

CANADA / JUDGMENT

R. v. Izzard

2025 BCCA 214

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 214 R. v. Izzard

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Izzard,

2025 BCCA 214

Date: 20250624

Docket: CA50392

Between:

Rex

Respondent

And

Kenneth Conrad Izzard

Appellant

Corrected Judgment: The text of the judgment was corrected at paragraph 59 on June 26, 2025 and at paragraphs 3, 60, 68, and 69 on July 10, 2025.

Before:

The Honourable Mr. Justice Abrioux

The Honourable Justice Fleming

The Honourable Mr. Justice Gomery

On appeal from: An order of the Provincial Court of British Columbia, dated September 24, 2024 (sentence) (R. v. Izzard, Terrace Dockets 36006-1K, 36006-2K, 36006-3KA, 36124-1 and Prince George Docket 78960-1KA).

Counsel for the Appellant:

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Counsel for the Respondent:

C. Tomusiak

Place and Date of Hearing:

Vancouver, British Columbia

June 3, 2025

Written Submissions Received:

June 16, 2025

Place and Date of Judgment:

Vancouver, British Columbia

June 24, 2025

Written Reasons by:

The Honourable Mr. Justice Gomery

Concurred in by:

The Honourable Mr. Justice Abrioux

The Honourable Justice Fleming

Summary:

This is an appeal from a global sentence imposed after a conviction on a guilty plea for aggravated assault, and four offences related to possession of weapons and breach of bail conditions. The appellant is an Indigenous and racialized person, and submits that the sentencing judge failed to fully consider the impact of this background in sentencing him. The Crown concedes that the judge's discussion of the appellant's background was brief, but says it was sufficient to withstand appellate scrutiny.

Held: Appeal allowed. Making due allowance for the fact that the reasons were delivered orally by a front-line judge at the end of an afternoon's argument, they still fall short of the standard of sufficiency required, and a fresh sentence is warranted. Having regard to the aggravating and mitigating factors, and particularly the appellant's background and the serious challenges he has faced throughout his life, a somewhat shorter sentence is warranted.

Reasons for Judgment of the Honourable Mr. Justice Gomery:

Introduction

- [1] Mr. Izzard was convicted, on a guilty plea, of aggravated assault and four other offences. The aggravated assault occurred in a homeless shelter when he stabbed the complainant twice in the back after she had approached his girlfriend to offer her drugs. Two of the other offences involved his possession of knives he was prohibited from possessing. The remaining two offences involved breaches of bail conditions.
- [2] Mr. Izzard has a significant criminal record, including a conviction for manslaughter. His background is both Indigenous and racialized.
- [3] The sentencing judge imposed a global sentence of 1,350 days before credit for time served. He found that Mr. Izzard was entitled to a credit of 660 days, resulting in a sentence of 690 days after credit for time served. 1,260 days or 3.5 years of the sentence before credit for time served were allocated to the aggravated assault, and consecutive sentences totalling 90 days were allocated to the weapons offences.
- [4] Mr. Izzard seeks leave to appeal his sentence and, on appeal, a reduced sentence equivalent to time served at the time of sentencing in September 2024. Acknowledging that the sentence imposed by the judge falls within the applicable sentencing range, he argues that the judge's reasoning was tainted by an error in principle and asks this Court to sentence him afresh. The alleged error is a failure to "fully consider" the impact of Mr. Izzard's Indigenous and racialized background, its impact on his moral culpability, and the availability of sentencing alternatives, all in accordance with s. 718.2(e) of the Criminal Code, R.S.C. 1985 c. C-46 as explained in *R. v. Gladue*, [1999] 1 S.C.R. 688, 199 CanLII 679 and *R. v. Ipeelee*, 2012 SCC 13. Mr. Izzard submits that the sentencing judge failed to engage in a "meaningful analysis" of how Gladue factors might attenuate his moral blameworthiness.
- [5] The Crown submits that the extent to which Gladue and other marginalized identity factors justify a reduced or alternative sentence is a discretionary judgment entitled to deference on appeal, the sentencing reasons must be read functionally and contextually, and "while the judge could have been more explicit, the reasons were sufficient".
- [6] Two appropriate concessions are implicit in these careful submissions. It is common ground that the judge was required to have regard to Mr. Izzard's Indigenous and racialized background in sentencing him. On Mr. Izzard's side, there is an acceptance that the reasons reveal some consideration of his Indigenous and racialized background. His argument is

that the consideration and analysis contained in the reasons is insufficient in the circumstances. On the Crown's side, there is an implicit acknowledgement that the reasons are scant. The Crown's submission is they are nevertheless sufficient to demonstrate legally adequate consideration of the mitigating effect of Mr. Izzard's Indigenous and racialized background on his moral culpability in the determination of a fit sentence.

