

# THE ROLE OF SECTION 718.2(a)(ii) IN SENTENCING FOR MALE INTIMATE PARTNER VIOLENCE AGAINST WOMEN

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*This article examines sentencing for male intimate partner violence against women since the 1996 enactment of s 718.2(a)(ii) of the Criminal Code, which requires that a spousal/common-law relationship between an offender and victim be considered an aggravating factor in sentencing. The article argues that, while in general appellate courts in Canada are taking this violence seriously, cases involving level I sexual assaults still demonstrate the longstanding tendency to treat the intimate relationship as mitigating. Further appellate guidance is necessary on how courts should reconcile s 718.2(a)(ii) with s 718.2(e), which requires that all options other than incarceration be considered when sentencing an Indigenous offender. The author argues that it is important for courts to at least consider the systemic problem of intimate violence against Indigenous women when sentencing male offenders in these cases.*

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*Le présent article examine la détermination de la peine dans le contexte de la violence conjugale faite aux femmes par les hommes depuis l'adoption, en 1996, du sous-alinéa 718.2a)(ii) du Code criminel. Cet article oblige le tribunal à tenir compte, à titre de circonstance aggravante dans le cadre de la détermination de la peine, de la relation conjugale qui existe entre le délinquant et la victime. L'auteure fait valoir que même si, dans l'ensemble, les tribunaux d'appel canadiens prennent cette question de violence au sérieux, semble toujours persister la tendance de longue date à traiter la relation conjugale comme étant un facteur atténuant dans les affaires mettant en cause des agressions sexuelles de niveau I. Par ailleurs, l'auteure souligne qu'il faudrait de plus amples directives de la part des tribunaux d'appel quant à la façon dont les tribunaux peuvent concilier le libellé du sous-alinéa 718.2a)(ii) avec celui de l'alinéa 718.2e), qui exige l'examen de toute sanction substitutive à l'incarcération au moment de la détermination de la peine de délinquants autochtones. L'auteure soutient qu'il est important que dans ces affaires, les tribunaux tiennent compte, à tout le moins, du fléau systémique*

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*qu'est la violence conjugale faite aux femmes autochtones, dans le cadre de la détermination de la peine des délinquants de sexe masculin.*

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## Contents

1. Introduction .....	159
A) Background .....	161
B) Scope of Section 718.2(a)(ii) .....	163
2. The Cases Under Study .....	167
A) Brief Overview of the Cases .....	167
B) Sentences Imposed .....	169
3. Analysis of Section 718.2(a)(ii) Case Law .....	171
A) Non-Custodial Sentences .....	171
1) Upholding Non-Custodial Sentences .....	172
2) Overturning Non-Custodial Sentences .....	172
3) Non-Custodial Sentences for Indigenous Offenders .....	175
B) Sentencing for Male Intimate Partner Sexual Violence Against Women ...	181
4. Conclusion .....	186

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## 1. Introduction

Male intimate partner violence against women has been described as “one of the most universal and widespread forms of violence against women.”<sup>1</sup> While there is significant social science literature on the causes and responses to such violence, very little academic work has focused on sentencing for intimate partner violence in Canada.<sup>2</sup> Section 718.2(a)(ii) of the *Criminal Code* was enacted in 1996 in response to a growing recognition that violence within intimate relationships was historically trivialized by the courts.<sup>3</sup>

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<sup>1</sup> 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”].

<sup>2</sup> 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]. See also 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) [Beaupré]. Sentencing for intimate femicides has garnered more interest in the legal literature. See e.g. Isabel Grant, “Intimate Femicide: A Study of Sentencing Trends for Men Who Kill Their Intimate Partners” (2010) 47:3 *Alta L Rev* 779; Myrna Dawson, “Punishing Femicide: Criminal Justice Responses to the Killing of Women Over Four Decades” (2016) 64:7 *Current Sociology* 996.

<sup>3</sup> RSC 1985, c C-46 [Code].

Section 718.2(a)(ii) provides that it is now a mandatory aggravating factor in sentencing if the offender was in a spousal or common-law relationship with the victim at the time of the offence.

This paper examines the impact of this provision through an analysis of all appellate decisions that have cited s 718.2(a)(ii) between its enactment in 1996 and the end of 2016. The goal of this paper is to shed light on where we are in sentencing for intimate violence and whether s 718.2(a)(ii) has made a difference. The case law review demonstrates that, in general, appellate courts are taking violence within intimate relationships seriously. Non-custodial sentences are no longer the norm and appellate courts have shown a willingness to overturn such sentences on Crown appeals. This paper will outline two areas where guidance is needed from the appellate courts. First, courts have struggled to reconcile s 718.2(a)(ii) when it applies in the context of an Indigenous offender. Courts are understandably more cautious about imposing custodial sentences on Indigenous offenders because of the over-incarceration of Indigenous persons in Canada. However, with a few notable exceptions, s 718.2(a)(ii) tends to fade in significance in these cases and courts only occasionally recognize the serious problem of violence against Indigenous women. Second, the sexual assault cases stand out as continuing to perpetuate the idea that the intimate relationship is mitigating and that being sexually assaulted by an intimate partner is less harmful to women than being sexually assaulted by a stranger. In these cases, we see remnants of the view that a man cannot rape his wife and that, if a woman had really been sexually assaulted, she would have left the relationship immediately. This is particularly striking when one remembers that, in all of these cases, non-consent will already have been proven beyond a reasonable doubt by the Crown or admitted by the accused through a guilty plea. The more egregious problems in these cases were evident in the trial decisions underlying the appeals. Appellate courts did use s 718.2(a)(ii) to increase the sentences in several of these cases. However, remnants of the idea that sexual assault in an intimate relationship is somehow less damaging to women are still evident in some appellate sentencing decisions.

The study began as an examination of the role of s 718.2(a)(ii) in sentencing for intimate partner violence generally.<sup>4</sup> However because such a large majority of the cases under study (94%) involved male offenders

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<sup>4</sup> This paper emerged out of a larger study done for the Department of Justice on the impact of s 718.2(a)(ii) on sentencing for intimate violence: Canada, Department of Justice, *Sentencing for Intimate Partner Violence in Canada: Has s.718.2(a)(ii) Made a Difference?*, Isabel Grant (Ottawa: Department of Justice, 2017) [Grant, "Sentencing for IPV"] (a copy of the report may be requested online: <<http://www.justice.gc.ca/eng/rp-pr/jr/index.html>>). For a summary of the report see Isabel Grant, "Sentencing for Intimate Partner Violence in Canada: Has s. 718.2(a)(ii) Made A Difference?" (2017) 10 Victims of Crime Research Digest, online: <<http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd10-rr10/p2.html>>. The original

engaging in violence against female victims, this paper uses the language of male intimate partner violence against women (“MIPVW”), in order to acknowledge the gendered nature of these cases, and intimate partner violence (“IPV”) when referring to gender-neutral statistics or legislative provisions. This paper focuses on appellate decisions for a number of reasons. First, we look to appellate courts to set ranges and starting points for trial courts in sentencing and to provide guidance on how to approach such cases. It is the job of appellate courts to bring some consistency to trial courts in sentencing. Second, the reasons in the trial level sentencing decisions citing s 718.2(a)(ii) were often brief and only made passing reference to s 718.2(a)(ii), and thus did not lend themselves to general observations. Finally, appellate cases often highlight the most egregious trial decisions that may not be widely available otherwise. For these reasons, and to obtain a manageable sample, appellate cases are the primary focus of this paper, but trial decisions will be referred to where relevant to the issues under discussion.

