Sentencing for Intimate Partner Violence in Canada: Has s.718.2(a)(ii) Made a Difference?

Isabel Grant
Professor

Peter A. Allard School of Law,
University of British Columbia

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Executive Summary

This study examines the use of s.718.2(a)(ii) in case law since its enactment in 1996. Section 718.2(a)(ii) was enacted in response to a history of courts both trivializing male intimate partner violence against women (MIPVW) and courts putting primary focus on the preservation of the family relationship rather than on the safety of the complainant. Using a sample of cases decided under s.718.2(a)(ii) this study aims to evaluate the effectiveness of this legislative mandatory aggravating factor. The primary sample is comprised of all appellate cases referencing the section as well as all trial cases referencing the section from the years 1998, 2007 and 2015. In order to understand why courts sometimes fail to reference s.718.2(a)(ii), this primary sample of cases will also be compared to a sample of appellate cases involving intimate partner violence (IPV) over the same time period that could have cited s.718.2(a)(ii) but did not.

Approximately 97% of the sample involved male offenders and female victims, with only three cases involving female offenders and male victims, and one case involving a male same-sex relationship. Roughly half of the cases involved former or current common-law relationships with the rest divided between married and dating relationships. Roughly one third of the cases involved first offenders and just over one third involved offenders with a criminal record for domestic violence. The remaining offenders had records for other offences. Overall the study found a high rate of federal incarceration for men convicted of MIPVW explained in part by the study's focus on appellate decisions and the high incidence of successful Crown appeals in the appellate cases.

The study concludes that some clarification is needed around the scope of s.718.2(a)(ii). While courts often apply the provision to former spouses or former common-law partners, there is more doubt about its application to non-cohabitating intimate partners. Most courts are willing to recognize that a non-cohabiting intimate relationship is an aggravating factor in sentencing although not all courts recognize the applicability of s.718.2(a)(ii). Similarly, when the offender targets a new partner of his former spouse, s.718.2(a)(ii) is not applied unless the former spouse/common-law partner herself is also a victim of the attack. The study recommends removing this uncertainty through legislative amendment to s.718.2(a)(ii).

Section 718.2(a)(ii) gives appellate courts a tool with which to scrutinize non-custodial sentences in the context of MIPVW. Almost one quarter of the appellate cases in the sample dealt with the issue of whether a non-custodial sentence was appropriate. This issue is of particular significance in the context of sentencing Indigenous offenders for MIPVW. These cases reveal a tension between s.718.2(a)(ii) and s.718.2(e) of the *Criminal Code*. Section 718.2(e) instructs courts to consider all sentencing options other than imprisonment for Indigenous offenders. This section takes courts in the direction of restorative and rehabilitative principles with a focus on reintegrating offenders into their communities where that can be done safely. Section 718.2(a)(ii), by contrast, leads courts to focus on denunciation and deterrence, an approach that tends to result in custodial sentences. For non-Indigenous offenders, appellate courts usually reject non-custodial sentences for MIPVW.

The appellate cases in the sample reveal some problematic reasoning from trial judges in the context of sexual assault. While in general courts take MIPVW seriously, sentencing for intimate

partner sexual violence (IPSV) appears to be the context that is most resistant to change. Rape myths surrounding why a woman stayed in a relationship or why she apparently consented to sexual relations with the offender after the sexual assault at issue still arise in these cases particularly when dealing with level I sexual assaults.

The study concludes that s.718.2(a)(ii) continues to play an important role in the jurisprudence on MIPVW and that the section should be retained and strengthened. This study also suggests that other processes in the criminal justice system need to be examined such as the efficacy of no contact orders for releasing people from pretrial custody. The absence of cases involving violence in same-sex couples is also notable in this sample suggesting that these cases are either not being reported or not being successfully prosecuted.

1. Introduction

This study examines the use of s.718.2(a)(ii) of the *Criminal Code*[1], enacted in 1996, which directs judges to consider a spousal or common-law relationship between the offender and the victim as an aggravating factor in sentencing. While the study examines cases involving intimate partner violence committed by men and women, the vast majority of cases in this sample (97%) involve male offenders engaging in violence against female victims. Thus, where appropriate, this study uses the language of male intimate partner violence against women (MIPVW) in order to acknowledge the gendered nature of these cases. Where referring to statistics, or the current *Criminal Code* provision, the gender-neutral term of intimate partner violence (IPV) will be used**.**

1.1 Background

Cases involving IPV constitute a majority of completed cases involving violence in Canadian courts with almost 335,000 completed cases between 2005/2006 and 2010/2011.[2] MIPVW accounts for 85% of these cases[3] and 98% of intimate partner sexual assaults involve male offenders and female victims.[4] Female victims are twice as likely as male victims to be injured[5] and charges are more likely to be laid where the victim is female.[6] MIPVW has been described as "one of the most universal and widespread forms of violence against women".[7]

Cases involving MIPVW, in the words of one Ontario judge, "come before the courts in Canada with depressing regularity."[8] Nonetheless, outside of the context of sentencing for intimate

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[1] RSC 1985, c C-46 [*Criminal Code*].
[2] Statistics Canada, *Cases in Adult Criminal Courts Involving Intimate Partner Violence*, by Pascale Beaupré, Catalogue No 85-002-X (Ottawa: Statistics Canada, 8 July 2015) at 6 [Beaupré, *IPV Cases in Adult Criminal Courts*].
[3] *Ibid* at 3.
[4] See Statistics Canada, *Family Violence in Canada: A Statistical Profile 2002*, by Canadian Centre for Justice Statistics, Catalogue No 85-224-XIE (Ottawa: Statistics Canada, June 2002) at 12 [Statistics Canada, *Family Violence in Canada*]. See also Angela Cameron, "Sentencing Circles and Intimate Violence: a Canadian Feminist Perspective" (2006) 18:2 CJWL 479 at 492-493 [Cameron, "Sentencing Circles and Intimate Violence"]; Jane Dickson-Gilmore, "Whither Restorativeness? Restorative Justice and the Challenge of Intimate Violence in Aboriginal Communities" (2014) 56:4 Can J Corr 417 at 420-22 [Dickson-Gilmore, "Whither Restorativeness"] for a description of male intimate partner violence against Indigenous women in particular.
[5] Statistics Canada, *Measuring Violence Against Women: Statistical Trends*, by Maire Sinha, Catalogue No 85-002-X (Ottawa: Statistics Canada, 25 February 2013) at 9.
[6] Statistics Canada, *Family Violence in Canada: A Statistical Profile 2010*, by Maire Sinha, Catalogue No 85-002-(Ottawa: Statistics Canada, 22 May 2012) at 5.
[7] J Du Mont, D Parnis, & T Forte, "Judicial Sentencing in Canadian Intimate Partner Sexual Assault Cases" (2006) 25:1 Med & L 139 at 139 [Du Mont, Parnis & Forte, "Judicial Sentencing in IPV Sexual Assault Cases"].
[8] *R v Chirimar*, 2007 ONCJ 385 at para 1.

homicide,[9] very little legal academic work has been done on sentencing for MIPVW in Canada.[10] Historically, MIPVW has been seen as less serious than violence against strangers and characterized as something that is private within the family and therefore not the legitimate source of public, or judicial, concern.[11] Historically, courts prioritized keeping relationships together even where violence was involved and characterized one of the primary goals of sentencing as "to facilitate, and certainly not impede, the reconciliation of the spouses."[12] If a woman was unable to leave the relationship, or chose not to, or if she expressed forgiveness towards her abuser, this would be a mitigating factor in sentencing.[13] Judges deliberately imposed lenient sentences in order to minimize the impact of the violence on the "sanctity" of the family.[14] Very little concern was shown in these cases for the safety of the woman involved. The trivialization of MIPVW is clearly demonstrated in *R v Acorn* where the trial judge, as a condition of a suspended sentence, ordered that the offender buy his wife a gift worth at least $50, a condition that was upheld by the PEI Court of Appeal.[15]

By the late 1980s, however, some appellate courts had begun to recognize that violence against women was even more serious when committed by an intimate partner precisely because it often takes place in the home, away from public scrutiny, and because of the profound breach of trust involved.[16] This was largely in response to concerns raised by feminists regarding the failure of the criminal justice system to respond to MIPVW. In 1992, for example, in a decision that is still frequently cited today, the Alberta Court of Appeal made the following statement about sentencing for intimate partner violence against women:

> This court's experience is that the phenomenon of repeated beatings of a wife by a husband is a serious problem in our society… when such cases do result in prosecution and conviction, then the courts do have an opportunity, by their sentencing policy, to denounce wife-beating in clear terms and to attempt to deter

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[9] See e.g. Isabel Grant, "Intimate Femicide: A Study of Sentencing Trends for Men who Kill Their Intimate Partners," (2010) 47 Alta L Rev 779 [Grant, "Intimate Femicide"]; Myrna Dawson, "Punishing Femicide: Criminal Justice Responses to the Killing of Women Over Four Decades" (2016) 64 Current Sociology 996.

[10] Diane Crocker does examine sentencing in her article "Regulating Intimacy: Judicial Discourse in Cases of Wife Assault (1970 to 2000)" (2005) 11:2 Violence Against Women 197 [Crocker, "Regulating Intimacy"]. See also Beaupré, *IPV Cases in Adult Criminal Courts*, *supra* note 2. Some work has also been done on sentencing for intimate partner sexual assault, see e.g. Du Mont, Parnis & Forte, "Judicial Sentencing in IPV Sexual Assault Cases," *supra* note 7.

[11] See e.g. *R v Deschamps*, 1989 CarswellOnt 2922 at para 24 (DC) where a conditional discharge was given in part because the offence was committed privately in front of the family only.

[12] *R v Chaisson*, (1975), 11 NSR (2d) 170 at 172. For a discussion of these early cases see Timothy A. O. Endicott, "The Criminality of Wife Assault" (1987) 45 UT Fac L Rev 355 [Endicott, "Wife Assault"].

[13] *R v Butler*, (1984) 34 Sask R 292.

[14] Endicott, "Wife Assault," *supra* note 12 cites *R v Goose*, [1984] NWTR 56 (Terr Ct) where the trial judge, after stating that marriage is not a license to beat up one's wife, imposes a fine of $1000 for doing so because he was concerned that a lengthy term of imprisonment would negatively impact the accused's marriage and that he might blame his wife for the imprisonment.

[15] [1986] PEIJ no 30 (CA).

[16] See e.g. *R v Stanley*, [1986] BCJ No 965 (CA); *R v Julian*, [1990] BCJ No 2775 (CA); *R v Inwood*, 1989 CarswellOnt 79 (CA).

> its recurrence on the part of the accused man and its occurrence on the part of other men…. When a man assaults his wife or other female partner, his violence toward her can be accurately characterized as a breach of the position of trust which he occupies. It is an aggravating factor. Men who assault their wives are abusing the power and control which they so often have over the women with whom they live. The vulnerability of many such women is increased by the financial and emotional situation in which they find themselves, which makes it difficult for them to escape.[17]

While this view was emerging in some appellate courts, it had not yet permeated all trial and appellate courts across the country. The enactment of s.718.2(a)(ii) in 1996 represented a landmark recognition by Parliament that the intimate relationship involved in IPV was an aggravating factor in sentencing.[18] Only a small number of aggravating factors were made mandatory by the *Criminal Code*, thus giving particular significance to the inclusion of the spousal relationship. No mitigating factors have ever been introduced in any Bill before Parliament although this legislation clearly envisions both aggravating and mitigating factors. When the subsection was introduced, it read:

> Other sentencing principles — A court that imposes a sentence shall also take into consideration the following principles:
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
>
> …
>
> (ii) evidence that the offender, in committing the offence, abused the offender's spouse or child …

This provision was a component of a wider suite of legislation, which was introduced following public consultation with women's organizations on issues surrounding violence against women, including discussions regarding family violence.[19]

In 2000, the word "spouse" in s.718.2(a)(ii) was changed to "spouse or common law partner".[20] This amendment was part of wider omnibus legislation designed to end discrimination against same-sex partners.[21] Common-law partner is defined in s. 2 of the *Criminal Code* as a person "who is cohabiting with the individual in a conjugal relationship, having so cohabited for a

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[17] *R v Brown*; *R v Highway*; *R v Umpherville*, 1992 ABCA 132 at paras 19, 21 [*Brown*].
[18] Section 718.2(a)(ii) of the *Criminal Code* was enacted in 1995 under *An Act to Amend the Criminal Code (Sentencing), etc.*, SC 1995, c 22, s 6. This legislation was given Royal Assent on July 13, 1995 and came into force on September 3, 1996.
[19] Canada, Parliament, *House of Commons Debate*, 35th Parl, 1st Sess (22 February 1995), http://www.lipad.ca/full/1995/02/22/11/.
[20] Modernization of Benefits and Obligations Act, SC 2000, c 12.
[21] Canada, Parliament, *House of Commons Debate*, 36th Parl, 2nd Sess (25 February 2000), http://www.lipad.ca/full/2000/02/15/10/#4142566.

period of at least one year." Section 718.2(a)(ii) was most recently modified in 2005.[22] The word "child" was removed, and a new subsection (s.718.2(a)(ii.1)) was added dealing exclusively with the abuse of a person under the age of eighteen years. This change separated spousal abuse and abuse of a child into two separate statutory aggravating factors.

The current Minister of Justice has been mandated to implement the platform commitments to toughen criminal laws dealing with domestic assault and sexual assault in order to keep survivors and children safe. One of the platform commitments provides:

> We will amend the *Criminal Code* to reverse onus [sic] on bail for those with previous convictions of intimate partner violence. We will also specify that intimate partner violence be considered an aggravating factor at sentencing, and increase the maximum sentence for repeat offenders.[23]

1.2 Methodology

This study reviews the use of the aggravating factor in s.718.2(a)(ii) since its enactment in 1996 with a view to determining its impact on sentencing. Sentencing is a complex and individualized process which does not easily lend itself to quantitative analysis. In many respects, sentencing is more of an art than a science.[24] While one can study outcomes in sentencing, it is particularly challenging to analyze the role of aggravating and mitigating factors in quantitative terms. The Canadian Centre for Justice Statistics does not collect data on aggravating and mitigating factors through its Integrated Criminal Court Survey. There is wide variation both in judicial approaches and outcomes. Thus, in studying the impact of s.718.2(a)(ii), a qualitative case law review is a better way to reveal patterns and problems with sentencing cases over a period of time. In reviewing the case law, one hopes to reveal the extent to which s.718.2(a)(ii) is being relied upon as an aggravating factor, whether it is having a meaningful impact on actual sentencing outcomes and whether it has led courts to take a more nuanced and gendered approach to sentencing for MIPVW.

A case law study inevitably has limitations. Not all sentencing decisions result in written reasons and not all written reasons are published. One is thus limited by the available case law. Judges are also inconsistent in their reliance on s.718.2(a)(ii). Some cases specifically cite the section as an aggravating factor and use it to conclude that, in the context of IPV, deterrence and denunciation must be the primary objectives in sentencing. Other cases may reach the same conclusion about deterrence and denunciation but without any mention of the specific aggravating factor set out in the *Criminal Code*. It is also difficult to determine exactly how much weight is given to any particular aggravating factor in crafting the ultimate sentence

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[22] An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons and the Canada Evidence Act), SC 2005, c 32.

[23] Liberal Party of Canada, "Preventing Domestic Violence and Sexual Assault", online: <https://www.liberal.ca/realchange/preventing-domestic-violence-and-sexual-assault/>. See also Prime Minister of Canada, *Minister of Justice and Attorney General of Canada Mandate Letter* (Ottawa: Prime Minister of Canada, 2015) < http://pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter>.

[24] See e.g. *R v Miller*, 2015 BCSC 1052 at para 19 citing *R v Carillo*, 2015 BCCA 192 at para 31.

because the weighing of aggravating factors is done in a holistic way rather than factor by factor. Judges rarely indicate in their reasons, for example, what the sentence would have been if the crime had taken place outside of the intimate partner context.[25] Rather, sentencing brings together a wide range of circumstances regarding the offence and the offender which makes each case unique. It should also be kept in mind that sentencing decisions are a narrow lens through which to examine judicial approaches to MIVPW because only cases where the offender has pleaded guilty or been convicted at trial will be included. Problematic acquittals, or the dropping of charges, are not visible in this sample nor are cases that have been deemed unfounded by police. In other words, this study only looks at cases where prosecutions for IPV have been successful.

2.0 The Sample

The study relies on a sample of cases drawn from Westlaw, QuickLaw and CanLII. The sample includes:

(i) All 82 appellate decisions that mention s.718.2(a)(ii) from 1996-2016. This group includes cases that do not specifically cite the section but mention that there is a statutory aggravating factor in the *Criminal Code*.[26]
(ii) Seventy-one trial cases that mention s.718.2(a)(ii) which represent all published decisions from the years 1998, 2007 and 2015.
(iii) Several additional trial level decisions from years outside of the sample which shed light on particular interpretive issues relevant to s.718.2(a)(ii);
(iv) One hundred and twenty-two additional appellate cases which do not refer to s.718.2(a)(ii) where one would have expected the section to be cited will be briefly discussed as a point of comparison for the cases in (i).[27]

Appellate cases are the best way to identify trends because these cases provide guidance for lower courts. Reviewing all the trial cases over 20 years would have led to an unmanageable number of cases. Therefore, a sample of trial cases was chosen across the time span during which s.718.2(a)(ii) has been in force in order to determine whether the approach to these cases has

[25] The Alberta Court of Appeal has suggested that the first step in sentencing for IPV is to ask what sentence would have been given if the victim were not an intimate partner although courts do not appear to be following this rigorously. See *Brown*, *supra* note 17 at para 20. The Alberta Court of Appeal however has subsequently adopted this approach, see e.g. *R v Coulthard*, 2005 ABCA 413 at para 8 [*Coulthard*].
[26] This number includes four cases that refer to s.718.2(a)(ii) but hold that it does not apply retroactively to the crime in question.
[27] It is difficult to define the contours of cases that "should have cited s.718.2(a)(ii)". This group of cases includes those where the (former) intimate partner is a victim of the offence and cases where the former intimate partner and someone else are victims of the offences. Cases where the only victim was someone other than the intimate partner were excluded from this group except where the victim was the new intimate partner of the woman in question. Cases where the only victim was the (former) intimate partner's child or parents were excluded even where the crime was motivated by anger against the (former) intimate partner. See for example *R v G(BJ)*, 2013 ABCA 260 where the accused assaulted his 11 month old son with a butcher knife almost killing him because he was angry at his estranged common-law partner.

changed over time. The focus of the study is on the 153 cases described in (i) and (ii) above and the findings presented below reflect those cases. Decisions from all provinces and territories are included. The crime of murder was excluded because the only discretion a trial judge has in sentencing for murder is in setting the parole ineligibility period for second degree murder[28] and because other work has examined the application of s.718.2(a)(ii) in sentencing for murder.[29] In an attempt to identify why courts sometimes rely on s.718.2(a)(ii) and sometimes do not, 122 appellate decisions that did not cite s.718.2(a)(ii) were reviewed over the same timeframe (1996-2016). These cases will be referred to where potential differences arise between the two samples.

The majority of appeals in this study were brought by the defence which is to be expected given that Crown appeals from sentence are less common than defence appeals. However, almost 40% of the appeals were brought by the Crown. Assuming that the Crown only appeals the most egregious sentences, one might expect that these cases will reveal problematic analyses of sentencing at the trial level.

Table 1: Appeal Outcomes: Crown and Defence Appeals

	Successful (% of total appeals by that party)	**Unsuccessful**	**Total (% of total appeals)**
Crown appeal	24 (77%)	7 (23%)	31 (38%)
Defence appeal	11(23%)	37 (77%)	48 (59%)
Both sides appeal			3 (4%)*
Total			**82 (100%)**

*In one of these cases the sentence was increased on appeal, in one it was reduced and in the third it was upheld.

Crown appeals of sentence in these cases had a much higher success rate (77%) than those brought by the defence (23%). Looking at all appellate cases regardless of who initiated the appeal, the Crown was successful in 62 cases (76%).[30] This is probably a slightly low estimate given that some successful defence appeals only involved a change in the amount of credit given for pretrial custody after the decision in *R v Summers*.[31] Despite the deferential standard of review set out by the Supreme Court of Canada in *R v Shropshire*,[32] in 43% of all cases the sentence imposed by the trial judge was altered. It is difficult to draw firm conclusions about these findings although the rate of successful Crown appeals raises the possibility of overly lenient sentences being corrected on appeal. This leaves an important role for s.718.2(a)(ii) as a vehicle through which an appellate court can alter an overly lenient sentence.

[28] *Criminal Code*, *supra* note 1 at ss 745, 745.4.
[29] See Grant, "Intimate Femicide," *supra* note 9.
[30] This number includes one of the three cases where both sides appealed.
[31] 2014 SCC 26.
[32] [1995] 4 SCR 227 at para 48.

2.1 Offence and Offender Characteristics

While this is not a quantitative study, a number of observations about the sample can be made. This section describes the demographics of the sample under study but should not be taken as reflective of the demographics of IPV in Canada. Cases citing the section included those involving legally married spouses, common-law spouses and dating relationships as well as couples who were formerly in one of those relationships. There were also a number of cases involving married spouses where the couple had separated but were still legally married. Table 2 illustrates the relationships found in the sample.

Table 2: Relationship between Offender and Victim in Cases Citing s.718.2(a)(ii)[33]

	Current	Former	Total
Married	36 (24%)	10 (7%)	46 (31%)
Married but separated	9 (6%)	0 (0%)	9 (6%)
Common-law	55 (36%)	21 (14%)	76 (50%)
Dating	16 (10%)	6 (4%)	22 (14%)
Total	**116 (76%)**	**37 (25%)**	**153 (101%)***

*In five cases the nature of the relationship could not be determined. The total number of intimate partner victims was 158. In nine of these cases, an offender also committed a crime against the intimate partner's new partner.

