The Conditional Sentence Returns to Our Hybrid Penal-Welfare State

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Introduction

With the 2022 arrival of Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*,[1] Canadian judges were confronted with restored discretion to impose conditional sentence orders (CSOs) for a range of offences, including sexual assault. Judges now have the option to make broader use of CSOs, allowing imprisonment to be served under strict house arrest instead of in jail, but the question is how this restored discretion interacts with jurisprudential change in sentencing law that unfolded when CSOs were more restricted.

In sex assault cases, the lingering question is whether decisions like *R. v. Friesen*[2] — handed down during the period when judges were largely barred from imposing CSOs — should be read so as to minimize the ability of offenders to benefit from legislatively restored discretion. *Friesen* directs sentencing judges to bring sentencing into harmony with a new societal understanding of the physical and psychological harm caused by sexual violence.[3] This article explores how the Ontario Court of Appeal has grappled with what can be seen as a conflicting message sent from Parliament in the removal of limits on CSOs for sexual assault.

I focus on *R. v. R.S.*,[4] reported above, in which Justice Huscroft, writing for the majority, criticized the trial decision of Justice Nakatsuru to impose a conditional sentence order of two years less a day, concurrent

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1 1st Sess., 44th Parl., 2022 (assented to 17 November 2022), S.C. 2022, C.15.

2 2020 SCC 9, 62 C.R. (7th) 1 (S.C.C.).

3 *Ibid.* at paras. 55–59. While *Friesen* is focused on sexual offences against children, Justice Trotter observes that there is no reason to think that it does not apply to sexual offences at large: *R. v. Brown*, 2020 ONCA 657 (Ont. C.A.) at para. 59.

4 2023 ONCA 608, 90 C.R. (7th) 290 (Ont. C.A.).

with a 90-day intermittent sentence, followed by two years' probation.[5] Justice Huscroft pointed to certain features of the offence that he says mandate custody: a violent attack involving choking and digital penetration in the context of a trusted relationship, in the victim's home. While Justice Huscroft said that a penitentiary sentence of three years should have been imposed, he saw reincarceration as inappropriate and did not wish to disturb the probation order. For that reason, the majority decision is to dismiss the Crown appeal, though it sends a message to trial judges that CSOs are effectively not available for this category of offence and that only custodial time can convey the significance of the harm caused by a sexual assault at the more serious end of the spectrum.

Justice Paciocco writes separately, arguing that Justice Huscroft is narrowly focused on offence features alone. Justice Paciocco reminds us that gravity of the offence is only "half of the equation" of the fitness analysis.[6] He writes that the sentencing judge was presented with a case "at the cross-roads of two powerful and pressing sentencing imperatives" — to recognize the harm and wrongfulness of sexual offending, but also to ensure "just, productive, and proportionate sentencing" for Indigenous offenders.[7] The circumstances of this case "called powerfully for the application of both sentencing imperatives."[8] Recall that *Friesen* explicitly said to consider and apply *Gladue* even in grave cases of sexual violence.[9] Add to this that the explicit legislative purpose of Bill C-5 was to allow greater use of CSOs for judges to address disproportionate levels of Indigenous incarceration.[10]

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[5] At the time RS was sentenced, s. 742(1)(f)(iii) prohibited conditional sentences for sexual assaults that were prosecuted by indictment, but the trial judge declared that provision to be of no force or effect after relying on *R. v. Sharma*, 2020 ONCA 478, 65 C.R. (7th) 1 (Ont. C.A.). The Supreme Court of Canada subsequently overturned the Ontario Court of Appeal in *R. v. Sharma*, 2022 SCC 39, 84 C.R. (7th) 1 (S.C.C.), but Parliament subsequently passed Bill C-5 before the appeal of *R.S.* was heard.

[6] *R.S.*, Justice Paciocco at para. 47.

[7] *R.S.*, Justice Paciocco at para. 45.

[8] *Ibid.*

[9] *Friesen* at para. 92.

[10] See eg "Legislative Summary of Bill C-5: *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*," Publication No. 44-1-C5-E (Parliamentary Information, Education and Research Services, May 31 2022);

The sentencing judge was attentive to *Gladue* in analyzing RS's degree of responsibility for the sexual offence, and he also considered an extensive, separate category of forward-looking mitigating material that spoke to RS's strong rehabilitative prospects. It was a somewhat unique case in that while RS encountered significant *Gladue* factors in his upbringing, he had also managed to build a positive adult life. Despite chronic violence in his childhood home and subsequent foster care placement, RS went to university and had stable employment throughout adulthood. Following the offence, he stopped drinking alcohol — a key contributor to the assault — and was meaningfully engaged in sober living practices. At 38, this was his first offence, suggesting a solid ability to live without offending. The sentencing judge concludes to the offender: "there is no need to physically separate you by jailing you to protect the public."[11] All of the circumstances of the offender in this case pressed in the direction of a sentence that would avoid the criminogenic risks of custody: jailing this offender was not required in terms of public safety and would be counterproductive to his long-term stability.