Standard of review

- [7] The standard of review on sentencing appeals is deferential: *R. v. Friesen*, 2020 SCC 9 at paras. 25-26; *R. v. Kehoe*, 2023 BCCA 2 at paras. 29-30. This Court will only intervene "if the sentence is demonstrably unfit or if the sentencing judge made an error in principle that had an impact on the sentence": *Kehoe* at para. 30. Speaking for the Court, Marchand J. (as he then was) explained:
- [29] Sentencing is a highly individualized process. Sentencing judges have "front-line" experience, see and hear all the evidence and submissions in person, and are generally familiar with the circumstances and needs of the local community. As a result, sentencing judges have broad discretion to impose a fit sentence. Sentencing decisions are entitled to considerable deference and will only be overturned for good reason

Background principles of sentencing

- [8] Sentencing requires close attention to the particular circumstances of the case and to characteristics of the offender. The focus is inherently individualized: *R. v. Ellis*, 2022 BCCA 278 at para. 110.
- [9] Principles of sentencing are set out in ss. 718 to 718.2 of the Criminal Code and include the following.
- [10] A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender: s. 718.1. This is the fundamental or cardinal principle of sentencing: *Ipeelee* at para. 37; *R. v. Lacasse*, 2015 SCC 64 at para. 12.
- [11] A sentence should account for any relevant aggravating or mitigating circumstances relating to the offence or the offender: s. 718.2(a). A sentence should be similar to sentences given to similar offenders for similar offences committed in similar circumstances: s. 718.2(b). This is the principle of parity. An offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances: s. 718.2(d).
- [12] Of particular importance in this case, s. 718.2(e) requires that: "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders". It engages particular sentencing requirements that are addressed below. Section 718.2(e) may also bear on the sentencing of non-Indigenous racialized offenders, albeit in a different way: *R. v. Morris*, 2021 ONCA 680 at

para. 123.

Mr. Izzard's background and circumstances

- [13] Mr. Izzard was 39 years old at the sentencing hearing. As set out in a presentence report and an informal Gladue report, he had a horrendous childhood. Along with an older brother, he was raised by his mother, with spells in foster care. She was 12 years old and his father was 22 when his brother was conceived. They were aged 16 and 27 years respectively when Mr. Izzard was born. Mr. Izzard's older brother died in a house fire when Mr. Izzard was a baby. His mother's relationship with his father did not survive into his childhood. She worked as a sex trade worker and struggled with alcohol and drug addiction. There were pimps, guns and drugs in the home. Mr. Izzard suffered physical abuse from his mother and others in the house and ran away at age 15.
- [14] Mr. Izzard's mother identified as Black and lived in a Black community in Toronto. She would slap him if he identified as anything other than Black.
- [15] Through his childhood and adolescence, he had some contact with his father, who was Indigenous, of Cree ancestry. His paternal grandmother had attended a residential school in Manitoba. She brought his father and her other children to Toronto fleeing abuse from her partner, his grandfather. His father, like his mother, struggled with substance abuse. He describes his father as "alcoholic, dead beat, and a goof". His father died in 2008.
- [16] Mr. Izzard attended school in Toronto through grade 11. He reports having completed grade 12 at an alternative school. After a falling out with his mother, he left Toronto at age 18 and ended up in Vancouver, and later in Northern British Columbia. He has had a spotty employment history. At one point, he was addicted to crack cocaine, but says that he no longer consumes it. He reports using amphetamines and fentanyl in the recent past, prior to his present period of incarceration.
- [17] Mr. Izzard managed to avoid the criminal justice system until 2012, when he was 27 years old. At that point, he was convicted of assault and carrying a concealed weapon, and sentenced to a suspended sentence and a year's probation.
- [18] The manslaughter conviction was in 2016. It arose from a dispute with his drug dealer over \$30. He struck the victim repeatedly on the head with a hammer, killing him, and then cleaned up the site and hid the body. The body was discovered by his former partner two months later. She called the police. Mr. Izzard was sentenced to serve 5.5 years in custody net of 18 months credit for pretrial incarceration. His sentence included a mandatory weapons prohibition.
- [19] Mr. Izzard's convictions for the weapons offences in this case date back to September and October 2022. In September, he was found in possession of a prohibited weapon, namely a switchblade knife. In October, he was found in possession of a knife while he was out on bail, contrary to a term of his release order. In November 2022, he committed the aggravated

assault with a knife that was already in his possession contrary to a term of his release on bail. Subsequently, in February and November 2023, he breached terms of release orders by leaving residential facilities he was required to occupy without permission, in one case removing an electronic monitoring device.