## A) 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.<sup>5</sup> Male violence against women accounts for 85% of these cases,<sup>6</sup> and 98% of intimate partner sexual assaults involve male offenders and female victims.<sup>7</sup> Female victims are twice as likely as male victims to be injured<sup>8</sup> and charges are more likely to be laid where the victim is female.<sup>9</sup>

Historically, MIPVW has been seen as less serious than violence against strangers and characterized as something that is private within the family

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study examined trial decisions as well as appeal decisions, but the focus of the present paper is on appeals.

<sup>5</sup> Beaupré, *supra* note 2 at 6.

<sup>6</sup> *Ibid* at 3.

<sup>7</sup> 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 6. See also Angela Cameron, “Sentencing Circles and Intimate Violence: A Canadian Feminist Perspective” (2006) 18:2 CJWL 479 at 492–93 [Cameron]; Jane Dickson-Gilmore, “Whither Restorativeness? Restorative Justice and the Challenge of Intimate Violence in Aboriginal Communities” (2014) 56:4 Can J Crim & Corr 417 at 420–22 [Dickson-Gilmore] (describing male intimate partner violence against Indigenous women in particular).

<sup>8</sup> Statistics Canada, *Measuring Violence Against Women: Statistical Trends*, edited by Maire Sinha, Catalogue No 85-002-X (Ottawa: Statistics Canada, 25 February 2013) at 9.

<sup>9</sup> Statistics Canada, *Family Violence in Canada: A Statistical Profile, 2010*, by Maire Sinha, Catalogue No 85-002-X (Ottawa: Statistics Canada, 22 May 2012) at 5.

and therefore not the legitimate subject of public, or judicial, concern.<sup>10</sup> In the early case law, judges prioritized keeping relationships together even where repeated violence was involved, and characterized one of the primary goals of sentencing as “to facilitate, and certainly not impede, the reconciliation of the spouses.”<sup>11</sup> If a woman was unable to leave the relationship, or chose not to, or if she expressed forgiveness towards her abuser, it was often considered a mitigating factor in sentencing.<sup>12</sup> Judges deliberately imposed lenient sentences to minimize the impact of the violence on the “sanctity” of the family.<sup>13</sup> Very little concern was shown in these cases for the safety of the women involved. Non-custodial sentences and very short terms of imprisonment were prevalent in the early cases. In her literature review, Diane Crocker demonstrated that many courts were reluctant to incarcerate men for MIPVW and that, when incarceration was imposed, it was often for a term of 30 days or less.<sup>14</sup> A 1994 Nova Scotia study that tracked 1,157 cases of “family violence” over a six-month period, of which 929 were spousal violence, found that only 28.4% of offenders were sentenced to incarceration, while the remaining 71.6% received non-custodial sentences.<sup>15</sup> Approximately half of those receiving custodial

<sup>10</sup> See e.g. *R v Deschamps*, 1989 CarswellOnt 2922 (WL Can) at para 24, [1989] OJ No 936 (QL) (Dist Ct) (where a conditional discharge was given in part because the offence was committed privately in front of the family only). On the public/private distinction see Frances Olsen, “Constitutional Law: Feminist Critiques of the Public/Private Distinction” (1993) 10:2 Const Commentary 319; Catherine Moore, “Women and Domestic Violence: The Public/Private Dichotomy in International Law” (2003) 7:4 Intl JHR 93; Jennifer Koshan, “Sounds of Silence: The Public/Private Dichotomy, Violence, and Aboriginal Women” in Susan B Boyd, ed, *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) 87.

<sup>11</sup> *R v Chaisson* (1975), 11 NSR (2d) 170 at para 14, 3 CR (3d) S-17 (SC (AD)). For a discussion of these early cases see Timothy AO Endicott, “The Criminality of Wife Assault” (1987) 45:2 UT Fac L Rev 355 [Endicott].

<sup>12</sup> *R v Butler*, 34 Sask R 292, 1984 CanLII 2542 (CA).

<sup>13</sup> Endicott, *supra* note 11, citing *R v Goose*, [1984] NWTR 56, 1983 CarswellNWT 35 (WL Can) (Terr Ct) (where the trial judge, after stating that marriage is not a license to beat up one’s wife, imposes a fine of \$1,000 for doing so because he was concerned that a lengthy term of imprisonment would negatively impact the offender’s marriage and that he might blame his wife for the imprisonment).

<sup>14</sup> Crocker, *supra* note 2 at 199; Nova Scotia, Solicitor General Canada & Nova Scotia Department of Justice, *The Response of the Justice System to Family Violence in Nova Scotia: A Report of the Nova Scotia Family Violence Tracking Project*, November 1994 (Halifax: Solicitor General Canada and Nova Scotia Department of Justice, 1995) at 191 [*The Response of the Justice System to Family Violence*].

<sup>15</sup> *The Response of the Justice System to Family Violence*, *supra* note 14 at 187–88: The 71.6% figure was reached by subtracting the percentage of offenders who received custodial sentences from the total sample. While 28.4% of offenders were sentenced to incarceration, 82.2% of offenders were given probation, 20.8% were fined, 0.5% received an absolute discharge, 5.6% were given a conditional discharge and 28.0% were given a suspended

sentences received sentences of 30 days or less.<sup>16</sup> Thirteen percent were sentenced to only “one day”, which could be served by attending court.<sup>17</sup> The most common sentence imposed was probation.<sup>18</sup> The trivialization of intimate violence is starkly exemplified in a 1986 case, where the trial judge imposed a condition (of a suspended sentence) that the offender buy his wife a gift worth at least \$50, a condition that was upheld by the Prince Edward Island Court of Appeal on a Crown appeal.<sup>19</sup>

By the late 1980s, however, some appellate courts were beginning 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, is often ongoing, and involves a significant breach of trust.<sup>20</sup> The enactment of s 718.2(a)(ii) in 1996 represented a landmark recognition by Parliament that the intimate relationship is an aggravating factor in sentencing.<sup>21</sup> Judges were now mandated to treat violence in intimate relationships as particularly serious.

## **B) Scope of Section 718.2(a)(ii)**

When s 718.2(a)(ii) was introduced in 1996, it only covered crimes against spouses (and children) of the offender. In 2000, common-law partners were added to the section<sup>22</sup> as part of wider omnibus legislation designed to end

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sentence. These numbers do not add up to 100% because some offenders received more than one type of sentence; for example, imprisonment and probation.

<sup>16</sup> *Ibid* at 191.

<sup>17</sup> *Ibid*.

<sup>18</sup> *Ibid* at 188.

<sup>19</sup> *R v Acorn* (1986), 57 Nfld & PEIR 270, 170 APR 270 (SC (AD)). A New Zealand study suggests that even in 2014 there may still be a discount for intimate violence as compared to violence outside of a relationship. Bond and Jeffries found that domestic violence offenders were less likely to be sentenced to incarceration as compared to those committing similar offences outside of an intimate relationship and, of those imprisoned, those committing intimate violence were sentenced to shorter terms. That study also found that older Indigenous men tended to be sentenced particularly harshly. Christine E W Bond & Samantha Jeffries, “Similar Punishment?: Comparing Sentencing Outcomes in Domestic and Non-Domestic Violence Cases” (2014) 54:5 Brit J Crim 849 at 849.

<sup>20</sup> See e.g. *R v Stanley*, [1986] BCJ No 695 (QL), 1986 CarswellBC 1264 (WL Can) (CA); *R v Julian* (1990), 1990 CarswellBC 1286 (WL Can), [1990] BCJ No 2775 (QL) (CA); *R v Inwood* (1989), 48 CCC (3d) 173, 69 CR (3d) 181 (Ont SC (CA)); *R v Brown*, 1992 ABCA 132, 125 AR 150.

<sup>21</sup> Section 718.2(a)(ii) of the *Code*, *supra* note 3, was enacted in 1995 under *An Act to Amend the Criminal Code (Sentencing), and Other Acts in Consequence Thereof*, SC 1995, c 22, s 6. This legislation was given Royal Assent on July 13, 1995 and came into force on September 3, 1996.