In this article, I try to show how *R. v. R.S.* fits within the broader institutional context of Canadian penal policy and practice. We have a blended system of sentencing that pursues a number of goals at once: certainly to impose punishments that reflect the gravity of the offence, but also to respond to individual circumstances that speak to blameworthiness and to pursue reform and rehabilitation. When done under the auspices of s. 718.1, the focus is a backward-looking assessment of the gravity of the offence and the individual degree of moral blameworthiness. But there is inevitably a forward-looking aspect to the material that speaks to blameworthiness, as well as overlap with other relevant principles of sentencing, as was the case in *R.S.* The sentencing judge saw that a long conditional sentence, followed by a probation order, reflected the offence and

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see also "Statement by Minister Lametti on Royal Assent of legislation that addresses systemic racism and discrimination in the criminal justice system" (Department of Justice, November 18 2022) ("These reforms also offer the courts greater use of conditional sentences and provide for the judicial discretion needed to impose sentences that reflect the seriousness of the offence and maintain public safety, while addressing the obvious and damaging overrepresentation of Indigenous people, Black persons, racialized Canadians, and members of marginalized communities in the criminal justice system.")

[11] *R. v. R.S.*, 2021 ONSC 2263 (Ont. S.C.J.) at para. 225 [Sentencing Decision].

RS's responsibility for it, as well as the prospect of long-term specific deterrence and rehabilitation. Justice Huscroft prefers a narrow formalism that says only custody can adequately respond to the offence. His approach neglects the circumstances of the offender and is a poor fit for the hybrid penal-welfarism that is the best characterization of Canada's system of punishment.

Drawing from the sociology of punishment, I will first argue that Justice Huscroft and the sentencing judge take divergent approaches in a way that nicely illustrates the competing commitments of punishment and welfare that the Canadian penal state is meant to simultaneously embrace. Justice Huscroft is focused on the fact of the offence and its aggravating features. The sentencing judge incorporates that side of the ledger but weighs it against the law's demand for an individualized assessment, here in the context of an Indigenous offender with personal circumstances that speak to reduced culpability and call for a restorative sanction. The sentencing judge's approach follows the law while serving the wider, hybrid commitments of criminal punishment in the Canadian system.

Let me say more about the historical and comparative material that highlights the hybrid system that Canada has opted to retain, before returning to *R.S.* and the evidence that led the sentencing judge to impose a conditional sentence in this case. I conclude with a brief critique of the standard of review employed by Justice Huscroft and his discussion of sentencing ranges.

The Hybrid Character of Penal-Welfarism: US and Canada Compared

In his 1985 book, *Punishment and Welfare*, David Garland describes how the emergence of welfare states in the UK and the US at the start of the 20th century reshaped ideas of criminal responsibility and penal practice.[12] In a 2023 return to these themes, Garland outlines how, as governments became involved in the provision of social welfare, the criminal justice system began to serve multiple functions as well. A hybrid model of penal-welfarism aims to punish and incapacitate but also to correct,

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12 David Garland, *Punishment and Welfare*: *A History of Penal Strategies* (Aldershot, Gower, 1985).

treat and rehabilitate criminal offenders.[13] The specific practices and institutions of penal-welfarism, developed over this period, are standard to us today: specialized courts for juveniles, probation, social work with offenders, indeterminate sentencing, rehabilitative prison regimes, and parole.[14] Sanctions aim to intervene productively in the life of an offender, as penal practices flow into, overlap with, and merge together with welfare practices.[15]

Garland describes how penal-welfarism is marked by criminal sanctions that rely on expert forms of knowledge in the pursuit of educational, therapeutic, or medical ends alongside punishment.[16] The system considers itself responsible for responding to the treatment of needy, reformable, and deserving offenders, though it can also pursue significant control and incapacitation of those deemed highly dangerous. In order to pursue these dual roles, the system requires significant discretion and individualization. It will try to discern the person standing before the court or parole board, and will try to fashion the penalty on a case-by-case basis with twin purposes of punishment and reform in mind.