- [20] At the time of sentencing, Mr. Izzard reported that for the past three years he had been in a stable common law relationship with a woman he hopes to marry. She has four adolescent and teenage children for whom he is a father figure. He reported helping her cut down on her use of addictive substances, and wanting to be able to attend detox with her.

The different approach to sentencing required by Gladue and Ipeelee

- [21] In Kehoe, Marchand J. comprehensively outlined the sentencing approach required by Gladue and Ipeelee. He stated:

- [36] In *R. v. Gladue*, [1999] 1 S.C.R. 688, 1999 CanLII 679, and *R. v. Ipeelee*, 2012 SCC 13, the Supreme Court of Canada made clear that s. 718.2(e) is remedial and is intended to deal with the continuing crisis of over-representation of Indigenous offenders in the Canadian criminal justice system: Gladue at para. 33; Ipeelee at para. 59.

- [37] This crisis is driven by the alienation, poverty, substance abuse, lower educational attainment, lower rates of employment, and prejudice experienced by Indigenous people in Canada. Sentencing judges are to take judicial notice of how Canada's colonial history and post-colonial assimilationist policies have translated into these terrible outcomes: Gladue at para. 83; Ipeelee at para. 60. These systemic and background factors do not excuse or justify criminal conduct. Rather, they provide the necessary context for understanding and evaluating case-specific information during the sentencing exercise: Ipeelee at para. 83.

- [38] Systemic and background factors affect the incidence of crime and recidivism for all offenders. However, as the Supreme Court recognized, the circumstances of Indigenous offenders are different from other offenders because many Indigenous people are "victims of systemic and direct discrimination" and "dislocation" and are "substantially affected by poor social and economic conditions": Gladue at para. 68.

- [39] The over-representation of Indigenous people in Canada's prison population is tied to broad societal issues. Nevertheless, the Supreme Court in Gladue and Ipeelee recognized that culturally attuned sentencing for Indigenous offenders has a role to play in addressing this crisis: Gladue at para. 65; Ipeelee at paras. 64-70; *R. v. Mero*, 2021 BCCA 399 at para. 68.

- [40] Accordingly, Gladue and Ipeelee transformed the approach to sentencing Indigenous offenders. As with all offenders, a judge sentencing an Indigenous offender must take a holistic approach to imposing a fit sentence that is proportionate to the seriousness of the offence and the moral blameworthiness of the offender: Ipeelee at para. 37. However, since the circumstances of Indigenous offenders are "significantly different" from those of non-Indigenous offenders, the judge must pay particular attention to two factors:

1. The unique systemic or background factors that may have played a part in bringing the particular Indigenous offender before the courts; and
2. The types of sentencing procedures and sanctions that may be appropriate for the offender in the circumstances given their particular Indigenous heritage or connection.

See Gladue at para. 66; Ipeelee at para. 59.

- [41] In considering systemic and background factors, the judge must take account of all the surrounding circumstances, including "the unique circumstances of the offender as an aboriginal person," and display sensitivity to and understanding of the "difficulties aboriginal people have faced with both the criminal justice system and society at large": Gladue at para. 81; Ipeelee at paras. 59-60, 75.
- [42] It is not necessary to establish a direct causal link between systemic and background factors and the offence at issue. How the complex interplay of historical factors impacted a particular Indigenous offender may be difficult or impossible to establish. Nevertheless, the specific systemic or background factors at play are critically important. They may help the court assess the moral blameworthiness of the offender or identify appropriate sentencing objectives: Ipeelee at paras. 81-83; Hamer at para. 98.
- [43] As for the appropriate sanctions, while restorative sentences may be more appropriate for Indigenous offenders, applying Gladue principles will not necessarily lead to a reduced sentence. There is no automatic heritage-based discount: Gladue at para. 88; Ipeelee at paras. 71, 75; Mero at para. 73. Generally, the more serious or violent the crime, the more likely it will be, as a practical matter, that the terms of imprisonment will be the same for an Indigenous and a non-Indigenous offender: Gladue at para. 33; R. v. Wells, 2000 SCC 10 at paras. 42-44; Ipeelee at paras. 84-85; Mero at para. 73.
- [44] That said, no offence is so serious that it negates the need for a sentencing judge to consider s. 718.2(e) of the Code and Gladue principles: Ipeelee at paras. 84-85. In fact, absent an informed waiver, sentencing judges have a duty to consider s. 718.2(e) and Gladue principles in every case involving an Indigenous offender: Gladue at para. 82. As the Court explained in Ipeelee at para. 87, a failure to do so constitutes an error in principle justifying appellate intervention:
- [87] 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. Failure to apply Gladue in any case involving an Aboriginal offender runs afoul of this statutory obligation. As these reasons have explained, such a failure would also result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality. Therefore, application of the Gladue principles is required in every case involving an Aboriginal offender, including breach of an LTSO, and a failure to do so constitutes an error justifying appellate intervention.