<sup>22</sup> Bill C-23, *Modernization of Benefits and Obligations Act*, 36th Parl, 2nd Sess, 2000, c 12, s 94(c).

discrimination against same-sex partners.<sup>23</sup> “Common-law partner” is defined in s 2 of the *Code* as “a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year.”<sup>24</sup> Children were removed from s 718.2(a)(ii) in 2005,<sup>25</sup> and a new aggravating factor (s 718.2(a)(i.1)) was added, dealing exclusively with the abuse of a person under the age of 18. Section 718.2(a)(ii), which now reads:

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 common-law partner<sup>26</sup>

The drafting of this section still raises some uncertainty with respect to its scope. A narrow reading of the section would suggest that only current spouses and common-law partners are included, and that victims who are former partners or non-cohabiting partners are not. How the courts interpret these questions and what scope they give to the section will inevitably have a significant impact on its effectiveness. In general, the courts have been willing to apply the section to former spouses/common-law partners, or to apply an equivalent common law aggravating factor recognizing the heightened risk women face when they try to extricate themselves from a violent relationship<sup>27</sup> and the degree to which the purpose of s 718.2(a)(ii)

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<sup>23</sup> [House of Commons Debates, 36th Parl, 2nd Sess vol 136, no 85](http://www.lipad.ca/full/2000/02/15/10/#4142566) (15 February 2000), online: <<http://www.lipad.ca/full/2000/02/15/10/#4142566>>. However, it is notable that only one case in the present sample included violence against a same-sex partner.

<sup>24</sup> *Code*, *supra* note 3.

<sup>25</sup> *An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canada Evidence Act*, SC 2005, c 32.

<sup>26</sup> *Code*, *supra* note 3. Since this paper went to press, the government has introduced Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2018 (first reading 29 March 2018) [Bill C-75], which would replace the words “spouse or common-law partner” in s 718.2(a)(ii) with “intimate partner”, which in turn would be defined as including dating relationships and as extending to former intimate partners.

<sup>27</sup> Statistics Canada, *Family Violence in Canada: A Statistical Profile, 2014*, by Canadian Centre for Justice Statistics, Catalogue No 85-002-X (Ottawa: Statistics Canada, 21 January 2016) [Statistics Canada, *Family Violence in Canada, 2014*] at 6 (“[m]ore victims self-reported spousal violence in former relationships than in current unions”).

would be undermined by rejecting its application to former spouses. Many cases apply s 718.2(a)(ii) to former spouses without any discussion of whether the section covers former partners; rather, it is simply assumed.<sup>28</sup> Others discuss the issue 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.<sup>29</sup> Judges talk about a former spouse being *similar* to the relationship in s 718.2(a)(ii), and therefore conclude that the intimate relationship is aggravating without specifying the source of the aggravating factor.<sup>30</sup>

However, there is more disagreement with respect to whether the section applies to non-cohabiting couples, with courts in Newfoundland and Labrador holding explicitly that it does not. In *R v Squires*, the Newfoundland and Labrador Court of Appeal held that the section is directed to the vulnerability and dependency that is “presumed to arise from [a] domestic relationship.”<sup>31</sup> It is that dependency that makes it particularly difficult for a woman to extricate herself from a relationship. Such is not the case where no domestic relationship exists.<sup>32</sup> This approach fails to recognize the dangers of intimate violence in non-cohabiting relationships. The *Squires* approach has led at least one trial judge to conclude that the vulnerability and dependency analysis is a prerequisite for applying the section even where spouses are actually living together.<sup>33</sup> Other appellate courts that have considered the issue have not followed the *Squires* approach. The Alberta Court of Appeal has taken the position that this provision extends to non-cohabiting intimate

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<sup>28</sup> See e.g. *R v Khamphila*, 39 WCB (2d) 307, 1998 CarswellOnt 3250 (WL Can) (Ct J (Gen Div)); *R v Wood*, 2007 BCPC 257, 2007 CarswellBC 1862 (WL Can); *R v Good*, 2012 YKCA 2, [2012] 2 CNLR 204 [Good]; *R v OFB*, 2006 ABCA 207, 391 AR 215; *R v Lausberg*, 2013 ABCA 72, 544 AR 56; *R v MacDonald*, 2012 BCCA 155, 320 BCAC 51 [MacDonald BCCA].

<sup>29</sup> The most frequently cited case on this issue is *R c Cook*, 2009 QCCA 2423, 71 CR (6th) 369, leave to appeal to SCC refused, [2010] SCCA No 112. For cases relying on this decision see e.g. *R c Rancourt*, 2016 QCCQ 9169, 2016 CarswellQue 8746 (WL Can); *R c JP*, 2014 QCCQ 6098, 2014 CarswellQue 7257 (WL Can); *R c Gravel*, 2014 QCCQ 10611, JE 2014-2065; *R c ND*, 2011 QCCS 4945, JE 2011-1872; *R v Dyck*, 2014 SKCA 93, 442 Sask R 209; *R v Glennie*, 2010 SKPC 22, 357 Sask R 58.

<sup>30</sup> *R v Cuthbert*, 2007 BCCA 585, 54 CR (6th) 99 [Cuthbert]; *R v Pakoo*, 2004 MBCA 157, [2005] 9 WWR 414 [Pakoo].

<sup>31</sup> 2012 NLCA 20 at para 31, 320 Nfld & PEIR 39 [Squires].

<sup>32</sup> *Ibid.*

<sup>33</sup> In *R v Gilley* (2013), 234 Nfld & PEIR 307 at para 14, 1037 APR 307, Gorman J refused to apply s 718.2(a)(ii) to the relationship in question because “[a]s 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.’” This requirement should not have been necessary since the couple did live together.



partners.<sup>34</sup> The Saskatchewan Court of Appeal in *R v Woods* applied the section to a couple that had been living together for less than two months in a “short-lived and not particularly conventional” relationship<sup>35</sup> and, in *R v Ochusthayoo*,<sup>36</sup> to a non-cohabiting intimate relationship without any discussion of this issue.

The final issue around the scope of s 718.2(a)(ii) is whether it extends to crimes that are committed against a third party because of that person’s relationship to a (former) spouse/common-law partner. It is not uncommon to see a new partner or another family member targeted for violence in addition to, or instead of, the former intimate partner. Targeting a new partner or other loved one of a former partner is a mechanism used to control the partner’s behaviour or to deter her from leaving a relationship or from starting a new one. In the five appellate cases citing s 718.2(a)(ii) where a new partner/boyfriend was included as a victim,<sup>37</sup> the former spouse/partner was also a victim of violence and the courts did not differentiate between the two victims or discuss whether or not the section applied to the new partner only. There are no appellate cases where a court has applied the section where the only victim is a new partner or other family member. In fact, courts sometimes fail even to acknowledge the domestic violence nature of a crime where only a new boyfriend is targeted. For example, in *R v McCowan*, the offender scaled the outside of his wife’s apartment building, broke into her bedroom and committed aggravated assault against his wife’s new boyfriend.<sup>38</sup> The majority of the Court of Appeal did not mention domestic violence, let alone cite the section, even though the wife was in bed with the victim at the time of the attack.<sup>39</sup>

<sup>34</sup> See e.g. *R v Evans*, 1997 ABCA 165, 196 AR 207 (where the Court held that it was wrong to exclude former intimate partners in the scope of domestic violence sentencing guidelines); *R v Lee*, 2004 ABCA 46, 346 AR 195 (where the Court relied on *Evans* to stress the need to deter intimate violence after the breakup of the accused and his former girlfriend, although not mentioning s 718.2(a)(ii)); *R v Coulthard*, 2005 ABCA 413, 384 AR 353 [*Coulthard*] (where the Court took for granted that s 718.2(a)(ii) applied to a dating relationship); *R v Wenc*, 2009 ABCA 328, 460 AR 366 [*Wenc*] (where the Court extended this decision to apply to a former same-sex relationship even though it was not clear whether the couple had ever lived together).