It was anticipated that the sample of cases not citing s.718.2(a)(ii) might have a higher percentage of dating non-cohabiting relationships because the section may not cover these relationships. However, the sample does not support this conclusion. In fact, the relationship breakdown was surprisingly similar in the two groups of cases.

Table 3: Relationship between Offender and Victim In Cases Not Citing s.718.2(a)(ii)

	Current	Former	Total
Married	24 (20%)	1 (1%)	25 (20%)
Married but separated	5 (4%)		5 (4%)
Common-law	48 (39%)	24 (19%)	72 (59%)
Dating	10 (8%)	5 (4%)	15 (12%)
Could not be determined			5 (4%)
Total			**122 (100%)**

There is no overlap between the appellate and trial decisions. The total number of cases and offenders is 153 whereas the total number of intimate partner victims is 158 because four cases

[33] The General Social Survey, 2014 found "those living in common-law relationships were more likely to have been victims of spousal violence during the preceding 12 months than those who were legally married (2% versus 1%, respectively)." See Statistics Canada, *Family Violence in Canada: A Statistical Profile 2014*, by Marta Burczycka, Catalogue No 85-002-x (Ottawa: Statistics Canada, 22 May 2012) at 15 [Burczycka, *Family Violence in Canada 2014*]. The study speculates that as the mean age of people in common-law relationships increases, we may see a decrease in the prevalence of IPV in common-law relationships because IPV decreases with age.

involved an offender convicted of offences against more than one intimate partner. In a number of cases, there were also additional victims beyond the (former) intimate partner.

Table 4: Victims in Addition to the (Former) Spouse or Common-Law Partner			
	Trial decisions (% of 71 cases)	**Appellate Decisions (% of 82 cases)**	**Appellate Decisions Not Citing the Section (% of 122 cases)**
Children of victim	7 (10%)	8 (10%)	7 (6%)
Extended family and friends	4 (6%)	1 (1%)	10 (8%)
New partner of victim	3 (4%)	5 (6%)	6 (5%)
Additional (former) intimate partner of accused	2 (3%)	3 (4%)	3 (2%)
Peace officers/court officials	1 (1%)	2 (2%)	0
Strangers	2 (3%)	2 (2%)	2 (2%)
Former partner of victim	0	0	2 (2%)
Unclear	0	0	1 (1%)
Total	**19 (27%)**	**21 (26%)***	**31 (25%)****

*Percentages do not add up due to rounding.

**This total reflects the number of other victims. There were actually only 29 cases involving other victims but two cases involved more than one other victim.

The vast majority of the 153 offenders at both the trial and appeal levels were male, with a total of 150 men (98%) and three women offenders (2%).[34] One of the 150 cases involving male offenders involved a same-sex couple where a man was charged with criminally harassing his former male partner.[35] Thus in total, 149 or approximately 97% of the cases in this study involved male violence against (former) female intimate partners.[36] In one of the female offender cases, the offender was charged with the manslaughter of her abusive spouse,[37] thus also implicating male violence against women. It is possible that judges are more likely to cite the section in cases involving male violence against women and thus one would expect more female offenders in the cases not citing the section. This was not borne out by the 122 cases that do not cite the section. One hundred and eighteen of these cases (97%) involved male offenders and

[34] For cases involving female offenders, see *R v Good*, 2012 YKCA 2 [*Good*]; *R c Zugravescu*, 2015 QCCA 914; and *R v Gladue*, [1999] 1 SCR 688 [*Gladue*].

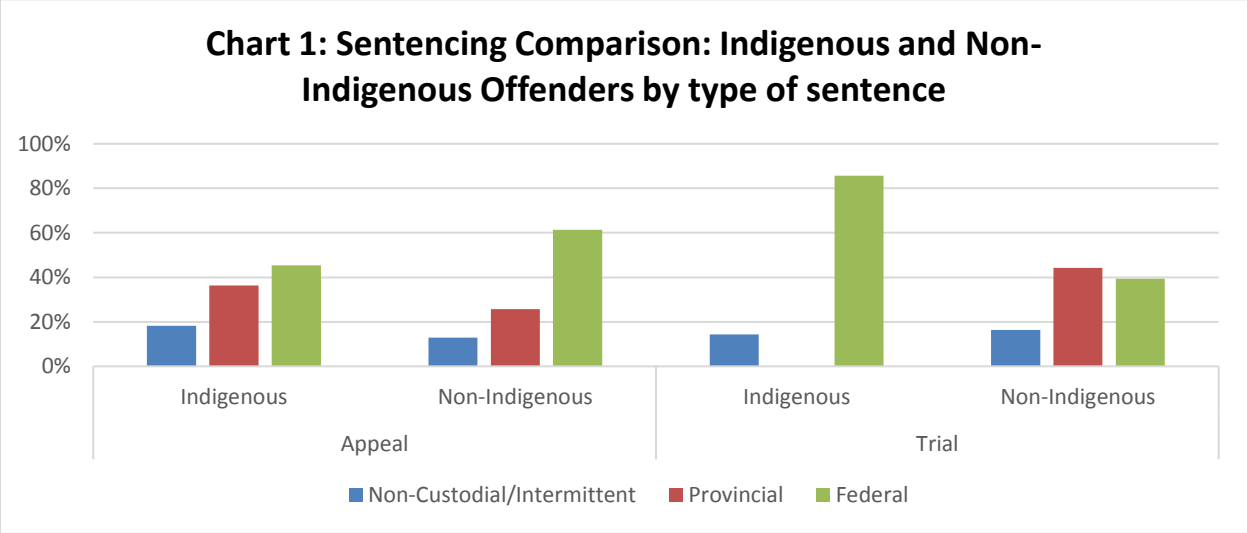
[35] *R v Wenc*, 2009 ABCA 328 [*Wenc*]. In *R v Woodford*, 2016 NBQB 72, an Indigenous woman was convicted of manslaughter for killing her female common-law partner and assaulting her partner's sister with a weapon. Section 718.2(a)(ii) was not cited although the Court did say, at para 20, that the intimate partner violence nature of the case was an aggravating factor.

[36] This is a higher number than found in a recent Juristat report of criminal cases where, in cases involving IPV, 85% of victims were female. See Beaupré, *IPV Cases in Adult Criminal Courts*, *supra* note 2 at 3. Cases involving male IPV may be more likely to result in convictions or more likely to result in written sentencing reasons or to be published.

[37] *Gladue*, *supra* note 34. While the Supreme Court of Canada's judgment cites all of s.718.2(a), there is no discussion of this statutory aggravating factor but rather a brief mention (at para 96) that "the offence involved domestic violence and a breach of the trust inherent in a spousal relationship." The British Columbia Court of Appeal does not cite s.718.2(a)(ii). See *R v Gladue*, 1997 CarswellBC 2244 (CA).

only four involved female offenders. There were no cases of same-sex violence in this 122 case sample suggesting that same-sex cases may be under-prosecuted. Thus the two groups of cases are similar in terms of gender and relationships.
Eighteen of the offenders in the sample of cases citing the section, or just under 12%, were Indigenous, including two of the three female offenders. A number of the victims appear to be Indigenous but this fact was not often mentioned explicitly. As will be discussed below, where the offender is Indigenous, s.718.2(a)(ii) may sometimes recede in significance. Thus, one might expect a higher number of cases involving Indigenous offenders in the cases not citing the section. There were 20 cases not citing the section involving Indigenous offenders or 16% as compared to the 12% found in the cases that did cite the section.

Chart 1 summarizes sentencing for Indigenous and non-Indigenous offenders in the primary sample. It is important to remember that we are dealing with small numbers of Indigenous offenders, with 11 Indigenous offenders in the appeal cases and seven in the trial cases, and percentages can be misleading when dealing with such small numbers. This table also does not account for the relative seriousness of the offences charged. It is thus important not to put too much weight on the percentages in the following table.



There were 51 first offenders (33%)[38] and 53 offenders (35%) who had records for domestic violence, including 32 offenders (21% of the total sample) for violence against the same victim.[39] The rest of the offenders had a record for unrelated offences. Even where the offender was a first

[38] See e.g. *R v Francisco*, 2005 MBCA 110; *R v Pudlat*, 2005 NUCA 03 [*Pudlat*]; *R v Morovati*, 2007 ONCJ 8 [*Morovati*].
[39] Some offenders had criminal records for other offences which is why these totals do not add up to 100%.

offender,[40] some cases involved abuse that took place over a significant period of time but had only recently come to police attention.[41]

In 55 cases or 36% of the sample, judges referred to the offender's consumption of alcohol in sentencing for MIPVW. Several of these cases also mentioned drugs, although alcohol was mentioned more often. In two of the three cases involving female offenders, judges also referred to the offender's intoxication. Judges also referred to the victim's intoxication in a smaller number of cases but this was much more difficult to quantify because this information was not always included in the judgments. In the cases that do not cite the section, intoxication was referred to in 38 cases (31%). Judges often assume a causal relationship between alcohol consumption and violence despite the fact that there is Canadian research suggesting that the relationship between alcohol and MIPVW may be mediated through other factors such as male attitudes towards women.[42]

In many of the cases in this sample, very serious violence was inflicted on the victim[43] and in eight cases the female victim's new partner was also attacked.[44] There were no cases in which female offenders committed offences against the victim's new partner although there was one such case in the group of cases that did not cite the section.[45] In 33 cases (22%), all involving

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[40] In *R v Cairns*, 2004 BCCA 219 the offender was convicted of manslaughter in the death of his wife. In the decision, the majority raises the sentence from 4 to 7 years without citing s.718.2(a)(ii) and instead relies on *R v Stone*, [1999] 2 SCR 290 as authority for treating the spousal relationship as aggravating. The dissenting judgment, which would have upheld the sentence, does however refer to s.718.2(a)(ii) extensively.

[41] In *R v Smith*, 1999 CarswellOnt 2214 (CA) [*Smith ONCA*], the offender at trial was granted a conditional sentence order (CSO) after being convicted on six counts of offences involving violence against his wife (at the time of the offence). This violence took place over a seven year period and included two counts of assault causing bodily harm. The trial judge described the offender as a first offender and the Court of Appeal, at para 2, stressed that it was important "to recognize that the charges relate to several events which occurred over a period of years". See also *R v T(B)*, 2007 BCPC 268 [*TB*] where the offender sexually assaulted his wife during diabetic seizures on 6 different occasions. The offender also sexually assaulted his daughter and son.

[42] Research by Holly Johnson found that "The acting-out of negative attitudes towards women, especially men's rights to degrade and devalue their female partners through name-calling and putdowns, was an especially important predictor and, once entered, reduced the effects of alcohol abuse to nonsignificance." Johnson uses these findings to argue that young men "look to alcohol and control and violence against women as resources to enhance masculine status." Holly Johnson, "Contrasting Views of the Role of Alcohol in Cases of Wife Assault" (2001) 16:1 Journal of Interpersonal Violence 54 at 68–69.

[43] In *R v GK*, 2007 CarswellOnt 546 (Sup Ct) [*GK*] for example, the offender beat his ex-partner severely and ran her over with a car, dragging her underneath for 80 feet causing life-threatening injuries and lifelong disability. In *R v MacLeod*, 1999 BCCA 420 [*MacLeod*] the offender beat and sexually assaulted his common-law partner. The victim sustained extensive, long-lasting injuries and the offender left her in a state of injury and pain for 6 hours before he called for help.

[44] *R v Khamphila*, 1998 CarswellOnt 3250 (Ct J (Gen Div)) [*Khamphila*]; *R v Morris*, 2004 BCCA 305 [*Morris*]; *R v Pakoo*, 2004 MBCA 157 [*Pakoo*]; *Morovati*, *supra* note 38; *R v Wood*, 2007 BCPC 257 [*Wood*]; *R v Wesslen*, 2015 ABCA 74 [*Wesslen*]; *R v MacDonald*, 2012 BCCA 155 [*MacDonald BCCA*]; *R v Cuthbert*, 2007 BCCA 585 [*Cuthbert*].

[45] *R c Parker*, 2014 NBCA 17 [*Parker*].

male offenders, the crimes took place in front of the children of either the victim or the couple.[46] Applications for dangerous offender and long-term offender designations were not common. A dangerous offender application was brought in only two cases and in both cases the court determined that a long term offender designation was more appropriate.[47] In an additional three cases, the Crown sought and obtained a long term offender designation.[48] No indeterminate sentences were imposed in this sample and none of the cases involved a life sentence of imprisonment although one appeal case reduced a life sentence imposed at trial to 13 years.[49] This finding is notable given that many of these cases involve significant violence over an extended period of time in the context of more than one intimate partner. One might speculate that presenting a risk to future intimate partners is viewed differently by Crown counsel than presenting a risk to as yet unidentified persons in the community, which may reflect the remnants of the view that sees MIPVW as presenting less of a threat than stranger violence.[50] However, the 122 appellate cases that do not cite the section have a number of dangerous offender designations as well as cases imposing indeterminate sentences. In the cases that do not cite the section, an indeterminate sentence was upheld on appeal in ten cases and in two cases the designation was upheld but remitted to the trial judge to determine what disposition should be imposed. A probable explanation for why s.718.2(a)(ii) is not cited in these cases is that the test for dangerous offender designations and indeterminate sentences are based on a risk assessment and the degree to which that risk can be managed in the community. The application of these tests does not involve the same balancing of aggravating and mitigating factors as in other sentencing cases.

Offenders in 43 cases (28%) were on conditions imposed by probation orders, no contact orders, and bail conditions at the time of the offence including 26 cases (17%) where the offender was on a no contact order with respect to the victim at the time of the offence. While there were 31 cases involving offenders charged with breach offences, many offenders on some form of no contact order at the time of the offence do not appear to have been charged with an offence in relation to that violation.[51] In several cases the offender, after being arrested for one offence, was released on conditions, and then proceeded to commit other offences against the victim.[52]

Consistent with other studies, assault-based offences are the most common charges found in the sample.[53] Many offenders were charged with multiple offences. Table 5 presents the frequency of offences charged in the sample:

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[46] See e.g. *R v Dhillon*, 2007 BCPC 92; *GK*, *supra* note 43.
[47] *R v O'Quinn*, 2015 CanLII 7376 (NL PC); *R v DD*, 2006 QCCA 1323 [*DD QC*].
[48] *R c Dutil*, 2015 QCCA 5554 [*Dutil*]; *Good*, *supra* note 34; *Turgeon c R*, 2016 QCCA 1797.
[49] *R c Roy*, 2010 QCCA 16 [*Roy*].
[50] See e.g. Crocker, "Regulating Intimacy," *supra* note 10 at 199.
[51] See e.g. *MacLeod*, *supra* note 43; *R v McCulloch*, 2001 BCCA 1966 [*McCulloch*]; *R v Knockwood*, 2009 NSCA 98 [*Knockwood*]; *R v Wishlow*, 2013 MBCA 34; *R v McLean*, 2014 PECA 10 [*McLean*]; *Khamphila*, *supra* note 44; *R v Moise*, 2015 MBQB 37 [*Moise*]. In some cases, the offender was violating the no contact order with the consent of the victim. See e.g. *MacLeod*, *supra* note 43; *McLean*; *Knockwood*; *R v Ramsay*, 2012 ABCA 257 [*Ramsay*].
[52] See e.g. *Ramsay*, *supra* note 51; *R v Allen*, 2015 BCPC 226; *R v Bell*, 2015 BCPC 235; *R v C(KS)*, 2015 BCPC 199; *McCulloch*, *supra* note 51; *Pudlat*, *supra* note 38; *R v Rush*, 2010 BCCA 293.
[53] See e.g. Crocker, "Regulating Intimacy," *supra* note 10 at Table 1 at 203.

Table 5: Offences Charged			
	Appeal Citing (% of 82 appellate cases)	**Trial (% of 71 trial cases)**	**Total (% of 153 cases)**
Assault 1 (simpliciter)	29 (35%)	32 (45%)	61 (40%)
Assault 2 (causing bodily harm, or with weapon)	27 (33%)	19 (27%)	46 (30%)
Assault 3 (Aggravated assault)	10 (12%)	8 (11%)	18 (12%)
Sexual Assault 1 (simpliciter)	13 (16%)	9 (13%)	22 (14%)
Sexual Assault 2 (sexual assault causing bodily harm, or with weapon)	3 (4%)	4 (6%)	7 (5%)
Sexual Assault 3 (aggravated sexual assault)	1 (1%)	1 (1%)	2 (1%)
Uttering threats	24 (29%)	25 (35%)	49 (32%)
Weapon related offence	24 (29%)	18 (25%)	42 (27%)
Breach of recognizance/court order	15 (18%)	16 (23%)	31 (20%)
Criminal Harassment	10 (12%)	4 (6%)	14 (9%)
Attempted Murder	8 (10%)	4 (6%)	12 (8%)
Forcible Confinement	6 (7%)	6 (8%)	12 (8%)
Manslaughter	8 (10%)	3 (4%)	11 (7%)
Break and Enter (including unlawfully in dwelling house)	7 (9%)	3 (4%)	10 (7%)

There were some differences between the two groups of cases with respect to the offence as charged but there was still considerable similarity. Table 6 compares the two groups of appellate decisions only:

Table 6: Offences Charged: A Comparison with Appellate Cases Not Citing s.718.2(a)(ii)		
	82 Appellate Cases Citing Section	**122 Appellate Cases Not Citing Section**
Assault	29 (35%)	55 (44%)
Assault with a weapon or assault causing bodily harm	27 (33%)	44 (35%)
Aggravated assault	10 (12%)	15 (12%)
Sexual assault*	13 (16%)	17 (14%)
Sexual assault with a weapon or causing bodily harm	3 (4%)	1 (1%)
Aggravated sexual assault	1 (1%)	2 (2%)
Uttering threats	24 (29%)	32 (26%)
Weapons-related offences	24 (29%)	9 (7%)
Breach of Recognizance/Court Order/Probation	15 (18%)	32 (26%)
Criminal Harassment	10 (12%)	14 (11%)
Attempted Murder	8 (10%)	6 (5%)
Manslaughter	8 (10%)	2 (2%)
Break and Enter or being unlawfully in a dwelling house with intent	7 (9%)	22 (18%)
Forcible confinement	6 (7%)	13 (11%)

The group of cases that do not cite the section had fewer manslaughters (many of which were initially murder charges), fewer weapons-related offences, and considerably more break and enters.

It is difficult to identify exactly why some cases cite s.718.2(a)(ii) and others do not. Many of the cases which do not cite the section are shorter judgments than those which do. There are a number of short decisions which allow or dismiss the appeal with very brief reasons, sometimes given orally from the bench. This would explain why the court is not engaging in a full analysis of aggravating and mitigating factors. There are two cases where the only victim is a new partner and, as will be discussed below, courts do not apply s.718.2(a)(ii) to cases where the intimate partner is not herself one of the victims.[54] There are 14 dangerous offender or long term offender cases in this group which do not analyze aggravating and mitigating factors in the usual way. These differences explain the absence of s.718.2(a)(ii) in many, but not all, of these cases.

2.2 Sentences Imposed

It is difficult to compare sentences because of variables like credit for pretrial custody (the calculation of which shifted throughout the period under study from 2:1 credit, to 1:1 and then to 1.5:1). Criteria for conditional sentence orders (CSO) also shifted throughout the time period under study which makes it difficult to compare earlier cases with later ones under a more constrained CSO regime. Nor do all judges impose sentences for multiple offences in the same way. Most judges who are sentencing an offender for multiple offences impose a sentence for each offence charged and then, where sentences are imposed consecutively, adjust accordingly using the principle of totality. Some judges, however, still sentence globally for all offences charged making sentences difficult to compare. The sentences that are presented below reflect the sentence imposed before pretrial custody has been taken into account in order to provide some consistency across the sample. This method is not without its problems in that, for example, it may suggest that an offender was given a penitentiary sentence when in fact that sentence was reduced to provincial time on the basis of credit for pretrial custody. In one case, for example, pretrial custody reduced a sentence of three years penitentiary time to a suspended sentence with probation.[55] The Court held that a term of three years was the appropriate sentence and imposed the suspended sentence presumably in order to justify a period of probation rather than release the offender without conditions.[56]

[54] See e.g *Parker*, *supra* note 45; *R v McCowan*, 2010 MBCA 45 [*McCowan*].
[55] *R c CP*, 2007 QCCQ 7975 [*CP*].
[56] In some cases difficult judgment calls had to be made about how to characterize the sentence. For example, in *Wenc*, *supra* note 35 the Court of Appeal held that an intermittent sentence was manifestly unfit and that a period of 12 months should have been imposed but ultimately denied the Crown leave to appeal from sentence because the offender had served his sentence. Because the intermittent sentence was technically upheld this has been classified as an intermittent sentence.

Table 7: Sentences Imposed			
	Trial decisions citing section N= 71	**Appellate cases citing the section N= 82**	**Appellate cases not citing the section N = 122**
Discharge (Absolute or conditional)	3 (4%)	0	2 (2%)
Suspended Sentence/probation	5 (7%)**	3 (4%)	4 (3%)
CSO	5 (7%)	5 (6%)	8 (7%)
Intermittent Sentence	1 (1%)	3 (4%)	6 (5%)
Provincial Time	2 (3%)	2 (2%)	16 (13%)
Provincial Time (with probation)	25 (35%)	20 (24%)	26 (21%)
Federal Time	28 (39%)	44 (53%)	46 (38%)
Federal Time + parole ineligibility		1 (1%)	
Federal Time + LTO	2 (3%)	3 (4%)	2 (2%)
Federal Time plus D.O. designation	0	0	2 (3%)*
Indeterminate sentence for D.O.	0	0	10 (7%)
Unclear from judgment		1 (1%)	
Total	**71**	**82**	**122**

*In both these cases the matter was remitted to the trial judge to determine whether an indeterminate sentence was appropriate.

**The offender in *R c CP*, 2007 QCCQ 7975 was initially sentenced to 36 months imprisonment, but he ultimately ended up with a suspended sentence when pre-trial custody was considered.