[22] Mr. Izzard has roots in both Indigenous and Black marginalized communities. Both aspects of his upbringing are relevant to an assessment of his moral culpability, although not quite in the same way: *Morris* at paras. 122-123. *Morris* is a per curiam judgment of a five-judge division of the Ontario Court of Appeal that held, at para. 123:

Just as with the discrimination suffered by Indigenous offenders, courts should take judicial notice of the existence of anti-Black racism in Canada and its potential impact on individual offenders. Courts should admit evidence on sentencing directed at the existence of anti-Black racism in the offender's community, and the impact of that racism on the offender's background and circumstances. Similarly, in considering the restraint principle, courts should bear in mind well-established over-incarceration of Black offenders, particularly young male offenders. Finally, as with Indigenous offenders, the discrimination suffered by Black offenders and its effect on their background, character, and circumstances may, in a given case, play a role in fixing the offender's moral responsibility for the crime, and/or blending the various objectives of sentencing to arrive at an appropriate sanction in the circumstances.

[23] *Morris*, and *Ellis* at paras. 74-86, make the point that a Gladue analysis bears on one aspect of the sentencing analysis, namely the assessment of moral blameworthiness, but not on the equally important assessment of the seriousness of the offence. The Court in *Morris* states:

[77] It is important to preserve the distinction between factors relevant to the seriousness or gravity of the crime on the one hand, and factors relevant to the offender's degree of responsibility on the other. Unless the distinction is maintained, the proportionality principle may be misapplied. A sentence, like the sentence imposed here, which wrongly discounts the seriousness of the offence to reflect factors which are actually relevant to the offender's degree of responsibility, will almost inevitably produce a sentence that does not adequately reflect the seriousness of the offence and, therefore, fails to achieve the requisite proportionality.

[24] This reasoning is expressly adopted by this Court in *Ellis* at paras. 84-85.

The law concerning adequacy of reasons

[25] A sentencing judge, like any judge, must give reasons for their decision. As explained in *R. v. Sheppard*, 2002 SCC 26 at paras. 1-8, the delivery of reasoned decisions is inherent in the judge's role. The standard is not one of perfection. The reasons must be, "having regard to the particular circumstances of the case, reasonably intelligible to the parties and [provide] the basis for meaningful appellate review of the correctness of the trial judge's decision": at para. 8.

[26] Reasons need not address matters that are well settled, uncontroversial, or understood and accepted by the parties: *R. v. R.E.M.*, 2008 SCC 51 at para. 19. They need not identify everything the judge considered, explain each of their findings, or detail each aspect of their reasoning process: *R. v. Kardan*, 2024 BCCA 56 at para. 37.

- [27] In *R. v. Tom*, 2024 BCCA 239 at para. 42, Chief Justice Marchand spoke for the Court in addressing the adequacy of a sentencing judge's reasons. In that case, as in this one, the reasons were delivered at the conclusion of a day's submissions following a guilty plea. He stated:
- [42] Front-line judges carry very heavy caseloads and are under significant pressure to deliver timely decisions. Imperfections in their expression are not unusual and do not, on their own, amount to reversible error. The reasons of front-line judges are to be read functionally and contextually. That means their reasons must be read as a whole and in the context of the live issues at trial, informed by the positions of the parties. Reasons are not to be finely parsed in search of error:

The sentencing judge's reasons

- [28] The sentencing judge heard submissions over the course of an afternoon, adjourned for 20 minutes, and delivered his decision. His reasons are 28 paragraphs long and took 20 minutes to deliver. He summarizes the circumstances of the offences, and fairly outlines salient points made by the Crown and defence. He notes aggravating and mitigating factors identified by the Crown, including Mr. Izzard's status as an Indigenous person and someone of Black ancestry. He then turns to defence counsel's submission and states:
- [14] Mr. La Liberté noted from the presentence report the horrendous childhood of Mr. Izzard, that his mother was engaged in the sex trade, that he was assaulted in various ways by the male that came into her life, and ultimately left home at the age of 13 and it was pointed out by Mr. La Liberté, and I certainly agree, that it is unusual, but a good thing, that Mr. Izzard does not actually have any involvement in the criminal legal system until 2012, although that is an assault and having a concealed weapon and, of course, there is the manslaughter conviction for which he was sentenced to five-and-a-half years' incarceration in 2016.
- [15] Mr. La Liberté has stressed the sentencing factor of -- or considerations of the factor -- consideration laid out in *Ipeelee* of moral blameworthiness and the reduction of moral blameworthiness because of the either, intergenerational effects of -- and I will make this for both First Nations and black people, intergenerational marginalization by mainstream society.
- [29] The judge notes positive reports on Mr. Izzard's progress while incarcerated prior to trial in the Prince George Regional Correctional Centre, his plans for involvement with Indigenous events and supportive organizations and other supports for his rehabilitation. He states:
- [17] The sentencing principles in aggravated assault, which, of course, is the major offence here, include proportionality, the sentence to be proportional to both the offence, the personal factors of the accused, and also deterrence and denunciation because of the violence, and of course, the court must never forget rehabilitation, which is what has been stressed by Mr. La Liberté

- [30] The judge notes that sentencing is a highly individualized process. He identifies the sentencing range for aggravated assault as between two and six years, closer to the high end if it is unprovoked or serious injury is involved, and lower if it arises out of an escalation of a physical fight.
- [31] The judge refers to *R. v. Fortune*, 2024 ONCA 269 as a case on similar facts in which a sentence of 3.5 years was imposed. He states:
- [22] I quote from paragraph 36 of the *Fortune* case, "Given the seriousness of the offence and the fact that the respondent is a repeat violent offender who committed this offence in breach of," in that case, it was probation, in this one, in breach of bail, "(which is an aggravating factor), a global sentence of three years and six months is within the range for similar offences committed by similar offenders and meets the objectives of denunciation and deterrence," which are the overarching principles of sentencing in this type of offence and, as the Crown actually said, it is an unusually similar fact pattern, of course, not identical.

[Emphasis added.]

- [32] The judge then immediately concludes by imposing the same sentence as was imposed in *Fortune* for the offence of aggravated assault, and goes on to address the other offences and subsidiary orders that are not in issue on appeal.
- [33] At the end of the hearing, the judge asked whether counsel had any comments. Defence counsel suggested that he had not commented on the effect of *Gladue*. The judge replied:

It is a *Gladue* situation and it does reduce the moral blameworthiness, but it is still within the range.

Did the sentencing judge err in principle in his assessment of *Gladue* factors?

- [34] As stated in *Kehoe*, the sentencing judge was obliged to take a holistic approach to imposing a fit sentence that is proportionate to the seriousness of the offence and the moral blameworthiness of the offender. He was required to pay particular attention to the unique systemic or background facts that may have played a part in bringing Mr. Izzard before the courts, and the types of sentencing procedures and sanctions that may be appropriate given his particular indigenous heritage. He had to display sensitivity to the difficulties faced by Indigenous people within the criminal justice system and society at large. Aggravated assault is a serious, violent offence, and he was not necessarily required to impose a shorter term of imprisonment than would have been appropriate in the case of a non-Indigenous offender and non-racialized offender.
- [35] The essential question is whether the reasons suffice to indicate that the judge adopted the required approach.

- [36] It is plain from a review of the entire transcript of the sentencing hearing that the judge was familiar with Gladue, Ipeelee, and cases such as Morris. He acknowledged that a Gladue analysis was required. While there was no need for him to review the jurisprudence in his reasons, he was obliged to address its requirements.
- [37] In his reasons, the judge noted Mr. Izzard's "horrendous childhood", the connections he has recently established with Indigenous communities, and the support offered for his rehabilitation. In summarizing defence counsel's submissions, he referenced Ipeelee and "intergenerational marginalization by mainstream society". It would follow that Mr. Izzard's moral blameworthiness was reduced, although the reasons do not discuss this.
- [38] The judge's emphasis on the similarity of this case to Fortune is troubling, because the offender in Fortune was not Indigenous or a racialized individual, and that case did not require a Gladue analysis. Fortune was not, as the judge put it, "an unusually similar fact pattern". The judge's apparent use of Fortune to arrive at a 3.5-year sentence for the aggravated assault suggests that he was not taking seriously "the unique circumstances of the offender as an aboriginal person": Kehoe at para. 41.
- [39] Read as a whole, the reasons do not display sensitivity to and understanding of the "difficulties aboriginal people have faced with both the criminal justice system and society at large": Kehoe at para. 41. They do not disclose that the judge paid "particular attention" to the essential considerations identified in Gladue, Ipeelee, and Kehoe and the role they played in assessing Mr. Izzard's moral blameworthiness.
- [40] Allowing for the circumstance of their delivery by a front-line judge on a guilty plea at the conclusion of an afternoon's argument, I conclude that these reasons fall short of the legal standard where a Gladue analysis is required, as it is in this case. The judge's reliance on Fortune persuades me that the error had an impact on the sentence. Accordingly, I would find that the sentence imposed by the judge is marred by an error in principle that had a material impact on the sentence and it is necessary to sentence afresh.