<sup>35</sup> 2008 SKCA 40 at paras 1, 38, 310 Sask R 16 [*Woods*].

<sup>36</sup> 2004 SKCA 16, 241 Sask R 284; see also the trial decision in *R c Regis-Fodé*, 2015 QCCQ 8160, 2015 CarswellQue 8968 (WL Can).

<sup>37</sup> *R v Morris*, 2004 BCCA 305, 186 CCC (3d) 549 [*Morris*]; *Pakoo*, *supra* note 30; *Cuthbert*, *supra* note 30; *MacDonald* BCCA, *supra* note 28; *R v Wesslen*, 2015 ABCA 74, 599 AR 159.

<sup>38</sup> 2010 MBCA 45 at para 4, [2010] 7 WWR 195. See also *R v McNeil*, 1998 NSCA 95, 125 CCC (3d) 71 (where the offender had been convicted of the manslaughter of his wife’s new partner; assaulted his wife in the process of killing the new partner; and where the domestic violence nature of the offence was noted but s 718.2(a)(ii) was not mentioned).

<sup>39</sup> In *R c Bossé*, 2015 QCCQ 6652, 2015 CarswellQue 7484 (WL Can), the offender was convicted of a number of offences related to a home invasion after targeting a particular

It may not appear to make much practical difference whether courts apply s 718.2(a)(ii) or some equivalent common law aggravating factor to former intimate partners and non-cohabiting partners. However, s 718.2(a)(ii) is mandatory. Failure to address the section is therefore always a reviewable error, whereas with non-mandatory aggravating factors, a sentencing judge may have more discretion. Section 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. Thus, it would be helpful to amend the section to give it a broader and clearer scope. Violence within any (former) intimate relationship should be aggravating, and it is also important to include new partners and third parties within s 718.2(a)(ii) because courts often fail to see this as a form of MIPVW, even though these victims are targeted to hurt and control the female intimate partner.

## 2. The Cases Under Study

This study focuses on the 82 appellate cases that cite s 718.2(a)(ii) from 1996 to 2016. A number of additional MIPVW cases not referencing the section are also mentioned where relevant to issues being discussed. It is important to acknowledge that sentencing decisions provide a narrow lens through which to examine criminal justice responses to MIPVW, because only cases where a prosecution has ended in a conviction will be included. This paper does not include cases that have been deemed unfounded by police, where charges have been dropped, or where problematic acquittals have been entered.

### A) Brief Overview of the Cases

The vast majority of the 82 offenders in the appeal cases were male, with a total of 79 men (96%) and three women (4%).<sup>40</sup> Seventy-eight (94%) of the cases involved male violence against (former) female intimate partners and one case involved a male same-sex couple.<sup>41</sup> All of the offences committed

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home because he wrongly suspected his pregnant ex-girlfriend and her new partner were in the house that night. The trial judge applied s 718.2(a)(ii) because the offence was motivated by domestic violence even though the victims did not include either the ex-girlfriend or her new partner. Bill C-75, *supra* note 26, would include intimate partners within s 718.2(a)(ii), which is defined as including dating relationships and former partners. Third parties who are targeted because of their relationship to an intimate partner remain outside the scope of the section.

<sup>40</sup> For cases involving female offenders, see *Good*, *supra* note 28; *R c Zugravescu*, 2015 QCCA 914, JE 2015-984; *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385 [*Gladue*].

<sup>41</sup> *Wenc*, *supra* note 34. The original study also looked at 71 trial decisions citing s 718.2(a)(ii) and 122 appellate cases about MIPVW that did not cite the section. These cases had a very similar distribution of male and female offenders and victims. None of these cases involved same-sex violence.

by women involved male victims. At least one of the female offenders had also been subject to repeated abuse by her male partner, thus also implicating MIPVW.<sup>42</sup> Assault-based offences are the most common charges found in the sample with 76 cases (93%) including some level of assault conviction and 17 cases (21%) including convictions for some level of sexual assault.<sup>43</sup>

Indigenous offenders were overrepresented in this sample of cases. Eleven, or 13%, of the offenders in the sample of appellate cases citing the section were Indigenous, including two of the three female offenders. The intersection of s 718.2(a)(ii) and s 718.2(e) is complex and, as will be discussed below, s 718.2(a)(ii) tends to recede in significance where s 718.2(e) is involved.

There were 26 first offenders (32%) and 26 offenders (32%) who had records for domestic violence, including 17 offenders (21%) for violence against the same victim. The rest of the offenders had a record for unrelated offences. Even where the offender was a first offender, some cases involved abuse that took place over a significant period of time but had only recently come to police attention. In about one quarter of cases, the offender was subject to some court order at the time of the offence, including almost 20% of cases where the offender was on a no-contact order with respect to the ultimate victim.

Alcohol played a prominent role in these cases, with judges referring to the offender's intoxication in 29 (35%) of the cases. Judges often assume a causal relationship between alcohol consumption and violence such that if one could only stop the offender from drinking, the violence would stop. In fact, the relationship between alcohol and MIPVW is more complex and may not be a causal one. Canadian research by Holly Johnson suggests that the relationship is mediated by other factors such as male attitudes towards women. In her study, Johnson found that "[t]he 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 [of violence] and ... reduced the effects of alcohol abuse to nonsignificance."<sup>44</sup>

Thirty-one (38%) of the appeals in this paper were brought by the Crown. Crown appeals of sentence in these cases had a much higher success

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<sup>42</sup> *Gladue*, *supra* note 40.

<sup>43</sup> This finding is consistent with other studies. See e.g. Crocker, *supra* note 2 at 203, Table 1.

<sup>44</sup> Holly Johnson, "Contrasting Views of the Role of Alcohol in Cases of Wife Assault" (2001) 16:1 *J Interpersonal Violence* 54 at 68. Johnson uses these findings to argue "that young men look to alcohol and control and violence against women as resources to enhance masculine status" at 69.

rate (77%) than those brought by the defence (23%). Considering all 82 appellate cases, the Crown was successful in 62 cases (76%). This is probably a slightly low estimate given that some successful defence appeals involved only a change in the amount of credit given for pretrial custody after the decision in *R v Summers*.<sup>45</sup> These findings are particularly striking given the deference appellate courts give to trial courts in sentencing,<sup>46</sup> particularly where the appeal is brought by the Crown.<sup>47</sup> Assuming that the Crown only appeals the most egregious sentences, one might expect that these cases will reveal the most problematic analyses of sentencing at the trial level. The high rate of successful Crown appeals raises the possibility that, despite the trend towards deference, overly lenient sentences are being corrected on appeal, indicating that some trial courts continue to fail to acknowledge the seriousness of these offences.

## **B) Sentences Imposed**

One must be cautious comparing groups of cases where the seriousness of the offences charged and circumstances of the offender cannot be adequately controlled. Changes in the availability of conditional-sentence orders (“CSOs”) over the time period under study also complicate the picture. Nonetheless, attempting to quantify these sentences demonstrates that, overall, significant periods of incarceration are often being imposed for MIPVW at the appellate level. The sentences that are presented below reflect the sentence imposed *before pretrial custody* has been taken into account in order to provide some consistency.