One must be cautious comparing groups of cases where one cannot adequately compare the seriousness of the offences charged nor the circumstances of the offenders. What is striking is that overall, there is a high rate of federal incarceration. The highest rate is found in appellate cases that do cite the section, 58% of which resulted in federal time. This is followed by appellate cases that did not cite the section (44%). The lowest rate of federal incarceration was found in trial judgments (42%). However, if one excludes the dangerous offender cases from the cases that did not cite the section, because these cases involve a different test, that percentage drops to 39% involving federal time thus suggesting either that cases not citing the section are less serious or that cases not citing the section are receiving less serious sentences. This could support an inference that s.718.2(a)(ii) is associated with more serious sentences although other explanations cannot be ruled out.

It is important to note that these results may well not reflect the actual rate of federal incarceration given by the courts. It is likely that serious cases are more likely to lead to appeals and more likely to lead to written reasons. It is also possible that prosecutions of serious charges are more likely to lead to convictions.

The study also examined whether appellate decisions have changed over time (Table 8).

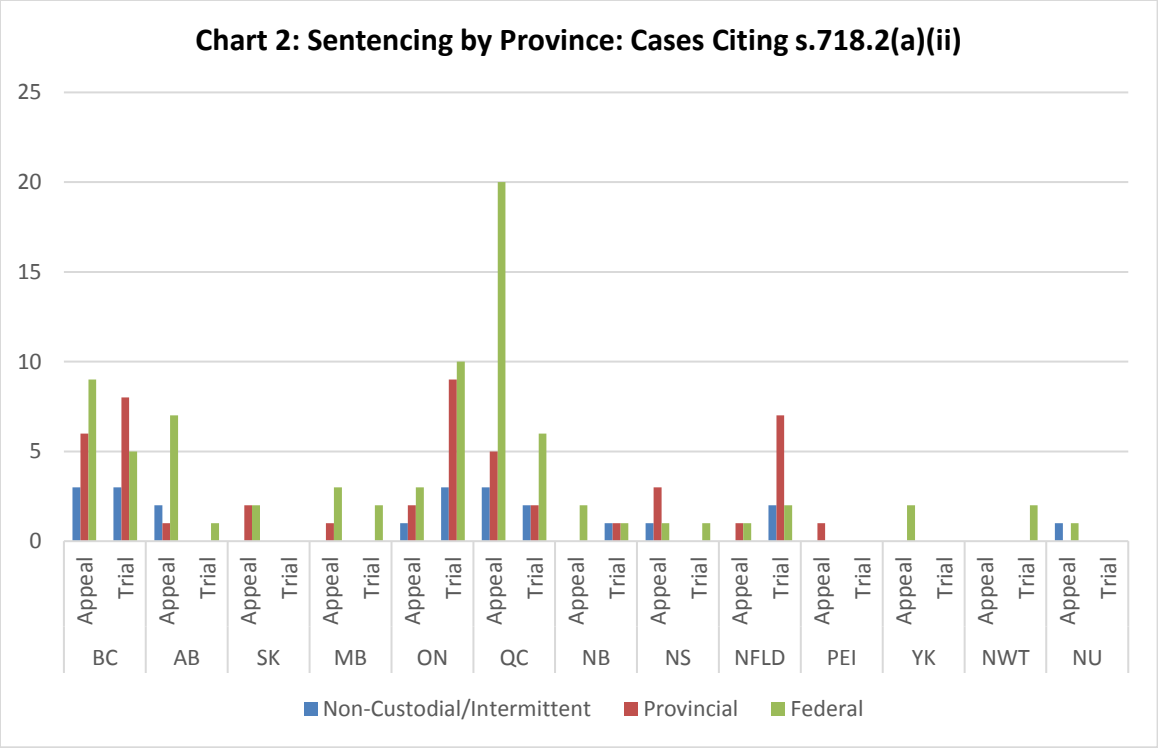
Table 8: Appellate Sentences in Cases That Cite s .718.2(a)(ii) Over Time				
	1996-2002 N= 14	**2003-2009 N= 32**	**2010-2016 N= 36**	**Total**
Discharge (Absolute or conditional)	0	0	0	0
Suspended Sentence with Probation	0	1 (3%)	2 (6%)	3 (4%)
CSO	2 (14%)	2 (6%)	1 (3%)	5 (6%)
Intermittent Sentence		1 (3%)	2 (6%)	3 (4%)
Provincial Time (without probation)	0	1 (3%)	1 (3%)	2 (2%)
Provincial Time (with probation)	3 (21%)	11 (34%)	6 (17%)	20 (24%)
Federal Time	8 (57%)	15 (47%)	22 (61%)	45 (55%)
Federal Time + LTO	1 (7%)	0	2 (6%)	3 (4%)
Indeterminate sentence				
Sentence unknown		1 (3%)		1 (1%)
Total	**14**	**32**	**36**	**82**

The rate of federal sentences imposed is highest in the most recent time period. The small number of cases in the earliest time period makes it difficult to compare 1998 with the other years. There is a considerable increase in federal sentences being imposed in the final time period along with a corresponding decrease in provincial sentences being imposed.

Table 9: Trial Sentences in Cases That Cite s .718.2(a)(ii) Over Time				
	1998 (% total decisions in year)	**2007**	**2015**	**Total (% of total cases)**
Discharge (Absolute or conditional)	0	2 (6%)	1 (3%)	3 (4%)
Suspended Sentence with Probation	0	3 (10%)	2 (6%)	5 (7%)
CSO	1 (25%)	1 (3%)	3 (8%)	5 (7%)
Intermittent Sentence	0	0	1 (3%)	1 (1%)
Provincial Time (without probation)	0	2 (6%)	0	2 (3%)
Provincial Time (with probation)	2 (50%)	10 (32%)	13 (36%)	25 (35%)
Federal Time	1 (25%)	13 (42%)	14 (39%)	28 (39%)
Federal Time + LTO	0	0	2 (6%)	2 (3%)
Indeterminate sentence	0	0	0	0
Sentence unknown	0	0	0	0
Total	**4**	**31**	**36**	**71**

The trial decisions also demonstrated an increase in federal sentencing from 2007 to 2015 but lower rates of federal incarceration overall as compared to the appellate decisions possibly because these were a more representative sample of prosecutions brought than were appellate cases.

The cases in the sample were not evenly distributed among provinces and territories. Chart 2 demonstrates the breakdown of cases and sentences given by various appellate and trial decisions across provinces. Perhaps the most notable finding is the number of trial decisions from Newfoundland given its relative size.



There were only three intermittent sentences in the appeal cases and one in the trial cases.

3.0 Review Of Section 718.2(a)(ii) Case Law

There are a number of issues that could be addressed in this study and to a large extent the content of the case law drove the topics covered. The study begins with an analysis of three interpretive questions regarding the scope and application of s.718.2(a)(ii). The study then examines the intersection of s.718.2(a)(ii) with s.718.2(e), much of which focuses on whether a non-custodial sentence is appropriate for an Indigenous offender in circumstances where it might not be for another offender. The study then considers the judicial approach to non-custodial sentences for non-Indigenous offenders. Sentencing for sexual assault is specifically addressed because there are some indications in the appellate case law that sexual assault within an intimate relationship is still treated as less serious than other sexual assaults. Finally, the study briefly examines the question of whether break and enter offences, for the purpose of attacking a (former) spouse or partner, should be sentenced as home invasions.

3.1 To Whom Does the Section Apply

Three interpretive questions arise over the applicability of s.718.2(a)(ii).

(i) Whether the section applies to former spouses and former common-law partners;
(ii) Whether the section applies to non-cohabitating intimate partners such as those in a dating relationship; and
(iii) Whether the section applies to third party victims such as new partners of a former spouse/common-law partner of the offender.

Given that these are legal interpretive questions, the focus will be on appellate decisions with trial judgments referred to where they shed light on these questions. For these interpretive questions, trial judgments outside of the sample will also be referenced where they shed light on these questions.

3.1.1 Former Intimate Partners

The definition of common-law partner in the *Criminal Code* is relatively narrow, applying only to cohabiting couples who have lived together for at least one year. The word "spouse" is not defined in the *Code*. Section 718.2(a)(ii) does not mention former spouses. However, we know that women are at particular risk of violence when they attempt to extricate themselves from intimate relationships.[57] A statutory aggravating factor attempting to deal with MIPVW must apply in the context of former intimate partners in order to respond to this reality. Overall, the present study suggests that courts are either applying s.718.2(a)(ii) to former spouses or applying an equivalent common law aggravating factor. In some cases it is not entirely clear which of these two options is being applied but there is no question that judges recognize the very serious danger women face when they leave relationships. Legislative amendment to clarify that s.718.2(a)(ii) applies to former spouses and common-law partners is recommended.

Many cases apply s.718.2(a)(ii) to former spouses without any explicit consideration of whether the section covers former partners; rather it is simply assumed.[58] For example, in *R v OFB*[59] the Alberta Court of Appeal held that the trial judge had erred by failing to give adequate weight to the aggravating factor that "the complainant was a former domestic partner with ongoing dependency upon the offender (s.718.2(a)(ii) of the *Criminal Code*)".[60] In *R v Lausberg*[61] the offender attacked a former common-law partner causing her bodily harm. The court criticized the trial judge for failing to refer to both s.718.2(a)(ii) and s.718.2(a)(iii) which deals with breaches of trust. The Court indicated that "sentences should reflect the need to deter violence during the period following separation or termination of a relationship."[62] The BC Court of Appeal also applied the section in *R v MacDonald*[63] where the offender broke into the home of his former spouse and her new partner. The Court assumed, without discussion, that the section applied and noted that it was an aggravating factor.

There are a number of cases where this issue is discussed explicitly although sometimes it is not entirely clear whether the section is being applied or whether the same principle is being applied as a common law aggravating factor. Overall, one is left with the impression that courts are not rigorous about making this distinction because the result is the same. Judges talk about a former spouse being similar or analogous to the relationship in s.718.2(a)(ii). For example, in *R* v *Pakoo*,[64] the offender had separated from his common-law spouse at the time he broke into her

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[57] Burczycka, Family Violence in Canada 2014, supra note 33.
[58] See e.g. *Khamphila*, *supra* note 44; *Wood*, *supra* note 44; *Good*, *supra* note 34.
[59] 2006 ABCA 207.
[60] *Ibid* at para 11.
[61] 2013 ABCA 72.
[62] *Ibid* at para 24 citing *R v Lee*, 2004 ABCA 46 [*Lee*].
[63] *MacDonald BCCA*, *supra* note 44.
[64] *Supra* note 44.

home and attacked her and her new partner. On the issue of whether s.718.2(a)(ii) applied, the Manitoba Court of Appeal skirted the issue by finding a common law aggravating factor:

> Although, as I have said, there was clearly a domestic violence aspect to what occurred, it may be that the deeming provision of s.718.2(a)(ii) of the *Code* has no application, since at the time of the offences, Ms. Bruyere and the offender were not cohabitating (see the definition of "common law partner" in s.2 of the *Code* ("a person who is cohabiting with the individual" [emphasis added]). This question need not be resolved, because in this case I am satisfied that the attack on his former common-law partner, which in my view was "domestic violence" as commonly understood, should be regarded as an aggravating factor, and I would so regard it.[65]

In *R* v *Cuthbert*,[66] the offender was convicted of the attempted murder of his former wife and discharging a firearm with intent to wound her new common-law husband. Again the BC Court of Appeal is somewhat ambiguous about whether the section applies directly or whether some analogous common law aggravating factor applies. The Court of Appeal summarized this issue as follows:

> The judge characterized these offences as abuse of a former spouse, holding that this was an aggravating factor ***similar*** to that codified in s.718.2(a)(ii). The primary sentencing principles to be applied in cases of spousal violence are denunciation and deterrence.[67]

Perhaps the most often cited authority on this question comes from the Quebec Court of Appeal in *R* c *Cook*,[68] where the offender was charged with first degree murder and ultimately convicted of manslaughter for killing his former common-law partner with whom he was still having an on-again off-again relationship. Again, there is some ambiguity about whether the section does apply to former partners although it is very clear that the common law would fill any gap left by s.718.2(a)(ii):

> Mr. Cook is correct to point out that Mme. Frenière was not his common-law partner in the strict sense of the definition in section 2 *Cr. C.*, which provides that for individuals to be so considered, they must be actually cohabiting in a conjugal relationship for a period of at least one year. Whatever the nature and duration of their cohabitation may have been, they were not cohabitating when Mr. Cook took the life of Mme. Frenière.
>
> That being said, the enumeration of factors in subsection 718.2 *Cr. C.* is not exhaustive, as Mr. Cook concedes. It would be incongruous to exclude the abuse of former spouses or common-law partners as an aggravating factor when such persons are just as susceptible, if not more susceptible, to being abused as those

[65] *Ibid* at para 47.
[66] *Supra* note 44.
[67] *Ibid* at para 57.
[68] 2009 QCCA 2423 [*Cook*], leave to appeal to SCC refused, [2010] SCCA No 112 (SCC).

who fall within the four corners of the definition. Such an approach coincides with the view of Prof. Allan Manson, who has written:

> While there is ample support for the view that subsections (i)-(iii) (of section 718.2 *Cr. C.*) were recognized by the common law before statutory entrenchment, their inclusion in the *Code* serves to alert all participants to the aggravating role which these factors play. Their inclusion may give rise to some interpretation issues and it is relevant to note that these three were enacted as a package with a unifying theme – the importance of recognizing power imbalances as aggravating contexts for sentencing. In other words, the gravity of an offence is increased when it manifests an abuse of power against a vulnerable individual, or is motivated by a wrongful assertion of power.… For example, the aggravating nature of offences against spouses goes beyond an intention to deter domestic violence. It would continue after separation and perhaps even after divorce so long as there was a continuing relationship that reflected the underlying concern about an imbalance of power.[69]

Cook has been cited for the principle that s.718.2(a)(ii) does apply to former spouses.[70] In *Dyck*,[71] for example, the Court applied s.718.2(a)(ii) to a former girlfriend on the basis of *Cook*. However, it is not entirely clear that *Cook* is applying the section but rather saying that it does not matter whether the section applies because it is either a statutory aggravating factor or a common law aggravating factor. In this respect, it is notable that the Court in *Cook* relies on a judgment of Justice Arbour in *R v Denkers*,[72] a pre-s.718.2(a)(ii) case in the Ontario Court of Appeal, where she addressed the issue of assaults against former common-law partners:

> The determination of what is a fit sentence in this case must be made in the context of the circumstances outlined above. This victim, and others like her, are entitled to break off romantic relationships. When they do so they are entitled to live their lives normally and safely. They are entitled to live their lives free of harassment by and fear of their former lovers. The law must do what it can to protect persons in those circumstances. In this case its order that the appellant *not* have contact with the victim failed to provide that protection.
>
> It follows that the principles of general and specific deterrence must be the over-riding considerations in the determination of a fit sentence in this case. Those principles demand a very heavy sentence to act as a general deterrent to other persons who cannot abide their rejection by a person whom they love.[73]

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[69] *Ibid* at para 76 citing Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001), at 149, emphasis in original.
[70] See e.g. *R c Rancourt*, 2016 QCCQ 9169; *R c Ramia*, 2016 QCCQ 2423; *R c P(J)*, 2014 QCCQ 6098; *R c Gravel*, 2014 QCCQ 10611; *R c D(N)*, 2011 QCCS 4945; *R v Dyck*, 2014 SKCA 93 [*Dyck*]; *R v Glennie*, 2010 SKPC 22.
[71] *Supra* note 70.
[72] [1994] OJ No. 660 (CA) [*Denkers*].
[73] *Cook*, *supra* note 68 at para 80 citing *Denkers*, *supra* note 72 at paras 15–16

Denkers is routinely cited by Quebec courts in support of applying s.718.2(a)(ii) to former spouses/partners even though *Denkers* was a pre-s.718.2(a)(ii) case.[74] Thus it would appear that cases are either applying the section to former spouses/common-law partners or at least treating that fact as an aggravating factor at common law, suggesting that there is little difference between the two.

3.1.2 Intimate Partners Who Are Not Cohabitating

The second issue that arises in the context of the applicability of s.718.2(a)(ii) is whether the section applies to intimate partners who are not cohabitating. There is more uncertainty with respect to this issue, with Newfoundland courts holding explicitly that the section does not apply.

The Alberta Court of Appeal has clearly taken the position that this provision extends to non-cohabitating intimate partners. Interestingly, this conclusion is based on pre-s.718.2(a)(ii) case law dealing with what crimes are included within domestic violence sentencing guidelines. In *R v Evans*,[75] a pre-s.718.2(a)(ii) case, the sentencing judge had refused to label a case as domestic violence where the offender had assaulted his then partner with whom he had lived for just a few months. The Court of Appeal disagreed:

> We have concerns about the findings of the learned Trial Judge that the guidelines respecting domestic violence cases do not apply in this case because there was insufficient indication of a continuation of control within the relationship and may have decided otherwise were we dealing with this matter at first instance. However, in this case, we will not attempt to further define what constitutes a domestic violence case. We do have regard to the fact that the period following separation is often the most dangerous for the abused partner. Often, as here, this period is characterized by a reluctance on the part of the abuser to give up control over the person he has abused. Whether or not this period is properly characterized by breach of trust or by the continuation of control or attempted control, sentences must reflect the need to deter violence during the period following separation for so long as the danger continues.[76]

In *R v Lee*,[77] the offender assaulted a former girlfriend. There was no reference to s.718.2(a)(ii) but instead the Alberta Court of Appeal relied on *Evans* to stress the need to deter violence following the termination of a relationship. In *R v Coulthard*,[78] the Alberta Court of Appeal simply took for granted that s.718.2(a)(ii) applied to a dating relationship. The offender had entered into his ex-girlfriend's home and committed assault causing bodily harm against her. The

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[74] *CP*, *supra* note 55; *R c Lacasse*, 2015 QCCQ 1367; *Dutil*, *supra* note 48; *R c Bossé*, 2015 QCCQ 6652 [*Bossé*]; *Tiberghien c R*, 2008 QCCA 2178; *Roy*, *supra* note 49; *R c Flageol*, 2008 QCCA 732; *Cook*, *supra* note 68; *Berthelet c R*, 2011 QCCA 1811.
[75] (1997) 196 AR 207 (CA) [*Evans*].
[76] *Ibid* at para 12.
[77] *Supra* note 62.
[78] *Supra* note 25.

Court of Appeal held that the trial judge erred in imposing a CSO in part because he failed to review the factors in s.718.2(a) to (e) "which deems it aggravated if an offender abused his spouse or common-law partner or abused a position of trust."[79] The Court went on to hold that "where denunciation and general deterrence are said to be paramount, these factors cannot be overtaken by an offender's individual circumstances or the need for rehabilitation."[80] Finally, in *R v Wenc*,[81] the Alberta Court of Appeal relied only on *Lee* and *Evans*, neither of which applied s.718.2(a)(ii), to conclude that s.718.2(a)(ii) applies in the context of other intimate relationships, in this case a (former) same-sex relationship. The offender had been convicted of criminal harassment against his former boyfriend. The trial judge had not applied s.718.2(a)(ii) in imposing a 90 day intermittent sentence. The Court of Appeal made clear that the section did apply despite the fact that they had not been common-law partners:

> In this case, the offender and the victim had been in a sexual relationship. At times, they may have lived together, although that is not entirely clear from the record. They were not spouses or common law partners. However, [s.718.2(a)(ii)] has been applied to cases of other intimate relationships, even after the relationships ended.[82]

The Court went on to hold that the trial judge did not err in failing to discuss s.718.2(a)(ii). Even though she did not specifically address the intimate relationship as an aggravating factor, she did mention that "many cases arise from the breakup of intimate relationships."[83]

However, even the Alberta Court of Appeal does not rely on the section consistently for non-spousal cases. For example in *R v Ramsay*,[84] the offender was convicted of sexual assault, uttering threats, forcible confinement, assault causing bodily harm, obstruction of justice and breach of recognizance, and had a long criminal record including offences against intimate partners. The victim of these offences was his girlfriend. The majority of the Court's judgment addressed whether the trial judge had adequately taken into account the FASD diagnosis of the offender in crafting a fit sentence. While the Court upheld the trial judge's focus on denunciation and deterrence, there was no mention of s.718.2(a)(ii) nor the intimate partner context of these offences.

The Saskatchewan Court of Appeal has also considered this issue. In *R v Woods*,[85] the Court applied the section to a couple that had been living together for a period of less than two months in what the court described as "a short lived and not particularly conventional" relationship.[86]

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[79] *Ibid* at para 8.
[80] *Ibid* at para 9.
[81] *Supra* note 35.
[82] *Ibid* at para 24. In making this conclusion, the Court relies on *Lee*, *supra* note 62 and *Evans*, *supra* note 75.
[83] *Ibid* at para 25. In *Wenc*, *supra* note 35 the Court holds that the intermittent sentence was not a fit sentence but denies the Crown's application for leave to appeal because the offender had served his sentence. A fit sentence would have been 12 months.
[84] *Supra* note 51.
[85] 2008 SKCA 40 [*Woods*].
[86] *Ibid* at para 38.

The Court applied s.718.2(a)(ii) as an aggravating factor without mentioning the fact that the definition of common-law spouse as set out in the *Criminal Code* was not met. The Saskatchewan Court of Appeal has also applied the section to a non-cohabitating intimate relationship without discussion of this issue in *R* v *Ochusthayoo*.[87] In *Dyck*, the Court specifically mentioned that s.718.2(a)(ii) has been held to apply to former spouses but applied the section to a former girlfriend without mention of the fact that she did not appear to meet the definition of spouse or common-law partner.[88]

There is one Quebec trial level case in the sample that explicitly discusses the applicability of s.718.2(a)(ii) to non-cohabitating intimate relationships.[89] In *Regis-Fode*, the offender was convicted of assault causing bodily harm, uttering death threats, and possession of cannabis. The victim with respect to the first two counts was the offender's girlfriend of a number of years. While the facts are not totally clear, it appears that the violent assault was motivated by jealousy. The sentencing judge held that s.718.2(a)(ii) should apply as an aggravating factor, even though the offender and his victim did not live together. Citing Professors Parent and Desrosiers' *Treatise on Sentencing*, the judge held that s.718.2(a)(ii) should not be limited to partners who are married or otherwise cohabit, but should also apply to relationships characterized by confidence and trust. The judge stated:

> Bien que l'accusé et la plaignante ne cohabitaient pas, ils étaient en relation depuis trois ans; comme le soulignent les professeurs Parent et Desrosiers dans leur Traité sur la peine sur l'interprétation à donner à l'article 718.2(a)(ii) du Code criminel, « L'article n'étant pas limité au mariage, le principe est également applicable aux personnes, qui sans cohabiter, entretiennent une relation de confiance et d'intimité.»[90]
>
> [Although the accused and the complainant did not cohabit, they were in a relationship for three years. As stated by Professors Parent and Desrosiers in their Traité sur la peine with respect to the interpretation of subparagraph 718.2(a)(ii) of the *Criminal Code*, [TRANSLATION] "Since the section is not limited to marriage, it is also applicable to people, who, without living together, have a relationship of trust and intimacy".]