The Canadian sentencing and prison system today is palpably penal-welfarist. Prosecutors, judges and prison and parole officials would all describe a concern with rehabilitation as central to their work. All possess significant discretion which, in theory, allows them to separate the reformable from the incorrigible, a process aided by expert systems of classification and assessment. While most custodial sentences imposed in Canada are very short, a large percentage of those that are sent to federal custody receive indeterminate sentences (including a dangerous offender

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[13] David Garland, "The Punishment Welfare Relationship: history, sociology and politics" *Oxford Handbook on Criminology*, 7th Edition (Oxford University Press, 2023) at pp. 771–791.

[14] *Ibid.* at p. 772.

[15] For one ethnographic account of this kind of hybridity in the punishment of incarcerated mothers, see Lynne Haney, *Offending Women: Power Punishment, and the Regulation of Desire*, (Berkeley: University of California Press, 2010); Lynne Haney, "Motherhood as Punishment: The Case of Parenting in Prison," *Signs* 39:1 (Autum 2013): 105–130.

[16] Garland, *supra* note 13 at p. 774.

designation or life sentence for murder).[17] To anyone familiar with our system, the hybrid penal-welfarist label is immediately apt. The degree to which we live up to the label is another question — my point here is to identify the formal, official commitments and arrangements, all of which turn up in the central concerns of sentencing jurisprudence.

Garland describes a similar high degree of official hybridity in US correctional practice in the first half of the 20th century. But it did not develop or survive to the degree it does in Canada today. By the 1980s, retrenchment of the US welfare state saw the related erosion of welfarist features of sentencing and penal policy.[18] While these changes were uneven across US states, the period saw unmistakable reforms to sentencing and penal policy. Traditional penal purposes such as retribution and incapacitation became central, expressed through the abolition of parole in the federal system and many states, a shift to determinate and more severe sentencing, and a critique of rehabilitative logic and discretion in the prison system.

James Whitman characterizes this period in US penal policy as the widespread loss of faith in what he calls "penal modernism," defined as a purpose-driven, consequentialist program of state punishment in which penal-welfarism predominates.[19] The contraction of a rehabilitative ethos in punishment was part of a larger discrediting of the welfare state that occurred over the same period.[20] Strikingly, critique of the marriage between punishment and correction came from across the political spectrum — liberals were concerned with arbitrary discretion and the autonomy of offenders, conservatives with excessive and arbitrary lenience. In

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[17] "Corrections and Conditional Release Statistical Overview" (Public Safety Canada, 2019). 48.0% of all custodial sentences imposed by adult criminal courts are one month or less. 80.6% of men receive six months or less, and only 3.6% receive a federal sentence of two years or more. But 24.3% of the total federal population was serving a life/indeterminate sentence.

[18] See eg David Garland, *Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press, 2001) at pp. 53–74; Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Creature a Culture of Fear* (University of Chicago Press, 2007) at pp. 13–32.

[19] James Q. Whitman, "The Case for Penal Modernism: Beyond Utility and Desert" (2014) 1 *Critical Analysis of Law* 143.

[20] *Ibid.* at 145.

a 1981 book, Francis Allen argued that a new critique of the "rehabilitative ideal" rested on doubt that it worked and a sense that it was mere camouflage for unacceptable forms of social control.[21]

As these critiques took hold, calls for sentencing reform gained significant public and political attention and momentum. The central target for reform was the indeterminate sentence — in which courts announced a range of time to be served but left the question of release to backend parole authorities — and the rehabilitative logic that it rested on. The new federal sentencing regime looked very different: it was transformed from discretionary and indeterminate to tightly regulated and fixed. Under the U.S. *Sentencing Reform Act* of 1984,[22] sentence lengths were based almost entirely on the offence and the criminal history of the offender. Judges had very little ability to depart from the applicable ranges generated by those two factors. The power of the individual judge and parole board was replaced by a structured grid. Under the guidelines, offence conduct triggered either the application of a mandatory minimum sentence or a guideline sentence. The only important individual fact about an offender, for the purpose of sentence calculation, was the person's criminal record.

Canada wrestled with whether to follow the US reforms of this period; similar proposals circulated at the same time that the United States redesigned its federal and many state systems.[23] The 1987 report of the Canadian Sentencing Commission proposed significant change: to abolish parole and make a switch to guideline sentencing.[24] But these proposals were never taken up. While the common law of sentencing was signifi-

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[21] Frances Allen, The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose (New Haven: Yale University Press, 1981) at 34, 53-54, and 57.

[22] Pub L No 98-473, 98 Stat 1987 (1984).

[23] For a more detailed account of this comparative story, see Lisa Kerr "How Sentencing Reform Movements Affect Women", in David Cole and Julian Roberts, eds., *Sentencing in Canada: Essays in Law, Policy, and Practice*. Toronto: Irwin Law, 2020, 250.