The high rate of federal incarceration (59%) is the most striking finding with an additional 30% serving provincial time including three offenders sentenced to intermittent sentences. As will be discussed below, appellate courts in several cases jumped from non-custodial sentences imposed at trial to penitentiary time on appeal. There was an increase over time in the proportion of cases leading to federal sentences. For example, between 2003 and 2009, 47% of cases involved federal time whereas between 2010 and 2016, 67% of cases resulted in federal time, which suggests that the impact of s 718.2(a)(ii) may have increased over time. While appellate decisions cannot be directly compared to what is happening at first instance, this is nonetheless a significant trend.

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<sup>45</sup> 2014 SCC 26, [2014] 1 SCR 575.

<sup>46</sup> See *R v Shropshire*, [1995] 4 SCR 227, 129 DLR (4th) 657.

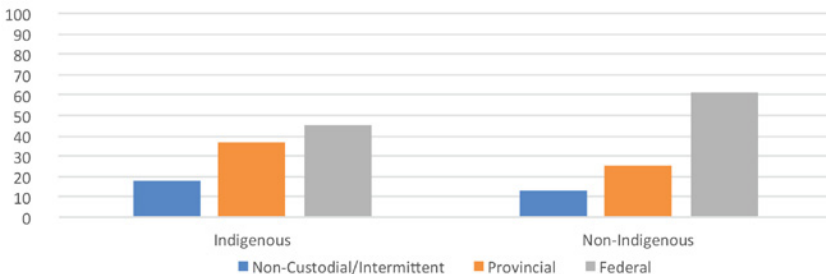
<sup>47</sup> See *R v DJS*, 2015 BCCA 111, 370 BCAC 57.

**Table 1: Sentences Imposed 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	0	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* + Long Term Supervision Order	1 (7%)	0	2 (6%)	3 (4%)
Sentence Unknown	0	1 (3%)	0	1 (1%)
<b>Total</b>	14	32	36	82

\* Federal time refers to a sentence of two years or more.

An examination of the distribution of sentences between non-custodial, provincial and federal time shows some small differences between Indigenous and non-Indigenous offenders, which will be discussed in more detail below in Part 3.<sup>48</sup>

**Chart 1: Sentencing Comparison: Indigenous and Non-Indigenous Offenders by type of sentence**

<sup>48</sup> It should be noted that the same trend was not evident in the trial cases that were examined in the original study. In the trial cases, Indigenous offenders were more likely to get federal time and less likely to receive non-custodial sentences, suggesting that appellate courts may be giving more weight to *Gladue* factors than trial courts: Grant, “Sentencing for IPV”, *supra* note 4 at 15.

### 3. Analysis of Section 718.2(a)(ii) Case Law

#### A) Non-Custodial Sentences

No area has been more controversial in sentencing for MIPVW than the overuse of non-custodial sentences. Such sentences have been seen as a reflection of the trivialization of MIPVW and a failure to acknowledge the danger to women from these offences. The appropriateness of non-custodial sentences is still a live issue given that almost one quarter of the cases in this study dealt with the appropriateness of a non-custodial sentence imposed at trial. These cases are a useful lens through which to examine the degree to which appellate courts are taking such violence seriously. Because cases involving Indigenous offenders raise unique issues requiring appellate courts to reconcile s 718.2(a)(ii) and s 718.2(e), these cases warrant particular attention and will be examined in more detail.

Finding the right balance between custodial and non-custodial sentences in the context of MIPVW is particularly challenging because non-custodial sentences often mean putting the offender back into the same community, and sometimes even the same home, as the victim. Given the prevalence of penitentiary sentences in these cases, it is notable that 19, or almost 23%, of the appellate decisions actually dealt with the appropriateness of a non-custodial sentence.<sup>49</sup> In 11 appellate cases, spanning almost the entire timeframe of the study, appellate courts overturned a non-custodial sentence imposed at trial and substituted a period of imprisonment.<sup>50</sup> In eight cases, an appellate court upheld or imposed a non-custodial sentence, although several of these cases were defence appeals where the accused was seeking a more lenient form of non-custodial sentence.<sup>51</sup> While the outcomes suggest

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<sup>49</sup> “Non-custodial” refers to cases in which either a discharge, suspended sentence with probation or a CSO was imposed. While a CSO is technically a term of imprisonment, the offender is allowed to serve his sentence in the community. It is important to acknowledge that in some of these cases, the offender had served time in custody prior to trial.

<sup>50</sup> *R v Smith*, 123 OAC 228, [1999] OJ No 2694 (CA) [*Smith ONCA*]; *R c Bérube*, 215 NBR (2d) 341, 551 APR 341 (CA) [*Bérube*]; *R v Smith*, 1999 BCCA 747, 141 CCC (3d) 421 [*Smith BCCA*]; *R v MacDonald*, 2003 NSCA 36, 12 CR (6th) 99 [*MacDonald NSCA*]; *R c Chénier*, 2004 CanLII 35643, 191 CCC (3d) 512 (Qc CA) [*Chénier*]; *Morris*, *supra* note 37; *R v Pudlat*, 2005 NUCA 3, 404 AR 389 [*Pudlat*]; *Coulthard*, *supra* note 34; *Woods*, *supra* note 35; *R v GGS*, 2016 MBCA 109, 2016 CarswellMan 489 (WL Can) [*GGS*]; *R c Beaulieu*, 2013 QCCA 208, JE 2013-309 [*Beaulieu*] (where the Court of Appeal overturned a CSO and imposed a period of imprisonment to be served intermittently).

<sup>51</sup> *R v JCT*, 1998 CanLII 17661, 124 CCC (3d) 385 (Ont CA) [*JCT*]; *R v Reid*, 2002 BCCA 268, 168 BCAC 107 [*Reid*]; *R v Brown*, 2004 NSCA 51, 222 NSR (2d) 393 [*Brown* 2004]; *R v Etuangat*, 2009 NUCA 1, 457 AR 172 [*Etuangat*]; *R v Olson*, 2011 BCCA 8, 300 BCAC 288 [*Olson*]; *R c Moisan*, 2012 QCCA 2197, 2012 CarswellQue 13045 (WL Can) [*Moisan*]; *Beaulieu*, *supra* note 50; *R v TEC*, 2015 BCCA 43, 366 BCAC 288 [*TEC*]; *R c Garneau*, 2005 QCCA 969, 2005 CarswellQue 9348 (WL Can) [*Garneau*].

that appellate courts treat non-custodial sentences as exceptional, no clear or consistent criteria have developed around what might warrant such an exception. Of course, s 718.2(a)(ii) is not the only factor contributing to the sentences in these cases. The presence or absence of a history of violence, prospects for rehabilitation and other aggravating and mitigating factors must be balanced with s 718.2(a)(ii).

## 1) Upholding Non-Custodial Sentences

Overall, appellate courts have hesitated to impose non-custodial sentences. Four of the six cases in which an appellate court upheld a non-custodial sentence for a non-Indigenous offender were defence appeals where the offender was asking for a more lenient form of non-custodial sentence and the appellate court dismissed the appeal.<sup>52</sup> One Crown appeal from a suspended sentence resulted in a more onerous CSO being imposed on appeal.<sup>53</sup> Outside of the cases dealing with Indigenous offenders, there was only one case in which an appellate court dismissed a Crown appeal of a non-custodial sentence where the Crown was seeking a custodial sentence. In *R v JCT*, one of the first sentence 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, criminal harassment and several breaches of conditions.<sup>54</sup> The sexual assault charge involved nonconsensual intercourse, a fact that often leads courts to impose penitentiary time. The Court of Appeal was influenced by the fact that the offender had recently lived through the deaths of multiple loved ones and that expert evidence strongly supported a community-based disposition. 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.<sup>55</sup> As will be discussed below, it is no coincidence that this outlier case with respect to non-custodial sentences on appeal involved a sexual assault, the one crime for which courts have failed to consistently respond harshly to intimate violence.