There are a number of New Brunswick trial decisions discussing this issue which are not part of the sample reviewed in this study. In *R v Bernard*,[91] for example, the Court recognized that the section did not technically apply to the relationship between the offender and the victim because

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[87] 2004 SKCA 16.
[88] *Supra*, note 70. It is important to note that in some of these cases it is difficult to ascertain whether or not the couple lived together in a former relationship and, if so, how long they cohabited thus making it difficult in some cases to determine whether or not the victim was a former common-law partner or a former girlfriend. This is not clear from the appellate judgment in this case although the court uses the word girlfriend.
[89] *R c Regis-Fode*, 2015 QCCQ 8160 [*Regis-Fode*].
[90] *Ibid* at para 22.
[91] 2005 NBQB 254.

they had not been living together for more than a couple of months. However, the relationship was seen as aggravating at common law:

> In the present case, James Bernard and Suzanne Gagnon had been cohabiting for a couple of months only when the incident occurred. Therefore, the deeming section does not automatically apply. However, section 718.2(a) is not meant to be exhaustive in its list of aggravating factors. Other aggravating factors developed by the courts apply.
>
> In my view, in the present case, the fact that James Bernard assaulted Suzanne Gagnon, a common-law spouse with whom he had been seriously involved for some time, is an aggravating circumstance. The circumstances are peculiar because of the relationship. The assault constitutes a breach of a position of trust. This is domestic violence.[92]

An Ontario judge refused to apply the section to a relationship of a 19-year-old man with his so-called "girlfriend" who was only 13 when the relationship began. The judge held that the section only covered spouses and common-law relationships:

> In this case, boyfriend/girlfriend, I am to decide if such a relationship is akin to a domestic type of relationship. This relationship lasted close to two years and the victim and the accused had sexual relations several times per week at one point. The *Criminal Code* in section 718.2 does not specify anything outside spouse or a common law relationship.[93]

Another Ontario judge refused to apply the section because the couple had only been living together for a few months although the judge found the domestic relationship aggravating.[94] An NWT court also held that the section did not apply to a couple that was engaged to be married but not living together. The Court did find that the offence was a form of domestic violence which was an aggravating factor particularly given the rate of violence against women in northern communities.[95]

The Newfoundland Court of Appeal has taken the position that s.718.2(a)(ii) does not apply to couples who are not cohabitating. In *R v Squires*,[96] the offender and the victim had been involved in a relationship over approximately two years. He was a transport truck driver and she frequently travelled with him or would meet him at rest stops. The relationship was "tempestuous" and fraught with "jealousy and mistrust on the part of both."[97] The offender was convicted of two counts of sexual assault, one count of assault and one count of assault causing bodily harm against her. The trial judge had applied both s.718.2(a)(ii) and s.718.2(a)(iii) in imposing a five-year sentence even though he explicitly recognized that the couple was neither

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[92] *Ibid* at paras 25–26.
[93] *R v Nawaz*, 2007 CarswellOnt 9628 (ONCJ.GD) at para 14. The victim's age was applied as a statutory aggravating factor.
[94] *R v DD*, 2015 ONSC 5865.
[95] *R v Betsidea*, 2007 NWTSC 85 [*Betsidea*].
[96] 2012 NLCA 20 [*Squires*].
[97] *Ibid* at para 2.

married nor cohabitating on a permanent basis. The Court of Appeal held that this was an error and that neither subsection applied to this case:

> The rationale underlying section 718.2(a)(ii) is directed to the vulnerability and dependency, particularly from an emotional, financial and psychological perspective, presumed to arise from the domestic relationship between married or common-law spouses. The relevance of this factor is heightened where physical or psychological abuse results in a sense of powerlessness making escape or leaving the relationship difficult… There is no indication in the case before this Court that the complainant's relationship with Mr. Squires engaged the kind of vulnerability or dependency associated with the spousal relationship. (The relevance of a continuing intimate relationship is referenced below.)
>
> Nor could it be said that Mr. Squires was in a position of trust vis-à-vis the complainant. While it may be said that any personal or intimate relationship involves an element of trust broadly speaking, section 718.2(a)(iii) is directed to the abuse committed by a person in a "position of trust or authority" in relation to the victim, such as a parent, teacher, guardian and so forth.[98]

While there was a dissent on other grounds, the Court was unanimous on this issue.[99] However, the Court indicated that the factors enumerated in s.718.2(a) are not exhaustive and that the trial judge was not wrong to take the nature of their relationship into account. Thus, the error in applying s.718.2(a)(ii) was immaterial to the validity of the sentence.[100]

Squires has been followed in lower court decisions in Newfoundland. In *R v JH*,[101] the Court declined to apply s.718.2(a)(ii) to the relationship in the case on the basis of *Squires*:

> I conclude, the relationship between J.H. and the complainant in the present case has not been established to be other than one of boyfriend – girlfriend. Although this may be considered as a factor under the categories of general and specific deterrence, it is not an aggravating circumstance. Likewise, it cannot be said J.H. abused a position of trust or authority in relation to the victim. It has not been shown, other than the usual trust between two individuals in a relationship, that either one or the other exercised authority or was in a uniquely vulnerable situation as say for example where abuse has occurred over an extended period of time, the result of which the victim is unable to extricate herself from the relationship.[102]

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[98] *Ibid* at paras 31–32.
[99] The dissenting judgment of Justice Hoegg agreed with the majority that s.718.2(a)(ii) and (iii) had been applied erroneously but concluded that the mistake was not material and did not affect the ultimate fitness of the sentence. *Ibid* at para 95.
[100] *Ibid* at para 34.
[101] 2012 CanLII 74127 (SCTD) [*JH*].
[102] *Ibid* at para 70. However, this case is not technically within the sample under review.

Squires has been cited in numerous Newfoundland trial level sentencing decisions, the majority of which were decided by Judge Gorman (and are not part of the sample). His approach is not entirely consistent but he interprets *Squires* as holding that the provision does apply where the relationship "engaged the kind of vulnerability or dependency associated with the spousal relationship."[103] In one case, Judge Gorman considered whether the section applied to two women who had lived together in a relationship that was described as "domestic". No further details were given about the nature of the relationship. The accused was charged with damaging the computer of the victim after they had a fight. Judge Gorman rejected the applicability of s.718.2(a)(ii) because their relationship did not demonstrate the vulnerability and dependency talked about in *Squires*:

> In *R. v. Squires*, it was held that the "rationale underlying section 718.2(a)(ii) is directed to the vulnerability and dependency, particularly from an emotional, financial and psychological perspective, presumed to arise from the domestic relationship between married or common-law spouses. The relevance of this factor is heightened where physical or psychological abuse results in a sense of powerlessness making escape or leaving the relationship difficult..." As in *Squires*, there was no evidence presented here that Ms. Brake's relationship with Ms. Martineau "engaged the kind of vulnerability or dependency associated with a spousal relationship." In addition, for the reasons pointed out in *Squires*, a position of trust was not breached by Ms. Brake in this case (see *Squires*, at paragraph 32 and *R. v. J.H.*, at paragraph 70). [citations omitted][104]

Thus it is possible that the approach taken to *Squires* by Judge Gorman would be more difficult to apply in some same-sex relationships where the power dynamics may be different, and less familiar to some courts, than in cases of MIPVW.[105]

Another difficulty with Judge Gorman's decisions is that they seem to suggest that the vulnerability and dependency analysis is now a prerequisite for applying the section even where spouses are actually living together. In one of the cases outside of the sample *R v Gilley*,[106] Judge Gorman repeats the above cited passage, almost word for word, ending with the conclusion that "As in *Squires*, there was no evidence presented here that Mr. Gilley's relationship with Ms. Whillans "engaged the kind of vulnerability or dependency associated with a spousal relationship."[107] This requirement should not have been necessary since the couple were living together.

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[103] For examples of cases where this criterion is not satisfied see e.g., *R v Burton*, 2012 PCNL 1311A00415 (female offender); *R v Best*, 2012 PCNL 1312A00065 (female offender); *JH*, *supra* note 101; *R v Gilley*, 2013 PCNL 131-280-0458 [*Gilley*]; *R v Brake*, 2013 PCNL 1312A00456 (female offender) [*Brake*]; *R v Marche*, 2013 PCNL 1313A00143 [*Marche*]; *R v Antle*, 2013 NLPC 0111A02947; *R v Gould*, 2014 NLPC 131; *R v Pennell*, 2014 NLPC 1313A00584.

[104] *Brake*, *supra* note 103 at para 15.

[105] In many cases where the section does not apply, courts go on to find the nature of the relationship aggravating nonetheless.

[106] *Supra* note 103.

[107] *Ibid* at para 14.

Judge Lord in *R v Linklater*[108] also held that the section does not apply to an offender who committed aggravated assault against his girlfriend but that the relationship was an aggravating factor nonetheless:

> The aggravating factors highlighted by the Crown include the fact that this was an intimate relationship. While this relationship does not specifically fall within the statutorily aggravating factor as described in Section 718.2(ii) (*sic*) referring to an assault – – or an offence rather on the spouse or common-law partner, it is nonetheless aggravating that the relationship was an intimate one and that trust, the trust that this implies was violated.[109]

As described above, this study also examined 122 appellate level decisions that could have cited s.718.2(a)(ii) but did not. There were several cases dealing with violence against girlfriends that did not cite s.718.2(a)(ii). In *R v Bates*,[110] for example, the offender, married to another woman, was convicted of criminal harassment, uttering death threats, multiple counts of assault and breach of bail conditions after the breakdown of his relationship with a girlfriend outside of the marriage. While the Court clearly saw this as a case involving "domestic violence" and stressed the importance of "sentencing courts to respond to this type of offence in the most forceful and effective terms, sending the message of denunciation and general deterrence to the community, and specific deterrence to individual offenders",[111] no reference was made to the section. Similarly in *R* v *Asapace*,[112] the offender was convicted of aggravated sexual assault against his former girlfriend which he committed when he found her with another man. While the Saskatchewan Court of Appeal acknowledged she was his ex-girlfriend, no reference was made to s.718.2(a)(ii).

Thus the cases on this issue do not lead one to a consistent conclusion. While the majority of cases will view a dating relationship as an aggravating factor in sentencing, courts are divided on whether s.718.2(a)(ii) applies in this context with the Newfoundland courts clearly holding that it does not. A Supreme Court of Canada decision or legislative amendment would clarify Parliamentary intent in this area.

3.1.3 New Partners or Other Third Parties

The final interpretive issue addressed here is whether s.718.2(a)(ii) applies where the victim is the new partner of a former spouse of the offender or another third party, where the victim is targeted because of their connection to a (former) intimate partner. This is an important interpretive question because men often target new partners, or other family members, as a way of controlling and limiting the relationships of their former partners. An effective aggravating factor must apply to these cases. The case law suggests that the section does not apply where the only victim is a new partner or other family member. There are no cases in the sample that cite

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[108] 2015 CarswellMB 541 (PC) [*Linklater*].
[109] *Ibid* at para 19.
[110] [2000] OJ No 2558 (QL) (CA).
[111] *Ibid* at para 42.
[112] 2011 SKCA 139.

the section where the only victim is a new partner. There is at least one trial decision outside the sample, *R v Marche*,[113] where Judge Gorman discussed this issue in the context of a crime against a new partner only. He held that s.718.2(a)(ii) did not apply because the former spouse was not the direct victim of the assault. However, the relationship was found to be aggravating nonetheless: "the offence was committed by Mr. Marche in response to Ms. Marche's choice to be with [the victim]. This is an aggravating factor."[114]

There were eight cases in the sample citing s.718.2(a)(ii) where the new partner/boyfriend was included as a victim, three trial decisions[115] and five appellate decisions.[116] In all of these cases, the former spouse/partner was also a victim and the courts did not differentiate between the two victims or discuss whether or not the section applied to a new partner only. In *R v Wesslen*, for example, the offender found his girlfriend having sex with another man. The primary assault was committed against that man but the offender also assaulted his girlfriend when she tried to defend the male victim. After describing the domestic nature of the assault as aggravating, the Court goes on to mention s.718.2(a)(ii) which "formally mandate[s]" the aggravating nature of the circumstances with respect to former spouses and former common-law partners.[117] The Court does not discuss either the fact that the female victim was a girlfriend only or the applicability of the section to the male victim.

The cases not citing the section lend support to the argument that s.718.2(a)(ii) does not apply where the new partner is the only victim. In *R v McCowan*,[118] the Manitoba Court of Appeal was faced with a case in which the offender scaled the outside of his wife's apartment building, broke into her bedroom and committed aggravated assault against his wife's sexual partner leaving him with "catastrophic" injuries including a traumatic brain injury. The sentencing judge imposed time served (the equivalent of 5 ½ years) and probation. The majority does not treat this case as a domestic violence case even though the wife was in bed with the victim at the time of the attack. The dissenting judgment by Beard JA does acknowledge the domestic violence aspect of the case but does not cite s.718.2(a)(ii):

> I agree with the Crown that there is an aspect of domestic violence involved in the assault. While the offender did not hit his wife, he was clearly prepared to use threats and violence against her new boyfriend to try to end the relationship. A fear

[113] *Supra* note 103. Note that this case is outside of the sample.
[114] *Ibid* at para 12.
[115] *Khamphila*, *supra* note 44; *Morovati*, *supra* note 38 (it is difficult to tell here whether in fact the female victim was having a relationship with the male victim and she is described as a common-law partner of the offender. The male victim had driven her home late one evening); *Wood*, *supra* note 44 (in this case, the crime involving the male victim was impersonation as the offender purchased a cell phone in the name of the man he suspected was the new partner of his ex-wife. This charge accompanied a criminal harassment charge with respect to the ex-wife).
[116] *Morris*, supra note 44; *Pakoo*, supra note 44; *Cuthbert*, supra note 44; *MacDonald BCCA*, supra note 44; *Wesslen*, supra note 44.
[117] *Supra* note 44 at 29.
[118] *Supra* note 54. See also *R v McNeil*, 1998 NSCA 95 where the offender had been convicted of the manslaughter of his wife's new partner. He also assaulted the wife in the process of killing the new partner. The domestic nature of the offence was noted but s.718.2(a)(ii) was not relied on explicitly.

> for the safety of others is often a way to force a partner to stay in a relationship and can be as effective as controlling the behaviour of the partner as threatening the partner directly, and sometimes more so.[119]

In *R v Hill*,[120] the offender's ex-girlfriend and her male friend were both attacked but the male victim was subjected to very serious life-changing injuries. In reducing the sentence from 11 to 8 years, the Manitoba Court of Appeal did not mention s.718.2(a)(ii). Likewise in *R c Parker*[121] the female offender broke into the home of and uttered death threats against her husband's girlfriend. A suspended sentence was given on appeal and no mention was made of s.718.2(a)(ii) nor of the spousal relationship being an aggravating factor.

There is one Quebec trial level decision in which the Court applied s.718.2(a)(ii) to a home invasion against third parties. In *R c Bossé*,[122] the offender was convicted of a number of offences including break and enter with intent to commit robbery after targeting a particular home because he suspected his pregnant ex-girlfriend and her new partner were at the house on the night in question. The trial judge applied s.718.2(a)(ii) because the offence was motivated by domestic violence even though the victims of the offence did not include either the girlfriend or her new partner:

> L'autre facteur législatif est l'article 718.2(a)(ii), lequel indique que le caractère familial ou conjugal de l'infraction est un facteur aggravant…La preuve révèle que Matthew Bossé croyait ou suspectait que son ancienne copine soit présente sur place et qu'il comptait inspirer la crainte, la peur ou la détresse en se rendant sur place dans la soirée en question…. Il y a immanquablement une connotation conjugale à cet événement.[123]
>
> [The other statutory factor is subparagraph 718.2(a)(ii), which indicates that the family or conjugal nature of the offence is an aggravating factor. … The evidence shows that Matthew Bossé believed or suspected that his former girlfriend would be on site and that he hoped to create fear or distress by going there that evening. … There is invariably a conjugal connotation to this event.]

The weight of the case law suggests that s.718.2(a)(ii) is not being applied consistently to new intimate partners (or third parties) except in cases where the intimate partner is also assaulted and both victims are discussed together in the court's analysis. Where the new partner is the only victim, s.718.2(a)(ii) is not being applied.

3.1.4 Concluding Observations on Interpretive Issues

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[119] *Ibid* at para 82.
[120] 2000 CanLII 11394 (MBCA)
[121] *Supra* note 45. In this case the female offender broke into the home of her husband's girlfriend and threatened to kill her and burn down her house with her children in it.
[122] *Supra* note 74.
[123] *Ibid* at paras 29, 47.

There is still a lack of clarity around the scope of s.718.2(a)(ii) on all three interpretive issues discussed here, particularly around the issues of whether it applies to non-cohabitating intimate partners and to crimes against third parties. It is important to remedy this lack of clarity for a number of reasons. First, s.718.2(a)(ii) is being applied inconsistently with respect to former partners and non-cohabiting partners, and not being applied at all to third parties even where the attack is clearly an attempt to control the former spouse/partner. Second, the aggravating factors in s.718.2(a) are mandatory. Failure to address these factors is therefore always a reviewable error whereas with non-mandatory aggravating factors a sentencing judge may have more discretion. The fact that some trial courts are still not treating an intimate relationship as an aggravating factor suggests that legislative clarity is necessary. Third, s.718.2(a)(ii) makes an important statement about the law's approach to such violence. What is included within the section, and what is not, matters. It is beyond contention that former spouses and former common-law partners must be included within its scope given that women are often most in danger when they try to leave intimate relationships. It also seems beyond question that the section should apply to couples who have cohabitated for less than 12 months even though they do not meet the statutory definition of a common-law partner. Similarly, a comprehensive approach to MIPVW must cover non-cohabitating relationships. With respect to new partners and third parties, men often target family members, friends and new partners as a way of controlling a (former) intimate partner. These people are targeted in order to hurt the female partner and as a means of exerting control over her and limiting her social relationships. This is part of the dynamic of coercive control in MIPVW and thus the aggravating factor should be applied. One way to address this problem would be to draft the legislation in a way that focuses on the ultimate victim's relationship to the female intimate partner.

> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
>
> …
>
> (ii) evidence that the offender, in committing the offence, abused the offender's former or current intimate partner, or a third party who is targeted because of that third party's connection to a former or current intimate partner.

A definition of intimate partner would be necessary, which could include spousal, common-law and dating relationships. An expansive definition of intimate partner should explicitly include relationships regardless of sex and sexual orientation.

3.2 The Intersection of s.718.2(a)(ii) and s.718.2(e)

3.2.1 General Observations

In this section, the study examines how courts apply s.718.2(a)(ii) in cases where the offender is Indigenous. The cases examined in this study demonstrate that there are tensions between the need to deter and denounce MIPVW and the importance of reducing the over-incarceration of male and female Indigenous offenders. Section 718.2(e) of the *Criminal Code* instructs courts to consider all options other than incarceration, particularly in the sentencing of Indigenous

offenders.[124] This section is meant to be remedial in the sense of being responsive to the problem of over-incarceration. Both s.718.2(e) and s.718.2(a)(ii) must be interpreted in a manner that is consistent with other principles of sentencing, such as proportionality in s.718.1, and the purposes of sentencing in s.718.

Courts have held that s.718.2(a)(ii) demands that denunciation and deterrence must prevail when sentencing for MIPVW which usually requires a period of incarceration. Section 718.2(e), by contrast, seeks to reduce incarceration for Indigenous offenders through more restorative and rehabilitative sentences. Courts have struggled, although often not explicitly, to reconcile these two provisions and the competing objectives of sentencing raised by them.

It is important to note that in many of these cases, the victims of MIPVW are Indigenous women, although this is difficult to quantify in the sample under review because many cases do not provide this information. MIPVW has had a devastating impact on many Indigenous communities. The legacy of colonialism and residential schools may contribute to this problem and also impact the way in which Indigenous women experience intimate violence. Some of these communities have taken steps to address MIPVW through their own practices and legal traditions.[125] However, only in rare cases does the Crown lead evidence about the impact of domestic violence on the Indigenous women within a particular community.[126] Such evidence is necessary to enable courts to integrate s.718.2(e) with other principles of sentencing to craft an appropriate sentence.

Gladue factors are relevant both to the type of sentence imposed as well as to the quantum of sentence. Many of the appellate cases that discussed s. 718.2(e) arise in the context of determining whether a non-custodial sentence would be uniquely appropriate for an Indigenous offender. This is a particularly challenging issue in the context of MIPVW because non-custodial sentences usually mean putting the offender back into the same community, and sometimes the same home, with his (former) spouse/partner. Thus these cases directly raise the issue of the safety of the (former) spouse/partner in that community.

It is beyond the scope of this case study to analyze the impact of colonialism and residential schools on MIPVW or on the gendered power structures within some Indigenous communities. Rather, the study seeks to highlight the most notable sentencing cases in this area recognizing that much work needs to be done beyond the sentencing process to reconcile the competing values at stake. However, a brief review of some criticisms of the application of restorative

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[124] Sentencing principles for Indigenous offenders are commonly referred to as *Gladue* factors, named after the decision of *Gladue*, *supra* note 34 where the Supreme Court of Canada considered s 718.2(e) of the *Criminal Code* for the first time.