[24] Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services Canada, 1987), online: http://johnhoward.ca/wp-content/uploads/2016/12/.

cantly codified in the 1996 *Criminal Code* reforms,[25] more radical ideas like abolishing parole or switching to guideline sentencing received no political or legislative uptake. The *Code* amendments made clear that all sentences must be proportionate, which functions as a limiting constraint on the other principles of sentencing. But as Julian Roberts puts it, the late 20th century sentencing reform experience was "far more modest and tentative" in Canada than in the United States.[26]

Canada did not experience the same degree of contraction of the penal-welfare model that US scholars describe in the late decades of the 20th century. Canada's sentencing and prison systems continue to embody significant discretion, both in sentencing itself and the administration of sentence. We continue to have a meaningful system of parole, premised on a twin welfarist logic: (a) that offenders should be released when rehabilitation is complete, and (b) that release from custody should ideally be structured and supervised, so as to maximize rehabilitative prospects. Most importantly for this article, sentencing jurisprudence remains invested in the logic of rehabilitation and the individual circumstances of the offender. The offence committed matters — and in this way we have a hybrid that includes retributive logics as well — but so too do the individual experiences and prospects of the accused.

The Conditional Sentence, Resurrected

The conditional sentence regime in s. 742.1 was initially passed alongside s. 718.1(e), now known as the *Gladue* provision. Both can be seen as important elements of legislative expression of Canada's hybrid penal welfarist sentencing regime, passed as part of the package I described above of 1996 reforms to the *Code*.[27] The conditional sentence was the mechanism by which judges could pursue the ideals of s. 718.1(e): "re-

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[25] In 1995, following preparatory work of several years, Parliament enacted Bill C-41, or the *Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, S.C. 1995, c. 22. The law, which came into force the following year, created Part XXIII of the *Criminal Code*, marking the first codification and significant reform of sentencing principles in the history of Canadian criminal law.

[26] Julian V. Roberts, "Sentencing Reform: The Canadian Approach" (1997) 9 Federal Sentencing Reporter 245 at 248.

[27] For discussion, see para. 130 of *R. v. Sharma*.

straint" in the use of imprisonment generally, and with "special attention to the circumstances of Aboriginal offenders." When the question of moral blameworthiness and the rehabilitative potential of the accused called for it, judges were directed to make use of a non-custodial path for Indigenous and other appropriate offenders.

In the years that followed, however, the conditional sentence regime became highly politicized, resulting in several amendments that narrowed its reach. When first introduced, conditional sentences were made available whenever the offence carried no mandatory minimum, the appropriate jail term would have been less than two years, and when the offender would not "endanger the safety of the community." In 1997, amendments specified that conditional sentences had to be "consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2."[28] The decade of the Harper Conservative government saw considerably more clawback. In 2007, amendments made conditional sentences unavailable for "serious personal injury offence[s] as defined in section 752", and for terrorism or criminal organization offences, prosecuted by way of indictment, for which the maximum sentence was at least 10 years imprisonment.[29] In 2012, amendments removed the reference to "serious personal injury offences" and provided that conditional sentences would be unavailable, among other things, for offences punishable by up to 14 years' or life imprisonment (s. 742.1(c)); and certain drug offences punishable by up to 10 years' imprisonment (s. 742.1(e)(ii)).[30] This final change made a CSO unavailable in sexual assault cases where the Crown proceeded by indictment.

Today, in the wake of Bill C-5 — passed explicitly so as to reduce overrepresentation of Indigenous and Black offenders in custody — the law is once again that a judge may impose a conditional sentence where four prerequisites are met: (1) the offence must not carry a minimum period of incarceration; (2) the trial judge determines that a sentence of less than two years of incarceration will be imposed; (3) serving the sentence in the community would not endanger the safety of the community; and (4)

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[28] *Criminal Law Improvement Act, 1996*, S.C. 1997, c. 18, s. 107.1.

[29] *An Act to amend the Criminal Code (conditional sentence of imprisonment)*, S.C. 2007, c. 12, s. 1.

