



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *R. v. Barter*, 2024 NLCA 40

Date: November 26, 2024

Docket Number: 202101H0049

BETWEEN:

DEAN BARTER

APPELLANT

AND:

HIS MAJESTY THE KING

RESPONDENT

Coram: D.E. Fry C.J.N.L., F.J. Knickle and K.J. O'Brien JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador,
Corner Brook 1321A00013

Appeal Heard: October 15th, 2024

Judgment Rendered: November 26, 2024

Reasons for Judgment by: F.J. Knickle J.A.

Concurred in By: D.E. Fry C.J.N.L. and K.J. O'Brien J.A.

Counsel for the Appellant: Jonathan D. Regan

Counsel for the Respondent: Kathleen O'Reilly, K.C.

Authorities Cited:

CASES CITED: *R. v. Barter*, 2021 CanLII 23883 (NLPC); *R. v. Hillier*, 2016 NLCA 21; *R. v. Nahanee*, 2022 SCC 37; *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089; *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424; *R. v. Lévesque*, 2000 SCC 47, [2000] 2 S.C.R. 487; *R. v. Sipos*, 2014 SCC 47, [2014] 2 S.C.R. 423; *Barendregt v. Grebliunas*, 2022 SCC 22; *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; *R. v. K.A.N.*, 2020 BCPC 41, aff'd 2021 BCCA 13, aff'd 2022 SCC 37; *R. v. Brown*, 2020 ONCA 657; *R. v. Bennett*, 2017 NLCA 41; *R. v. Phillips*, 2023 ABCA 210.

STATUTES CONSIDERED: *Criminal Code*, R.S.C., 1985, c. C-46, sections 687(1), 683(1), 718.2(a), 718.2(e).

F.J. Knickle J.A.:

INTRODUCTION

[1] This sentence appeal addresses whether a six-year period of imprisonment imposed for armed robbery and several other criminal offences committed by Mr. Barter, should be set aside.

[2] Mr. Barter submits that the sentencing judge erred because he concluded that a sentence of six years imprisonment (excluding remand time) was the fit sentence despite that the sentence exceeded the four and a half to five years imprisonment proposed by the Crown. Although Mr. Barter also agreed to the sentence proposed by the Crown, this was not a joint submission. The sentencing judge neither notified the parties of his intention to impose a higher sentence, nor did he permit further submissions. Mr. Barter submits this failure by the sentencing judge amounted to an error in principle.

[3] The Crown concedes that the sentencing judge erred in principle by imposing a sentence harsher than that recommended by Crown counsel without first notifying the parties and providing them an opportunity to make further submissions. However, the Crown submits that the error did not impact the sentence and that the sentence was fit.

[4] The question for this Court is whether the error in failing to notify or permit the parties further submissions would justify appellate intervention.

[5] Mr. Barter relies on two arguments: 1) had the parties known that the sentencing judge was considering a longer period of imprisonment than suggested by the Crown, Mr. Barter would have provided further information to the sentencing judge that would have impacted the sentence, namely that he is Indigenous, and 2) that the sentencing judge failed to adequately account for the mitigating effect of Mr. Barter's addictions issues and this error also impacted the sentence.

[6] Mr. Barter submits that the sentencing judge took too narrow a view of the relevance of addictions and so erred by not considering how Mr. Barter's addictions attenuated his level of moral blameworthiness in the commission of the offences.

[7] For the reasons that follow, while I would grant leave to appeal, I would dismiss the appeal and affirm the sentence imposed by the sentencing judge.

The circumstances of the offences

[8] The offences occurred between February 19, 2020 and January 9, 2021.

[9] In February 2020, Mr. Barter stole a \$400.00 watch from a jewelry store. He entered the store, opened the case where the watch was on display, took the watch and ran. It was returned to the store by another individual.

[10] The next offence occurred several months later on December 1, 2020, when Mr. Barter failed to appear in court as required. A warrant for his arrest was issued. The next day, December 2, 2020, a police officer attempted to apprehend Mr. Barter after observing Mr. Barter walking on the street. While conducting a search of his person, the officer was pushed by Mr. Barter. Mr. Barter then ran. Mr. Barter was later located at his residence. Once apprehended, during a search incident to arrest, Mr. Barter was found to be in possession of two rounds of ammunition. At the time, he was bound by a court order prohibiting him for life from possessing a firearm or ammunition. As a result of this conduct, Mr. Barter was charged not only with breaching the terms of his release and failing to appear in Court, but resisting arrest, escaping lawful custody, and possession of ammunition contrary to the prohibition order.

[11] Despite these new offences, Mr. Barter was released by the court on December 3, 2020. This release did not go well. On December 17, 2020, Mr. Barter breached the terms of his release by failing to abide by his curfew, and then on January 8, 2021, by failing to report to the police. Although Mr. Barter did call the police on January 9, 2021, it was the day after he was required to report and he did not report in person as required.

[12] It was also on January 9, 2021, that he committed the armed robbery. This was by far the most serious of the offences. Mr. Barter entered a pub around noon with his hood up and his face not visible. He left shortly after but returned again within minutes. He held a knife in his hand and eventually threatened to stab one of the pub's employees. Two other women in the pub at the time locked themselves away in different rooms. The employee, threatened by Mr. Barter brandishing the knife, gave him \$186.00. Mr. Barter also wanted money from the video lottery terminals but the employee told him she could not access that money. He then became upset when another patron prevented him from leaving the pub by holding the door shut. Mr. Barter threatened to stab the female employee if he was not released. He took a bar stool and smashed the windows in the entrance door. The police arrived soon afterwards and Mr. Barter was apprehended.

