Citation: *R. v. Rodrigue*, 2015 YKTC 5 Date: 20150211
Docket: 13-00793A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

SAMANTHA ANN RODRIGUE

Appearances:
Keith D. Parkkari Counsel for the Crown
Nils F. N. Clarke Counsel for the Accused

REASONS FOR SENTENCING

[1] Samantha Rodrigue has pled guilty to having committed the offence of assault causing bodily harm, contrary to s. 267(b) of the *Criminal Code*. The Crown has proceeded by summary election.

[2] The circumstances are as follows. On January 25, 2014, Ms. Rodrigue was at a bar in Whitehorse. There was a dispute between the complainant, Candace Pauch, and another individual. A friend of Ms. Pauch's was trying to mediate the dispute. Without warning, Ms. Rodrigue threw a glass at Ms. Pauch striking her above her eyebrow. Ms. Pauch then threw a glass at Ms. Rodrigue, striking her in the nose. Both parties were in close proximity to each other at the time.

[3] Ms. Rodrigue was quite intoxicated. Ms. Pauch, as was her friend, was relatively sober.

[4] The parties were known to each other.

[5] Ms. Pauch received a laceration which required 13 sutures to close. In addition, Ms. Pauch was subsequently diagnosed as having symptoms consistent with her having suffered a concussion and some nerve damage resulting in paralysis of a frown line in her face.

[6] Ms. Rodrigue suffered a laceration across her nose and her cheek which required 9 or 10 sutures to close.

[7] While both parties were initially charged with the offence of assault causing bodily harm, the charges against Ms. Pauch were stayed by the Crown.

Positions of Counsel

[8] Crown counsel submits that a sentence of 8 to 12 months incarceration be imposed. Counsel is not opposed to the sentence being served conditionally in the community.

[9] Counsel advises that Ms. Pauch has received two Botox treatments at a cost of $500.00 each which she has paid out of her own pocket. Counsel is unclear whether the Botox treatments were “remedial versus restorative”, however, and is seeking less than the full amount in restitution.

[10] Counsel for Ms. Rodrigue submits that she should be sentenced to a period of probation attached to a conditional discharge.

[11] In response to the submission of defence counsel, Crown counsel submits, without resiling from their stated position, that, in the event there is sympathy by the Court engendered by Ms. Rodrigue's circumstances, she could receive a sentence of probation. However, the probation order should not be attached to a conditional discharge as it is appropriate that Ms. Rodrigue receive a criminal record for her crime.

Circumstances of Ms. Rodrigue

[12] Ms. Rodrigue is 23 years of age. She was 22 years old at the time of the commission of the offence.

[13] She does not have a criminal record.

[14] Her mother, Karen Rodrigue, is Inuvialuit, of Inuit and Gwich'in heritage. She is currently serving day parole in Edmonton after serving a prison sentence for second-degree murder. Karen Rodrigue was initially charged with second degree murder and was convicted of that offence in 2005. She subsequently had that conviction overturned on appeal in 2007 but was again convicted of second degree murder in 2008.

[15] Ms. Rodrigue's maternal grandmother attended residential school and received a residential school settlement pay-out.

[16] Her father, Jimmy Rodrigue, is of French-Canadian heritage and resides in Whitehorse with his common-law partner. He has struggled with health and substance abuse issues for many years.

[17] Ms. Rodrigue has three sisters, one older and two younger. Her older sister has a different father. Ms. Rodrigue currently resides with this sister while awaiting her own place through Yukon Housing. Ms. Rodrigue states that she communicates regularly with her sisters.

[18] Ms. Rodrigue describes her childhood as being one that lacked closeness and was "fraught with violence". She witnessed verbal arguments and physical fights between her parents. In one instance she stepped between them to try to separate them in a physical fight.

[19] She witnessed her parents "always using drugs around us".

[20] She and her sisters were taken into care on a number of occasions by Family and Children's Services, ultimately, at the age of nine, being placed in permanent care after a fight between her parents in which her mother broke a glass over her father's head. She subsequently had limited contact with her mother while in foster care, and only had contact again with her father approximately four years ago.

[21] Ms. Rodrigue recalls that, prior to living in foster care, her mother and father were affectionate; her father when he returned from one of his frequent camp jobs, and her mother intermittently and infrequently. Her parents did not have much money and, at times, would buy the children items and gifts and then return them for a refund.

[22] She and her younger siblings were never subjected to physical abuse by her mother, although she states that her older sister was severely physically abused and mistreated at the hands of her mother. As such, when she and her younger sisters were left in her older sister's care, they suffered verbal and physical abuse.

[23] Ms. Rodrigue describes her time in foster care as being quite "difficult and strained". While she states that she and her sisters were not mistreated, and received good care, including going on family holidays, she feels like they were treated differently than the foster mother's grandchildren who attended the same day-care and were of the same age. She stated that the foster mother did not provide "affection or hugs".

[24] Ms. Rodrigue states that she was kicked out of the foster home at the age of 17 due to her rebellion and partying behaviour. She then went to live with her older sister in order to allow her to complete high school.

[25] Ms. Rodrigue graduated from high school with non-academic English and math. While she made some good friends who remain friends today, she states that she was also subjected to bullying, teasing and being called a cry-baby because she would tear up easily.

[26] Ms. Rodrigue plans to be trained as a massage therapist but is currently unable to travel outside of the Yukon to do so due to financial limitations.