## 2) Overturning Non-Custodial Sentences

Appellate courts have stressed the importance of denunciation and deterrence when overturning non-custodial sentences imposed at trial. The willingness of appellate courts to jump from non-custodial sentences

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<sup>52</sup> *TEC*, *supra* note 51; *Brown 2004*, *supra* note 51; *Olson*, *supra* note 51; *Moisan*, *supra* note 51.

<sup>53</sup> *Garneau*, *supra* note 51.

<sup>54</sup> *Supra* note 51.

<sup>55</sup> *Code*, *supra* note 3, ss 742.1(f)(ii), 742.1(f)(iii).

imposed at trial to penitentiary sentences on appeal demonstrates the shift to treating intimate violence more seriously, but also the potential egregious nature of the sentences imposed at trial.<sup>56</sup> These cases suggest that s 718.2(a)(ii) plays an important role in providing appellate courts a tool with which to overturn inappropriate non-custodial sentences. In *R v Smith*, for example, the trial judge imposed a nine-month CSO for a man convicted of six counts involving violence against his wife, including two counts of assault causing bodily harm.<sup>57</sup> The trial judge described the offender as someone with no previous record despite the fact that the offences against his wife took place over a seven-year period. 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, and thus the focus on the absence of a criminal record by the trial judge was misplaced.

In replacing a suspended sentence with two years of incarceration, the New Brunswick Court of Appeal has also made strong statements about the appropriate approach to sentencing for MIPVW:

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. 718.2a) (ii) (sic) du *Code*.<sup>58</sup>

Many of these cases involved very serious crimes and the non-custodial sentences imposed at trial are particularly difficult to understand. For example, in a case also called *R v Smith*, the trial judge had imposed a suspended sentence on an offender who had smuggled a firearm and ammunition into Canada and attempted to shoot his ex-spouse and her brother.<sup>59</sup> Fortunately, the weapon jammed and no one was injured.<sup>60</sup> The British Columbia Court of Appeal allowed the appeal and imposed a sentence

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<sup>56</sup> *GGS*, *supra* note 50; *Chénier*, *supra* note 50; *Bérube*, *supra* note 50; *Pudlat*, *supra* note 50.

<sup>57</sup> *Smith* ONCA, *supra* note 50.

<sup>58</sup> *Bérube*, *supra* note 50 at paras 21–22. See also *Chénier*, *supra* note 50 (where 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; and the Quebec Court of Appeal imposed a federal sentence of 30 months, relying on s 718.2(a)(ii)).

<sup>59</sup> *Smith* BCCA, *supra* note 50 at paras 9, 4.

<sup>60</sup> *Ibid* at para 4.



of two years' incarceration.<sup>61</sup> In *R v Coulthard*, the offender, wearing a mask, hid in his ex-girlfriend's apartment building and attacked her from behind.<sup>62</sup> She was pregnant and had refused to have an abortion.<sup>63</sup> The Alberta Court of Appeal held that a CSO of two years less a day 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) to (e)."<sup>64</sup> Denunciation and general deterrence "cannot be overtaken by an offender's individual circumstances or the need for rehabilitation."<sup>65</sup>

Sentencing judges have a particularly difficult task where the victim is urging a non-custodial sentence in circumstances where the seriousness of the offence appears to demand otherwise. There is by no means a uniform position on how to deal with such submissions. On the one hand, the victim's testimony should be listened to and taken seriously. On the other hand, courts must be scrupulous about whether a particular woman is under pressure or has been threatened with respect to such testimony. These cases raise the tension between the historical view that violence within the family is private and a matter of individual choice, on the one hand, and the view that courts have a responsibility to protect women from violence regardless of the victim's wishes, on the other. In *R v MacDonald*, for example, MacDonald had beaten his common-law partner with a clothes iron and a wine bottle while in a drunken rage.<sup>66</sup> He had a history of violence against her.<sup>67</sup> The victim made a plea for leniency, blaming herself for the violence against her and telling the Court she would not want to live if she were separated from the offender.<sup>68</sup> The trial judge was influenced by this plea and imposed a two-year CSO for aggravated assault even though the CSO would mean that the couple would continue to cohabit.<sup>69</sup> The Nova Scotia Court of Appeal, in imposing a sentence of two years' incarceration, stressed that the victim's plea for leniency 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."<sup>70</sup> Because the couple was planning to resume cohabitation during the CSO, the Court of Appeal was concerned that there were no conditions that could be imposed that would protect the victim's safety.<sup>71</sup>

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61 *Ibid* at para 28.

62 *Supra* note 34 at paras 1-2.

63 *Ibid* at para 2.

64 *Ibid* at para 8.

65 *Ibid* at para 9.

66 *MacDonald* NSCA, *supra* note 50 at para 2.

67 *Ibid* at para 12.

68 *Ibid* at para 42.

69 *Ibid* at para 3.

70 *Ibid* at para 43.

71 *Ibid* at para 35.

These cases demonstrate that while some trial judges are still imposing non-custodial sentences for very violent offences of MIPVW, appellate courts are reluctant to uphold such sentences on Crown appeals. The mechanism for so doing is to use s 718.2(a)(ii) to shift the focus to deterrence and denunciation. It would be helpful to have more guidance about when non-custodial sentences are appropriate, as these appellate decisions fail to provide guidance for future cases.

### 3) Non-Custodial Sentences for Indigenous Offenders

Additional factors come into play when courts are sentencing an Indigenous offender for crimes involving MIPVW. In this section, the paper addresses sentencing Indigenous men for violence against their female intimate partners. While it is impossible to identify precisely how many of the women involved in these cases were themselves Indigenous, the circumstances of the cases suggest that a significant number of them were.

Assessing the appropriateness of a non-custodial sentence is more complicated in cases dealing with Indigenous offenders because courts must reconcile s 718.2(a)(ii) with the important direction of s 718.2(e) to consider all options other than incarceration when sentencing Indigenous offenders. Courts are faced with reconciling a particularly high level of intimate violence against Indigenous women with the need to reduce the over-incarceration of Indigenous men. Section 718.2(a)(ii) demands that denunciation and deterrence prevail when dealing with IPV, which usually means a custodial sentence is required. Section 718.2(e), by contrast, calls for more restorative and rehabilitative approaches to sentencing.<sup>72</sup>

The appellate cases on s 718.2(a)(ii) do not provide much guidance on how these two provisions can be reconciled. Overall, the cases suggest that judges choose which section to prioritize in a particular case, focusing on factors such as the degree of violence involved and the extent to which *Gladue* factors have negatively impacted the accused.<sup>73</sup> The more difficult task of somehow reconciling both of these important provisions is less commonly undertaken, and sometimes the fact that these cases involve MIPVW disappears from the analysis.<sup>74</sup>

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<sup>72</sup> Kent Roach & Jonathan Rudin, “*Gladue*: The Judicial and Political Reception of a Promising Decision” (2000) 42:3 Can J Crim 355 at 356–58.

<sup>73</sup> In this paper, I refer to “*Gladue* factors” to describe the background factors a court must consider under s 718.2(e) that are described by the Supreme Court of Canada in *R v Gladue*, *supra* note 40.

<sup>74</sup> For example, the larger study also examined 122 appellate cases involving MIPVW that did not mention s 718.2(a)(ii). Indigenous offenders were overrepresented in this group of cases at a higher rate with 16% of these cases involving Indigenous offenders: Grant, “Sentencing for IPV”, *supra* note 4 at 15.