[13] Once Mr. Barter was apprehended, the two other women who had locked themselves in separate rooms emerged and were "clearly distraught" (Transcript, at page 10). The employee who had been confronted by Mr. Barter advised that she was uncertain that she could thereafter continue work as a bartender and that she "now lives in constant fear" (Transcript, at page 10).

[14] Mr. Barter was charged with robbery, possession of a weapon for the purpose of committing an offence, and breach of his release order from December 3, 2020.

[15] In total, between the theft in February 2020, and the robbery in 2021, Mr. Barter was charged with 10 criminal offences. Mr. Barter pled guilty to the charges and a sentencing hearing was held on March 26, 2021.

[16] At the sentencing hearing, the Crown counsel submitted that a fit sentence for all of the offences was a total sentence of four and a half to five years incarceration, less time spent in custody. After the Crown counsel had made her submissions, defence counsel in her submissions agreed and stated (Transcript, at page 18):

So our position is that the Crown's submission is an appropriate sentence for Mr. Barter. And so we would make a joint recommendation that the sentence fall somewhere between four and a half to five years.

[17] The sentencing judge confirmed with counsel that the submissions were not a joint submission but a joint recommendation and counsel agreed. When the sentencing judge asked Mr. Barter if he had anything to say, Mr. Barter stated that he hoped the judge could “focus” on rehabilitation and that he had been struggling with addictions “my whole life”. Mr. Barter then expressed disagreement with the four and a half to five years imprisonment recommended by counsel (Transcript, at page 21). Upon hearing this, the sentencing judge inquired of Mr. Barter's counsel if she wanted to respond, however, defence counsel declined.

[18] The sentencing judge then advised Mr. Barter that he could not change counsel's submissions, but if Mr. Barter felt “misled”, he could apply to withdraw his guilty pleas. The sentencing judge then stated to Mr. Barter (Transcript, at pages 21-22):

Otherwise, those are the submissions that have been made. In any event, the Judge is not bound by them. I can impose a sentence which is lower or higher than the sentence recommended by both counsel. So do you understand those things?

[19] Mr. Barter replied that he did understand. The judge then asked Mr. Barter if he wished to maintain his guilty pleas and Mr. Barter confirmed that he did.

The sentencing judge's decision

[20] The sentencing judge provided a written decision (*R. v. Barter*, 2021 CanLII 23883 (NLPC)).

[21] In his written decision, the sentencing judge referred to the relevant principles of sentencing (paras. 27-43), including the fundamental principle of proportionality, that the sentence must be the least restrictive available that is appropriate in the circumstances, and that the sentence should, to the extent it is appropriate, be in keeping with other sentences imposed for similar offences and offenders, as per the parity principle. The sentencing judge also considered the jurisprudence regarding how to assess the gravity of the circumstances, and the moral blameworthiness of an offender, and when deterrence and denunciation will take precedence over reformation and rehabilitation of the offender.

[22] Although the sentencing judge was not made aware of Mr. Barter's Indigeneity, the sentencing judge noted that a fit sentence had to account for the personal circumstances of an offender (para. 17). He then considered the information that had been provided (paras. 18-19), including Mr. Barter's lengthy criminal history (paras. 23-26), and that Mr. Barter's stated he had addictions issues (paras. 18, 20-22).

[23] The sentencing judge also reviewed the position of the parties and the cases upon which they relied to support the proposed sentence. The sentencing judge then provided a thorough review of not only the cases provided by counsel, but several other decisions to consider the range of sentence imposed for each of the offences. After reviewing the circumstances of the offences, the relevant principles, the positions of the parties and the ranges of sentence, the sentencing judge concluded what he viewed as the appropriate sentence for each individual offence, as follows:

Resisting arrest	1 month imprisonment
Escaping lawful custody	1 month imprisonment
Failure to appear	3 months imprisonment
Breach of curfew	2 months imprisonment
Breach by failing to report in person	2 months imprisonment
Breach by concealing a knife	4 months imprisonment
Theft of watch	3 months imprisonment
Robbery	5 years imprisonment
Possession of weapon for the purpose of committing an offence	3 months imprisonment
Possession of ammunition while prohibited	4 months imprisonment

[24] The sentencing judge then determined which sentences should run concurrently and which should run consecutively. This determination resulted in a

sentence of a total period of imprisonment of six years and ten months. The sentencing judge then adjusted again for totality and concluded that the overall fit sentence was six years imprisonment. He achieved this result by making certain offences concurrent. The sentencing judge also awarded a credit of 121 days for time Mr. Barter spent on remand. This meant that the ultimate sentence imposed was less than six years, and was five years and 244 days (approximately eight months). Finally, the sentencing judge imposed several ancillary orders, none of which were opposed or appealed by Mr. Barter.

THE ISSUES

[25] Mr. Barter did not suggest that the sentence for each of the individual offences or overall was demonstrably unfit. Nor did he assert that the sentencing judge incorrectly applied the principle of totality in his calculation of the individual and overall sentence. The principal basis for the appeal was that by failing to notify the parties that he intended to impose a higher sentence than recommended by the Crown, the sentencing judge made an error in principle that impacted sentence.

[26] The issues on appeal can be framed as follows:

- (1) Should leave to appeal be granted?
- (2) Should the new information regarding Mr. Barter's Indigeneity be admitted?
- (3) Would this new information have impacted the sentence?
- (4) Did the sentencing judge err in his treatment of Mr. Barter's addictions issues and, if so, did that error impact the sentence?

ISSUE 1: Should leave to appeal be granted?