[125] See e.g. Michael Bopp, Judie Bopp & Phil Lane Jr "Aboriginal Domestic Violence in Canada" (Ottawa: Aboriginal Healing Foundation, 2003) at 73–78; Manitoba, Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba*, Volume I – the Justice System and Aboriginal People (Manitoba: Government of Manitoba, 1999) at Chapter 13, "Aboriginal Women."

[126] The most notable exception to this is *Morris*, *supra* note 44 where the Crown led evidence demonstrating that intimate partner violence was a serious problem in the particular indigenous community and that many women in the community were not comfortable with restorative responses to the case.

justice principles in the context of MIPVW will highlight some of the tensions in the case law. Some feminist scholars have expressed concern about the use of restorative justice when dealing with MIPVW in Indigenous communities.[127] Jane Dickson-Gilmore, for example, notes how restorative responses to violence against women have promised much but have thus far been unable to "deliver good solutions or free women and children from violence."[128] Angela Cameron argues that restorative justice processes in the context of judicially convened sentencing circles in Indigenous communities have failed to take into account the inequality of women within these communities and the inherent power imbalance between abusers and survivors, thus perpetuating "the intersecting oppressions experienced by Aboriginal women who are survivors of intimate violence."[129] These scholars do not necessarily endorse our existing criminal justice system and its ability to respond to MIPVW but rather raise cautions about the intersection of sex and Indigeneity in relying on restorative principles. Other feminist scholars argue that it is misguided to think that punitive sentences for male offenders will protect Indigenous women. Debra Parkes and David Milward argue that what Indigenous women want is safety from violence not the incarceration of their male partners:

> The challenge is that the demands from survivors of intimate-partner violence – particularly the calls by Aboriginal women – for the violence against them to be taken seriously have been often misunderstood as calls for retributivist, punitive approaches, rather than as calls to stop the violence. Too often, the resources necessary to provide the safety, economic independence, and ongoing support required to really make a difference simply do not flow to the people who need them.[130]

The cases in the sample do not provide much guidance on how these two *Criminal Code* provisions are applied together. Just as s.718.2(a)(ii) is often not cited in cases involving intimate partner violence, s.718.2(e) and *Gladue* factors are sometimes not mentioned by judges sentencing Indigenous offenders and must be addressed on appeal. Where s.718.2(e) is applied, it inevitably receives much more attention in terms of space in the judgment than does s.718.2(a)(ii). Relevant case law is cited at length and the offender's history is often reviewed in detail. That is not the case with s.718.2(a)(ii) – it is usually mentioned in a sentence or, at most, a short paragraph with sometimes a couple of cases cited in support. While space in the judgment does not necessarily reflect the importance of a factor in the sentencing outcome, it is nonetheless revealing about the lack of attention that some courts give to s.718.2(a)(ii). Overall, the cases suggest that judges are either prioritizing the need to deter domestic violence or the need to reduce the over-incarceration of Indigenous offenders. The more difficult task, of somehow reconciling both of these important values, is less commonly undertaken.

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[127] Dickson-Gilmore, "Whither Restorativeness," *supra* note 4.
[128] *Ibid* at 419.
[129] Cameron, "Sentencing Circles and Intimate Violence," *supra* note 4 at 483.
[130] Debra Parkes & David Milward, "Colonialism, Systemic Discrimination, and the Crisis of Indigenous Over-incarceration: Challenges of Reforming the Sentencing Process," in Elizabeth Comack, ed *Locating Law: Race/Class/Gender/Sexuality Connections*, 3rd ed (Toronto: Brunswick Books, 2014) at p 136.

Several of the cases described here predate the Supreme Court of Canada's 2012 decision in *R v Ipeelee*,[131]where the Court made clear that the *Gladue* principles apply to all crimes, including the most serious, and clarified that there is no requirement for the offender to prove a causal connection between the impact of colonialism and his criminality. However, the *Ipeelee* Court also held that the connection between the *Gladue* factors and the particular offender is important:

> 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.[132]

This passage has been used by subsequent appellate courts to weaken the impact of *Ipeelee*.[133]In the context of MIPVW, the Ontario Court of Appeal has confirmed that despite the fact that the offender does not have to prove a causal connection, the absence of a connection between *Gladue* factors and the offender's criminality is nonetheless relevant.[134] What remains to be clarified, as courts work through the implications of *Ipeelee*, is the precise role for these considerations in assessing the individual culpability of the offender before the court.

The cases in this sample suggest that the degree to which the individual offender has been impacted by *Gladue* factors himself has been an important indicator of how the sections have been reconciled in sentencing decisions by appellate courts. Where, for example, the offender had a stable childhood with supportive parents, *Gladue* has been given less weight. The degree of violence exhibited by an offence also has had a significant impact on courts. Other relevant factors include the degree to which the offender's community is able to provide the necessary resources to support the offender in the community[135] and the degree to which the victim opposes having the offender back in the community.[136] With respect to this latter factor, as *R v Morris* illustrates, there can be considerable pressure on women to agree to participate in community-based dispositions for their abusers. Power dynamics within the particular Indigenous community may well have a gendered dimension which can make it difficult for women to refuse to participate or to express their fear of the offender.

The following section outlines the most notable cases involving Indigenous offenders convicted of MIPVW in the sample of cases, focusing on appellate decisions. Several cases are described in detail in order to fully convey the nature of the reasoning. As mentioned, the context in which the tensions between these conflicting *Criminal Code* provisions are most acute are those involving the appropriateness of a non-custodial sentence where, were the offender not Indigenous, a period of incarceration would have been warranted. The first section examines cases where the central issue is whether a non-custodial sentence is uniquely appropriate for the Indigenous offender. Non-custodial in this study refers to cases in which either a discharge,

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[131] 2012 SCC 13 [*Ipeelee*].
[132] *Ibid* para 83
[133] See e.g. *R v Chanalquay*, 2015 SKCA 141. This case does not involve IPV.
[134] *R v Fraser,* 2016 ONCA 745 [*Fraser*].
[135] See e.g. *R v TC,* 2009 SKCA 124 [*TC*] where the court explicitly said the sentence would have been higher but for the efforts at rehabilitation and the support of the restorative justice program and the offender's community; *R v Etuangat*, 2009 NUCA 1 [*Etuangat*].
[136] *Ibid*.

suspended sentence with probation or a CSO was imposed. While a CSO is technically a term of imprisonment, it is treated as a non-custodial sentence in this study because the offender is allowed to serve his time in the community. The second group of cases looks at the approach to s.718.2(e) where custodial sentences are under consideration. Finally, the study briefly examines two recent cases, not in the sample, which apply s.718.2(e) to MIPVW following the 2015 amendment to s.718.2(e) that explicitly requires attention be given to the harm caused to the victim and to the community. Thus far, courts do not appear to have changed their approach to s.718.2(e) on the basis of this amendment but we are only beginning to see case law under the amended provision.

3.2.2 The Appropriateness of a Community-Based Sentence

There are two British Columbia cases that stand out in the context of whether a non-custodial sentence is appropriate for an Indigenous offender in the context of MIPVW, each one reaching a different conclusion. In *R v Reid*,[137] the issue was the appropriateness of a CSO for an offender who had been convicted of aggravated assault against his former wife.[138] The trial judge had refused to impose a CSO and the Court of Appeal overturned that decision. The facts of the case are summarized by the Court of Appeal as follows:

> On January 12, 1999, Mr. Reid had a chance encounter with his estranged wife, S. R., on the street in Bella Bella. After visiting at the home of friends, Mr. Reid and S.R. returned to the trailer where Mr. Reid was living at the time. Although Mr. Reid was sober when he encountered S.R., both he and S.R. were extremely intoxicated by the time they arrived at Mr. Reid's trailer. Shortly after their arrival there, Mr. Reid assaulted S.R. with a knife, apparently because he was angry with her for associating with other men. The assault was of a very serious nature, involving Mr. Reid striking and kicking the victim and stabbing her three times with a knife. Two of the stab wounds were to S.R.'s legs, and one was to her left shoulder. All of the wounds required stitches.
>
> Immediately following the attack, Mr. Reid realized the seriousness of what he had done and he attempted to address S.R.'s wounds. Ultimately, he told S.R. to go to the hospital, but, in so doing, he threatened her with further harm if she implicated Mr. Reid in the assault. Although the hospital authorities suspected that S.R. had been assaulted and called the police, it was not until approximately one month later that S.R. acknowledged to the police that Mr. Reid had assaulted her.[139]

The offender had a history of assault against the victim as well as against a former spouse. He also had two criminal convictions for unspecified breaches of conditions. The offender had been abused as a child and had a long-standing problem with alcohol which the Court held played an important role in his offending. He had apparently abstained from alcohol for 20 months prior to

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[137] 2002 BCCA 268 [*Reid*].
[138] However, note that a CSO would no longer be available for aggravated assault, but a suspended sentence with probation would be. *Criminal Code*, *supra* note 1 at ss 742–742.7.
[139] *Reid*, *supra* note 137 at paras 4–5.

the sentencing although this fact was not corroborated beyond the statements of defence counsel. The trial judge imposed a three-year penitentiary term; a sentence which the Court of Appeal indicated would have been fit if it had not had new evidence before it about the resources available to support a CSO in his Indigenous community. In describing this new information, the Court noted that the victim no longer opposed a CSO:

> Mr. Jorgenson also emphasized that an important factor in the band's willingness to work with Mr. Reid was the fact that the victim was not opposed to Mr. Reid returning to the community, and no longer viewed his return with anxiety. Mr. Jorgenson emphasized that the community regarded family violence as a serious matter and that Mr. Reid would be expected to assist in sending that message to other members of the community. In his letter of March 14, 2002, Mr. Jorgenson stated:
>
> > The advisory committee is sensitive to the message we are sending to our community. We do not wish to imply that we condone family violence or feel it should be treated lightly. For that reason it is essential that Mr. Reid become a voice against family violence and be an example to our community of a person's willingness and ability to change.[140]

The Court of Appeal gave the most weight to the fact that the offender had apparently given up alcohol[141] and the fact that the victim no longer felt threatened by his presence, although she clearly had in the past. The Court indicated that Reid would be a risk to the community if he consumed alcohol and noted that he should be incarcerated if he breached that condition of his CSO.

It is highly unusual for an offender convicted of aggravated assault, with a history of violence against two former intimate partners, and a history of breaches of conditions, to receive a non-custodial sentence and subsequent amendments to the *Code* preclude a CSO for aggravated assault although a suspended sentence is still technically available. However, it was clearly s.718.2(e) that made the difference in *Reid*.

The British Columbia Court of Appeal took a different approach in *Morris*,[142] a case in which the Court dealt more directly with the tension between ss.718.2(a)(ii) and 718.2(e). In *Morris*, the accused was charged with uttering threats, assault, pointing a firearm and forcible confinement. The threats were made against a male friend of his common-law spouse while all the other charges arose from an attack on his spouse. The couple was living together in an open relationship, with both parties allowed to date other individuals. One afternoon when she was not home, the respondent set out to track her down taking a firearm and ammunition. He found her and her male friend sleeping in her car. He forced the male victim out of the car and threatened to kill him. The boyfriend escaped and the offender then forced his spouse to drive to a secluded location where he threw her to the ground and beat her. She agreed to have sexual intercourse with him to calm him down after which he continued to beat her again. This violence went on for two hours. For reasons that were not explained, he was not charged with sexual assault. His wife

[140] *Ibid* at para 23.
[141] *Ibid* at para 8.
[142] *Supra* note 44.

continued to have ongoing physical difficulties as a result of the assault eight months after the offence. The case reached the Court of Appeal by way of a Crown appeal from a suspended sentence with two years of probation. One of the Crown's grounds of appeal was that the trial judge failed to give sufficient weight to denunciation and general deterrence thus leading to an unreasonable and unfit sentence.

Morris had been a Band Councillor with the Laird First Nation for three years and Chief for six years. He had a dated criminal record. A psychological report indicated that he had a high risk for future spousal violence and a low risk for other violent offending.

A community talking circle was held with a view to making recommendations to the sentencing judge. The victim did participate, although hesitantly. The facilitator's summary recommended that healing and counselling would be better for the community than incarceration, and suggested that the offender organize a potlatch and make a public apology. The Laird Aboriginal Women's Society wrote a letter to Crown counsel that was also put before the sentencing judge expressing concern about the postponement of the sentencing hearing and reservations about the sentencing circle process given the violent nature of the crime. The letter also outlined concerns about the involvement of the Kaska Tribal Council given the offender's position as Chief:

> Kaska women fear that the decision-makers within these political offices are too close to the issue to maintain objectivity. Furthermore, Kaska women fear that the aboriginal leadership will use their power and authority to retaliate against those who find the courage to speak out against violence. Kaska women fear that the political leadership and their involvement in this case will only serve to further ostracize, isolate and subject our families to further oppression.[143]

At the sentencing hearing, Crown counsel asked for 18 months imprisonment. The offender represented himself and argued against incarceration. The trial judge made the following comments at trial:

> On many occasions I have sentenced men and a few women to jail for domestic violence. Early in my career I thought I was making a difference; I may have. It may be that in just the right cases a jail sentence saved somebody else from a beating. I hope so. But, I have also come to learn that in the Aboriginal community, and in other communities alike, it is not the only answer. In many communities it perpetuates a problem. The fact of jail and zero tolerance can create a problem, because if you know that your provider is going to jail if you pick up the phone and call 911, you are not going to pick up the phone. If you know that the sentence is going to be a restorative one, the result may be that your beatings stop, and that a healing can occur.[144]

In its pre-*Ipeelee* decision, the Court of Appeal stressed that, the more serious the offence, the less likely the sentence will be different for an Indigenous offender than for any other offender:

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[143] *Ibid* at para 27.
[144] *Ibid* at para 32.

> Although judges are therefore required to approach the sentencing of aboriginal offenders with an analysis that is sensitive to the conditions, needs and understandings of aboriginal offenders and communities, this does not mean that sentences for such offenders will necessarily focus solely on restorative objectives or give less weight to conventional sentence such as deterrence and denunciation. As Iacobucci J. observed in *Wells*….:
>
> > Notwithstanding what may well be different approaches to sentencing as between aboriginal and non-aboriginal conceptions of sentencing, it is reasonable to assume that for some aboriginal offenders and depending on the nature of the offence, the goals of denunciation and deterrence are fundamentally relevant to the offender's community. As held in *Gladue*, at para. 79, to the extent that generalizations may be made, the more violent and serious the offence, the more likely as a practical matter that the appropriate sentence will not differ as between aboriginal and non-aboriginal offenders, given that in these circumstances, the goals of denunciation and deterrence are accorded increasing significance.[145]

The Court of Appeal focused both on the seriousness of the offences and on the fact that the offender had not been directly impacted by *Gladue* related factors:

> This was not an assault which involved a single, impulsive blow that caused only minor or temporary harm. Rather, it was a violent and protracted assault which occurred after Mr. Morris spent more than an hour searching for his wife. He was sober and had the opportunity to contemplate his actions. When he did find [the victim], he brutally assaulted her for a prolonged period and inflicted serious injuries. She required three days in hospital to recover. The use of a firearm during the offence enhanced the risk to both victims.
>
> Parliament has expressly indicated in s.718.2(a)(ii) that the severity of an offence is aggravated where it is committed against a spouse. The sentencing judge made no comment with respect to the severity of this offence, or the statutory direction to treat the circumstances as aggravated.
>
> In addition, the sentencing judge failed to appreciate the moral culpability of this offender. Although he identified Mr. Morris as an aboriginal offender, he did not properly assess how any systemic or background factors related to that identity contributed to bringing him before the court. In particular, Mr. Morris is not a victim of alcohol or other substance abuse. There is no evidence that he endured a childhood of family breakdown or dysfunction. And although he mentioned residential school in his submission, I do not understand him to say that he had been victimized or abused in school.
>
> We are bound to be aware of and sensitive to systemic issues faced by aboriginal peoples generally. However, there do not appear to be any of the personal

[145] *Ibid* at para 55.

> mitigating factors so often present in cases of aboriginal offenders. On the contrary, Mr. Morris has achieved an impressive level of education and been successful in business. He became a leader in his community, and a person who was looked to as an example and role model.[146]

The Court went on to reject the appropriateness of the suspended sentence with probation because of the message such a sentence would send:

> In my view, the suspended sentence and probation order is unfit because it sends a completely wrong message to the victim, the offender and the community. An incident of brutal spousal abuse by this offender, in the context of a community where spousal abuse is epidemic, and victims are intimidated, clearly called for a sentence that provided some deterrent to the general sense, and more importantly perhaps, denunciation of the conduct. In my view, a term of incarceration is required to give effect to these objectives.[147]

The Court stressed the "toxic atmosphere" in the community relating to the epidemic of spousal abuse and the divisions within the community based on gender and political lines.[148] The importance of responding to intimate partner violence was the focus of the Court of Appeal's concern:

> In these circumstances, the conventional Canadian judicial system must respond with a sentence that reflects all the principles of sentencing as articulated in the *Criminal Code.* All Canadians, aboriginal or not, are entitled to the protection of the law, and are subject to the control of the law. Women, and other persons who are vulnerable, must be protected and must not be afraid to lay complaints or to pursue charges. And when they do, the law must be seen to respond effectively.
>
> Several reports and commentators have emphasized the need to ensure that the use of traditional aboriginal sentencing measures pay attention to the voices and special needs of aboriginal women…. This may be especially important where, as in this case, the offender is linked to the dominant power structures within the community. Unfortunately, the evidence indicates that this community has not yet been able to formulate a process that effectively addresses such concerns.[149]

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[146] *Ibid* at paras 58–61.
[147] *Ibid* at para 62.
[148] *Ibid* at para 67.
[149] *Ibid* at paras 68–69, citations omitted. See also *Betsidea, supra* note 95 at pp 7–8 where the trial judge refused to order a conditional sentence for sexual assault because of the need for denunciation and deterrence of the offender who had a long history of violence. The court stated that "the aboriginal women in the North, indeed all women, have the right to live in safety and their community. Violence of this nature is not only a violation of the relationship between the offender and the victim. Especially in smaller communities such as Deliné, violence of this nature is a violation of the relationship between the offender and the entire community."

While on the one hand, this case involves a more thoughtful assessment of the challenges of restorative justice when dealing with MIPVW, it can also be criticized for putting too much emphasis on the absence of *Gladue* factors in the offender's history particularly in light of the brief reference to the offender attending residential school.

The Nunavut Court of Appeal gave more weight to s.718.2(e) in *R v Etuangat*,[150] in deciding that a suspended sentence was warranted for an Indigenous offender. The sentencing judge did not mention either s.718.2(e) or s.718.2(a)(ii) in imposing a suspended sentence on a man who had assaulted his spouse, punching her in the head repeatedly while she was carrying their baby on her back. He was also convicted of four counts of breaching an undertaking with respect to consuming alcohol. His criminal offending was found to be related to excessive alcohol consumption and he had a significant criminal record with these charges being his fifth charge of assault and his fifth through ninth breach offences within the last two years. The trial judge had explicitly declined to order a CSO because he was not persuaded that the offender would comply with the conditions. Despite this concern about his inability to comply with conditions, the trial judge imposed a more lenient suspended sentence, stating:

> It's going to be hard on you. I don't know if you can do it, but I hope you can. I can't put you on a conditional sentence because you're at a high risk to reoffend and that's one of the conditions that you don't meet to [receive] a Conditional Sentence.[151]

The Court of Appeal did recognize "the need to deter and denounce spousal assault generally" and the fact that "Nunavut requires denunciatory sentences for spousal assault because of the prevalence of this type of offence."[152] However, s.718.2(e) took the Court of Appeal in another direction given the offender's difficult background, his problems with alcohol and the fact that he was prepared to go to a treatment program. The heart of the Court's judgment on the balance between s.718.2(e) and s.718.2(a)(ii) is as follows:

> The question I ask myself is whether the sentencing principle of deterrence and denunciation should override s. 718.2(e) and *Gladue.* On balance, I am not satisfied that this case requires a level of deterrence suggested by the Crown. The situation would be different if any of the previous assaults were on the same complainant and involved a higher degree of violence.[153]

This point about violence being against the same complainant arises in a few cases and is never clarified with respect to why this makes MIPVW less serious. One could argue that the fact an offender has assaulted more than one woman in fact makes him a greater risk to assault women in the future.

[150] *Supra* note 135.
[151] *Ibid* at para 20.
[152] *Ibid* at para 24.
[153] *Ibid* at para 37.

While the Court of Appeal called this a "borderline case", it concluded that it was not an error to grant a suspended sentence with probation. The oblique last paragraph of the judgment suggests that this offender may well have had some difficulty complying with conditions:

> As a final observation, it would be unfair to the accused to impose a jail sentence at this time when there are outstanding charges that have not yet been resolved. It is within the Crown's discretion to now start proceedings to revoke the probation and speak to that sentence in the context of a global sentence assuming there are guilty pleas to the outstanding charges.[154]

The Court does not explain how the offender's inability to comply with the conditions of a CSO gave it confidence that he could comply with the conditions of probation attached to the suspended sentence.