[27] Ms. Rodrigue has worked at a variety of jobs over the past years, starting while she was in grade 8 at a day-care operated by her foster-mother's daughter. She worked at Superstore while in Grade 10. She lost a job at a local café due to her

partying when she moved out of the foster home at the age of 17. She worked briefly at Walmart, the Klondike Inn and the Yukon Inn, leaving the Yukon Inn when she found out she was pregnant, due to concerns about the impact the chemicals she was working with may have on her child.

[28] She obtained employment with Paradise Alley in 2009 and continues to be employed there part-time, taking time off on maternity leave following the births of her two children.

[29] Ms. Rodrigue stopped drinking when she became pregnant in 2009 with her first son. He is now five years old. After the birth of her first son, Ms. Rodrigue states that she only consumed alcohol once every couple of months.

[30] Her relationship with her son's father began to deteriorate in 2011 and he was charged with assault against her. They reunited after the birth of their second child in 2012 but her partner was again charged with assaulting her. Again, she and her partner subsequently were re-united but she moved out of his home in Kwanlin Dun in May 2014 due to their deteriorating relationship. Her partner attended detox and Ms. Rodrigue moved back into his residence in September 2014. He was once again charged with having assaulted her and she moved out permanently in November, 2014.

[31] Ms. Rodrigue states that she is aware that there are patterns in her relationship similar to those she witnessed between her parents when she was a child and that she wants a better life for her children where they do not grow up witnessing violence and substance abuse.

[32] Ms. Rodrigue receives no financial support from her partner and he is not yet allowed contact with the children. While Ms. Rodrigue states that she feels slightly overwhelmed, she feels like she is coping with the situation. Any activities Ms. Rodrigue is involved in outside of employment revolve around her children. Her younger sister, Jacqueline, describes Ms. Rodrigue as kind, patient and loving to her children.

[33] Ms. Rodrigue scores as having a moderate level of problems related to alcohol abuse on the Problems Related to Drinking assessment, although the author of the Pre-sentence Report ("PSR") notes that the score is entirely related to the current offence. I note that this assessment was based upon the prior 12 months period of time, which included the offence date. We are now outside of that time.

[34] Ms. Rodrigue stated to the author of the PSR that she had not consumed alcohol since the assault.

[35] Ms. Rodrigue states that she has generally been a social drinker who goes out with friends every couple of months and does not usually drink to excess. Her sister Jacqueline supports this assertion by Ms. Rodrigue, stating that all the sisters are acutely aware of and understand the extent of their parents' addictions and how it puts each of them at a high risk for addictions. She confirms that Ms. Rodrigue does not keep alcohol in her home and that she is aware that Ms. Rodrigue either refrains or tries to stay away from drinking.

[36] Ms. Rodrigue scores as having no problems related to drug abuse.

[37] With respect to her behaviour in assaulting Ms. Pauch, Ms. Rodrigue states that she had not seen her friends for a long time and it was the first time since they had had children that they had gone out for an evening. She participated in a drinking game and by midnight blacked out. She has no recollection of the assault and relies on what her friends have told her happened. She states that she had no intent to assault Ms. Pauch and that had she been sober this never would have happened. She describes herself as a shy and non-violent person. Her sister Jacqueline confirms this and describes Ms. Rodrigue's actions that night as "bizarre" and "out of character".

[38] On the criminogenic risk assessment, Ms. Rodrigue scores as requiring a low level of supervision. She also, due to not possessing a prior criminal record, scores as having a low criminal-history risk rating. She scores as having a medium level of criminogenic need. This rating is based on a number of factors. It appears to me that the rating of medium as compared to low is primarily based upon the static factors of her childhood circumstances, her having been assaulted by her domestic partner and the involvement of her parents and ex-partner in the criminal justice system.

[39] In my opinion, the dynamic factors, ie. those within Ms. Rodrigue's control and which her choices can have an impact upon, are generally positive and would be supportive of a lower needs rating. In saying this I am not discounting the fact that static factors can elevate a needs rating; I am just being careful not to assume that these factors will necessarily do so in any particular case, and in particular in the case of Ms. Rodrigue. So, while being cognizant of these factors and their potential to impact upon Ms. Rodrigue's needs going forward, I am more concerned about the dynamic factors and what she is doing in this regard to forming and shaping her life.

Analysis

[40] This is a serious offence. It caused a significant laceration to Ms. Pauch's eyebrow, as seen in the photographs of the injury. It was unprovoked, and I have no evidence before me that Ms. Pauch said or did anything in particular that would amount to provocation such as to justify or excuse Ms. Rodrigue's response, or mitigate her actions.

[41] The purpose, objectives and principles of sentencing are set out in ss. 718 to 718.2 of the *Code*.

> **Purpose**
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> **718.** The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
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> (*a*) to denounce unlawful conduct;
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> (*b*) to deter the offender and other persons from committing offences;
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> (*c*) to separate offenders from society, where necessary;
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> (*d*) to assist in rehabilitating offenders;
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> (*e*) to provide reparations for harm done to victims or to the community; and
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> (*f*) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.
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> …
>
> **Fundamental principle**
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> **718.1** A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Other sentencing principles

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(*a*) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

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

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(v) evidence that the offence was a terrorism offence

shall be deemed to be aggravating circumstances;

(*b*) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(*c*) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(*d*) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(*e*) 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.

[42] Sentencing is an individualized process. While in certain cases some aspects of the sentencing regime will rise to the forefront and others move towards the back, it must always be remembered that a fit and just sentence will be one that takes into account all the relevant considerations and weighs them in accordance with the particular circumstances of each offence and each offender.