[27] As Mr. Barter seeks to appeal sentence he must seek leave. The test for leave to appeal sentence is well established, namely, whether the appeal is "frivolous in the sense of having no arguable basis or sufficient merit" (*R. v. Hillier*, 2016 NLCA 21, at para. 7).

[28] The Crown concedes that the sentencing judge erred in failing to provide notice to the parties that he was considering imposing a harsher sentence than was

sought by the Crown and providing an opportunity to make further submissions. Without conceding that the error warrants setting aside the sentence imposed by the sentencing judge, the Crown acknowledges that the issues raised by Mr. Barter meet the requirements for leave to appeal. I agree and would grant leave to appeal.

The law governing sentence appeals

[29] In *R. v. Nahanee*, 2022 SCC 37, the Supreme Court of Canada established that it is an error in principle for a sentencing judge to exceed the recommendation of the Crown without first notifying the parties or providing the parties an opportunity to respond to the sentencing judge's concerns, including providing further information, if such is relevant and available (*Nahanee*, at paras. 43-50).

[30] However, that error alone does not justify appellate intervention. Moldaver J. stated in *Nahanee*, at paragraph 52:

... The judge's failure to provide notice and the opportunity for further submissions is an error in principle that will only justify appellate intervention "where it appears from the trial judge's decision that such an error had an impact on the sentence" (*Lacasse*, at para. 44; see also *R. v. Friesen*, 2020 SCC 9, at para. 26). In short, this failure is always an error, though not necessarily one warranting appellate intervention. Where the appellant can establish impact, the judge will have been deprived of an important piece of information relevant to determining a fit sentence. I see no reason to diverge from this established approach to sentence appeals.

[31] The requirement that the error in principle must impact the sentence is in keeping with the Supreme Court's jurisprudence generally regarding when an appellate court should intervene on sentence.

[32] Sentencing is a highly individualized process. The sentencing judge hears the relevant evidence, observes the offender first hand, and will be familiar with the community in which the crimes occur (*R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, at paras. 89, 91-92). After hearing the evidence of the offences and the circumstances of the offender, the sentencing judge must balance the various considerations to best give effect to the objectives of sentencing which are at times competing. As stated in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, in its opening paragraph:

Sentencing remains one of the most delicate stages of the criminal justice process in Canada. Although this task is governed by ss. 718 et seq. of the *Criminal Code*, R.S.C. 1985, c. C-46, and although the objectives set out in those sections guide the courts and are clearly defined, it nonetheless involves, by definition, the exercise of a broad

discretion by the courts in balancing all the relevant factors in order to meet the objectives being pursued in sentencing.

[33] Given the broad discretion afforded sentencing judges, appellate courts will show deference to a sentencing judge's determination of the fit sentence. In the absence of an error in principle that impacts the sentence, or that the sentence imposed is demonstrably unfit, an appellate court will generally not intervene (*Lacasse*, at paras. 41, 44). In *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at paragraph 26, the Court stated:

Not every error in principle is material: an appellate court can only intervene if it is apparent from the trial judge's reasons that the error had an impact on the sentence (*Lacasse*, at para. 44). If an error in principle had no impact on the sentence, that is the end of the error in principle analysis and appellate intervention is justified only if the sentence is demonstrably unfit.

[34] Also in *Lacasse*, at paragraphs 39 and 40:

This Court has reiterated on many occasions that appellate courts may not intervene lightly, as trial judges have a broad discretion to impose the sentence they consider appropriate within the limits established by law: s. 718.3(1) of the *Criminal Code*; see also *R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 46; *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at para. 14; *R. v. L.F.W.*, 2000 SCC 6, [2000] 1 S.C.R. 132, at para. 25; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at paras. 43-46.

In this regard, Iacobucci J. explained in *Shropshire* that consideration of the fitness of a sentence does not justify an appellate court taking an interventionist approach on appeal:

An appellate court should not be given free rein to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable. [para. 46]

[35] It is through the lens of deference to a sentencing judge's discretion in imposing sentence that the principles in *Nahanee* operate.

The principles in *Nahanee*

[36] In circumstances where there is no joint submission, as was the case here, a sentencing judge may exceed the recommendation of the Crown. However, where the sentencing judge fails to provide notice and/or an opportunity for further submissions, *Nahanee* identified three errors in principle that would warrant appellate intervention: 1) there was information that would have impacted the sentence, 2) if the sentencing judge failed to provide reasons or provided unclear or insufficient reasons for imposing the harsher sentence (not raised in this appeal), and 3) if the sentencing judge provided erroneous reasons for imposing the harsher sentence that, like the first type of error, impacted the sentence. As stated in *Nahanee*, referring back to *Lacasse*, “flawed reasoning will not be enough” the reasoning must impact the sentence (*Nahanee*, at para. 59).

[37] The majority in *Nahanee* stated that information that the parties were “unable” to put before the sentencing judge, may be furnished to an appellate court. The appellate court may then consider if the information is “material”, such that it would have impacted sentence. If the reviewing court is satisfied that the information would have impacted the sentence, it then may intervene (*Nahanee*, at para. 57).

The principles governing fresh evidence on sentence appeals

[38] The Court in *Nahanee* did not speak to “how” further information would be furnished to the appellate court. However, section 687(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, permits an appellate court to receive evidence in determining the fit sentence. Section 683(1) of the *Criminal Code* also permits the admission of fresh evidence on appeal where the appellate court “considers it in the interests of justice”. This Court’s criminal appeal rules and civil appeal rules also permit the receipt of evidence by the Court.