[30] *Safe Streets and Communities Act*, S.C. 2012, c. 1 (SSCA).

a conditional sentence would be consistent with the fundamental purposes and principles of sentencing.[31]

The Supreme Court has emphasized that a conditional sentence is properly understood as punitive, even though an offender may not experience institutional incarceration. Conditional sentences carry significant consequences — they can be as harsh in application as sentences of incarceration.[32] First, they include real limits on liberty through strict house arrest, more punitive than the conditions imposed on probation, parole, or statutory release. Second, the threat of incarceration persists throughout the sentence. A breach of conditions need only be proved on a balance of probabilities, after which an offender will presumptively be incarcerated in an institution for the remainder of their sentence. Finally, if a breach occurs early in the sentence, the offender may end up being incarcerated for longer than they would have been if they had initially been sentenced to incarceration, because conditional sentences are often longer than sentences of incarceration in recognition that serving a sentence in the community, although punitive, tends not to be as punitive as the equivalent sentence of incarceration. Add to this that conditional sentences are not eligible for parole, meaning that an offender who breaches will serve the entire period of incarceration.

As Tim Quigley notes in his case comment at p. 318, as a strong candidate for parole, RS would likely have only served one year in custody under the sentence that Justice Huscroft preferred, and it is not possible to attach a probation order for a federal sentence. The sentence Justice Nakatsuru imposed would entail more correctional supervision — four years between the CSO and probation — with the risk of incarceration for any breach during the two years less a day conditional period. The attraction of the conditional sentence is that it "incorporates some elements of non-custodial measures and some of incarceration."[33] It is therefore capable of achieving both punitive and restorative objectives, simultaneously.[34] It is often an attractive option for punishing an of-

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[31] *R. v. Proulx*, 2000 SCC 5, 30 C.R. (5th) 1 (S.C.C.) at para. 46; s. 742.1 of the *Criminal Code*.

[32] *Proulx* at para. 41.

[33] *Proulx* at para. 21.

[34] *Proulx* at paras. 22 and 41. Though there are cases where incarceration will be the only suitable way to achieve the denunciation and deterrence that is re-

fender while enabling them to retain the housing and employment that will be essential to long-term pro-social behaviour. In this sense, it is quite obvious how it may do more to serve the long-term aims of specific deterrence than custodial punishment in some cases.

Conditional sentencing and *Gladue* have always gone hand in hand. The dissenting opinion in *Sharma* reviewed the uncontested legislative history showing that these reforms were "by design, intertwined."[35] The CSO is the ultimate blended, hybrid sentence, capable of achieving deterrence and denunciation, while pursuing restorative objectives that are generally important but often particularly so in the case of Indigenous offenders.

The Full Equation: A Violent Attack + Profound Gladue Factors and Strong Rehabilitative Prospects

R. v. R.S. was an appeal from a decision of Justice Nakatsuru, which followed a trial in which a jury found RS guilty of one count of sexual assault and one count of choking with intent to overcome resistance to facilitate the sexual assault. The 252-paragraph sentencing decision embodies what is by now a well-known distinctive style of this judge: sparse prose, plain language, thorough analysis, with respectful and direct addresses to both the victim of the crime and the accused throughout.

RS met the victim at work. They were friends. They were sexually intimate on two occasions before the assault. On the night of the assault, they saw a hockey game and each had several drinks afterward. They went to the victim's apartment for the accused to help her prepare for a job interview the next day. The attack on the victim was sudden, she recalls being in the kitchen and hitting the fridge on her way to the ground. RS removed her tampon and digitally penetrated her. RS also choked the victim, which stopped only when she grabbed his hand from her throat. The attack could have continued and been worse without an upstairs neighbour who appeared to investigate the noise. This was a serious sexual assault with several aggravating features, although unfortu-

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quired: *Proulx* at para. 106; *R. v. Ali*, 2022 ONCA 736, 164 O.R. (3d) 81 (Ont. C.A.), at para. 32.

[35] *Sharma* at paras. 215–217.

nately our courts also see many more brutal cases at an even more serious end of the spectrum.

Both Justice Huscroft[36] and Justice Paciocco[37] mention that RS was living a pro-social life, which gives just a hint of the detailed and large body of material before the trial judge on that front. Defence counsel in this case did an unusual amount of work, no doubt in recognition of the compelling circumstances of the offender. In the wake of the offence, RS joined Alcoholics Anonymous. It had been "life altering" for him; he attended group meetings and sessions with his sponsor nearly every day.[38] Multiple witnesses spoke to his meaningful engagement in the AA community over the course of two years before sentencing. He also completed programming with the Kizhaay Anishinaabe Niin "Kind Man" program at the Toronto Council Fire Native Cultural Centre, aimed at engaging Indigenous men to speak out against all forms of abuse towards women and others. He completed anger management training with the Salvation Army. Meaningful rehabilitation was significantly underway, and specific deterrence was not required — Justice Nakatsuru concludes that physical separation through jail was not necessary to protect the public.[39]

The strongest *Gladue* factors related to RS's experience of alcoholism and violence against women in his childhood home, followed by foster care and his own struggle with alcoholism. Once again, only a review of the decision of Justice Nakatsuru discloses the extensive material filed on these issues. The offender's roots were to the Michipicoten First Nation on the shores of Lake Superior on his mother's side. His maternal great-grandfather relinquished his Indigenous status, which was the only path to enfranchisement at that time.[40] RS believed his father was connected to the Garden River First Nation, and many of its members shared the offender's surname, but records could not confirm this connection. Both parents were alcoholics. His father was "abusive to everyone in the

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[36] *R.S.*, Justice Huscroft at para. 15.