[43] The determination of a fit and just sentence in Canada is not accomplished by plotting points on a grid in a mathematical manner in accordance with rigid guidelines and rules. Sentencing offenders in Canada, as legislated and developed in case law, is a fluid exercise where the individuality and uniqueness of each case will impact upon the sentence to be imposed.

[44] While there will, and should be, parity in sentencing for similar offenders being sentenced for similar offences committed in similar circumstances, the sentence imposed for the individual offender should be one which best pulls together all the relevant considerations and strikes the appropriate balance. Judges cannot simply impose “one-off” sentences which are not appropriate and which fail to take into account relevant considerations. In crafting a fit and just sentence, judges are required to follow a principled approach to decision-making that does not skip or improperly accentuate or minimize any steps or relevant considerations.

[45] Both Crown and Defence counsel submit that ***Gladue*** considerations (***R.*** v. ***Gladue***, [1999] 1 S.C.R. 688) are relevant here. Ms. Rodrigue is of Aboriginal ancestry, with at least her maternal grandmother having attended residential school. The negative aspects of her home life as described by Ms. Rodrigue are consistent with

what is seen all too often in this Court in association with the fallout of the residential school system and other governmental policies intended to separate Aboriginal peoples from their families, their communities and their culture in an attempt to assimilate them into the dominant non-Aboriginal society.

[46] The consideration of ***Gladue*** factors, as legislated in s. 718.2(e) and mandated in ***R. v. Ipeelee,*** 2012 SCC 13, to be considered and applied when sentencing Aboriginal offenders, are primarily intended to address the overrepresentation of Aboriginal offenders incarcerated in Canadian prisons. Every sanction other than imprisonment should be utilized, when appropriate. As stated in paras. 59, 60 and 75 of ***Ipeelee***:

> 59 The Court held, therefore, that s. 718.2(*e*) of the *Code* is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing (*Gladue*, at para. 93). It 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).
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> 60 Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society (see, e.g., *R. v. Laliberte*, 2000 SKCA 27, 189 Sask. R. 190). To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes,

> higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. 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. …
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> 75 Section 718.2(*e*) does not create a race-based discount on sentencing. The provision does not ask courts to remedy the overrepresentation of Aboriginal people in prisons by artificially reducing incarceration rates. Rather, sentencing 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, 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. *Gladue* affirms this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process. Section 718.2(*e*) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples. Neglecting this duty would not be faithful to the core requirement of the sentencing process.

[47] It is important to remember that ***Gladue*** factors are only part of numerous relevant factors that a sentencing judge must take into account. While the application of s. 718.2(e) in regard to Aboriginal offenders is critical, it does not supplant and suppress the requirement to properly consider every purpose, objective and principle of sentencing in determining the sentence to be imposed.

[48] The circumstances of the offender and of the offence must be fit into the sentencing framework and be touched and influenced by all the relevant considerations.

Application to Ms. Rodrigue

[49] This was a spontaneous and impulsive act on the part of Ms. Rodrigue. It was not pre-planned and premeditated, even to the extent that I could say it would have been had she smashed a glass on the table and then taken the time necessary to approach Ms. Pauch and strike her with it. This was, in my opinion, clearly an out of character act by Ms. Rodrigue. This is not an excuse, however; it simply provides context.

[50] A spontaneous and impulsive act can at times have such devastating and unintended consequences on a victim, including death, that a sentence of incarceration in a penitentiary can result, notwithstanding that the act was out of character for the offender.

[51] My first consideration is whether Ms. Rodrigue needs to be sentenced to a custodial disposition for this offence.

[52] I am familiar with the ***R.*** v. ***Manuel Raul Perez*** case (May 31, 1996 decision of Yukon Territorial Court Judge Faulkner, unreported) where the offender was sentenced on a guilty plea to a charge of aggravated assault for breaking a beer bottle across the face of the victim in a bar and attempting to flee (which Faulkner J. considered to be significantly aggravating). The victim suffered devastating emotional and physical consequences.

[53] Mr. Perez was 26 years old with no criminal history. He was steadily employed as a journeyman plumber who provided support for his two children. He had positive

testimonials to his character and his work habits. He had taken steps to deal with his anger management and substance issues between the time of the offence and sentencing.

[54] Faulkner J. noted that denunciation and deterrence were the primary considerations. After noting that the case law filed illustrated the "remarkable range of sentence" available, Faulkner J. sentenced Mr. Perez to one year incarceration followed by one year of probation.

[55] In ***R.*** v. ***Pulido,*** 2010 ONSC 3143, the 35-year-old offender was sentenced to three months custody on a conviction after trial for an aggravated assault. The offender was sitting at a bar with friends when he got into a verbal altercation with friends of the victim who were sitting at another table. The victim told Mr. Pulido to leave and when he refused to do so the victim pushed him. Mr. Pulido grabbed a beer bottle and brought it down towards the victim's head. When the victim raised his hand to block the blow, the bottle broke and severed the tendons in the victim's hands. A brawl then started and the victim suffered a further serious injury to his neck with a broken bottle. Mr. Pulido was acquitted of having caused the neck injury.

[56] Mr. Pulido had three children. He was a good father and worker. He had prior convictions for theft in 1993 and an assault causing bodily harm in 1998 for which he had received a suspended sentence and 16 months of probation. Significantly, this previous assault had also occurred in a bar setting where Mr. Pulido had caused the victim to suffer a head injury when he pushed him to the floor.