[39] The Supreme Court has stated that the rules regarding the admission of evidence on appeal from a verdict under section 683 apply in the same manner to appeals from sentence under section 687: *R. v. Lévesque*, 2000 SCC 47, [2000] 2 S.C.R. 487, at paragraph 20. See also *R. v. Sipos*, 2014 SCC 47, [2014] 2 S.C.R. 423, at paragraphs 28-32, and *Barendregt v. Grebliunas*, 2022 SCC 22, at paragraphs 3, 29-34. The overarching consideration is whether the court thinks it is in the interests of justice to admit the fresh evidence (*Lacasse*, at paras. 115-116).

[40] Whether the admission of the evidence is in the “interests of justice” under section 683, is determined by what is commonly known as the “*Palmer* test” as established by the Supreme Court in *Palmer v. The Queen*, [1980] 1 S.C.R. 759. Judges have broad discretion to admit fresh evidence and are guided by four factors in exercising that discretion:

- (1) The evidence should not be admitted if by due diligence it could have been adduced at trial.
- (2) The evidence must be relevant and bear upon a decisive/potentially decisive issue;
- (3) The evidence must be credible – or is reasonably capable of belief; and
- (4) If believed, the evidence could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[41] The first criterion is not applied strictly in the criminal context.

[42] In summary, if it is asserted on a sentence appeal that there is information that would have impacted the sentence, as per *Nahanee*, the evidence or information should be furnished to the Court by way of an application to admit fresh evidence. The evidence should meet the criteria under the *Palmer* test – keeping in mind that in *Lévesque* the Supreme Court noted that the “sources” and “types” of evidence are more flexible in relation to sentence appeals than appeals from verdict. As stated in *Sipos*, in affirming *Lévesque*, at paragraph 29:

The Court established in *R. v. Lévesque*, 2000 SCC 47, [2000] 2 S.C.R. 487, that while the sources and types of new evidence are more flexible in relation to sentence appeals, the well-known “*Palmer*” test governs admissibility of fresh evidence. That test, as is well known, sets out four criteria concerned with due diligence, relevance, credibility and impact on the result: *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775.

ISSUE 2: Should the additional information be admitted?

[43] In these circumstances, the additional evidence proposed by Mr. Barter consisted of an affidavit of less than seven lines, in which he stated that he is an Indigenous person of Mi’kmaq descent, that he was born and raised in Burgeo, Newfoundland and Labrador, that he is not a member of any Mi’kmaq First Nation, that he has family members who are members of the Qalipu First Nation Band, and

that he did not apply for membership in the Qalipu First Nation before that registration closed (Affidavit, Appeal Book, Tab 7).

[44] Mr. Barter also filed one page (page 12) of a 14-page document from Corrections Canada entitled Criminal Profile Report with a date of February 28, 2022 (Criminal Profile Report, Appeal Book, Tab 8). According to the Criminal Profile Report:

Dean BARTER identifies as Indigenous...

...

... Mr. BARTER identified Indigenous ancestry on his mother's side though he knows limited information about his Indigenous Social History. He indicated that his partner is Indigenous and since they commenced their relationship, he has been exploring Indigenous practices with her.

...

Mr. BARTER reports Mi'kmaq ancestry...

[45] The excerpt also provided general information about the Qalipu peoples in Newfoundland and Labrador: that the Qalipu Band consists of approximately 24,000 recognized members, located in "66 communities" in the Province; and that the Band possesses no reserve lands. The excerpt describes that despite that the Mi'kmaq peoples "have a long and rich history" with "unique cultural, social, political and spiritual traditions" in Newfoundland and Labrador, such traditions have been "eroded and lost with centuries of European contact". According to the excerpt, this erosion is, in part, due to the Mi'kmaq peoples having been excluded from being recognized as "status Indians" in the Province's Terms of Union with Canada. The excerpt also states that despite the erosion of the culture, the Band is:

... committed to preserving their traditional ways, and works to re-educate members and assist them in learning about their lost culture and traditions, such as their language, Mi'kmaq craft, sacred rites, and spiritual practices.

[46] The excerpt also referred to Mr. Barter's addictions issues and states:

... Mr. BARTER has struggled with a significant addictions issue for the past 10 years noting that he was using opiates for a considerable time to deal with his emotional

difficulties, including dealing with the loss of his marriage, distance from his children and later, his disconnect from his parents and family. Mr. BARTER has an extensive and varied criminal history dating back to 1986 when he was a youth and there are convictions noted from across NL, in Ontario as well as Alberta. In recent years, he has not maintained any connections with his family and does not currently have any contact with anyone. ...

[47] At the hearing of the appeal, the Crown did not oppose the admission of the evidence.

[48] On the one hand, this information, through due diligence, could have been put before the sentencing judge. Even in *Nahanee*, the Court did not condone holding back relevant information at a sentencing hearing, stating that the parties are expected to put “their best foot forward” (*Nahanee*, at para. 55). The need to ensure all relevant information is placed before a sentencing judge was stated in *Nahanee*, at paragraph 48:

It is critical that both the Crown and the accused initially provide as much relevant information as possible at the contested sentencing hearing in support of their respective positions. The opportunity for further submissions should not be relied on as a chance to pull a rabbit out of the hat. Additional submissions should respond to the concerns raised, including matters that the parties considered irrelevant or simply overlooked in their initial submissions. For example, this will be the case where the parties propose differing non-custodial options and the judge signals that they are considering a period of incarceration. Further argument and pertinent authorities will likely be necessary.

[49] There is sound reasoning behind ensuring that the sentencing judge has all relevant information. Sentencing does not occur in two stages, before the sentencing court and then again on appeal. As stated in *Sipos*, at paragraph 39, sentencing is not done by “instalment”.

