judicial consideration of "all available sanctions other than imprisonment" – concludes with the words "with particular attention to the circumstances of aboriginal offenders". It is through "attention" to these "circumstances" – respecting both the fate of First Nations communities and that of McGill himself – that I find the resolution of this case largely driven by the same considerations that led the Manitoba Court of Appeal to affirm the suspended sentence imposed in *R. v. Peters, supra*. These considerations are animated by the principle of restorative justice – a concept that contemplates both objectives and process and that, as earlier outlined, focuses on the acknowledgement of harm, healing, and reintegration into the community. McGill's conduct in the 27 months since his arrest convincingly evidences his ongoing commitment to the goals of restorative justice. This sentence is intended to encourage, under close community supervision, his continuing progress. As *Gladue*, at para. 81, directs:

> The analysis for sentencing aboriginal offenders, as for all offenders, must be holistic and designed to achieve a fit sentence in the circumstances. There is no single test that a judge can apply in order to determine the sentence. The sentencing judge is required to take into account all of the surrounding circumstances regarding the offence, the offender, the victims, and the community, including the unique circumstances of the offender as an aboriginal person. Sentencing must proceed with sensitivity to and understanding of the difficulties aboriginal people have faced with both the criminal justice system and society at large. When evaluating these circumstances in light of the aims and principles of sentencing … the judge must strive to arrive at a sentence which is just and appropriate in the circumstances.

Citing this passage and expressly commenting on the "remedial purpose" of s. 718.2(e), Iacobucci J. on behalf of a unanimous Supreme Court in *R. v. Wells, supra*, added, at para. 49,

> [T]he reasons in *Gladue*, *supra*, do not foreclose the possibility that, in the appropriate circumstances, a sentencing judge may accord the greatest weight to the concept of restorative justice, notwithstanding that an aboriginal offender has committed a serious crime. [Emphasis added.]

See, also, *R. v. Jacko, supra*, at paras. 87 and 92.

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[119] Ranges and exceptionality aside, a suspended sentence, coupled with a lengthy term of probation, is, in my view, a proportionate sentence as directed by *Lacasse* and the Supreme Court's precursor judgements. It is a sanction that comprehends the seriousness of the offence as well as the circumstances of the offender, his moral responsibility and the role of the community in both the manufacture and repair of the criminal conduct at issue. It is, as commanded by *Gladue*, a sanction that is "holistic and designed to achieve a fit sentence in the circumstances", which circumstances necessarily include "the unique circumstances of the offender as an aboriginal person". McGill's personal history and rehabilitative efforts, culturally contextualized, grant elevated weight to the principles of restorative justice in the calculus of proportionality in this case.

[120] Nor does a suspended sentence threaten the principle of parity. The individualized, as opposed to categorical, basis for the reconciliation of proportionality and parity – and in particular its application to Indigenous offenders – is made clear in LeBel J's reasons in *R. v. Ipeelee, supra*, at para. 86:

> Who are courts sentencing if not the offender standing in front of them? If the offender is Aboriginal, then courts must consider all of the circumstances of that offender, including the unique circumstances described in *Gladue*. There is no sense comparing the sentence that a particular Aboriginal offender would receive to the sentence that some hypothetical non-Aboriginal offender would receive, because there is only one offender standing before the court.

Hardly incidentally, in the same paragraph LeBel J. instructs that the codification of the principle of restraint must be held to apply to offences of any gravity since any other construction would "deprive s. 718.2(*e*) of much of its remedial power, given its focus on reducing overreliance on incarceration".

D. CONCLUSION

[121] For the reasons here set out, Robert McGill's sentence is suspended and he is placed on probation for the next 30 months. As directed by s. 732.1(3), the discretionary conditions of his probation are intended to both protect society and facilitate his successful reintegration into the community. Apart from his statutory obligation to keep the peace and be of good behaviour and appear before the court when required, McGill is required to comply with the following conditions:

- Report promptly and thereafter as directed to a probation officer;

- Reside at an address approved by his probation officer and obtain consent of the officer in advance of any change of address;
- Remain in his residence at all times between the hours of 11:00 pm and 7:00 am, except for family medical emergencies and authorized counseling sessions and, following the first six months of probation, with written permission of his probation officer;
- Promptly present himself to a probation officer or peace officer at the front door of his residence during any unexcused curfew hours;
- Not to possess any weapons as defined in the Criminal Code;
- Not to possess or consume any drugs or substances listed in Schedule I to the *Controlled Drugs and Substances Act* unless in possession of a valid prescription in his or his child's name;
- Attend and actively participate in all assessment, counselling and rehabilitative programs as directed by his probation officer, including those Aboriginal programs in which he is already engaged, and to sign such releases as are necessary to enable his probation officer to monitor his progress;
- Seek and maintain suitable employment, and provide proof thereof as required by his probation officer;
- Continue his education as approved by his probation officer and provide proof thereof as required by his probation officer;
- Provide a sample of his bodily substance for purposes of analysis and on the demand of a peace officer or probation officer where that person has reasonable grounds to believe a drug abstention condition of the probation order has been breached;
- Remain within the jurisdiction of the court unless written permission to do otherwise has been obtained from the court or a probation officer;
- Carry a copy of the probation order at all times when outside his residence.

A weapons prohibition order and one requiring McGill to provide a sample of his bodily substance for purposes of DNA analysis and archiving complete this disposition.

[122] The imposition of a suspended sentence for possession of some 300 grams of cocaine for the purpose of trafficking is rare if not unprecedented. It is, however,

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the proportionate and fit sentence for this offender for this offence upon assimilating all the relevant factors and principles, including those applicable to Indigenous offenders. In the language of the Supreme Court in *Lacasse, supra*, this case is among

those "situations that call for a sentence outside a particular range". The process of individualized sentencing inevitably generates such disparate results.

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Sentence pronounced on February 11, 2016

Reasons for Sentence Released on March 14, 2016

Revised Reasons Released on March 16, 2016

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Justice Melvyn Green