[37] *R.S.*, Justice Paciocco at para. 63.

[38] *R.S.*, Sentencing Decision at para. 193.

[39] *R.S.*, Sentencing Decision at para. 225.

[40] For extensive discussion of these policies and their impact, see *R.S.*, Sentencing Decision at paras. 80–82.

home" and vicious to his wife.[41] His father shot his mother in the shoulder when she was 30 years old and pregnant. His father was jailed for two years on an attempted murder charge which was eventually dropped.[42] His mother eventually kicked him out, but she disappeared within one year of that separation. In September of 1988, after a Canada-wide manhunt, his father was found dead by a self-inflicted gunshot wound.[43] RS and his siblings all became Crown wards. They lived in a religious, non-Indigenous home with significant conflict between the children and parents. RS eventually attended the University of Windsor, when he began seriously abusing alcohol.[44] He worked at a call centre in Guelph from 2011 to 2015, before moving to a full-time job in logistics for a large retail corporation, where he has worked since 2015. He told his employer of his alcohol addiction in 2018, the year of the offence. The employer was supportive. It is clear that both the conditional sentence order and the 90-day intermittent sentence for the choking were fashioned in order to enable the offender to keep his job.[45]

Justice Huscroft's analysis of the *Gladue* issues in this case is opaque. There are two substantive paragraphs under a "Relevance of *Gladue*" heading in his opinion. He mentions at the outset of his analysis that *Gladue* is not a "race-based discount."[46] In the context of this case and his brief treatment of the subject, this reference functions as a somewhat revealing non-sequitur. There is no spectre of a "race-based discount" in a case where an Indigenous offender points to heartland *Gladue* factors: violence against an Indigenous mother, alcoholism in the family home and foster care. Since the connection of these factors to the offence is palpable for a man convicted of a sexual assault committed while intoxicated, Justice Huscroft's comment seems to disclose nothing but a general degree of resistance to *Gladue*.

Justice Huscroft then observes that the trial judge focused on *Gladue* factors that significantly reduced RS's moral blameworthiness, which the Crown also concedes. But Justice Huscroft then concludes that there was

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41 *R.S.*, Sentencing Decision at para. 86.

42 *Ibid.*

43 *R.S., Sentencing decision* at para. 92.

44 *R.S., Sentencing decision* at paras. 99–102.

45 *R.S., Sentencing decision* at para. 240.

46 *R.S.*, Justice Huscroft at para. 34.

"little discussion of RS's moral agency" in the sentencing decision.[47] He does not unpack this comment and the meaning is unclear. The *Gladue* factors that Justice Nakatsuru was focused on are relevant to the question of his degree of responsibility or moral blameworthiness. If Justice Huscroft thinks "moral agency" is a different topic than that, he does not explain.

What Justice Huscroft seems to be suggesting is that *Gladue* factors should count for less because RS looked "very different from some Indigenous offenders who find themselves in direct social and economic deprivation with limited options to escape their personal circumstances."[48] Of course, in the hands of the sentencing judge, the positive features of RS's adult life are marshalled in support of the conditional sentence order. In contrast, to Justice Huscroft, the idea seems to be that if an Indigenous offender has managed to pull themselves out of poor living conditions, then *Gladue* factors are trumped by the "moral agency" that more privileged people can exercise. If that is the point Justice Huscroft is making — and it is hard to say whether it is — there is little support for it in the *Gladue* caselaw. When an Indigenous offender has built a positive adult life, that does not negate the relevance of systemic background factors which are linked to their offence.

Far from being a reason to minimize *Gladue* on the basis of "moral agency", the mitigating factors in this case — his employment, his education, the absence of a criminal record — are what made a noncustodial sentence a safe, promising option. At the same time, this was a case in which *Gladue* factors also pressed in the direction of a non-custodial and restorative approach. Justice Paciocco offers the correct analysis of *Gladue* alongside the relevant mitigating and aggravating factors as follows:

> [48] Based on the findings of fact made by the trial judge, this case is a striking illustration of an offender whose criminal behaviour has been profoundly shaped by the damage done to him as a result of his indigeneity. As the trial judge found, the impact that the harm that R.S. experienced as the result of his indigeneity contributed meaningfully to the offence, materially reducing his degree of responsibility. When this is borne in mind, along with the fact that R.S. was a

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47 *R.S.*, Justice Huscroft at para. 35.