[50] There was no explanation as to why this information was not placed before the sentencing judge. According to the record, Mr. Barter wanted to deal with the matters expeditiously. His counsel submitted that Mr. Barter declined a pre-sentence report and that this supported his cooperation in having the matters dealt with quickly and without the need for a trial. At page 18 of the Transcript, counsel for Mr. Barter stated:

[Mr. Barter] declined to have a pre-sentence report prepared because it's his desire to just expedite these proceedings and have things dealt with as quickly as possible, and so he did plead guilty at a very early opportunity to a substantial number of charges.

And he's been cooperative. He waived his bail hearing, so he saved the Court time with respect to that.

[51] From a due diligence perspective, if there was information that was capable of impacting sentence, the necessary information ought to have been before the sentencing judge. Circumstances of Indigeneity should not be “overlooked” or considered “irrelevant” by the parties. It was incumbent on Mr. Barter to ensure that the necessary information was before the sentencing judge to weigh it with the other evidence in determining sentence.

[52] On the other hand, whatever the reason for the failure to provide the sentencing judge with the information Mr. Barter now seeks to admit, it is important that evidence not be excluded where its admission is not contrary to the interests of justice. As stated in *Sipos*, at paragraph 29:

Generally, fresh evidence should not be received if it could have been obtained at trial by exercising due diligence, although this criterion is not strictly applied in criminal matters when it would be contrary to the interests of justice to do so.

[53] As due diligence is not applied so strictly in criminal matters and in light of the Crown's consent to its admission, as well that this is a sentence appeal in which there is more flexibility regarding the source of information (Mr. Barter and Corrections Canada), this Court was satisfied that it was in the interests of justice to admit the evidence for consideration of impact on sentence.

ISSUE 3: Does this new information impact the sentence?

[54] Mr. Barter submits that had the sentencing judge notified the parties that he was considering a period of imprisonment higher than that recommended by the Crown, Mr. Barter would have raised with the judge that he identifies as Indigenous. The judge then would have been obliged to consider Mr. Barter's unique circumstances as an Indigenous person in sentencing Mr. Barter. Mr. Barter argues that the sentencing judge would likely have inquired as to whether or not Mr. Barter sought a sentencing report, commonly known as a *Gladue* report, to provide the necessary information. Mr. Barter argues that because the sentencing judge may have sought a *Gladue* report, or some other source of information regarding Mr. Barter's circumstances as an Indigenous offender, this establishes as per *Nahanee* that there was information that would have impacted the sentence.

[55] Mr. Barter also argues that his addictions issue is a factor that is relevant to the consideration of his circumstances as an Indigenous person and the cumulative effect of this information would have supported that his circumstances as an Indigenous offender mitigated sentence.

[56] The personal circumstances of an offender are always a relevant consideration in sentencing, in an effort to impose a sentence that is commensurate with the harm done and the moral blameworthiness of the offender (*Criminal Code*, s. 718.2(a)). The circumstances of Indigenous offenders is specifically emphasized in section 718.2(e) and requires special attention from the sentencing judge. Section 718.2 states:

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

...

e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[57] Given the mandatory nature of section 718.2(e), had the sentencing judge been alerted to Mr. Barter's circumstances as an Indigenous offender, the sentencing judge would have had to consider those circumstances in determining the fit sentence. He would, at a minimum, have been required to inquire of Mr. Barter whether he intended to seek a *Gladue* report to furnish the appropriate information to assist him in determining sentence.

[58] Now having been given the opportunity before this Court, the only information Mr. Barter has furnished is that he identifies specifically as an Indigenous person of Mi'kmaq descent. This is insufficient to warrant intervention by this Court as information that would impact sentence.

[59] It is not mitigating on sentence to simply assert one's Indigeneity. The Supreme Court of Canada in *R. v. Gladue*, [1999] 1 S.C.R. 688, and in *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, was clear that the application of section 718.2(e) does not mean an "automatic" reduction in sentence on the basis of one's Indigeneity (*Gladue*, at paras. 58-64, 82, 88). At paragraph 71 of *Ipeelee*, the Court stated:

In *Gladue*, this Court rejected Ms. Gladue’s argument that s. 718.2(e) was an affirmative action provision or, as the Crown described it, an invitation to engage in “reverse discrimination” (para. 86). Cory and Iacobucci JJ. were very clear in stating that “s. 718.2(e) should not be taken as requiring an automatic reduction of a sentence, or a remission of a warranted period of incarceration, simply because the offender is aboriginal” (para. 88 (emphasis added)). This point was reiterated in *R. v. Wells*, 2000 SCC 10, [2000] 1 S.C.R. 207, at para. 30. There is nothing to suggest that subsequent decisions of provincial and appellate courts have departed from this principle. In fact, it is usually stated explicitly. For example, in *R. v. Vermette*, 2001 MBCA 64, 156 Man. R. (2d) 120, the Manitoba Court of Appeal stated, at para. 39:

The section does not mandate better treatment for aboriginal offenders than non-aboriginal offenders. It is simply a recognition that the sentence must be individualized and that there are serious social problems with respect to aboriginals that require more creative and innovative solutions. This is not reverse discrimination. It is an acknowledgment that to achieve real equality, sometimes different people must be treated differently.

[60] The ultimate sentence imposed will depend on the consideration of “all” the factors that must be taken into account in a given case. Even if an offender’s Indigenous circumstances are furnished to the court, this does not mean that there will necessarily be a mitigating effect on the determination of the fit sentence.