It is important to put these cases in context. Indigenous women are more than three times more likely to report victimization by a spouse or common-law partner than non-Indigenous women<sup>75</sup> and are eight times more likely to be killed by their intimate partner than are non-Indigenous women.<sup>76</sup> MIPVW has had a devastating impact on many Indigenous communities and has been linked to the legacy of colonialism and residential schools.<sup>77</sup> Indigenous women in remote communities face additional barriers to reporting MIPVW and to accessing support services.<sup>78</sup>

Some feminist scholars have expressed concern about the use of restorative justice when dealing with MIPVW in Indigenous communities.<sup>79</sup> Jane Dickson-Gilmore 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.”<sup>80</sup> Angela Cameron argues that restorative justice processes in the context of judicially convened sentencing circles in Indigenous communities have failed to account for 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.”<sup>81</sup> These scholars do not necessarily endorse the response of our existing criminal justice system to violence against Indigenous women, 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, for

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<sup>75</sup> Statistics Canada, *Family Violence in Canada, 2014*, *supra* note 27 at 15.

<sup>76</sup> Kimberley G Zorn et al, “Perspectives on Regional Differences and Intimate Partner Violence in Canada: A Qualitative Examination” (2017) 32:6 J Family Violence 633 at 634 [Zorn et al].

<sup>77</sup> Cameron, *supra* note 7 at 493–94. Some Indigenous communities have taken steps to address MIPVW through their own practices and laws. 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* (Manitoba: Government of Manitoba, 1999) vol 1, ch 13.

<sup>78</sup> Zorn et al, *supra* note 76 at 634.

<sup>79</sup> See Dickson-Gilmore, *supra* note 7.

<sup>80</sup> *Ibid* at 419.

<sup>81</sup> Cameron, *supra* note 7 at 483. See also Gillian Balfour & Janice Du Mont, “Confronting Restorative Justice in Neo-Liberal Times: Legal and Rape Narratives and Conditional Sentencing” in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa, 2012) 701 at 703 [Balfour & Du Mont, “Confronting Restorative Justice”]; Joanne Belknap & Courtney McDonald, “Judges’ Attitudes about and Experiences with Sentencing Circles in Intimate-Partner Abuse Cases” (2010) 52:4 Can J Corr 369; Rashmi Goel, “No Women at the Center: The Use of the Canadian Sentencing Circle in Domestic Violence Cases” (2000) 15:2 Wis Women’s LJ 293.

example, argue that what Indigenous women want is safety from violence—not the incarceration of their male partners.<sup>82</sup>

There is no question that Canada faces a very serious problem of the over-incarceration of Indigenous men and women, an ongoing problem despite the efforts of the Supreme Court of Canada in *R v Gladue*<sup>83</sup> and *R v Ipeelee*.<sup>84</sup> Some of the cases described in this paper predate the decision in *Ipeelee*, where the Court made clear that *Gladue* principles apply to all crimes, including the most serious, and clarified that there is no requirement that the offender prove a causal connection between the impact of colonialism and his criminality.<sup>85</sup> The *Ipeelee* Court did require that there be a connection between the *Gladue* factors and the particular offender before the application of s 718.2(e): “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.”<sup>86</sup> This passage has been used by subsequent appellate courts to somewhat weaken the impact of *Ipeelee*.<sup>87</sup> In the context of MIPVW, for example, courts are sometimes willing to impose harsher sentences because the offender has *not* struggled with drug or alcohol addiction.<sup>88</sup>

Section 718.2(e) was amended in 2015 by the Harper government to explicitly require that consideration also be given to the harm caused to the victim and to the community.<sup>89</sup> Thus far, courts do not appear to have changed their approach to s 718.2(e) on the basis of this amendment, possibly because judges were already taking these factors into account.<sup>90</sup>

The appellate cases indicate that the degree to which the individual offender has been impacted by *Gladue* factors himself is perhaps the most significant determinant of how s 718.2(a)(ii) and s 718.2(e) will be applied

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<sup>82</sup> David Milward & Debra Parkes, “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 136.

<sup>83</sup> *Supra* note 40.

<sup>84</sup> 2012 SCC 13, [2012] 1 SCR 433 [*Ipeelee*].

<sup>85</sup> *Ibid* at paras 81–87.

<sup>86</sup> *Ibid* at para 83.

<sup>87</sup> *R v Fraser*, 2016 ONCA 745 at para 21, 33 CR (7th) 205 [*Fraser*]; see also *R v Chantalquay*, 2015 SKCA 141, 472 Sask R 110 (a case not involving MIPVW).

<sup>88</sup> *Fraser*, *supra* note 87 at para 25; *Morris*, *supra* note 37 at para 18.

<sup>89</sup> *Code*, *supra* note 3.

<sup>90</sup> See e.g. *R v RJN*, 2016 YKTC 55, 2016 CarswellYukon 130 (WL Can) (in imposing a CSO for sexual assault, the Court mentioned that the provisions of s 718.2 seem to conflict with each other but did not discuss the change to s 718.2(e)); *R v Creighton*, 2016 ABPC 83, 2016 CarswellAlta 688 (WL Can) (where there was no discussion of the revised wording of s 718.2(e) in an aggravated assault case).

together. Other influential factors include the degree to which the offender's community is able to provide the necessary resources to support the offender in the community<sup>91</sup> and whether the victim opposes having the offender back in the community.<sup>92</sup> It is important to note that 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 that makes it difficult for women to refuse to participate or to express their fear of the offender.

The courts have struggled to determine when a non-custodial sentence is uniquely appropriate for an Indigenous offender in the context of MIPVW. In *R v Reid*, the offender was convicted of aggravated assault against his former wife.<sup>93</sup> He had stabbed her three times and kicked and beaten her, apparently because she had been associating with other men.<sup>94</sup> While he immediately showed some remorse and let her go to the hospital, he also threatened more violence if she disclosed his involvement in the attack.<sup>95</sup> He had a history of assault against the victim, as well as against another former spouse, and a record of breaching conditions.<sup>96</sup> The trial judge imposed a three-year custodial sentence and the Court of Appeal overturned that sentence and imposed a CSO.<sup>97</sup> The Court of Appeal indicated that three years would have been a fit sentence but for new evidence before it about the resources available to support a CSO in the offender's Indigenous community and the fact that the victim no longer opposed a community-based sentence, although she had in the past.<sup>98</sup> The Court of Appeal gave the most weight to the fact that the offender had apparently given up alcohol.<sup>99</sup>

It is unusual for someone convicted of aggravated assault, with a history of violence against two women and a history of breaching conditions, to receive a non-custodial sentence. Subsequent amendments to the *Code* preclude a CSO for aggravated assault, although a suspended sentence is still technically available. It was clearly s 718.2(e) and the availability of support in the offender's community that made the difference in *Reid*.

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<sup>91</sup> See e.g. *R v TC*, 2009 SKCA 124, 343 Sask R 182 [TC]; *Etuangat*, *supra* note 51.

<sup>92</sup> *TC*, *supra* note 91; *Etuangat*, *supra* note 51.

<sup>93</sup> *Supra* note 51 at para 1.

<sup>94</sup> *Ibid* at para 4.

<sup>95</sup> *Ibid* at para 5.

<sup>96</sup> *Ibid* at para 9.

<sup>97</sup> *Ibid* at para 37.

<sup>98</sup> *Ibid* at paras 28–29.

<sup>99</sup> *Ibid* at para 28; although the only evidence to this effect was the statement of defence counsel.

The Nunavut Court of Appeal upheld a suspended sentence in a context where a more punitive CSO had been rejected by the judge because the offender would not be able to comply with the conditions attached to a CSO. In *R v Etuangat*, the offender had assaulted his spouse, punching her in the head repeatedly while she was carrying their baby on her back.<sup>100</sup> The sentencing judge had not mentioned either s 718.2(e) or s 718.2(a)(ii) in his reasons for sentence. While the Court of Appeal did talk about the importance of deterring domestic violence, s 718.2(e) took the Court 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.<sup>101</sup> The Court indicated the outcome would have been different if his history of assault had been against the same victim, although did not explain why.<sup>102</sup> Nor did the Court indicate 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.