48 *R.S.*, Justice Huscroft at para. 35.

> suitable candidate for a restorative sentence, it was reasonable for the trial judge to arrive at the sentence he imposed, notwithstanding that the sexual offence R.S. committed was serious, intrusive, degrading, violent, and damaging to the complainant.

Sentencing Ranges and Standard of Review

The point I have tried to make in this article is a deeper one than repeating the test for appellate review of sentence. But it's worth noting that a penal-welfarist system also entails significant individualization and discretion, with inevitable effect on notions of parity and the standard of appellate review. As Justice Paciocco observes, intermediate appeal courts have been "repeatedly implored'" by the Supreme Court of Canada to exercise a high degree of deference to the sentencing decisions of trial judges.[49] A blended system that pursues punishment as well as reform will not see strict parity based on offence features in the abstract.

Justice Huscroft states that he would overturn the conditional sentence on the basis that it was not proportionate.[50] In doing so, he seems to conflate proportionality with the appellate standard of review, which is not whether the sentence is disproportionate but whether it is demonstrably unfit. There is no doubt that proportionality is a key concept in the *Criminal Code* and in sentencing law generally, but the Supreme Court has made clear that the application of proportionality is a "profoundly subjective process" that is assigned to trial judges working "on the front lines of our criminal justice system."[51] *Lacasse* instructs: a sentence is

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[49] *R.S.*, Justice Paciocco at para. 46. In *R. c. Lacasse*, 2015 SCC 64, 24 C.R. (7th) 225 (S.C.C.), for example: "[E]xcept where a sentencing judge makes an error of law or an error in principle that has an impact on the sentence, an appellate court may not vary the sentence unless it is demonstrably unfit." at para. 11. See also *R. v. Parranto*, 2021 SCC 46, 75 C.R. (7th) 217 (S.C.C.) at para. 35: "it is not the role of appellate courts to enforce a uniform approach to sentencing."

[50] *R.S.*, Justice Huscroft at para. 23: "a sentence must be proportionate and, as I will explain, this sentence was not." Elsewhere, Justice Huscroft does use the language of "demonstrably unfit", but this same paragraph makes clear that he sees this as a synonym for "not proportionate" (para. 5).

[51] *R. v. Shropshire*, [1995] 4 S.C.R. 227, 43 C.R. (4th) 269 (S.C.C.) at para. 46; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, 46 C.R. (4th) 269 (S.C.C.) at para. 91, and at para. 92: "It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. . . . Sentencing is an inherently individual-

only demonstrably unfit if it constitutes "an unreasonable departure" from the principle of proportionality.[52] The job of appellate courts is not to correct all sentences that the reviewing court thinks falls outside what is a highly subjective spectrum of proportionality.

Separately, Justice Huscroft also justifies intervention on the basis that Justice Nakatsuru cited the wrong range to justify a sentence of less than two years. Justice Huscroft points to a 2022 decision by ACJO Fairburn, *R. v. A.J.K.*,[53] and says this:

> [22] The sentencing judge relied on several older authorities, including *R. v. Smith*, 2011 ONCA 564, 274 C.C.C. (3d) 34, in asserting that decisions from this court support a range for serious sexual assaults that includes an upper reformatory sentence. He did not have the advantage of this court's decision in A.J.K., released subsequent to his decision, and the range he cited is erroneous . . . The cases cited by the sentencing judges that pre-date A.J.K. cannot be taken as sound authority for the proposition that a reformatory sentence would be appropriate for sexual assault with forced penetration.

There are at least three reasons that *A.J.K.* does not justify critique of the sentence imposed by Justice Nakatsuru. First, the main concern of ACJO Fairburn in *A.J.K.* was to reject the idea, drawn from *Smith*, that a lower sentencing range should apply where the victim has been or is an intimate partner of the accused at the time that the act of sexual violence takes place.[54] At no time does Justice Nakatsuru engage in this type of reasoning.

Second, what ACJO Fairburn said in *A.J.K.* is that the "forced penetration of another person will typically attract a sentence of at least three years in the penitentiary" absent "some highly mitigating factor."[55] The question in any review of *R.S.* was whether there was a highly mitigating factor present. The material before the sentencing judge indicated exactly that.