[61] For example, in *Nahanee*, Mr. Nahanee’s circumstances as an Indigenous person were detailed to the sentencing judge through a *Gladue* report. After a thorough review of this aspect of Mr. Nahanee’s circumstances, the sentencing Judge concluded that there were no relevant factors, as contemplated in *Gladue*, that would impact the sentence (*R. v. K.A.N.*, 2020 BCPC 41, aff’d 2021 BCCA 13, aff’d 2022 SCC 37). At paragraph 66, the sentencing judge stated:

... I do not find relevant *Gladue* factors exist here such as to moderate the nature or severity of the appropriate sentence... .

[62] The sentencing judge noted that Mr. Nahanee had been raised in a positive family environment. At paragraph 68, the sentencing judge stated:

He enjoyed a safe household as a child. He did not suffer abuse himself, sexual, physical, or emotional. He was not exposed to substance abuse or violence. While an Aboriginal man, his parents effectively created a home in which the intergenerational effects of colonization, particularly the impact of the Indian Residential System, were ameliorated successfully.

[63] The sentencing judge concluded at paragraph 71:

These passages from Morris are helpful in my assessment of the application of the *Gladue* factors here. I am mindful that K.A.N. is an Aboriginal offender. I am mindful of his family's historic experiences. However, he grew up in an urban area, in a happy home, devoid of violence or substance abuse. He attended public school, did fairly well, has no cognitive deficits. There are none of the personal mitigating factors so often present in cases of Aboriginal offenders, such that his blameworthiness is consequently attenuated.

[64] The above extract from the sentencing decision in *Nahanee* illustrates the principle in *Gladue* and *Ipeelee* that section 718.2(e) is not an automatic sentence reduction provision. While the consideration of the circumstances of the Indigenous offender under section 718.2(e) *may* result in the imposition of a sentence other than imprisonment or period of imprisonment lesser or different than otherwise would be imposed, it does not mean that the result *will* be a lesser or different sentence.

[65] In these circumstances, there is insufficient information beyond the fact of Mr. Barter's self-identification as Mi'kmaq to be satisfied that had this information been before the sentencing judge it would have impacted the sentence.

[66] To be clear, the concern with the lack of specific information regarding Mr. Barter's circumstances as an Indigenous person does not mean that Mr. Barter was required to establish a causal evidentiary link between those circumstances and his commission of the offences. This would be incorrect. But there has to be some basis in his Indigeneity that meaningfully influenced what the fit sentence should be. As stated in *Ipeelee*, at paragraph 83:

Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.

[Emphasis added.]

[67] And as further stated in *Ipeelee*, at paragraph 59:

... 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).

[68] The known systemic factors emanating from the history of colonialism (the continuing disadvantages such as discrimination, poverty, isolation, oppression or addictions to substances), have to ultimately ascend from the general to the particular. There has to be some basis in the information or evidence explaining the relationship between the systemic background circumstances and particular circumstances of the offender as Indigenous, and the offences for which the offender is to be sentenced. The Ontario Court of Appeal in *R. v. Brown*, 2020 ONCA 657, at paragraph 48, put the assessment of one's Indigenous circumstances this way:

An accused person is not required to draw a straight line between Aboriginal status and the offences for which he or she is being sentenced: see *Ipeelee*, at paras. 82-83; *R. v. Kreko*, 2016 ONCA 367, 131 O.R. (3d) 685, at paras. 21-22. Such a requirement "imposes an evidentiary burden on offenders that was not intended by *Gladue*": *Ipeelee*, at para. 82. However, more is required than the bare assertion of Aboriginal status: *R. v. Monckton*, 2017 ONCA 450, 349 C.C.C. (3d) 90, at para. 115; *F.H.L.*, at para. 38; *R. v. E.C.*, 2019 ONCA 688, at para. 16.

[69] Also in *Brown*, the Court stated, at paragraph 50:

In determining the extent to which *Gladue* factors bear on an offender's culpability, the court must consider whether the offender has "lift[ed] his life circumstances and Aboriginal status from the general to the specific": *F.H.L.*, at para. 45. Put another way, the sentencing judge must determine the degree to which unique circumstances related to the offender's background played a part in bringing that offender before the court. This is necessarily a case-specific inquiry.

[70] Mr. Barter has provided no information about his case-specific circumstances as an Indigenous person beyond the recent and bare assertion that he identifies as Indigenous. While the excerpt of the Criminal Profile Report contains basic information regarding the circumstances and history of Mi'kmaq peoples in Newfoundland and Labrador, this information too is general. It does not assist the Court in assessing how this history relates to Mr. Barter.

[71] The "erosion" of one's Indigenous culture referred to in the Criminal Profile Report is the kind of systemic factor contemplated in *Gladue* as contributing to why

an Indigenous person might find themselves repeatedly before the criminal courts. However, there is nothing in the information provided that assists this Court in concluding that there is any relationship between the general description of long term erosion of Mi'kmaq culture and Mr. Barter having committed the criminal offences. The information is too general to assess the relationship, if any, to Mr. Barter. There is nothing about Mr. Barter's circumstances as an Indigenous person in the provided information which either "bear on his culpability" or "level of moral blameworthiness" or "indicate which sentencing objectives can and should be actualized".

[72] I have similar concerns respecting Mr. Barter's submissions regarding his opiate addiction issues as evidence of the effects of systemic factors that impact Indigenous persons. The excerpt from the Criminal Profile Report confirms that Mr. Barter has addictions to opiates and there is no dispute that addictions suffered by Indigenous persons is one of the realities that contributes to such offenders being before the courts. However, again, there is nothing in the excerpt that would assist the Court in relating his issues with addictions to his unique circumstances as an Indigenous person. There are no details regarding his opiate addiction, except that it is something he has struggled with for 10 years, which has affected his relationship with his family. There is nothing in this information that indicates his addiction issues are related to Mr. Barter's circumstances as an Indigenous person. Many families, Indigenous or not, become estranged by family members who suffer from addictions.