In *R v GGS,*[155] the Manitoba Court of Appeal also dealt with whether a suspended sentence with probation would be appropriate for an Indigenous offender convicted of sexual assault, sexual assault with a weapon and forcible confinement all committed against his common-law spouse. The offender had nonconsensual anal intercourse with his spouse, who was recovering from childbirth and had declined sexual activity with him just prior to the assault. Before sexually assaulting her, he burned her with a lighter and tied her up to the nearby crib in which her newborn was sleeping. The trial judge found that he was a productive member of the community and therefore she placed significant weight on rehabilitation and imposed a suspended sentence with probation.[156] The Crown had mistakenly informed her that none of the offender's prior convictions had related to this victim although it is unclear why this might be mitigating.[157]

The Court of Appeal held that, based on s.718.2(a)(ii), deterrence and denunciation were the governing principles of sentencing in this case and that a sentence of six years would have been appropriate. However the Court imposed a sentence of 48 months less pretrial custody, largely on the basis of *Gladue* factors and the fact that the offender had taken significant steps towards rehabilitation, giving up alcohol and drugs and participating in counselling. The *Gladue* factors in this case were significant – the offender had attended a residential school from the age of 6 to 15 where he had been physically and sexually abused. Both of his parents had been addicted to alcohol and he had lost many family members to alcohol-related deaths. The offender had requested that, if the Court altered the sentence, it stay the remaining custodial portion of the sentence because of the significant progress the offender had made. The Court of Appeal

[154] *Ibid* at para 41.
[155] 2016 MBCA 109 [*GGS*].
[156] Note that in this case the trial judge had erred in sentencing the accused to a period of two years imprisonment to be suspended. This was an error because a suspended sentence should not impose a particular sentence but rather suspend the passing of sentence. *Ibid* at para 19.
[157] In fact, in this case the accused had convictions for violence against this victim both before and after the incident in question. *Ibid* at para 2. No clarification is given as to why assaulting different women in the past may be considered less aggravating then assaulting the particular complainant.

declined to do this, noting again that the circumstances of the offences involved domestic violence and were particularly demeaning and degrading to the victim.[158]

3.2.3 Cases Involving the Quantum of a Custodial Sentence

Gladue factors are also relevant where courts are considering more serious sentences. The Yukon Court of Appeal dealt with the intersection of these two provisions in *R v Good*,[159] a case involving a female Indigenous offender. She was convicted of assault causing bodily harm and uttering death threats and sentenced to three years' incarceration less time for pretrial custody. Briefly, she was drinking with her former husband and she threatened and seriously assaulted him, breaking his jaw. These convictions were the fourth time she had been charged with assaulting him and she had a 40 year history of violent criminal behaviour, often fuelled by alcohol. There was virtually no discussion of s.718.2(a)(ii) in this case other than a brief reference to the sentencing judge's conclusion that penitentiary time was required. While the trial judge had mentioned her background, and there was a *Gladue* report, he did not mention the fact that she was Indigenous nor undertake the analysis mandated by *Gladue*. The Court of Appeal speculated about whether there was a degree of complacency in courts in this small northern community where so many of the offenders are Indigenous. Nonetheless the Court of Appeal held that the trial judge must have been aware of the obligation on him given the nature of the material that was before him:

> I cannot fault that approach. In *Gladue* at paras 78-79, the Supreme Court recognized the practical reality that sentences for Aboriginal offenders cannot always serve the objectives of reducing incarceration and promoting restorative justice. More serious and violent offences will merit similar custodial sentences for Aboriginal and non-Aboriginal offenders alike.[160]

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[158] See also *Linklater*, *supra* note 108. In that case the offender and his family had three generations of involvement with residential schools including the offender himself. He was also exposed to a community plagued by violence and in particular domestic violence, substance abuse and mental health challenges. The judge wanted to be able to impose a suspended sentence for aggravated assault but felt that the aggravating factors were simply too severe and instead imposed a sentence of two years less credit for time served.

[159] *Supra* note 34.

[160] *Ibid* at para 35. See also *Moise*, *supra* note 51 at paras 40–41, Judge Greenberg imposed a lower sentence than he otherwise might have in the context of an accused convicted of 10 offences involving MIPVW over a period of several months. Judge Greenberg stated:

The complainant here suffered from significant emotional trauma and the importance of condemning spousal assault is as pressing in this case as in others. As stated by the court in *Dodd* (at par.38):

in responding to such conduct, the criminal law system is constrained to employ its power of sanction with an eye to protecting the safety and security of the victim and society in general. This requires both specific and general deterrence to play important roles in fashioning an appropriate sentence.

That said, while denunciation and deterrence are paramount in cases of domestic violence, in ensuring that the sentence is proportionate, one must also consider whether there are circumstances that diminish the moral culpability of the accused, including circumstances related to his aboriginal heritage..."

The Court of Appeal accordingly affirmed the sentence of three years less time served imposed by the trial judge. It is noteworthy that this case was decided just three weeks before the decision in *Ipeelee* was released which may explain the Court of Appeal's heavy reliance on the seriousness of the offence to minimize the significance of *Gladue*.

The fact that the offender had a stable childhood with supportive family members also played a significant role in *R* v *Fraser*.[161] The Ontario Court of Appeal relied on these factors to uphold a seven year sentence in a case where the trial judge had not dealt with *Gladue* and thus the Court of Appeal had to deal with it on appeal. The offender had violently assaulted his partner for over a year and was convicted of a number of offences including aggravated assault and assault with a weapon. Despite a stable early childhood, the offender had a significant criminal record and little insight into his offending. The Court, in upholding the seven year sentence, gave significant weight to the fact that the offences were part of a pattern of domestic violence:

> The offences for which the appellant was convicted were very serious. They involve domestic violence of a heinous and brutal nature. As noted by the trial judge, they were controlling, cruel and sadistic. Abuse against the offender's common-law partner is specifically enumerated as an aggravating factor under s.718.2(a)(ii) of the *Criminal Code*.
>
> Domestic violence is an insidious crime, the effects of which endure long after the victim's physical wounds have healed. Here, the complainant provided a victim impact statement. While a victim impact statement should not overwhelm a sentencing decision, it is a factor to consider. The description of the impact of the offences on the complainant in this case can only be described as devastating. This evidence also amounts to a statutory aggravating factor, as set out in s. 718.2(a)(iii.1) of the *Criminal Code.*[162]

3.2.4 2015 Amendments to s. 718.2(e)

It is important to note that s.718.2(e) was amended in July of 2015 to give more weight to harm to the victim and the community. Judges are now instructed to consider:

> (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.[163]

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[161] *Supra* note 134.

[162] *Ibid* at paras 29–30. Note that some of the offences had taken place before the victim turned 18. In *Knockwood, supra* note 51, the Court of Appeal refused to reduce a 12 month sentence of incarceration to a CSO for assault causing bodily harm to his spouse and breach of recognizance along with a number of other charges. The appeal was based on the sentencing judge's failure to adequately consider s. 718.2(e) and her overemphasis on deterrence and denunciation. There was only a brief reference to s.718.2(a)(ii) as an aggravating factor and to the fact that this was the offender's second assault on the same victim.

[163] *Criminal Code*, *supra* note 1 at s 718.2(e) as amended by *An Act to enact the Canadian Victims selected knowledges Selected Knowledges Bill of Rights and to Amend Certain Acts*, 2015, c 13, s 2, emphasis added.

It is too early to have much jurisprudence addressing the significance of this change but the few cases decided under the amended provision suggest the amendments do not seem to be triggering a significant change of approach. One recent trial decision from the Yukon applies the new language in the context of MIPVW but no mention is made of the change to the wording in the provision.[164] The offender was convicted of common assault, sexual assault (by summary conviction) and breach of the terms of his release. The sexual assault at issue involved forced intercourse. Without explicitly mentioning s.718.2(a)(ii), the trial judge acknowledged the apparent conflict between some of the sentencing provisions in the *Criminal Code*. While recognizing that a CSO for sexual assault should be rare, it was found to be appropriate here:

> The various principles set out in these sections have very different objectives. Often, it is clear from the circumstances which principles and corresponding objectives should take priority. Such is not true in this case. Indeed, a number of the sentencing principles are at play here, some with diametrically opposed objectives, creating a tension in determining which of these principles should take priority.
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> On the one hand, it must be acknowledged that these are extremely serious offences. The circumstances are highly disturbing, and the fact that the offences were committed against a spouse is a statutorily aggravating factor. The principles of denunciation and deterrence mandate that a strong message be sent that such behavior will not be tolerated or condoned. This is normally done through the imposition of a custodial disposition as sought by the Crown.
>
> On the other hand, the principle of rehabilitation is raised by R.N.'s full acceptance of responsibility and his considerable efforts to address his risk factors. Furthermore, s. 718.2(e) of the *Code* must be considered in light of R.N.'s aboriginal heritage. [s. 718.2(e) has been omitted]
>
> The combined effect of s. 718.2(e) and the principle of rehabilitation would favour the community-based disposition sought by defence counsel.[165]

In *R v Creighton*,[166] another case from outside the sample, the offender was convicted of aggravated assault against his female intimate partner although s.718.2(a)(ii) was held to be inapplicable because they had only been living together for a short time at the time of the offence. The relationship was nonetheless found to be aggravating. Again there was no discussion of the revised wording of s.718.2(e), although the Court did hold that deterrence and denunciation had to prevail because of the significant violence and the criminal record of the offender.

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[164] *R v N(RJ)*, 2016 YKTC 55. Note that this case is not within the sample under study.
[165] *Ibid* at paras 27–30.
[166] 2016 ABPC 83.

3.2.5 Concluding Observations on s.718.2(e)

A number of observations can be made about the cases involving Indigenous offenders, particularly with respect to the cases which address the issue of the availability of a non-custodial sentence. First, these cases involve serious crimes of violence, aggravated assault, assault causing bodily harm and sexual assault. While in some of these cases, changes to the criteria for a CSO would lead to a different outcome today, all of the crimes involved in these cases would still be eligible for a suspended sentence with probation. Second, some courts appear willing to impose these non-custodial sentences for Indigenous offenders even where there is a significant history of breaching conditions including those related to alcohol consumption and no contact orders. This raises concern about the safety of victims, and of other intimate partners, and about the efficacy of releasing offenders on conditions. Finally, a number of considerations are influential in the courts' reasoning. Significant weight is given to whether the offender before the court was personally impacted by *Gladue* factors. Where the offender had a stable upbringing, and no history of drug or alcohol abuse, *Gladue* factors were less likely to play a significant role. Steps taken towards rehabilitation, the ability of the community to support a non-custodial sentence, and the available resources, also play a significant role in these decisions. As suggested above, however, it is important to interrogate carefully the victim's willingness to have the offender back in the community given the pressures she may experience to support a non-custodial disposition.

Morris stands out in its consideration of the voices of Indigenous women at sentencing. This decision highlights the role of the Crown in putting violence against Indigenous women in context. Community impact statements, outlined in s.722.2 of the *Criminal Code*, enacted in 2015, could be one mechanism for doing this although attention needs to be paid to the question of who speaks for the community and to recognizing the gendered nature of the power structure in some Indigenous communities. *GGS* is a rare case where an appellate court recognizes the devastating nature of MIPVW but also takes seriously the impact of significant *Gladue* factors on the offender.

The reconciliation of s.718.2(a)(ii) and s.718.2(e) is complex and cannot be accomplished by simply choosing one of the two provisions to prioritize. The over-incarceration of Indigenous offenders is a serious problem in Canada as is intimate partner violence against Indigenous women. Sentencing alone cannot solve either of these complex systemic problems. Nonetheless, the sentencing process has to respond to both these problems. Judges should recognize the systemic nature of MIPVW and at the very least hear about the violence Indigenous women experience in their homes and communities when deciding whether to send these men back into the community. Just as it is important to have *Gladue* reports before the court in sentencing, it is the job of Crown counsel to contextualize the impact of the violence experienced by the individual victim and by the women in her community.

3.3 Non-custodial Sentences for Non-Indigenous Offenders

In this section, the study examines the appellate decisions addressing the issue of whether a non-custodial sentence is appropriate, outside the context of s.718.2(e). Nineteen, or almost 23%, of the appellate decisions, dealt with the appropriateness of a non-custodial sentence. Nineteen appellate decisions either considered a non-custodial sentence imposed at trial or imposed a non-

custodial sentence on appeal. In 11 appellate cases, spanning almost the entire time frame of the study, appellate courts overturned a non-custodial sentence imposed at trial and substituted a period of imprisonment.[167] Two of those cases involved an Indigenous offender and have been discussed above.[168] In eight cases, an appellate court upheld or imposed a non-custodial sentence,[169] albeit in one of those cases imposing a more severe CSO in place of the suspended sentence given at trial.[170] In two of these cases, the appeal was actually brought by the offender, one asking for a discharge instead of a suspended sentence[171] and the other seeking a reduction in the length of his CSO.[172] It is difficult to identify clear trends about when a non-custodial sentence will be appropriate. Some of the cases in which non-custodial sentences were upheld or imposed on appeal involved serious crimes such as sexual assault, uttering death threats and criminal harassment. The cases suggest that non-custodial sentences should be the exception, and not the rule, but no criteria have developed in appellate decisions around what might warrant such an exception.

It is important to note that in some of these cases, the offender had served time in custody prior to the trial when a non-custodial sentence was ordered so that in actuality the sentence was not truly non-custodial.[173] For the purposes of this discussion, the sentences have been categorized as non-custodial even where the offender was held in custody prior to trial if the disposition imposed involved a discharge, a suspended sentence or a CSO. The following discussion looks at the cases in two categories: first, the cases where non-custodial sentences are upheld by an appellate court and second, cases where a non-custodial sentence is overturned on appeal.

3.3.1 Appellate Courts Upholding Non-Custodial Sentences

There are two cases involving Indigenous offenders where non-custodial sentences were upheld or imposed on appeal. In one case a suspended sentence[174] was upheld on a Crown appeal and in the other case a penitentiary term was overturned and a CSO given on a defence appeal.[175]Of the

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[167] *Smith ONCA*, *supra* note 41; *R c Bérube*, 1999 CarswellNB 256 (CA) [*Bérube*]; *R v Smith*, 1999 BCCA 747 [*Smith BCCA*]; *R v MacDonald*, 2003 NSCA 36 [*MacDonald NSCA*]; *R c Chénier*, 2004 CarswellQue 2619 (CA) [*Chénier*]; *Morris*, *supra* note 44; *Pudlat*, *supra* note 38; *Coulthard*, *supra* note 25; *Woods*, *supra* note 85; *GGS*, *supra* note 155; *R c Beaulieu*, 2013 QCCA 208 [*Beaulieu*]. In *Beaulieu*, the Court of Appeal overturned a CSO and imposed a period of imprisonment that the offender was allowed to serve intermittently.

[168] *Morris*, *supra* note 44; *GGS*, *supra* note 155.

[169] *R v T(JC)*, 1998 CarswellOnt 1783 (CA) [*T(JC)*]; *Reid*, *supra* note 137; *R v Brown*, 2004 NSCA 51 [*Brown 2*]; *Etuangat*, *supra* note 135*; R v Olson*, 2011 BCCA 8 [*Olson*]; *R c Moisan*, 2012 QCCA 2197 [*Moisan*]; *Beaulieu*, *supra* note 167; *R v C(TE)*, 2015 BCCA 43 [*C(TE)*]; *R c Garneau*, 2005 QCCA 969 [*Garneau*].

[170]*Garneau*, *supra* note 169.

[171] *C(TE)*, *supra* note 169.

[172] *Olson*, *supra* note 169.

[173] See e.g. *Smith BCCA*, *supra* note 167 where the trial judge suspended the passing of sentence and put the accused on probation notwithstanding charges of uttering death threats to his former spouse's family members and pointing a firearm at her and her brother. The offender had served 13 months in custody prior to trial.

[174] *Etuangat*, *supra* note 135

[175] *Reid*, *supra* note 137.

remaining six cases involving a non-custodial sentence upheld on appeal, four of these cases were defence appeals.[176] In other words, the defence was challenging some form of non-custodial sentence asking for a more lenient non-custodial sentence. In two cases, the offender was asking for a shorter CSO,[177] and in two cases, the offender appealed a suspended sentence asking for a discharge.[178] Thus while the appellate court upheld non-custodial sentences in these cases, in all four cases the offender's appeal was actually dismissed. In one case, the Crown appeal from a suspended sentence was allowed and a CSO was imposed instead.[179]

In only one case, outside the context of s.718.2(e), did an appellate court dismiss a Crown appeal of a non-custodial sentence where the Crown was seeking a custodial sentence. In *T(JC)*,[180] one of its first sentencing appeals following the coming into force of s.718.2(a)(ii), the Ontario Court of Appeal upheld a CSO of 18 months for an offender who was convicted of sexual assault, assault, two counts of criminal harassment, two counts of failing to comply with an undertaking and two counts of breach of recognizance. The sexual assault charge involved nonconsensual intercourse, a fact that usually warrants a significant custodial sentence. A number of factors influenced the Court of Appeal's decision to uphold the sentence, including that the offender was under considerable stress having lived through the death of five of his family members in a short time. The expert evidence was strongly supportive of a community-based sentence and demonstrated that the offender had made significant progress in treatment. This decision does not mention whether the Crown proceeded by summary conviction or by indictment but it is notable that a CSO is no longer available for sexual assault or criminal harassment where the Crown proceeds by indictment.[181]

R v C(TE)[182] was one of the very few cases in this sample that involved what might be characterized as a minor assault, although there were also charges of sexual assault and uttering threats of which the offender was acquitted. The offender threw a plastic cup with water and a sleeve of crackers at his wife. The offender was appealing his suspended sentence asking for an absolute or conditional discharge because he worked in the security field and was concerned about having a criminal record. In upholding the suspended sentence with probation the Court of Appeal stressed the significance of domestic violence:

> The jurisprudence of this country has long recognized the uniquely emotional and malevolent nature of domestic assaults and the inherent dangers they present, not only to the victims but to public interests as well.[183]

and:

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[176] *C(TE)*, *supra* note 169; *Brown 2*, *supra* 169, *Olson*, *supra* note 169, *Moisan*, *supra* note 169.
[177] *Brown 2*, *supra* note 169; *Olson*, *supra* note 169.
[178] *C(TE)*, *supra* note 169.
[179] *Garneau*, *supra* note 169.
[180] *Supra* note 169.
[181] *Criminal Code*, *supra* note 1 at ss 742.1(f)(ii), 742.1(f)(iii).
[182] *Supra* note 169.
[183] *Ibid* at para 13.

> As the judge observed, however, this assault engaged the public interest in generally deterring and denouncing domestic abuse. From his unique perspective as the trial judge, he determined it was an intentional and gratuitous gesture, emanating from the appellant's intense anger with his wife. While a relatively minor assault, he found it had had the potential to escalate into more severe violence. Despite the appellant's personal circumstances and potential for rehabilitation, he effectively concluded a discharge was not in the public interest and imposed a suspended sentence.[184]

One can conclude from these cases that appellate courts have not been eager to impose non-custodial sentences and have upheld more restrictive non-custodial sentences in the face of defence appeals asking for more lenient ones. *T(JC)*, one of the first appellate decisions under s.718.2(a)(ii), and one which may have been overtaken by changes to the CSO regime, is difficult to explain, but the fact that it is in the context of sexual assault is significant and will be discussed further below.

3.3.2 Appellate Courts Varying Non-Custodial Sentences

Appellate courts have made some strong pronouncements about the importance of denunciation and deterrence when overturning non-custodial sentences imposed at trial. However, what is lacking in the jurisprudence is a strong statement that non-custodial sentences should only be imposed in extraordinary circumstances. No clear guidelines have been provided for determining when non-custodial sentences are appropriate for MIPVW and each case is decided on its own facts. In *R v Smith*,[185] for example, the trial judge imposed a nine month CSO for an offender convicted of six counts involving violence against a woman who was his wife at the time of the offence, including two counts of assault causing bodily harm, three counts of assault and pointing a firearm. The trial judge described the offender as someone with no previous record despite the fact that these offences took place over a seven year period against the same victim. The Ontario Court of Appeal held that the non-custodial sentence was inappropriate and highlighted the fact that this violence was ongoing over a considerable period of time:

> In our view, the trial judge erred in failing to give sufficient weight to the fact that these offences involved an ongoing and escalating situation of serious physical abuse and terror by a husband on a wife. Such conduct makes the principle of denunciation in sentencing a primary one, even where specific deterrence may no longer be needed. Abuse of a spouse is also an aggravating factor on sentencing, prescribed by s.718.2(a)(ii) of the *Criminal Code.* Although this does not preclude a conditional sentence in all circumstances, in this case, the ongoing and escalating situation of abuse emphasizes the need for a denunciatory sentence to

[184] *Ibid* at para 20. This is one of the very few cases in the sample where the assault could plausibly be considered minor in the sense that he threw a plastic cup of water and a sleeve of crackers at his wife. There were also allegations of sexual assault and uttering threats but these resulted in acquittals.
[185] *Smith ONCA*, *supra* note 41.

> reflect the recognition that spousal abuse is treated with special attention in the *Code*.[186]

In another early decision, also called *R v Smith*,[187] the trial judge had imposed a suspended sentence on an offender who had smuggled a firearm and ammunition into Canada, pointed a loaded firearm at his ex-spouse and her brother and tried to pull the trigger. Fortunately, the weapon jammed and no one was injured. The trial judge imposed a suspended sentence plus probation mentioning that the offender had already served 13 months of pretrial custody at a time when two for one credit was the norm. The British Columbia Court of Appeal allowed the appeal and imposed a period of two years' incarceration although did not address the issue of pretrial credit.

In *R c Bérubé*,[188] the offender pleaded guilty to forcible confinement, using a weapon during an indictable offence and possession of a weapon for purposes dangerous to the public peace. He had held a knife to the victim's throat, after she attempted to end their relationship, and threatened to disfigure her face. The trial judge suspended the passing of sentence and placed the offender on probation for two years. The Court of Appeal substituted a sentence of two years on each count to be served concurrently. The Court made a strong statement about sentencing for domestic violence:

> Le débat est clos sur le sujet: les tribunaux doivent être particulièrement sensibles aux problèmes de la violence conjugale et de la violence familiale, et ils doivent exprimer au moyen de sanctions suffisamment sévères l'intolérance de la société à l'endroit de ces violences.
>
> L'ère de la tolérance pour la violence conjugale est révolue depuis belle lurette. Il appartient aux tribunaux de se mettre au diapason de sorte à être en harmonie avec les attitudes modernes sur la question. Ces attitudes sont incarnées dans le sous-al. 718.2*a*) (ii) (sic) du *Code*.[189]
>
> [The debate is closed on the subject: the courts must be particularly sensitive to problems of conjugal violence and family violence and they must express society's intolerance of these forms of violence by imposing sufficiently severe punishments.
>
> The era of tolerance towards conjugal violence is long gone. The courts must catch up to reflect the modern attitudes on this issue. These attitudes are enshrined in subparagraph 718.2(a)(ii) of the Code.]