Fresh sentencing analysis

- [41] In sentencing afresh, we should defer to the judge's findings of fact and identification of aggravating and mitigating factors to the extent that they are untainted by the error in principle: Friesen at para. 28.
- [42] Without unduly repeating matters already reviewed, I will address important elements of the analysis required in determining a fit and appropriate sentence in this case.

Circumstances of the offences

- [43] It is necessary to say more about the circumstances of the offences.

- [44] The weapons offence in September 2022 to which Mr. Izzard pleaded guilty arose from a domestic dispute between Mr. Izzard and a female complainant in a public place. The police were called and, when they arrived, Mr. Izzard was observed to throw a switchblade into the grass. When he was arrested, a butterfly knife, which is a prohibited weapon, was found on his person.
- [45] The weapons offence in October 2022 occurred two weeks later while Mr. Izzard was out on bail and the subject of an outstanding warrant for his arrest. He fled arrest and was captured, at which point he was found in possession of a folding utility knife contrary to a condition of his release on bail.
- [46] The aggravated assault took place in a homeless shelter in Terrace in late November 2022. Mr. Izzard, his girlfriend, and the victim were all present. The victim was a woman described by Crown counsel at the sentencing as a heroin addict and a highly vulnerable individual. The girlfriend and the victim had a dispute, and the victim offered the girlfriend drugs to make it up. Mr. Izzard intervened. He argued with the victim. She moved away and he followed her and stabbed her in the back with a knife in his possession, contrary to the terms of his release on bail. The victim suffered a one-and-a-half-inch stab wound to the centre left of the spine which was not life-threatening. The police were called, and Mr. Izzard was arrested with a knife in his pocket.
- [47] The two remaining offences in February and November 2023 involved being at large contrary to the terms of release orders requiring him to reside at residential facilities.

Circumstances of the offender

- [48] Mr. Izzard's background is described above, and it remains to discuss its significance.
- [49] In summary, Mr. Izzard was neglected and victimized by abuse through his childhood and adolescence, and eventually ran away from home. He was raised in poverty and suffered instability in his living arrangements. He was exposed to childhood tragedy (the loss of a brother in a fire), violence and substance abuse. All of this was in consequence, at least in part, of his Indigenous and racialized background. His father was the son of a residential school survivor whose life was marked by physical abuse. His mother got together with his father and started having children at far too young an age. Both parents struggled with substance abuse.
- [50] Mr. Izzard in turn has lived a life marked by instability, substance use, and violence. It is not surprising that this would be so.
- [51] The contours of Mr. Izzard's antecedents are sadly familiar. They are representative of the systemic and background factors that have led to the over-representation of Indigenous and racialized offenders in the criminal justice system. It is clear that Mr. Izzard's history contributed to the criminal conduct in this case. This history mitigates, though it does not eliminate, his moral culpability.

[52] From March 2024 until the sentencing in September 2024, Mr. Izzard was in custody at the Prince George Regional Correctional Centre. He was reported as having done well at the Centre, having been appointed a representative for his unit. He pursued Indigenous programming activities and sought and obtained counselling. An aftercare worker who prepared the informal Gladue report stated:

In summary, Kenneth is an Indigenous man who continues to deal with the impacts of many traumatic events in his life, including a high amount of abuse and instability. He has faced intergenerational trauma due to residential school and like many other Indigenous people, has turned to substances to cope. He has maintained a good relationship with community supports throughout his incarceration. He attends many programs to deal with his addiction and connects with culture to support his healing plan. Our organization uses restorative justice measure to support and aid in a healing plan with our clients. Ken has expressed a plan that includes:

- 1) Continuing counselling or seeing a psychiatrist to address past trauma.
- 2) Continuing journaling for healing.
- 3) Connect with culture for healing purposes.
- 4) Find permanent housing.

Impact on the victim

[53] The victim reported to police that, at the time of the assault, she feared for her life. She received medical attention and her wound was sutured. Crown counsel were unable to locate her in connection with the sentencing and there was no victim impact statement.