[73] Further, another part of the excerpt describes Mr. Barter's upbringing as having occurred in a "positive and pro-social environment" and that he "enjoyed the support of his parents through his lifetime, despite his involvement in the justice system". There is no elaboration in the excerpt as to what is meant by "positive and pro-social environment" but, in my view, this reference to his upbringing as being in a positive environment is significant. It tends to undermine any relationship between his family circumstances (immediate or generational) and his addictions.

[74] For example, there is no suggestion in the excerpt that Mr. Barter was exposed to personal trauma or was exposed to the effects of the kinds of intergenerational trauma that are frequently reported by Indigenous offenders. Nor is it suggested that he acquired his addiction after such exposure, which is often sadly the case and readily apparent from the circumstances of an Indigenous offender.

[75] Two examples from other decisions, where the circumstances provided from an Indigenous offender did assist the Court in fashioning the fit sentence, illustrate why the information here is so lacking.

[76] In *R. v. Bennett*, 2017 NLCA 41, the offender, who unlike Mr. Barter is a member of the Qalipu band, appealed the sentence imposed by the sentencing judge for serious drug trafficking charges. The context of alleged error by the sentencing judge was similar to Mr. Barter's appeal in that the sentencing judge imposed a lengthy period of incarceration without considering the circumstances of Mr. Bennett as an Indigenous offender, even though the sentencing judge had been made aware that Mr. Bennett was Indigenous. The error was that once being apprised of this information, the sentencing judge took no steps to inquire whether Mr. Bennett wished to furnish the necessary information to permit the Court to properly consider those circumstances on sentence. This was an error even though, like Mr. Barter, Mr. Bennett had waived pre-sentence reports to expedite the proceedings. Similar to the question on this appeal, the question was whether Mr. Bennett's circumstances as an Indigenous offender impacted sentence.

[77] Unlike Mr. Barter, Mr. Bennett furnished a report to this Court, under section 687 of the *Criminal Code*, that provided details of his circumstances as an Indigenous person. The details included that he experienced substance abuse personally and, in the immediate family, physical abuse at the hands of his mother's partners, violence in the family, particularly seeing his mother and brother beaten, and living in poverty.

[78] Although the Court was unanimous that the failure to consider Mr. Bennett's Indigenous circumstances was an error, the Court was divided on whether the information provided was sufficient to have impacted the sentence. The dissenting justice was not satisfied the information in the report was sufficient, however, the majority was satisfied that the details were adequate to provide the necessary context to assess Mr. Bennett's unique circumstances as an Indigenous offender (*Bennett*, at para. 35).

[79] Mr. Barter has provided no such details to facilitate any correlation between his circumstances as an Indigenous person and why he finds himself before the sentencing court.

[80] Another example is the decision in *R. v. Phillips*, 2023 ABCA 210, where the detailed circumstances of the Indigenous offender furnished to both the sentencing

and appeal court permitted the appellate court to assess how those circumstances, in particular, Ms. Phillips' history of addictions, had a bearing on the fit sentence.

[81] Without repeating all of the information that was referred to by the court, there was information that Ms. Phillips was born in Fort McMurray, Alberta, and identified as belonging to the Chipewyan Prairie First Nation, that her mother and both her grandmothers attended residential school, that her father was described as an "abusive alcoholic who was controlling and manipulative", that her mother had resorted to obtaining a restraining order against the father, that Ms. Phillips recalled spending a short time at a shelter with her mother, that she lived in multiple homes, sometimes with her mother, sometimes with her father, and even with her grandmother, that she was sexually abused by a family member, and that she also experienced multiple deaths in her family, and abuse and instability in her intimate relationships (see paras. 38-47).

[82] There was ample information before the court to determine the extent to which the *Gladue* factors weighed in the determination of sentence. As described by the court, at paragraph 47:

... The struggle of Ms. Phillips' grandparents and parents as will undoubtedly be passed on to her own children because of her experiences with dislocation, addiction and now incarceration, speaks volumes about the devastating consequences and seemingly endless cycle of intergenerational trauma.

[83] There are no such details before this Court regarding Mr. Barter's personal circumstances.

[84] It is not enough to assert that one is Indigenous. There has never been a principle that one's circumstances as an Indigenous person mean an automatic reduction in sentence (*Ipeelee*, at paras. 71-72). There must be sufficient information that the sentencing court can be satisfied that, in keeping with all the principles in sentencing, those unique circumstances have a bearing on what the fit sentence should be, either because they provide the appropriate information to tailor a sentence to the offender's Indigenous circumstances, or attenuate the offender's moral blameworthiness, as was the case in *Phillips*, (paras. 28-29; see also *Ipeelee*, at paras. 73, 75).

[85] In light of the requirements under section 718.2(e) as interpreted in the jurisprudence, Mr. Barter's additional information that he identifies of Mi'kmaq

descent is insufficient to meet the test in *Nahane* that there is missing information not before the sentencing judge that would have impacted sentence.

[86] For these reasons, this ground of appeal must fail.

ISSUE 4: Did the sentencing judge err in his treatment of Mr. Barter's addictions issues and, if so, did that error impact the sentence?

[87] Mr. Barter also relies on the third prong of the *Nahane* test that the sentencing judge provided erroneous reasons for imposing the harsher sentence (*Nahane*, at para. 59). Mr. Barter alleges that the sentencing judge erred by failing to properly consider Mr. Barter's addictions issues as mitigating and reducing his level of moral blameworthiness. Mr. Barter submits that the presence of addictions issues was particularly relevant to his moral blameworthiness as an Indigenous offender.