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ized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction.

[52] *Lacasse* at para. 53.

[53] 2022 ONCA 487, 82 C.R. (7th) 116 (Ont. C.A.).

[54] *A.J.K.* at paras. 69.

[55] *A.J.K.* at para. 77.

Finally, the choice of sentencing range or of a category within a range falls within a trial judge's discretion, and "cannot in itself constitute a reviewable error."[56] ACJO Fairburn says exactly that in *A.J.K.*: "there is no magic to citing the correct range of sentencing; the task is to arrive at a fit sentence through the employment of proper sentencing principles."[57] A trial judge is under no obligation to cite the actual range for this type of offence in order to invite deference in. It follows that Justice Nakatsuru committed no error by mentioning a case that contained outdated reasoning suggesting a particular range for this offence. Given the absence of any error by Justice Nakatsuru, the only question was whether the sentence he imposed was manifestly unfit. *A.J.K.* has little to say on that issue. Indeed, ACJO Fairburn reminds us that the question is not the recitation of a particular range, but the employment of proper sentencing principles in pursuit of a fit sentence.

To be clear, the assault in *A.J.K.* was far more serious. After a first date, the victim begged to be released from a moving vehicle. The appellant took her to a secluded area, choked her, penetrated her vaginally from behind, pinned her down, punched her, beat her, and then left her alone in the dark in a remote area. She had a concussion, bruising and swelling. There were no *Gladue* factors present. The Ontario Court of Appeal upheld the five-year sentence imposed by the trial judge. It was a very different case and we should expect to see a very different sentence in *RS*.

Conclusion

Canada has retained a blended, hybrid penal system that aims to do more than punish in a way that reflects the gravity of the offence alone. This is plain in the text of s. 718.1, that a sentence must be proportionate to both "the gravity of the offence and the degree of responsibility of the offender." This provision is just one part of our highly discretionary system in which judges and correctional authorities are empowered to craft and administer sentences in ways that are attuned to the individual circumstances of an offence and its perpetrator and that balance an array of aims and principles, including the question of the promise of reform. Canada's blended system tolerates a wide range of possible sentences for any given offence: there is no such thing as a uniform sentence for a particu-

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[56] *Lacasse* at para. 51.

[57] *A.J.K.* at para. 78.

lar crime.[58] There is also considerable indeterminacy in terms of how much time will actually be served in custody. Parole authorities are empowered to take a comprehensive look at how the offender has performed in the correctional context, effectively taking another pass at the question of sentence length and the prospects of future criminal offending.

The US comparison helps to underscore that the sentencing judge's decision in *RS* follows the governing law while also reflecting the wider institutional and policy arrangements and commitments of the Canadian penal regime. Over the US period in which penal-welfarism was rejected, the US federal system limited the points of discretion that could respond to individual circumstances at sentencing. The reforms of this period were largely founded on the idea that the only legitimate sentencing factors are the features of an offence and the defendant's criminal record, rather than the broader circumstances or future prospects of the offender. As Michael Tonry summarized this US experiment, judges were precluded from considering "the commonsense bases for distinguishing among offenders."[59] Differences that related to or flowed from socioeconomic circumstances, as one example among many, were prohibited from consideration. The rules from this US period of sentencing reform are incompatible with the *Gladue* jurisprudence and a great deal else of Canadian sentencing law.

Gladue sentencing is not exceptional in the Canadian legal context, given that *Gladue* is situated in a system with broad sentencing discretion and a robust commitment to tailoring sentences to each offender's distinctive circumstances. *Gladue* functions largely as a direction to trial judges to improve the epistemic quality of a sentencing hearing, so as to properly apply universal sentencing principles to Indigenous offenders. It also recognizes that imprisonment may be a particularly ineffective and counterproductive penal method for Indigenous offenders, pressing a judge to-

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[58] *Lacasse*, at paras. 56–61. See also *R. v. Parranto*, 2021 SCC 46, 75 C.R. (7th) 217 (S.C.C.) at para. 36 ("[t]here is no longer space to interpret starting points (or ranges) as binding *in any sense*") [emphasis in original]. Indeed, sentencing judges can err in principle by constraining their own discretion because they feel "bound" by a starting point or range. See *R. v. Ellis*, 2022 BCCA 278, 82 C.R. (7th) 223 (B.C. C.A.) at paras. 117–24.

[59] Michael Tonry, *Sentencing Matters* (Oxford: Oxford University Press, 1996) at 77.

ward the restorative side of our hybrid system. In this sense *Gladue* is itself a powerful expression of our blended system, along with its conditional sentence counterpart.