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[186] *Ibid* at para 5. The court upheld the nine month sentence but overturned the order that it could be served in the community. The Court also held that the trial judge erred in not imposing restrictions on liberty as part of the CSO indicating that there should have been some form of house arrest or a significant curfew.
[187] *Smith BCCA*, *supra* note 167.
[188] 1999 CanLII 13241 (*QC CA*).
[189] *Ibid* at paras 21–22.

In *R c Chénier*,[190] the offender was given a CSO after breaking into the victim's residence at night, threatening her and attempting to strangle her in front of her son. The Quebec Court of Appeal found this an unfit sentence and imposed a federal sentence of 30 months, relying on s.718.2(a)(ii).

In *Coulthard*,[191] the Alberta Court of Appeal dealt with the case of an offender who, while wearing a mask, hid in his ex-girlfriend's apartment building and attacked her from behind. She was pregnant and had refused to have an abortion. The trial judge imposed a CSO of two years less a day. He stressed that the respondent was young and had no criminal record. The Alberta Court of Appeal held that the sentence was unfit because of the trial judge's failure to give adequate weight to deterrence and denunciation and to review the "factors in s. 718.2 (a)-(e)".[192] The appellate court stressed that denunciation and general deterrence must be paramount and "cannot be overtaken by an offender's individual circumstances or the need for rehabilitation."[193]

In *R v MacDonald*[194] the trial judge had imposed a two-year CSO for an offender convicted of aggravated assault after beating his common-law spouse with a clothes iron and a wine bottle while in a drunken rage. The Crown had asked for a sentence of three years' incarceration in part so the offender could take advantage of the anger management and other courses that were available in the federal system. The Nova Scotia Court of Appeal found that the trial judge erred in imposing a non-custodial sentence. The Court of Appeal quoted extensively from the Alberta Court of Appeal's pre-s.718.2(a)(ii) decision in *Brown*, stating that while rehabilitation was important,

> [t]he more important principles [than rehabilitation] are that the sentence should be such as to deter other men from similarly conducting themselves toward women who were their wives or partners (what is called the principle of "general deterrence"), and that the sentence should express the community's wish to repudiate such conduct in a society that values the dignity of the individual (the "denunciation principle").[195]

The appellate court criticized the trial judge for not considering the requirement that a CSO be available only where the safety of the community is not endangered. The offender had a prior conviction for violence against the same victim and was planning to resume living with her. This meant there were no conditions that could be imposed that would protect the victim's safety.

> It is important to recognize, as well, that society has an interest in [the victim's] continued safety. Mr. MacDonald's random attacks burden the state's resources and endanger not only [the victim] but also the peace officers who are called upon to intervene. It is counter-intuitive to permit a violent offender to continue to cohabit

[190] *Supra*, note 167.
[191] *Supra* note 25.
[192] *Ibid* at para 8.
[193] *Ibid* at para 9.
[194] *MacDonald NSCA*, *supra* note 167.
[195] *Ibid* at para 26 citing *Brown*, *supra* note 17 at 249.

> with the victim, even though that victim is a willing participant. This would surely undermine confidence in the administration of justice.[196]

While the victim declined to give a victim impact statement she did make an oral plea for leniency before the judge, blaming herself for the violence that had been perpetrated against her and telling the Court she did not want to live if the offender were not with her. The Court noted this testimony underscored "the extent of her vulnerability and dependence upon Mr. MacDonald. One wonders if she is able to fairly evaluate the relationship and the dangers that it creates for her."[197] The Court stressed that hardship on the victim cannot prevail over the need for imprisonment as a means of deterring other men and breaking the cycle of violence. The Court imposed a sentence of 24 months incarceration and probation, reduced by two months based on time served. The Court's discussion of the probation order did not mention a no-contact condition.

These cases reveal that some trial judges are imposing non-custodial sentences for very serious crimes. The willingness of appellate courts to substitute penitentiary sentences for non-custodial sentences reflects the seriousness of these crimes.[198] Section 718.2(a)(ii) plays an important role by giving appellate courts a tool with which to overturn inappropriate non-custodial sentences.

3.4 Sentencing for Intimate Partner Sexual Assault

Research demonstrates that intimate partner sexual violence (IPSV) can be just as devastating as stranger sexual assault, if not more so, for its victims:

> Compared to survivors of non-partner sexual violence, survivors of IPSV experience longer lasting trauma, higher levels of physical injury, higher incidences of multiple sexual assaults, and an increased likelihood of violence resulting in pregnancy and deliberate exposure to sexually transmitted infections. In addition, *women who experience IPSV are also more likely to be killed by their intimate partner.*[199]

There are a number of cases in this sample that suggest that courts still do not recognize that IPSV is as serious as other sexual assaults. While courts often say the right thing about the intimate relationship not being a mitigating factor, sentences significantly below the range are sometimes imposed without any real explanation of why the case falls below the lower end of the range. More problematically, sentences are sometimes reduced on the basis that the woman continued in the relationship or agreed to have consensual sexual relations with the offender after the sexual assault(s) in question. These problems are less prevalent in the most serious cases *i.e.* those few cases involving aggravated sexual assault or sexual assault causing bodily harm/with a

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[196] *Ibid* at para 41.
[197] *Ibid* at para 43.
[198] *GGS*, *supra* note 155; *Chénier*, *supra* note 167; *Bérube*, *supra* note 167; *Pudlat*, *supra* note 38.
[199] Linda Baker, Nicole Etherington & Elsa Baratto "Intimate Partner Sexual Violence" (2016) 17 Centre for Research & Education for Violence Against Women & Children, Learning Network, online: <http://www.vawlearningnetwork.ca/issue-17-intimate-partner-sexual-violence > (Citations omitted, emphasis original.)

weapon where significant injury is done to the victim. Such cases often involve multiple charges and are almost always associated with significant penitentiary sentences. It is level I sexual assaults that reveal the more problematic reasoning. This reasoning comes to light in appellate cases which describe the underlying problematic reasoning in the courts below.

3.4.1 Appellate Cases

There were 17 appellate cases involving IPSV comprised of one charge of aggravated sexual assault, three charges of sexual assault with a weapon/causing bodily harm and 13 level I sexual assaults. There were also at least four cases where sexual assault charges were either dropped by the Crown or the offender was acquitted of that charge and convicted of other offences.[200] The three sexual assault appeals from Quebec all involved very serious sexual assaults (two sexual assaults with a weapon/causing bodily harm and one case involving "various" sexual assaults) and all resulted in significant penitentiary time imposed at trial and upheld on a defence appeal.[201] There were no Crown appeals from sentences imposed for sexual assault in Quebec. Problematic reasoning was found in some English appellate decisions, sometimes in the language of the Court of Appeal but more often in the trial decisions underlying those appeals. It is important to acknowledge that the Crown appeals in this context probably reveal some of the most egregious sentences imposed for IPSV and thus this sample may be somewhat slanted. But also invisible in this study are the cases where charges are never laid or the accused is acquitted based on stereotypes around consent in intimate relationships.[202]

Appellate courts consistently take the position that nonconsensual intercourse is a particularly serious form of sexual assault, yet in the spousal context some of these cases are not treated with the seriousness that courts say they deserve. In *R v RG*,[203] for example, the offender was convicted of sexual assault for nonconsensual intercourse with his wife. The victim told the offender she did not want to have sexual relations and that he was hurting her. The Newfoundland Court of Appeal upheld a sentence of six months with probation. The statement of facts indicated that the victim did not know that a husband could be charged with sexual assault for forced intercourse. Her victim impact statement described the devastating impact of the sexual assault on her mental state. The trial judge stressed that the couple had continued to cohabitate and to have consensual sexual relations before ultimately terminating the relationship. The trial judge also held that it was mitigating that the sexual assault was "more for sexual

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[200] *DD QC*, *supra* note 47 (offender acquitted of sexual assault charge); *MacLeod*, *supra* note 43 (sexual assault charge was stayed); *R v McIntosh*, 2004 NSCA 19 (sexual assault charge was dismissed for want of evidence); *C(TE)*, *supra* note 169 (offender acquitted of sexual assault).

[201] *Veillette c R*, 2010 QCCA 410 (six years for sexual assault causing bodily harm and sexual assault); *HK c R*, 2015 QCCA 64 (10 years for sexual assault with a weapon); *JD c R*, 2009 QCCA 805 (six years for "various" sexual assaults).

[202] For an example of a case demonstrating these rape myths in the context of IPSV see a recent Newfoundland Court of Appeal decision where the Court held that evidence of a sex tape and sexually suggestive text messages sent by the victim were inappropriately admitted to challenge the complainant's credibility but nonetheless refused to overturn the acquittal despite the "unfair manner" in which the complainant was treated. The Supreme Court of Canada ordered a new trial from the bench. See *R v SB*, 2017 SCC 16, rev'g 2016 NLCA 20.

[203] 2003 NLCA 73.

gratification as opposed to violence towards the victim,"[204] an assumption which trivializes the harm of sexual violence within intimate relationships. The Court of Appeal agreed with the Crown that it is wrong in principle to treat sentencing differently for IPSV. However, it agreed with the trial judge that, in this case, the fact that she had stayed with the offender was mitigating:

> ….I conclude that the trial judge was not in error in considering the continued cohabitation as an indication of the impact of the assault on the victim and in the unusual circumstances of this case, considering it to be a mitigating factor.[205]

The suggestion that IPSV is somehow less culpable than other sexual offences found some support in the Newfoundland Court of Appeal in *R v Squires*.[206] Justice Welsh writing the majority reasons for the Court of Appeal stated that the starting point sentence for sexual assault involving forced intercourse outside of an intimate relationship should be three years whereas the starting point within an intimate relationship should be 18 months – clearly creating a discount for IPSV. Justice Welsh went on to list relevant factors in crafting a sentence for IPSV which included whether the victim agreed to have sex with the offender after the sexual assault and whether the relationship was otherwise abusive, as if sexual assault occurs within non-abusive intimate relationships. However it is important to stress that Justice Rowe wrote concurring minority reasons to urge the Court not to deal with the starting point issue and there was a strong dissenting judgment by Hoegg JA demonstrating why the judgment of Welsh JA was so problematic.

> Setting a lower range of sentence for sexual assaults with intercourse that occur within an ongoing relationship is a statement that those assaults are less serious than sexual assaults with intercourse that are committed upon complainants who are not in ongoing relationships. This message directly contradicts the intention of Parliament, stands in direct opposition to much recent jurisprudence, and sends a message to this distinct group of complainants that they are less worthy of the law's protection than other complainants.[207]

The dissent relied explicitly on the enactment of s.718.2(a)(ii) to critique this position:

> This new legislation shows Parliament's recognition of the vulnerability of complainants who suffer abuse within a marriage or common law relationship by declaring the occurrence of assaults in these circumstances to be an aggravating factor on sentencing.[208]

The dissent also responded to the majority's suggestion that if the victim continues in an intimate relationship with the offender that is a relevant factor in sentencing:

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[204] *Ibid* at para 5.
[205] *Ibid* at para 14.
[206] *Supra* note 96.
[207] *Ibid* at para 105.
[208] *Ibid* at para 108.

> The fact that a victim continues a relationship with an offender for a period of time following the assault does not mean that she consented to the assault. Like any other circumstance of the case, it may be considered by the trial judge in determining whether there was consent. Once it is determined that there was not consent, the existence of a continuing relationship is irrelevant.…[209]

Even the language of the dissent was potentially problematic here in that consent to sexual intercourse with the offender on one occasion should not be used to conclude that she consented to sexual activity on another occasion.

In *R v Branton*[210] the Newfoundland Court of Appeal retreated from the position of Welsh JA noting that only one judge in *Squires* had supported a lower starting point. Thus, the lower starting point for IPSV is not the law in Newfoundland. It is notable that the dissenting opinion of Hoegg JA on this issue was recently followed by the Manitoba Court of Appeal in *GGS.*[211]

However, Newfoundland is not the only province in which this issue has arisen. In *Woods*,[212] the offender, jealous about rumours that his partner was seeing another man, had nonconsensual intercourse with her in a particularly demeaning fashion. This violence continued over "some considerable time" before the offender fell asleep.[213] The following day she had consensual sexual intercourse with him because she "had to let him because I didn't want to get hurt by him again."[214] The trial judge commented that the victim could not have been "profoundly shaken" by the sexual assault or she would not have had sexual intercourse with him the next day, and used this logic to justify a CSO of two years less a day.[215] The Saskatchewan Court of Appeal began its analysis by referring to "a well-established line of authority from this Court which indicates that the appropriate starting point sentence for a major or serious sexual assault is three years of imprisonment."[216] The Court held that the trial judge erred in allowing the offender to serve the sentence in the community on the basis that he failed to give sufficient weight to denunciation and deterrence:

> Courts across Canada have long recognized the significance of the problems of domestic violence and spousal abuse. For example, in *R v Lavallee*, Wilson J, for the majority of the Supreme Court of Canada said this at p 872:
>
> > The gravity, indeed the tragedy of domestic violence can hardly be overstated. Greater media attention to this phenomenon in recent years has revealed both its prevalence and its horrific impact on women from all walks of life.[217]

[209] *Ibid* at paras 115.
[210] 2013 NLCA 61.
[211] *Supra* note 155 at para 41.
[212] *Supra* note 85.
[213] *Ibid* at para 9.
[214] *Ibid* at para 10.
[215] *Ibid* at para 26.
[216] *Ibid* at para 30.
[217] *Ibid* at para 34.

However there was an undercurrent in this judgment that IPSV is less serious than stranger sexual assault. The following statement is revealing about how the argument unfolded in this case:

> Mr. Woods responds to all of this by saying, in part, that the existence of his conjugal relationship with Ms. S. diminished the seriousness of the offence and, by implication, made the need to emphasize deterrence and denunciation much less pressing.[218]

The Court of Appeal did not accept this argument, but nor did it condemn it strongly. It did rely on s.718.2(a)(ii) in rejecting the CSO:

> In our view, at least on the facts of this appeal, this argument can be given no effect. Section 718.2(a)(ii) of the *Criminal Code* specifically provides that abuse of a spouse or common-law partner shall be considered an aggravating circumstance for the purposes of sentencing [the section has been omitted]. While the relationship between Mr. Woods and Ms. S. was relatively short-lived and not particularly conventional, we see no basis for discounting the significance of the offence simply because they had a history of consensual sexual relations. Ms. S. did not give up her rights to physical and sexual integrity by entering a relationship with Mr. Woods. The sexual assault committed on her was serious. It featured full sexual intercourse and involved a significant element of intimidation and humiliation. Mr. Woods has apparently offered no apology to Ms. S. and has expressed no remorse.[219]

While this makes clear that the sexual assault was serious, in imposing a sentence of two years less a day, the Court of Appeal gives no explanation for going below the three-year starting point it had identified, leaving the impression that it was the lack of a "profound impact" on the victim that justified the lower sentence.

Even where the couple breaks up as a result of the sexual violence, spousal sexual assault may still be discounted in seriousness. In *R v RM*[220] for example, the Ontario Court of Appeal reduced a 15-month sentence for forced oral sex to six months on the basis that the trial judge wrongly relied on "a pattern of abuse" where the evidence indicated "heated arguments" but not abusive behaviour.

In *R v TC,*[221] the Saskatchewan Court of Appeal upheld the sentence of four months plus probation for an offender who sexually assaulted his spouse following separation. He attempted to have nonconsensual intercourse and, when that was unsuccessful, he punched the victim in the face and bit her. The Court of Appeal acknowledged that normally the Crown's appeal would have succeeded but stressed the offender's considerable remorse as well as the fact that he and

[218] *Ibid* at para 37
[219] *Ibid* at para 38.
[220] 1998 CarswellOnt 892.
[221] *Supra* note 135.

the complainant had reconciled and that his incarceration would create hardship for her and her children.

Two recent appellate decisions demonstrate that the trend towards lower sentences at trial for IPSV continues. In *R v A(DJ)*[222] the trial judge imposed 12 months plus probation for a man who forced anal intercourse on his common-law spouse leading to bleeding and pain for three days. The offender had a record of offences for obstruction, mischief, assault, uttering threats and breaching conditions, including violence against former spouses. The very brief reasoning of the trial judge gives no explanation for why the sentence is so discrepant with authorities. The Alberta Court of Appeal increased the sentenced to four years incarceration noting that the trial judge's sentence minimized and trivialized the very serious sexual assault involved and treated the starting point for major sexual assaults as something that could be "swept off the sentencing table."[223]

In *GGS,*[224] discussed above in the context of s.718.2(e), the trial judge imposed a suspended sentence for an offender who tied his common-law spouse to her infant's crib, burned her back twice with a lighter and anally raped her.[225] The sentence she imposed for forced intercourse fell well below the starting point which the Court of Appeal identifies as three years for a major sexual assault. Despite the violent nature of the offence, the trial judge characterized the incident as "a spontaneous act of violence between two people involved in an ongoing intimate relationship"[226] and stressed that there was no evidence that this offence was "part of a cycle or pattern of violence on the part of the accused."[227] The Court of Appeal held that the sentences for assault with a weapon and forcible confinement should be concurrent with the sentence for sexual assault but that a higher sentence should be imposed to reflect the number of crimes committed by the offender. The Court indicated that six years would have been appropriate but reduced that to four years on the basis of significant *Gladue* factors. To go from a suspended sentence to a four-year penitentiary sentence highlights the egregiousness of the sentence imposed at trial and the degree to which the trial judge was out of touch with sentencing for IPSV. No clarification is given about why the fact that previous crimes of violence related to a different intimate partners should reduce the offender's culpability.

Despite this decision, in general, courts appear to have less difficulty in understanding the seriousness of IPSV for those sexual assaults that fall on the higher end of the spectrum. Courts seem to have less difficulty analogizing these cases to stranger sexual assaults. However, there are still a few cases where trial judges imposed sentences that are significantly below the range. In *R v DS,*[228] for example, the offender subjected his common-law wife and her children to a "reign of terror" over 10 years. He was charged with 32 offences including six counts of sexual assault, some of which involved forcing the victim to have sex with strangers he brought home and then with him. The trial judge imposed a sentence of 10 years and then reduced it to six

[222] 2016 ABCA 282.
[223] *Ibid* at para 10 citing from the decision in *R v Arcand*, 2010 ABCA 363 at para 279.
[224] *Supra* note 155.
[225] See note 156 above explaining that the sentence was imposed illegally.
[226] *GGS, supra* note 155 at para 11
[227] *Ibid* at para 29
[228] 2013 ONCA 244.

years based on totality. Pretrial custody brought the sentence down to two years less a day plus probation. The Court of Appeal, in raising the six year sentenced to 12 years, agreed that the sentence was manifestly unfit given the significant impact on multiple victims.

Not all the sexual assault appeal cases in this sample are problematic, but there are enough troubling cases to raise concern. These cases suggest that, perhaps not surprisingly, we have not made the progress with IPSV that we have with other forms of MIPVW. Remnants of rape myths such as "why didn't she leave the relationship " or "would she have consented to have sex with him later if she had really been sexually assaulted" can still be found in these cases in a way that was not seen in this sample with nonsexual offences. In his description of sentencing in the 1980s for "wife assault," Endicott describes how reconciliation of the couple and forgiveness on the part of the female partner were mitigating factors in sentencing for wife assault generally.[229] The present study suggests that, while we may have overcome these problematic assumptions in the context of nonsexual offences, these views still linger when dealing with IPSV. Appellate courts may set ranges or starting points for major sexual assaults that involve significant penitentiary time but they are not consistently applied by trial judges or even appellate courts in the context of IPSV. Judges often go below these ranges without explanation. Sexual assault is simply not seen as being as serious within an intimate relationship as it is otherwise.

3.4.2 Trial Cases

It is more difficult to critique the trial decisions involving sexual assault in this sample in part because they were particularly serious cases often involving multiple charges. Thirteen of the 71 trial cases involved charges of some level of sexual assault. Of these there were five cases, or 38%, which included convictions for sexual assault with a weapon/causing bodily harm and one of these five also involved a charge of aggravated sexual assault. These numbers are not reflective of sexual assault charging patterns generally. The eight cases that were charged at level I were nonetheless serious cases involving forced anal and vaginal intercourse, violent assaults over a number of years, concurrent charges of aggravated assault and other serious offences, and in one case an additional charge of invitation to sexual touching against the offender's daughter.[230] Thus it is not surprising that there were no cases where a non-custodial sentence was given serious consideration although in one case pretrial custody reduced a sentence to time served and a suspended sentence was imposed.[231] Eleven cases out of the 13 involved penitentiary sentences and the remaining two cases received two years less a day and 18 months incarceration respectively.[232] The reasoning in these cases was not as problematic as in the trial decisions revealed by the appellate cases. The trial cases in the sample appear to support the notion that courts see less difference between sexual assault in intimate relationships and other sexual assaults when dealing with more serious sexual assaults. The appellate cases in this sample probably reflect the extremes of trial level sentencing for MIPVW. One could conclude

[229] Endicott, "Wife Assault," *supra* note 12.
[230] *T(B)*, *supra* note 41.
[231] *CP*, *supra* note 55 the offender was actually given a suspended sentence with probation but that was only after taking into account 36 months for pretrial custody. The Court held that three years would have been an appropriate sentence for sexual assault and possessing child pornography.
[232] *Ibid.*

that it is only where significant violence, beyond that inherent in the sexual assault, is inflicted on an intimate partner that courts will fully recognize the serious harm of IPSV.

These trial decisions on sexual assault provide a useful vehicle for raising an issue that was seen throughout the sample. There is inconsistency as to whether judges are imposing concurrent or consecutive sentences. One difference between stranger sexual assault and IPSV is that the latter is often part of a pattern of abuse that may take place over months or years. The sexual assault may be the culmination of a history of violence or it may be repeated over a significant period of time. This fact, one would expect, might lead to more serious sentences being imposed for IPSV. However, the use of concurrent sentences often masks the impact of a long course of violent behaviour against an intimate partner. If the same starting point, or bottom of the range, is used for multiple sexual assaults against an intimate partner as is used for one sexual assault against a stranger, this effectively discounts IPSV where concurrent sentences are imposed.