Positions of the Crown and defence

[54] At the sentencing hearing in the court below, the Crown sought a global sentence of four years, less credit time served prior to trial. The judge imposed what was, in effect, a global sentence of 3 years and 9 months before credit. On appeal, the Crown maintains that, even if the judge erred in his treatment of the Gladue factors present in this case, the sentence he imposed is fit. It summarizes its position as follows:

The sentence imposed in this case for an offence involving a dangerous unprovoked attack with a weapon the offender was then prohibited from possessing on a vulnerable victim who posed no physical threat to him, for an offender with a history of serious violence with a weapon that had previously resulted in a loss of life, and who had repeatedly violated court orders, was entirely fit, even having regard to the Gladue factors, racial background information, and efforts towards rehabilitation

[55] The defence submits that the appropriate sentence for the aggravated assault, before credit for time served, would be two years. It does not contest the consecutive sentences imposed for the other offences. Accordingly, the defence argues for a global sentence of 27 months, which would mean that Mr. Izzard has now served his sentence.

Aggravating and mitigating factors

[56] Section 718.2 of the Code states the general principle that "a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender".

[57] The following aggravating factors are evident:

- a) As the Crown submits, the victim of the aggravated assault was a vulnerable individual in a homeless shelter who presented no physical threat to Mr. Izzard;
- b) Mr. Izzard committed the assault with a knife he was prohibited from possessing while he was out on bail with weapons charges pending;
- c) Mr. Izzard's criminal record carries substantial weight in view of its recency and the pattern of offending, featuring violence inflicted with the use of or in association with weapons; and
- d) It is further aggravating that Mr. Izzard has repeatedly been found in possession of weapons while he was out on bail and subject to specific prohibitions because this conduct manifests a deliberate disregard of restrictions imposed on him by the court for the safety of the community.

[58] The mitigating factors are:

- a) As noted by the judge, Mr. Izzard's guilty plea;
- b) An expression of remorse for the stabbing, though not for the other offences; and
- c) As already discussed, Gladue factors and other features of Mr. Izzard's background reduce his moral culpability.

Sentencing options in this case

[59] Pursuant to s. 268 of the Criminal Code, the offence of aggravated assault is punishable on indictment by imprisonment for a term not exceeding 14 years.

[60] If the time remaining to be served, after credit for pretrial custody, does not exceed two years, it may include a probation order: s. 731(b).

The authorities

- [61] This Court has repeatedly identified the sentencing range for an aggravated assault as 16 months to six years, observing that sentences tend to the upper end of the range if the assault was unprovoked or resulted in serious injury, and to the lower end if the assault arises from the escalation of a physical fight: *R. v. Craig*, 2005 BCCA 484 at para. 10; *R. v. Nguyen*, 2016 BCCA 408 at para. 47. It is also well established that sentencing ranges reflect "judicial consensus on the gravity of the offence" and do not factor in characteristics of the offender: *Ellis* at paras. 126-127 citing *R v. Parranto*, 2021 SCC 46 at para 47.
- [62] The defence submits a list of cases involving Indigenous offenders convicted of aggravated assault with previous convictions for violent offences: *R. v. H.S.L.*, 2000 BCSC 1826; *R. v. Paquette*, 2012 BCSC 1497; *R. v. Jimmy*, 2017 BCSC 1218; *R. v. Barahona*, 2018 BCPC 74; and *R. v. Auckland*, 2022 BCPC 56. It notes that *Kehoe* is another such case. The defence's point is that the sentences imposed in the cases other than *Kehoe* were two years or two years less a day. The sentence imposed on appeal in *Kehoe* was four years but the defence submits that the injuries suffered by the victim were more serious, the offender's criminal record was more significant, and the impact of Gladue factors on the offender's moral blameworthiness was lower.
- [63] While the principle of parity is important, sentencing is an individualized process. This is particularly so in this kind of case. In *Kehoe* at para. 72, Marchand J.A. stated that "the hardest sentencing decisions involve offenders who have committed serious offences but have a reduced level of moral blameworthiness". In my view, the cases relied upon by the defence are helpful to the extent that they illustrate how sentencing judges have grappled with the impact of Gladue factors in sentencing offenders with a significant criminal record for the serious offence of aggravated assault. They do not establish a separate sentencing range applicable in such cases: *Kehoe* at para. 43.
- [64] A sentencing judge must have regard to the objectives set out in s. 718 of the Code. The most important, in this context, are usually denunciation, deterrence, and rehabilitation. With an aggravated assault, denunciation and deterrence are always significant, and their importance grows with the seriousness of the offence. The presence of Gladue factors heightens the importance of rehabilitation. Rehabilitation is identified as a significant sentencing objective in *Paquette* at para. 94, *Barahona* at paras. 56-57, *Jimmy* at paras. 21-24, *Auckland* at paras. 42 and 65-66, and *Kehoe* at paras. 71-73. In *Paquette*, *Barahona*, and *Auckland*, the judge imposed a probation order with a view to rehabilitation. In *Jimmy*, the judge viewed a probation order as unnecessary. In *Kehoe*, a probation order was not an available option.