[57] Crown counsel sought a prison sentence of 15 months and two years probation. Mr. Pulido was sentenced to 90 days of imprisonment to be served intermittently on weekends.

[58] Mitigating and aggravating factors were noted to be:

> 16 The mitigating factors here include the following:
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> a) The offender has been consistently employed for many years, the last three years of which he has successfully operated his own business;
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> b) He is a good father to his three children and provides financial support to the household;
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> c) He conceded liability for the hand injury, which proved to be the sole basis upon which he was convicted;
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> d) He has expressed remorse for the impact upon Mr. Fields.
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> 17 The aggravating features include:
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> a) This was a serious attack; the offender was aiming for the victim's head. The blow was averted because the victim blocked it with his hand, but a significant injury resulted nonetheless.
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> b) The offender has a previous, though dated, conviction for a similar offence committed under similar circumstances;
>
> c) Although he acknowledges alcohol consumption has been a problem, given his resistance to treatment it is unclear to what extent the offender will be able to control his behaviour in future.

[59] The sentencing judge also noted there to be some provocation in that the victim was confrontational and pushed Mr. Pulido before the blow was struck.

[60] In considering the appropriate sentence, the sentencing judge stated that "…in cases involving serious violence courts will generally impose a sentence of incarceration in order to fulfill the goals of denunciation and deterrence". (para. 19).

Both counsel in this case agreed that a custodial term was warranted; the issue was length.

[61] The sentencing judge in ***Pulido*** made reference to the case of ***R.*** v. ***MacDonald***, 2010 ONCA 178, where the Court of Appeal upheld a one year jail sentence for a youthful first offender who threw a beer bottle in a bar, seriously injuring the victim. In this case Macdonald was convicted after trial of an aggravated assault charge. While at a bar he threw a beer bottle at the victim and his co-accused threw a mug. Both struck the victim in the face and he was rendered unconscious as a result. The victim suffered lacerations and an injury to his jaw. This was found to be an unprovoked and vicious assault. There was little detail provided in the Court of Appeal decision with respect to the circumstances of the offender. The Court stated that the trial judge considered the relevant aggravating circumstances and mitigating factors and her conclusion that the degree of violence in the case required that general deterrence and denunciation operated as the paramount sentencing objectives. As such her decision was entitled to high degree of deference on appeal.

[62] MacDonald was cited in ***R.*** v. ***Brushett***, [2015] N.J. No. 32 (P.C.). In this case the offender was on a crowded dance floor when she was pushed from behind. She was holding a beer bottle in her hand and swung her arm behind her without looking to see who was there. The beer bottle struck the victim in the face causing her to suffer injuries to her mouth requiring internal and external sutures and facing the possibility of cosmetic surgery in the future. The Victim Impact Statement described the victim as suffering enormous and uncontrolled pain and her having experienced physical,

financial and emotional impact from this unprovoked and unexpected injury which she felt would have a permanent effect on her.

[63] The offender immediately apologized to the victim after striking her and was genuinely remorseful.

[64] Ms. Brushett was a 20-year-old first offender. She had been only an occasional user of alcohol prior to the night of the offence. She was intoxicated that night but had abstained since the offence. Her PSR was comprehensive and positive.

[65] After conducting a comprehensive review of case law, Porter J. imposed a suspended sentence and 12 months probation.

[66] In ***R. v. Peters***, 2010 ONCA 30, the Court of Appeal upheld a suspended sentence and three years of probation for conviction on a guilty plea after a preliminary hearing on a charge of aggravated assault. The victim was required to testify at the preliminary hearing.

[67] Crown counsel had sought a custodial disposition of 12 to 18 months. A conditional sentence was not available due to the amendments to the *Criminal Code* in 2007 prohibiting such a sentence for an aggravated assault charge.

[68] Ms. Peters was an acquaintance of the victim. They had been in an altercation earlier in the evening but had seemed to have reconciled their differences and were drinking along with the victim's boyfriend at the bar later on. Ms. Peters became impaired and took offence at something the victim said. She pushed the victim and a scuffle ensued. When the victim's boyfriend attempted to break them up, Ms. Peters

lunged past him and swung a beer bottle at the victim, striking her in the head. She continued with a downward motion of the broken bottle causing the victim to receive two lacerations to her face requiring 21 stitches. A year later the victim was suffering from continuing pain in her left eye and her face, muscle spasms in her left eyelid and facial asymmetry. The scars remained visible and may require plastic surgery.

[69] In upholding the sentencing judge's decision, the Court of Appeal stated in para 6 that:

> "…while the offence was serious and the antecedents of the respondent troubling, it was open to the sentencing judge to apply the Gladue principles as he did and to impose the sentence that he did. I can find no error in principle in his reasoning nor – given the jurisprudence – can the sentence be said to be manifestly unfit. In such circumstances, the judge's sentencing decision is entitled to considerable deference and an appellate court ought not to interfere.