While breach of conditions offences are usually, but not always,[233] sentenced with a consecutive period of imprisonment, such is not the case where there is an ongoing course of violence. It is not unusual, for example, to see cases where distinct incidents of abuse over a period of time are sentenced with a number of concurrent sentences. In *R v TB*,[234] for example, a total sentence of four years was given for six sexual assaults against a spouse that took place over seven years, each offence involving nonconsensual intercourse when the victim was in the throes of a seizure. This sentence was made concurrent to an additional 18-month sentence for invitation to sexual touching against the offender's daughter. The fact that there were multiple victims and the fact that the offences were spread out over many years are factors often used to justify consecutive sentences but not in this case. In *R v Moise*,[235] the offender was convicted on nine counts including sexual assault, assault causing bodily harm, uttering threats etc. for a number of incidents of violence against his intimate partner over 10 months. The Court characterized the violence as being one continuing course of events thus justifying concurrent sentences. What is troubling about these cases is the lack of consistency. In *R v CBK*, [236] for example, consecutive sentences were imposed on an offender for a number of offences that took place in one evening.

In some cases where concurrent sentences are given for multiple offences, the sentence for the sexual offence may be somewhat elevated because of the multiple offences involved,[237] although this is not always explicit. These different approaches to sentencing make it very difficult to compare sentences and for judges to ensure some degree of consistency. This issue is not unique

[233] See for e.g., *R v Dahlman*, 2007 BCSC 1912 where the offender sexually assaulted and forcibly confined his common-law spouse. When released by the police he breached a no contact order and criminally harassed the victim. Sentences for all these offences were ordered to be served concurrently, at two years less a day.
[234] *Supra* note 41.
[235] *Supra* note 51.
[236] 2015 NSSC 62 where the offender was given consecutive sentences for sexual assault, assault causing bodily harm and uttering death threats for events in the course of one evening the details of which were not described in the judgment. Additional concurrent sentences were given for forcible confinement, theft and damage to property.
[237] *Moise*, *supra* note 51.

to sexual offences, nor is it unique to trial decisions, but stood out in these cases because the sexual offence almost always attracts the longest sentence imposed.

3.4.3 Section 348.1 and s.718.2(a)(ii): Home Invasions

The break and enter offences, while not as numerous as other charges in this sample, tended to involve very serious violence. Break and enter charges were sometimes accompanied by charges of attempted murder or aggravated assault.[238] In some cases, where the offender broke into the victim's home, her new partner was also a victim of violence.[239] Section 348.1 of the *Criminal Code* deems that it is an aggravating factor in sentencing if an accused commits break and enter while knowing or being reckless with respect to the fact that the home is occupied. Section 348.1 creating the aggravating factor uses the term home invasion in its heading. Most home invasion cases take place in the context of one or more individuals breaking into a home, usually for the purposes of robbery, and often terrorizing its occupants. Appellate courts have generally set a high sentencing range for these cases given the degree of violence and danger that is often involved. One issue that arises in the sample and in the appellate cases that do not cite s.718.2(a)(ii) is whether the "home invasion" case law should apply to men who break into the home of their (former) intimate partner for the purpose of engaging in serious violence against her and/or her new partner. If the home invasion case law applies, the range of sentences would be higher than is generally applied in MIPVW. Some of the discussion in these cases almost suggests that breaking into a dwelling place in order to attack your former intimate partner is less blameworthy than breaking in to rob the unknown occupants of a home.

In *Pakoo*,[240] the offender, while intoxicated, broke into the home of his former common-law partner, carrying a rifle, through an unsecured window. He attacked her new partner and even shot the rifle in the living room where an 11-year-old child was hiding under a blanket. The bullet passed near the child but did not hit him. The offender then returned to the bedroom and pointed the weapon at the two adults, but it jammed when he was reloading it. His former partner struggled with him and was injured in the process but managed to wrestle the weapon away from him. He then continued to assault her new partner. He was sentenced to a total of approximately 45 months which after credit for time served resulted in a 36 month sentence.

The Crown appealed arguing that the sentence was markedly outside the range. The offender cross-appealed asking for a CSO. The main concern for the Manitoba Court of Appeal was whether this was a "home invasion" because the starting point sentence for home invasions was eight years. The Court's reasoning on this issue is a bit convoluted but the end result was a sentence lower than warranted by home invasion case law.

> If we are to apply the factors set out in [the leading home invasion case] literally, what occurred here, horrendous though it was, does not fit within the frequently used description of a "home invasion" in one main respect, namely, there is no evidence that the accused broke into Ms. Bruyere's house intending to commit robbery. While his intention may have been far more sinister, it does not appear

[238] *R v Cormier*, 1999 CarswellNB 81 (CA); *MacDonald BCCA*, *supra* note 44.
[239] *Supra* note 44.
[240] *Ibid.*

> that robbery was on his mind, and the cases suggest that the words "home invasion" are used in connection with robbery, and usually robbery of strangers. …. although what happened here was not, literally, a "home invasion" robbery, … for all practical purposes it amounts to the same thing.… The fact that the victims were known to the accused… is, in my view, irrelevant and in any case not a factor diminishing the gravity of the offence. The fact that there was a domestic violence aspect to what occurred, and it was not a robbery, in no way mitigates the brutality and seriousness of the accused's conduct. Nevertheless, since "home invasions," as judicially defined, seem to be restricted to cases where robbery (and usually of strangers) is the motive, this case was not, strictly speaking, such a "home invasion."[241]

The Court then went on to indicate that if 7 to 10 years were the range for home invasions it should also be the range for the collection of offences involved in this case. But the Court waffled in applying that range to this case. Concluding that the case was not a home invasion but that it had a strong resemblance to one, the Court imposed a sentence of five years, eight and a half months given the offender's post-arrest performance and his minimal criminal record. The Court described the offender as acting "out of character," being "contrite" and having taken positive steps to modify his behaviour. Justice Kroft wrote concurring reasons simply to say that he would be uncomfortable with a sentence any higher than the one imposed. He did not find the home invasion analogy helpful and in fact appeared to find the absence of a financial motive mitigating:

> The accused in this case had no financial motives when he broke into the dwelling. His objective was not to steal or extort money or property. His crime was one which arose out of the depression, anger and intoxication that followed an earlier domestic dispute. Whatever actually provoked the accused to break into the home of his former common-law wife, where she lived with her children and her new partner, we do not know. One may regard his conduct as more or less blameworthy than a "home invasion," but it was certainly different in character.[242]

One of the appellate decisions not citing the section also dealt with the home invasion issue. In *McCowan*[243] the offender scaled the wall at the victim's apartment building and broke in through the balcony. He found his wife in bed with the victim. He punched the victim in the face multiple times causing "catastrophic injuries."[244] He was sentenced at trial to five and a half years, reduced to provincial time with probation on the basis of pretrial custody. The Crown appealed arguing that the sentence was manifestly unfit given the seriousness of the injuries and the home invasion nature of the case. The majority, per Steel JA, upheld the sentence. The majority acknowledged that the range for home invasion cases was seven to 10 years but that each case had to look at the motive for the break-in and the context of the offence. Here, the victim was supplying drugs to the offender's wife and they had developed a sexual relationship. The offender had a minimal criminal record and references from the staff at the correctional facility.

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[241] *Ibid* at paras 34–35.
[242] *Ibid* at para 57.
[243] *Supra* note 54.
[244] *Ibid* at para 5.

Once again, the defence argued that the offence was "totally out of character," a characterization that is not uncommon in cases of MIPVW. The dissenting judgment of Beard JA held that this case was a serious home invasion accompanied by aggravated assault rather than robbery but that the range should be the same seven to 10 years with a starting point of eight years. Given the fact that the offender had already served over one year of probation the dissent would have imposed a sentence of seven and one half years' incarceration.

Despite the seriousness of these break and enter cases, rarely are sentences given that approach the home invasion cases. For example in *MacDonald*[245] the offender was sentenced to five years concurrent for each of two aggravated assaults and breaking and entering, which was upheld in the face of a defence appeal. The same five years was imposed in *R v Quinn*, another break and enter case that does not refer to s.718.2(a)(ii).[246] It is hard to see how these cases are not discounting the sentence on the basis that the victims are known to the offender and are taking place in the context of MIPVW. An amendment to section 348.1 that clarifies that home invasions include cases where the offender breaks in to attack either a (former) intimate partner or her new partner would provide useful direction to courts in this regard.

4.0 CONCLUSION

The cases reviewed in this study suggest that most courts are taking MIPVW seriously, at least for those cases that get to sentencing. The primary function of s.718.2(a)(ii) is to give statutory force to the interpretive principle that denunciation and deterrence should be the primary principles in sentencing for MIPVW unless there are particularly compelling reasons for prioritizing other sentencing principles. The result of this shift in focus away from keeping the family together towards deterring and denouncing MIPVW is that non-custodial sentences have become the exception. With the exception of sexual assault cases, there were virtually no cases where questions were raised about why the woman did not leave the relationship, or suggestions that she was responsible for bringing the violence on herself. In the context of IPSV, Crown counsel may need to do more to educate sentencing judges on the devastating impact of IPSV as some of these cases revealed a tendency to trivialize this form of sexual assault.

Section 718.2(a)(ii) is sometimes treated as if it codifies existing law rather than changing it. The Alberta Court of Appeal, in a spousal violence case not citing s.718.2(a)(ii), specifically stated that only ss.718.2(d) and (e) bring about any change in the law and the rest of s.718.2 simply codifies existing law.[247] This is perhaps why a number of courts rely on pre-s.718.2(a)(ii) jurisprudence to inform the meaning of s.718.2(a)(ii), particularly in Alberta and Quebec. However, this does not mean that the section is having no impact on sentencing. The most valuable function of s.718.2(a)(ii) may be as a tool for appellate courts to correct the most egregious trial decisions. There are 11 appellate cases (13% of the appellate cases) in which appeal courts overturned a non-custodial sentence relying at least in part on s.718.2(a)(ii). These cases suggest that some trial courts are failing to recognize the seriousness of these cases and that

[245] *MacDonald* BCCA, *supra* note 44.
[246] 2015 ABCA 250.
[247] *R v Hunter* (1998) 63 Alta LR (3d) 229 (CA).

s.718.2(a)(ii) plays an important role in facilitating appellate review. In *Pudlat,*[248] for example, the Nunavut Court of Appeal interpreted the section as requiring an increase in the quantum of sentence imposed for offences involving MIPVW.[249] Similarly when s.718.2(e) shifts the focus to restorative principles, it is important to have a statutory provision that brings the seriousness of MIPVW at least back into the discussion. The impact of s.718.2(a)(ii) may have been gradual as the study reveals an increase in penitentiary sentences imposed by trial and appellate courts between 2007 and 2015. The trial decisions in this sample were less problematic than some of the trial decisions underlying the appellate cases, a finding which supports the speculation that the Crown appeals may represent the most egregious trial decisions. Regardless, s.718.2(a)(ii) remains an essential tool for appellate courts where trial judges do fail to grasp the seriousness of MIPVW.

What seems to be missing from these appellate cases, however, is a thoughtful discussion about the purpose of s.718.2(a)(ii), and the problematic pre-s.718.2(a)(ii) case law. Section 718.2(a)(ii) is often cited in a cursory way with little discussion beyond saying that it is aggravating. It is simply added into the mix with other aggravating and mitigating factors. There are few cases that recognize the systemic nature of MIPVW and the remedial purpose of s.718.2(a)(ii) as is often recognized for s.718.2(e). Sentencing remains a very individualized exercise and incorporating concerns about systemic sex inequality into an individualized sentencing calculation is complex and not often attempted. When one adds the challenge of another systemic inequality through s.718.2(e), the cases become even more complex. It would be helpful to have more direction-setting appellate decisions in this area which set guidelines or at least general principles to be applied beyond the somewhat vague instruction of prioritizing deterrence and denunciation.

The results of this study raise a number of concerns. First, why are so many appellate cases not citing s.718.2(a)(ii)? Some of these appellate cases are very brief decisions where a full analysis of aggravating and mitigating factors is not undertaken. However, there are still a significant number of cases where one would expect s.718.2(a)(ii) to have been mentioned and it was not. It would be useful to examine whether Crown counsel are consistently putting the section before the courts and laying the groundwork for understanding the aggravated nature of these cases. A review of trial decisions in those cases would be helpful to determine how many of the sentencing judges did in fact rely on s.718.2(a)(ii).

Second, this study reveals problems with other stages in the criminal justice process. The prevalence of no contact orders in these cases, and the numbers of cases in which these orders are violated, suggests that other systems in the criminal justice system are failing to provide adequate protection to women. As one judge said with respect to no contact orders:

> It is important to understand that this order will not afford Ms. Carter any real protection from Mr. Nichols if he decides, after his release from prison, to harm or kill her because "no contact orders", whether they are contained in probation orders, undertakings or recognizance, are not supervised in any significant or

[248] *Supra* note 38.
[249] *Ibid* at para 6.

> effective fashion. Such orders do not provide the type of protection they promise to female complainants and victims in spousal assault cases.[250]

It is disturbing to read about men being released on conditions, violating those conditions, being released again, perhaps on a slightly higher surety, and violating the conditions again, especially where the breach relates to a no contact order. This pattern brings into question how the judicial interim release system deals with these cases and how police enforce no contact orders.

Third, noticeably absent from this sample of cases was IPV outside of heterosexual relationships. There is only one appellate case in the sample involving a same-sex couple and no trial decisions. Further, in the one appellate case that is present there is no mention of the nature of the relationship beyond citing s.718.2(a)(ii) and only a very close reading of the decision reveals the same-sex relationship. It is likely that the absence of these cases says more about reporting rates and charging practices, outside the scope of the study, than it does about sentencing.

While there is room for improvement, s.718.2(a)(ii) is playing an important role both at trial and on appeal. Ideally, the section should be clarified and expanded to include former spouses, non-cohabitating intimate partners and third parties who are targeted because of their relationship to the victim. The repeal of this section would send a dangerous message to courts about the importance of denouncing and deterring MIPVW. Repeal would suggest either that we no longer need s.718.2(a)(ii) or that the intimate relationship should not be the basis of an aggravating factor. Concerns raised in the analysis of the sexual assault cases suggest that more legislative direction, not less, may be necessary to assist courts in this area. Section 718.2(a)(ii) gives Crown counsel an important tool for keeping the systemic nature of this problem front and centre, both at trial but also on appeal, where trial judges have failed to give sufficient weight to the context of the violence. Crown counsel must be vigilant about using s.718.2(a)(ii) and their submissions on sentencing.

There is a tendency when examining sentencing for MIPVW to assume that longer sentences are better than shorter sentences. This may be inevitable given the history and failure of the criminal justice system to respond to MIPVW. Non-custodial sentences have historically been a result of the trivialization of MIPVW and therefore harsher sentences are seen as a reflection of the courts finally taking this violence seriously. However, it would be mistaken to think the sentencing process is an effective means through which to reduce MIPVW in a meaningful way. Sentencing is an after-the-fact response to MIPVW. Many of the offenders in the cases under study had previously served periods of incarceration which clearly did not protect the victims involved in these cases. Simply locking men up for longer periods of time will not protect women from violence. These men will ultimately be released, often more dangerous than when they were initially incarcerated. The significance of providing safe housing, childcare and other supports to help women extricate themselves from violent relationships should not be overshadowed by sentencing reform. Having said this, neither can MIPVW be discounted in the sentencing process as compared to other forms of violence. These cases demonstrate how pervasive and how devastating MIPVW is for women and, when they do seek out the criminal justice system, both in Indigenous communities and elsewhere, they need to be confident that courts, and other processes within the criminal justice system, will acknowledge and denounce this devastation.

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[250] *R v Nichols*, 2007 CarswellNfld 201 (PC) at para 2.

5.0 APPENDICES

Appendix 1: Trial and Appeal Cases Citing s.718.2(a)(ii) (The Sample)

Trial Cases (71 Cases)

R v Fonseca, 1998 CarswellOnt 693
R v Khamphila, 1998 CarswellOnt 3250
R v Travis, 1998 CarswellNB 258
R v Zambri, 1998 CarswellOnt 3120
R v G(K), 2007 Carswell Ont 546
R v Morovati, 2007 ONCJ 8
R c AY, 2007 QCCQ 306
R v Nawaz, 2007 Carswell Ont 9628
R v Dhillon, 2007 BCPC 92
R v Lemieux, [2007] OJ No 5647
R v Markotic, 2007 ONCJ 91
R v Compton, 2007 CarswellNfld 91
R c CL, 2007 QCCQ 3416
R v Nichols, 2007 CarswellNfld 201(NL PC)
R v M(DB), 2007 BCSC 1937;
R v Jassal, 2007 BCPC 231
R v Wood, 2007 BCPC 257
R v Copp, 2007 NBQB 271
R v Betsidea, 2007 NWTSC 85
R c CP, 2007 QCCQ 7975
R v McDonald, 2007 CarswellOnt 6241
R v Bridle, 2007 BCSC 1302
R v T(B), 2007 BCPC 268
R v Gill, 2007 BCSC 1216
R v Keyuajuk, 2007 NWTSC 71
R v Chirimar, 2007 ONCJ 385
R v Leslie, 2007 NBQB 305
R v Wheeler, 2007 CanLii 38544 (NL PC)
Audigé c R, 2007 QCCS 4812
R v Trotman, 2007 Carswell Alta 1867
R v Rahaman, 2007 ONCJ 523
R v Jararuse, 2007 CanLii 58852
R v D(WC), 2007 BCSC 1912

R c Elfaf, [2007] JQ No 18002
R c Gignac, 2007 QCCS 7116
R v Luksha, 2015 BCSC 6
R v Grandine, 2015 ONSC 18
R v Gludd, 2015 ONSC 392
R v Curtis, 2015 CarswellNfld 292
R v Drodge, 2015 CarswellNfld 22
R v Lal, 2015 ONCJ 56
R v K(CB), 2015 NSSC 62
R v O'Quinn, 2015 CanLII 7376
R c Lacasse, 2015 QCCQ 1367
R v Vanasse-Carpentier, 2015 QCCS 928
R v Brinston, 2015 CarswellNfld 54
R v Moise, 2015 MBQB 37
R v Outram, 2015 ONSC 1934
R v K(R), 2015 ONSC 2391
R v S(JS), 2015 BCSC 1369
R v De Niro, 2015 NLTD(G) 55
R v C(KS), 2015 BCPC 199
R c Dutil, 2015 QCCQ 5554
R v Smith, 2015 ONSC 3330
R v Linklater, 2015 CarswellMan 541
R v H(AS), 2015 ONSC 3316
R v St Martin, 2015 ONSC 3840
R v Stacey, 2015 CarswellNfld 237
R c Bosse, 2015 QCCQ 6652
R v Allen, 2015 BCPC 226
R v Fagg, 2015 BCSC 1694
R v Bell, 2015 BCPC 235
R v Morris, 2015 ONCJ 591
R v L(J), 2015 BCPC 316
R v D(D), 2015 ONSC 5865
R c Regis-Fode, 2015 QCCQ 8160
R v R(JA), 2015 BCPC 408
R v Churchill, 2015 NLTD(G) 144
R v B(PJ), 2015 BCPC 390
R v Wojcik, 2015 ONSC 6851
R v Hildebrandt, 2015 BCPC 130

Appeal Cases (82 Cases)

R v RM, 1998 CarswellOnt 892
R v T(JC), 1998 CarswellOnt 1783
R v Cormier, 1999 CarswellNB 81
R v Duquette, 1999 BCCA 219
R v Gladue, [1999] 1 SCR 688
R v Stone, [1999] 2 SCR 290
R v MacLeod, 1999 BCCA 420 (aka R v MDN)
R c Berube, 1999 CarswellNB 256
R v Smith, 1999 CarswellOnt 2214
R c Parent, 1999 CarswellQue 4738
R v Smith, 1999 BCCA 747
R c Gauthier, 2000 CarswellQue 334
R v McCulloch, 2001 BCCA 196
R v Reid, 2002 BCCA 268
R v Macdonald, 2003 NSCA 36
R v GR, 2003 NLCA 73
R v Ochuschayoo, 2004 SKCA 16
R v McIntosh, 2004 NSCA 19
R v Cairns, 2004 BCCA 219
R v Morris, 2004 BCCA 305
R v Brown, 2004 NSCA 51
R v Neudorf, 2004 BCCA 374
R c Chenier, 2004 CarswellQue 12487 (CA)
R v Pakoo, 2004 MBCA 157
R v Pudlat, 2005 NUCA 3
R v Kane, 2005 QCCA 753
R v Francisco, 2005 MBCA 110
R c Garneau, 2005 QCCA 969
R v Coulthard, 2005 ABCA 413
R c Derepentigny, 2006 QCCA 389
R v B(OF), 2006 ABCA 207
R v DD, 2006 QCCA 1323
R v Sweet, 2007 NSCA 31
R v Cuthbert, 2007 BCCA 585
R c Pilon, 2007 QCCA 1829
R v Woods, 2008 SKCA 40
R c Flageol, 2008 QCCA 732

Tiberghien c R, 2008 QCCA 2178
R v Etunangat, 2009 NUCA 1
JD c R, 2009 QCCA 805
R v Cooper, 2009 BCCA 208
Levesque c R, 2009 QCCA 1476
R v Wenc, 2009 ABCA 328
R v Knockwood, 2009 NSCA 98
R v CT, 2009 SKCA 124
R c Cook, 2009 QCCA 2423
R c Roy, 2010 QCCA 16
Veillette c R, 2010 QCCA 410
R v Rush, 2010 BCCA 293
R v D(DJ), 2010 ABCA 207
Nguyen c R, 2010 QCCA 1482
R v Olson, 2011 BCCA 8
R v Sanchez-Lopez, 2011 BCCA 14
R v Smith, 2011 ONCA 564
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