[88] The sentencing judge addressed the relevance of addictions issues in sentencing at paragraphs 20-22 of his Decision:

A drug or alcohol addiction can be a mitigating factor in imposing sentence (see *R. v. Sheppard* (1997), 147 Nfld. & P.E.I.R. 304 (N.L.C.A.) and *R. v. Lane*, [2004] N.J. No. 95 (S.C.)), particularly when an offender commits an isolated criminal act to satisfy the addiction and he or she has illustrated a commitment to rehabilitation. In those cases, the Court may resort to a community based sanction, depending upon the seriousness of the offence, in the hope that rehabilitation will be successful (see for instance, *R. v. Reid*, [2003] P.E.I.J. No. 118 (C.A.)).

However, when an offender with an addiction commits a serious criminal offence or has a criminal record, different considerations apply. In *R. v. Breen* (1982), 37 Nfld. & P.E.I.R. 472 (N.L.C.A.), for instance, the Court of Appeal indicated that though "the effect of alcohol or drugs" can be considered as mitigating factors in sentencing, "that consideration is normally confined to cases where the actions of a person are completely out of character. Thus, lenient treatment may be justified in anticipation of rehabilitation" (at paragraph 7).

Mr. Barter's actions are not out of character and rehabilitation is not a significant factor in this case. I do not view Mr. Barter's addiction issues as a significant mitigating factor in sentencing.

[89] Mr. Barter argues that the sentencing judge's reasoning in the above paragraphs suggests that addictions will only be relevant where an offender is

committed to rehabilitation or are out of character. Such a view of the relevance of addictions in sentencing would be an error. As stated in *Phillips*, at paragraph 31:

... Circumstances bearing on whether an untreated addiction mitigates or aggravates (or is neutral) is always case specific and may include whether the offender had a real opportunity to get addiction treatment but declined it and whether the offender knew they tended to behave violently under the influence of drugs. Even then an addict's failure to take steps to treat their addiction must also be psychologically realistic before one can characterize it as blameworthy. Sobriety is not a linear process and addictions meet real physical and psychological needs. Similarly, abstaining comes with physical and psychological costs. Moreover, the opportunity to avail oneself of treatment is not equally available to all people at all times in all geographical locations living in all environments or financial or educational circumstances.

[90] However, I do not see the comments of the sentencing judge as representing a conclusion that the relevance of addictions is confined to circumstances where the use of the substances is out of character or the offender has “illustrated a commitment to rehabilitation” after committing an isolated offence. In particular, the sentencing judge's reference to the decisions in *Sheppard* and *Lane*, two cases involving offenders whose gambling addiction was accepted as contributing to, if not causing, the commission of the offences in question (fraud/theft and possession of stolen property), shows that the sentencing judge was alive to the possibility of an addiction attenuating an offender's moral blameworthiness.

[91] When his decision is taken as a whole, the sentencing judge considered the evidence proffered from Mr. Barter that he had addictions, but fairly concluded that given the lack of information provided, measured against the seriousness of the offences, Mr. Barter's addictions did not attract significant weight. I see no basis to interfere with this reasoning or to disturb the sentence imposed by the sentencing judge.

[92] The offences committed by Mr. Barter were serious; in particular, the robbery and being in possession of ammunition while prohibited for life from so doing by a court order.

[93] This was Mr. Barter's second armed robbery in the course of a continuous criminal history that spans almost 40 years. He committed the most recent 10 offences, including the second armed robbery, after having completed the sentence for the first armed robbery. His criminal history is replete with breaching court orders. I see no error in the sentencing judge concluding that in light of Mr. Barter's extensive criminal history, in the absence of more detailed information, Mr. Barter's

commission of the offences was not out of character and that rehabilitation played a lesser role in the determination of sentence (Decision, at para. 22).

[94] For this reason, this ground of appeal must also fail.

CONCLUSION AND DISPOSITION

[95] The sentencing judge erred in principle by failing to give notice to counsel that he was considering a sentence higher than that recommended by the Crown and Mr. Barter. However, Mr. Barter has failed to establish, as required by *Nahanee*, that this error would have had any impact on sentence. Given that there was no argument that the sentence was demonstrably unfit, and the broad discretion afforded to judges in determining a fit sentence, there is no basis for this Court to intervene in the sentence imposed by the sentencing judge, notwithstanding that it was a sentence that exceeded the recommendation by the Crown.

[96] Mr. Barter submitted that if this Court was not satisfied that it had sufficient information to assess Mr. Barter's circumstances as an Indigenous person, as well as his addictions issues, the Court could seek a pre-sentence report, or return the matter to the sentencing judge to seek a report.

[97] *Nahanee* considered that in "rare cases", an appellate court could order a fresh sentencing hearing where the record is "so incomplete as to foreclose a fresh assessment at the appellate court" (*Nahanee*, at para. 61).

[98] In my view, this is not such a "rare case". It has now been over four years since Mr. Barter was sentenced. There is no submission that the overall sentence was demonstrably unfit. It was incumbent upon Mr. Barter to ensure information relevant to sentencing was furnished to the sentencing judge. This, he did not do. On appeal to this Court, as per *Nahanee*, Mr. Barter had a second opportunity to furnish the information he believed was relevant. The information he has furnished is not information that would have impacted sentence.

[99] In such circumstances, it would not be appropriate to adjourn this matter yet again, or return the matter to a sentencing court, when there is no expectation based on the information that has been provided that to so do would impact the sentence.

[100] I would allow leave to appeal sentence, however, I would dismiss the appeal from sentence.

F.J. Knickle J.A.

I Concur: _____
D.E. Fry C.J.N.L.

I Concur: _____
K.J. O'Brien J.A.