[70] Ms. Peters was 26 years old at the time of plea. She had no prior criminal record as an adult but had two prior convictions as a youth, one of which was for assault causing bodily harm. The ***Gladue*** Report:

> …revealed a difficult and disheartening upbringing in a home of violence and alcohol abuse. Ms. Peters , herself, may be suffering from Fetal Alcohol Syndrome. She has a history of abuse at the hands of her parents, and others, which started when she was three or four years of age. Ms. Peters has problems with alcohol and anger management, both arising out of her background. She began to drink and experiment with drugs in her early youth, turning to crack dealing in her early twenties. It is apparent, as the sentencing judge noted, that the confrontation leading to this offence was directly related to her consumption of alcohol. (para. 8)

[71] Ms. Peters had managed to gain employment in recent years and taken courses to improve her skills. Fresh evidence was filed that was positive in regard to her having

taken pro-social steps since being sentenced and her being in compliance with the terms of her probation order. She was noted in her volunteer work with the Aboriginal Services of Toronto to be “a very strong individual who is genuine and thoughtful” and who has “a gift in working with youth”. (para. 9)

[72] Crown counsel argued on appeal that the sentencing judge had erred in not giving sufficient weight to the principles of deterrence and denunciation. The Court of Appeal stated:

> 11 … However, when consideration is given to the appropriate principles - as it was here - the weight to be attributed to those principles in the balancing exercise is generally a matter attracting deference to the sentencing judge's decision. The sentencing judge not only referred to denunciation and deterrence in his general review of the applicable principles; he addressed those sentencing objectives *three* times during his consideration of the Crown's position (which, incidentally, he acknowledged was "a reasonable one given the circumstances surrounding the offence"). In addition, he recognized the *Gladue* and post-*Gladue* jurisprudence underscoring that s. 718.2(e) establishes a new methodology for approaching the sentencing of aboriginal offenders but does not necessarily mean aboriginal offenders will ultimately receive different sentences from other offenders, particularly for serious offences such as this one. In particular, the sentencing judge addressed the statement of this Court in *R. v. W. (R.)* (2008), 239 C.C.C. (3d) 47, at para. 31, and relied upon by the Crown: "In the case of serious and violent offences, even for aboriginal offenders, the balance will often tilt in favour of [deterrence, denunciation, and the need for social protection]." See also *Gladue*, at paras. 79, 88, and 93(9); *R v. Kakekagamick* (2006), 211 C.C.C. (3d) 289, at para. 43 (Ont. C.A.).
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> 12 Finally, the sentencing judge noted the theme running through some of the authorities to the effect that the objectives of denunciation and deterrence are not only met through the imposition of a term of incarceration: see *e.g. R v. Proulx*, [2000] 1 S.C.R. 61, at paras. 20 and 22; *R. v. Wismayer* (1997), 33 O.R. (3d) 225 (C.A.), at p. 241-245.
>
> 13 In the end - after balancing all of the factors relative to sentencing an aboriginal person, and after taking into account the seriousness of the offence and the aggravating and mitigating factors relating to it, the contents of the favourable *Gladue* report he had before him, the victim

> impact statements, and the particular circumstances of this offender - the sentencing judge simply decided that a period of incarceration was not the appropriate disposition for this offender in relation to this crime. He concluded:
>
> > In the end result, I am not satisfied that a period of incarceration is necessary either for the purpose of expressing denunciation or deterrence in this case. Further, a period of incarceration manifestly fails to achieve the restorative purpose that is of particular importance in the case of Aboriginal offenders. A period of incarceration would undoubtedly cause Ms. Peters to lose her job and then quite possibly set back the progress that she has made over the past few years. At the same time, however, I appreciate that there needs to be some close supervision of Ms. Peters in an effort to ensure that she does not commit a further offence.
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> 14 It was open to the sentencing judge to come to this conclusion on the record before him. To say that the balance will *often* tilt in favour of deterrence and denunciation in the case of serious and violent offences, as this Court did in *W.(R.)*, is not to say that it *always* will. Neither *Gladue* nor its progeny establish that aboriginal offenders are to be sentenced to terms of incarceration in all cases of serious offences. At the end of the day, as many authorities have noted, it remains for the sentencing judge to consider the case as a whole and to arrive at a sentence that is fit and just in the circumstances.

[73] I did not have case law filed before me to illustrate a range of sentences that would apply to the circumstances of this offence and this offender. It is difficult to come up with a definitive range as the range is very broad and very dependent on the unique circumstances of each case.

[74] I note that in this case the guilty plea is to the summary conviction offence of assault causing bodily harm and not the more serious indictable offence of aggravated assault. This is a distinguishing factor from some of the cases cited. Ms. Rodrigue also has no prior criminal history, another distinguishing factor from some of these cases.

[75] Ms. Rodrigue is a young woman of Aboriginal heritage with a troubled childhood in which violence and substance abuse were prevalent. Fortunately, she and her younger sisters were removed from this troubled home and placed in a foster home which, although perhaps not perfect, was nonetheless generally a positive experience and which, I would think, contributed to Ms. Rodrigue and her younger sisters finding the support and stability they needed to grow up into leading a better lifestyle than they perhaps may have had they remained in their parents' home, or than the lifestyle their parents lived.

[76] That is not to minimize the destabilizing impact that witnessing violence and substance abuse had on Ms. Rodrigue and that associated with her separation from the familial home.

[77] The application of ***Gladue*** considerations also causes Ms. Rodrigue's case to differ from some of those cited, excepting ***Peters***.

[78] Given her background and the negative factors that Ms. Rodrigue has had to deal with in her childhood, she has done remarkably well to achieve the level of success that she has without, other than this offence, becoming involved in the criminal justice system or struggling to overcome long-term substance abuse issues. When I add into this her having to deal with the stress and turmoil associated with living in a situation in which domestic violence has occurred and managing to raise two children, it is all the more remarkable.

[79] She has managed to complete high school. She has a good work record and long term current employment. A letter was provided by the manager at her place of

employment which is very positive in support of Ms. Rodrigue. She is raising two children without any support, either emotionally or financially from the childrens' father and by all accounts she is a good and attentive mother.