Assessment

- [65] This case involves a difficult sentencing decision because the offences are grave but Mr. Izzard's moral blameworthiness is significantly reduced. These considerations point in opposite directions.
- [66] In my opinion, a fit sentence for the offence of aggravated assault at the time of sentencing would be three years rather than the three-and-a-half-year sentence imposed by the judge.
- [67] Nothing less than three years would serve the objectives of denunciation and deterrence in view of the seriousness of the offence and aggravating circumstances I have noted. This was an unprovoked attack on a vulnerable person with a knife that Mr. Izzard was prohibited from possessing. He was not long out of jail after serving a lengthy sentence for manslaughter. It is pure happenstance, and Mr. Izzard and the victim are very lucky, that he did not damage a vital organ.
- [68] A sentence of just three years, as opposed to the longer sentence imposed by the judge, is justified by the reduction in Mr. Izzard's moral blameworthiness attributable to his background, as I have described. I am also of the view that, in the particular circumstances of this case, there is some guarded hope for rehabilitation and a probation order, available by virtue of the credit for time served prior to sentencing, may assist somewhat in this regard.
- [69] Accordingly, I would grant leave to appeal and allow the appeal. I would substitute for the sentence imposed by the judge on September 24, 2024, the following sentence as at that date: 3 years (1,095 days) for aggravated assault; 90 days consecutive for the weapons offences, and concurrent sentences for the other offences; for a global sentence of 1,185 before credit for time served or 525 days after credit for time served. I would further impose a probation order for 12 months on the terms set out in an appendix to these reasons, which were proposed in a joint submission of counsel. In my view, they are reasonable in the circumstances and serve the purpose of protecting society and facilitating Mr. Izzard's reintegration into the community: R v. Shoker, 2006 SCC 44 at para. 13. The ancillary orders made by the judge pursuant to ss. 487.051 and 109 of the Code should remain in effect.

"The Honourable Justice Gomery"

I AGREE:

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Justice Fleming"

Appendix: Conditions of probation order

1. You must keep the peace and be of good behaviour.

2. You must appear before the court when required to do so by the court.
3. You must notify the court or your probation officer in advance of any change of name or address and promptly notify the court or the officer of any change in employment or occupation.
4. You must have no contact or communication directly or indirectly with "L.R." or "T.M.".
5. You must not go to or be within 100 metres of any place where L.R. or T.M. lives, works, attends school, worships, or happens to be. If you see either of them, you must leave their presence immediately without any words or gestures.
6. You must report in person to a probation officer at Prince George Community Corrections within two business days of your release from custody. After that, you must report as directed by your probation officer.
7. When first reporting to a probation officer, you must provide them with the address or location where you live and regularly sleep and your phone number if you have one. You must not change them without notifying your probation officer in writing at least three days before making the change.
8. You must attend, participate in and complete any intake, assessment, counselling, or education program as directed by your probation officer. This may include counselling or programming for:
 - a) Substance use.
 - b) Mental health.
 - c) Trauma recovery.
9. You must not possess directly or indirectly any weapon as defined by the Criminal Code, including:
 - a) Firearms and ammunition.
 - b) Crossbows, prohibited or restricted weapons or devices, or explosive substances.
 - c) Anything used, designed to be used, or intended for use in causing death or injury to any person, or to threaten or intimidate any person.
 - d) Any imitation firearms or weapons, including any compressed air guns, BB or pellet guns.
 - e) Any related authorizations, license and registration certificates, and you must not apply for any of these.

10. If you possess any of the items prohibited by this order, you must immediately provide a peace officer at the Prince George RCMP detachment, with a copy of this order and arrange to go with the officer to the location(s) where all the items are and surrender them to the officer.
11. You must not possess any knife, or any other sharp-bladed instrument used, designed to be used, or intended to be used to cut things, except:
 - a) You can possess a knife when preparing and eating food.
 - b) You can possess these items inside the place where you live and regularly sleep.
 - c) For the purposes of lawful employment, while at or going directly to and from your place of lawful employment. If asked, you must provide your probation officer with the details of your location and hours of employment.
12. You must not be within a 10-kilometre radius of the City of Terrace. The exceptions are as follows: (a) with the prior written permission of your probation officer, such permission is to be given only for reasonable purposes; (b) to attend any court appearances and you must provide your probation officer with seven days' written notice in advance of your attendance within the prohibited area; (c) in a moving vehicle on your way to some other place, but only as permitted by your probation officer.

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