[80] She has been on an undertaking for over a year, with the only conditions being no contact and not attend the residence in respect of Ms. Pauch, and she has not breached the terms of this undertaking. She has not committed any further offences. She has stopped drinking alcohol since this offence was committed.

[81] She has accepted responsibility for the commission of this offence by entering a guilty plea. I recognize that the guilty plea was entered on the trial date and not at the earliest possible time. The charge set for trial was an aggravated assault, s. 268, which is indictable by law. The plea was entered to a lesser and included offence on a re-election to proceed summarily by the Crown. Given the greater sentencing options available for Ms. Rodrigue on the offence she has pled guilty to than had she pled guilty to the s. 268 offence, I consider the time of entry of the guilty plea in light of this. Certainly, Ms. Pauch was not required to testify, which is a mitigating factor associated with the guilty plea. However, Ms. Pauch would likely have been carrying the weight of possibly having to do so longer than had the guilty plea been entered before a trial date was set.

[82] This offence took place in a bar, a public place. Certainly the combination of alcohol and resultant violence is a significant concern in the Yukon, whether it be in a public place or a private one. Deterrence, both general and specific as well as denunciation are important when determining a sentence for offences committed in the

circumstances this offence was committed in. However, deterrence and denunciation do not of necessity require the imposition of a custodial disposition as this can be achieved through sanctions such as probation orders.

[83] I am satisfied that Ms. Rodrigue does not need a sentence that will deter her from the commission of further offences. This was an out of character act and I am satisfied that Ms. Rodrigue has learned her lesson. She is carrying a scar which will likely require cosmetic surgery to fix, that will remind her every time she looks into a mirror. She has taken all the steps she could reasonably be expected to take to move past this event and continue to make positive progress in her life. There is little more that I could think of that she would be able to do in her present circumstances than what she has done.

[84] In ***R. v. Shortt***, 2002 NWTSC 47, in para. 20, Vertes J. stated:

> 20 The purpose of sentencing, as outlined in s. 718 of the Criminal Code, is to contribute to a just, peaceful and safe society by the imposition of sanctions that have, among others, the objectives of denunciation, deterrence, rehabilition, reparations to victims, and the promotion of a sense of responsibility in offenders. The fundamental sentencing principle, set out in s. 718.1, is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. This necessarily requires an individualized approach. Another principle is, as stated in s. 718.2(e), that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered.
>
> 21 The Code, however, also stipulates that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender. …

[85] I note that while s. 718.2(e) applies to all offenders, I am required to pay special attention to the circumstances of Aboriginal offenders.

[86] I do not find there to be any features of this case that are particularly aggravating other than the offence itself. It was an unprovoked attack with a weapon, a glass, that caused Ms. Pauch to suffer a serious laceration to her eyebrow. It was not a breach of trust situation, not premeditated, and not predatory.

[87] By way of mitigation, there is the guilty plea, the lack of prior criminal history, the relative youth of Ms. Rodrigue, her positive employment history and her role as a caring mother in difficult circumstances. There is also her demonstrated ability to, other than this offence itself, live a pro-social life despite a difficult childhood.

[88] She is of Aboriginal ancestry and I am required to consider her ancestry in determining whether a custodial disposition is necessary in the circumstances. If it is not necessary it would be improper to impose such a sentence. A conditional sentence is still a custodial disposition and s. 718.2(e) and the reasoning of the Court in ***Gladue*** and ***Ipeelee*** still applies when considering whether to impose a custodial sentence, even if it is to be served conditionally in the community.

[89] In all the circumstances, while a custodial disposition is clearly within the range of sentence possible, I do not consider a custodial disposition to be necessary and as such I will not impose such a sentence. I am satisfied that the necessary denunciation and deterrence can be achieved through the imposition of a period of probation, in the circumstances of this offence and this offender.

[90] Ms. Rodrigue will be sentenced to a period of probation of two years.

[91] The next issue is whether the probation order should be attached to a conditional discharge or not.

[92] The conditional discharge option in the *Code* is set out in s. 730(1).

> Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).

[93] Vertes J. in considering the rationale behind the introduction of the discharge option into the *Code*, stated the following in para. 23 of ***Shortt***:

> 23 All this convinces me that the fundamental aim of the discharge option is the avoidance of a criminal record. As a general proposition, discharges are granted in circumstances where the nature of the offence, and the age, character and circumstances of the offender, are such that the recording of a criminal record would be disproportionate and unjust in relation to the offence.

Vertes J. goes on in para. 24 to 26 to state:

> 24 Numerous cases have interpreted the criteria set out in s. 730(1) of the Code: R. v. Sanchez-Pino (1973), 11 C.C.C. (2d) 53 (Ont. C.A.); R. v. Fallofield (1973), 13 C.C.C. (2d) 450 (B.C.C.A.); R. v. MacFarlane, [1976] A.J. No. 441 (C.A.). They generally agree that the first condition, that a discharge be in the best interests of the accused, pre-supposes that the accused is a person of good character without previous convictions, that it is not necessary to deter the accused from further offences or to rehabilitate him, and that the entry of a conviction may have significant adverse repercussions. The second condition, that the grant of a discharge not be contrary to the public interest, addresses the public interest in the deterrence of others. The cases also note that, while a need for general deterrence is normally inconsistent with the grant of a discharge, it does not preclude the judicious use of the discharge option. This option, however, should not be applied routinely to any particular

> offence (nor is it precluded from use in respect of any offence other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for 14 years or for life). Finally, the discharge option should not be resorted to as an alternative to probation or a suspended sentence.
>
> 25 The cases also emphasize that the power to grant a discharge should be used sparingly. This was the view expressed in MacFarlane (supra) at para. 13:
>
> > It is to be borne in mind that one of the strongest deterrents to criminal activity, particularly in the case of those who have no records, is the fear of the acquisition of a criminal record.
>
> 26 The MacFarlane judgment also noted that offences involving violence are generally not amenable to the granting of a discharge: see also R. v. Thibeault (1987), 76 A.R. 380 (C.A.); R. v. Ryback (1995), 61 B.C.A.C. 239 (C.A.). In particular, cases of domestic violence, since they engage considerations of general deterrence, and because of the prevalence of such crimes in all communities and the vulnerability of its victims, are ordinarily unsuitable for the use of the discharge option: R. v. Thompson, [1995] B.C.J. No. 547 (C.A.); R. v. Daley, [1997] N.S.J. No. 325 (S.C.); and see R. v. MacLean, [1991] A.J. No. 1150 (Prov. Ct.). This is not meant to create an offence-specific presumption that takes a certain type of offence out of consideration for a discharge (something much criticized by the Supreme Court of Canada in the context of conditional sentences in R. v. Proulx, [2000] 1 S.C.R. 61); it is simply a recognition that a greater emphasis on the need for general deterrence will usually mean that a discharge is contrary to the public interest.

Best Interests of Ms. Rodrigue

[94] It cannot be said that it will always be in an offender's best interests to avoid having a criminal record. There may be occasions where the offender's rehabilitation or need to be deterred will require, in the offender's best interests, that they receive a criminal conviction for an offence.

[95] I have decided that Ms. Rodrigue does not need to be specifically deterred from the commission of further offences, so the recording of a criminal conviction will not be

of benefit to her in this way. I also do not consider Ms. Rodrigue to be in need of rehabilitation in the way that the term is meant to require a change or an alteration in a person's lifestyle to turn them away from criminal activity and make pro-social life choices. Ms. Rodrigue needs support and assistance to help her but she is living a pro-social lifestyle and doing her best to maintain that.

[96] Ms. Rodrigue is young. Counsel is unable to point to any particular identified impact that a criminal record will have on Ms. Rodrigue's employment, educational or travel plans that would clearly make the recording of a criminal conviction contrary to her best interests.

[97] The fact that Ms. Rodrigue is young also means that her future plans may not yet have developed. It is hard to say what she will be doing in a few years and what impact a criminal record will have on her and on her family. When an offender is young, the fact that they cannot point to any clearly identifiable negative impacts of a criminal conviction should not be surprising. In such cases, I am more inclined to consider whether it may have a negative impact in a future yet to be sorted out. While this is uncertain and involves a degree of speculation, I consider such speculation, as long as all other relevant considerations are taken into account, not to be improper.

[98] I find that it is in Ms. Rodrigues best interests not to have a criminal record.

Public Interest

[99] With respect to the public interest component of the test, in para. 34 of ***Shortt***, Vertes J. stated that:

> The second criterion requires that a discharge not be contrary to the public interest. Most of the case law identifies the "public interest" with the need for general deterrence. Yet, in my opinion, there is a further aspect to the public interest, one familiar to those who work with the Criminal Code bail and bail pending appeal provisions, that being the need to maintain the public's confidence in the justice system. From this perspective the knowledge that certain type of criminal behaviour will be sanctioned by way of a criminal record not only acts as a deterrent to others but also vindicates public respect for the administration of justice. The question to ask here is would the ordinary, reasonable, fair-minded member of society, informed about the circumstances of the case and the relevant principles of sentencing, believe that the recording of a conviction is required to maintain public confidence in the administration of justice. In my opinion, on both aspects of general deterrence and the need to maintain public confidence, the granting of a conditional discharge in this case is not a fit disposition.

[100] When I consider the public interest component from this perspective, with which I agree, I am mindful of Ms. Rodrigue's Aboriginal ancestry.

[101] In his apology to Aboriginal People's on June 11, 2008, on behalf of Canadians, Prime Minister Stephen Harper stated the following:

> … Two primary objectives of the Residential Schools system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture. These objectives were based on the assumption Aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as it was infamously said, "to kill the Indian in the child". Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country.
>
> …
>
> The government now recognizes that the consequences of the Indian Residential Schools policy were profoundly negative and that this policy has had a lasting and damaging impact on Aboriginal culture, heritage and language. While some former students have spoken positively about their experiences at residential schools, these stories are far overshadowed by tragic accounts of the emotional, physical and sexual abuse and neglect of helpless children, and their separation from powerless families and communities.

> The legacy of Indian Residential Schools has contributed to social problems that continue to exist in many communities today.
>
> …
>
> To the approximately 80,000 living former students, and all family members and communities, the Government of Canada now recognizes that it was wrong to forcibly remove children from their homes and we apologize for having done this. We now recognize that it was wrong to separate children from rich and vibrant cultures and traditions that it created a void in many lives and communities, and we apologize for having done this. We now recognize that, in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow, and we apologize for having done this. We now recognize that, far too often, these institutions gave rise to abuse or neglect and were inadequately controlled, and we apologize for failing to protect you. Not only did you suffer these abuses as children, but as you became parents, you were powerless to protect your own children from suffering the same experience, and for this we are sorry.

[102] There is a public interest component within Canadian society and thus within the Canadian justice system to make reparations to Aboriginal Peoples, to their communities, to their children and to their children's children for the harm done to them by destructive governmental policies such as the residential school system. This harm all too often manifests itself in the disproportionate number of Aboriginal offenders that come before the courts having committed criminal offences and being sentenced to periods of incarceration as a result. In my opinion, the public interest component of the discharge option must include, in the case of Aboriginal offenders, a consideration by the court as to whether a discharge furthers the public interest towards making such reparations in the case of the individual Aboriginal offender. If it does, then that is a factor that would militate towards the granting of a discharge, so long as this factor is considered within the balancing of all the other relevant factors, including the need for general deterrence, in order to achieve a sentence that is proportional, just and fit.

[103] In this case, would the ordinary, reasonable, fair-minded member of society, informed about the circumstances of Ms. Rodrigue and the offence she has committed, including the impact on the victim, and the relevant principles of sentencing, believe that the recording of a conviction is required to maintain public confidence in the administration of justice?

[104] This is not a question to be taken lightly or dismissively. This is a serious offence which resulted in not insignificant harm to the victim. There is a need to denounce and deter others from the commission of such offences, in particular in the Yukon where alcohol and violence all too often are found in association with each other

[105] Does the seriousness of this offence mean that it would be contrary to the public interest to impose a discharge in this case?

[106] In ***Brushett***, Porter J. referred to the case of ***R.*** c. ***Benlemoudden***, 2014 QCCQ 2526. In that case the accused pled to a s. 267(a) offence prosecuted summarily, in which during the course of a physical altercation she took a beer bottle and struck the victim in the face resulting in lacerations which required 36 sutures to close and had other impacts on her work and education. In considering the request for a discharge, Beauchemin J. stated (as translated):

> 64 To an informed public, by giving a discharge to the accused, the Court may give the impression that it trivializes this kind of highly inappropriate behaviour in any civilized society.
>
> …
>
> 72 An informed public may not understand and lose confidence in the judicial system if the accused were to benefit from a discharge in the

> circumstances for an offence involving a significant degree of violence, even if the offence had been an isolated gesture.

[107] Beauchemin J. decided that a discharge was not appropriate in the circumstances and imposed a suspended sentence and a period of probation.

[108] While an informed public may react as Beauchemin J. posits, that need not necessarily be the case. To be "informed" requires that all the relevant information regarding the offence, the offender and the purposes, objectives and principles of sentencing, be before and be considered by the hypothetical "ordinary, reasonable and fair-minded member of society". In some cases the imposition of a discharge will have the impact Beauchemin J. notes; in others it will not and the imposition of a discharge will not offend the public interest.

[109] Further, the public interest includes much more than sending a strong "get tough on crime" message. The public interest in the Canadian justice system requires that we "get it right on crime". Getting it right, will at times be the same as getting tough on crime. At other times it will not.

[110] In this case, and taking into account all the relevant factors and considerations, and balancing them, I am satisfied that a discharge is not contrary to the public interest and, in fact and in all likelihood, furthers the public interest. Ms. Rodrigue is a young Aboriginal woman who, given the circumstances in which this offence occurred and her personal circumstances, I believe deserves the opportunity to continue in her life without a criminal conviction. This is not, in my opinion, contrary to the public interest, in fact it accords with it. While Ms. Rodrigue will have to complete her probation order in

compliance with the terms in order to achieve the discharge and avoid having a criminal record, I believe that she is well capable of doing so and likely to succeed.

[111] As such, the two year probation order will be attached to a conditional discharge.

[112] The terms will be as follows:

1. You will keep the peace and be of good behaviour;

2. You will appear before the Court when required to do so by the Court;

3. You will notify the probation officer in advance of any change of name or address and promptly of any change in employment or occupation;

4. You are to have no contact directly or indirectly or communication in any way with Candace Pauch, except with the prior written permission of your probation officer and with the consent of Ms. Pauch;

5. You will not go to any known place of residence, employment or education of Candace Pauch except with the prior written permission of your probation officer and with the consent of Ms. Pauch;

6. You will report to a probation officer immediately and thereafter when and in the manner directed by the probation officer;

7. You will reside as approved by your probation officer and not change the residence without the prior written permission of your probation officer;

8. You will not be under the influence of alcohol while in public;

9. You will attend and actively participate in all assessment and counselling programs as directed by your probation officer and complete them to the satisfaction of your probation officer for any issues identified by your probation officer and provide consent to release information to your probation officer regarding your participation in any program you have been directed to do pursuant to this order;

10. You will perform 50 hours of community services as directed by your probation officer or such other person as your probation officer may designate. This community service is to be completed no later than 45 days before the end of this order; any hours spent in programming may be applied to community service at the discretion of your probation officer;

11. You are to make restitution by paying into the Territorial Court the amount of $500 in trust for Candace Pauch at the rate of $25 per month, commencing the first day of June 2015 and continuing every month thereafter until paid in full;

12. You are to make reasonable efforts to find and maintain suitable employment and provide your probation officer with all necessary details concerning your efforts.

[113] Those are all the terms I am going to put on the probation order.

[114] You will provide a sample of your DNA. This is a primary designated offence. I decline to make a s. 110 order; I do not consider it to be necessary in the circumstances of this offence and this offender.

[115] There will be a victim surcharge of $100. Given the importance of restitution in this case, I will give you two years to pay the $100.

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COZENS T.C.J.