Appellate courts are less likely to uphold non-custodial sentences for Indigenous offenders where the negative impact of *Gladue* factors has been less significant for the accused and where the violence was particularly serious. In *R v Morris*, the offender had been convicted of uttering threats, assault, pointing a firearm and forcible confinement.<sup>103</sup> After finding his common-law wife and her male friend sleeping in her car, he forced her to drive to a secluded location where he threw her to the ground and beat her over the course of two hours.<sup>104</sup> During this attack, she acquiesced to sexual intercourse with him to calm him down, although he was not charged with sexual assault.<sup>105</sup>

Morris had been a Band Councillor with the Laird First Nation for three years and Chief for six years.<sup>106</sup> A psychological report indicated that he had a "high risk for future spousal violence," and a low risk for other violent offending.<sup>107</sup> The trial judge had imposed a suspended sentence with probation in part because he felt incarceration might deter women from coming forward in the community.<sup>108</sup> What was unusual about this case is that the Laird Aboriginal Women's Society wrote a letter to Crown counsel outlining its concerns about the involvement of the Kaska Tribal Council given the offender's position as Chief:

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<sup>100</sup> *Supra* note 51 at para 8.

<sup>101</sup> *Ibid* at paras 33–36.

<sup>102</sup> *Ibid* at para 37.

<sup>103</sup> *Supra* note 37 at para 1.

<sup>104</sup> *Ibid* at paras 9–11.

<sup>105</sup> *Ibid* at para 11.

<sup>106</sup> *Ibid* at para 16.

<sup>107</sup> *Ibid* at para 21.

<sup>108</sup> *Ibid* at para 35.

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.<sup>109</sup>

The Court of Appeal overturned the non-custodial sentence and imposed 12 months' incarceration plus probation because the crime had been so serious and because the offender had not been directly impacted by *Gladue* factors. The Court was clearly concerned about the message the trial judge's 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 deterrence in a 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.<sup>110</sup>

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.<sup>111</sup> *Morris* is a somewhat unusual case because the Crown made a significant effort to bring violence against women to the Court's attention. *Morris* highlights the Crown's role in putting violence against Indigenous women in context for the court. Community impact statements, outlined in s 722.2 of the *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 communities. 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 victim and by the women in her community.

A recent Manitoba Court of Appeal decision demonstrates an attempt to acknowledge the significance of both s 718.2(a)(ii) and s 718.2(e). In *R v GGS*, 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.<sup>112</sup> The offender burned her back with a lighter twice

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<sup>109</sup> *Ibid* at para 27.

<sup>110</sup> *Ibid* at para 62.

<sup>111</sup> *Ibid* at para 67.

<sup>112</sup> *Supra* note 50 at para 4.

and tied her to the crib where her baby was sleeping.<sup>113</sup> He was convicted of sexual assault with a weapon and forcible confinement.<sup>114</sup> The trial judge had imposed a suspended sentence with probation and had given significant weight to the (mistaken) information provided by Crown counsel that none of the offender's previous convictions for domestic violence had related to the same victim.<sup>115</sup>

In stark contrast to the suspended sentence, the Court of Appeal held that a sentence of six years would have been appropriate in this case, but ultimately imposed a sentence of 48 months less pretrial custody, largely on the basis of the very significant *Gladue* factors. The offender had been physically and sexually abused while at a residential school and his family had been gravely affected by alcohol-related problems. The Court of Appeal declined to stay the newly imposed custodial portion of the sentence, despite the offender's efforts towards rehabilitation, noting that the offences were particularly demeaning and degrading to the victim.

None of these judgments provides guidance for future trial judges trying to reconcile two statutory sentencing provisions that can point courts in different directions. Instead, appellate courts appear to give more weight to one provision over the other, depending on the facts of the case, although the reasons for such a preference are rarely explicit. Overall, the cases demonstrate the challenges of attempting to deal with systemic inequalities like MIPVW and over-incarceration through the vehicle of a sentencing process that is designed to focus only on the individual accused and his victim(s). This is especially true in communities where woefully inadequate resources are available both for women to safely escape violence and for offenders to be reintegrated into the community.

## **B) Sentencing for Male Intimate Partner Sexual Violence Against Women**

Most of the non-custodial cases discussed above suggest that appellate courts are taking MIPVW seriously and do not demonstrate a pattern of minimizing the seriousness of this violence. A close reading of the sexual assault cases, by contrast, reveals problematic reasoning most often in the trial decisions underlying the appeal, but sometimes also at the appellate level. These cases suggest that some trial judges still fail to recognize that male intimate partner sexual violence against women ("MIPSVW") is at least as serious as other sexual assaults, if not more so. While appellate

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<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid* at para 1.

<sup>115</sup> In fact, the accused had convictions for violence against this victim both before and after the incident in question. *Ibid* at para 2.



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 explanation of why the case falls below the lower end of the range. Additionally, sentences are sometimes reduced on the basis that the woman continued in the relationship or agreed to have sexual relations with the offender at some point after the sexual assault(s) in question. This problem is most evident in cases involving the lowest level of sexual assault, referred to as level I. In the small number of cases involving sexual assault causing bodily harm or aggravated sexual assault, judges took the violence more seriously.

Unlike intimate violence generally, the rate of intimate partner sexual violence reported to police increased by 15% between 2010 and 2015 in Canada, and is 36 times higher for women than for men.<sup>116</sup> One stereotype that exists about MIPSVW is that it is less damaging to its victims than other forms of sexual assault because the complainant has already been involved in a sexual relationship with the man in question. In fact, research demonstrates that MIPSVW has a particularly devastating impact on its victims because it is often repeated over months or even years and because of the profound breach of trust involved:

Compared to survivors of non-partner sexual violence, survivors of [intimate partner sexual violence (“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.<sup>117</sup>

What few studies there are on this subject suggest that lower sentences are traditionally given for MIPSVW than for stranger sexual assaults.<sup>118</sup>

It is perhaps not surprising that it is in the context of our most gendered crime that we see the greatest resistance to change and the endurance of

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<sup>116</sup> Statistics Canada, *Family Violence in Canada: A Statistical Profile, 2015*, by Marta Burczycka & Shana Conroy, Catalogue No 85-002-X (Ottawa: Statistics Canada, 16 February 2017) at 48.

<sup>117</sup> Linda Baker, Nicole Etherington & Elsa Baratto “[Intimate Partner Sexual Violence](#)” (2016) 17 Centre for Research & Education on Violence Against Women & Children, Learning Network, online: <<http://www.vawlearningnetwork.ca/issue-17-intimate-partner-sexual-violence>> [endnotes omitted].

<sup>118</sup> See the studies cited in Du Mont, Parnis & Forte, “Judicial Sentencing in IPV Sexual Assault Cases”, *supra* note 1 at 141.

myths about the violence women experience.<sup>119</sup> The literature suggests that CSOs have been used more often for sexual assault than for other violent crimes.<sup>120</sup> The overreliance on CSOs in sentencing for sexual assault<sup>121</sup> was one factor leading Parliament to make CSOs unavailable for sexual assault where the Crown proceeds by indictment.<sup>122</sup>

There were 17 appellate cases (21%) that included charges of sexual assault, comprised of one case involving aggravated sexual assault, three cases involving sexual assault with a weapon/causing bodily harm and 13 cases involving 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.<sup>123</sup> There were no cases involving sexual assault committed by women against their male intimate partners. The Crown appeals in this context probably reveal some of the most egregious sentences imposed for MIPSVW at trial, and thus this sample may not be representative of trial courts generally. But also invisible are the cases where charges are never laid or the accused is acquitted based on stereotypes around women's perpetual state of consent in intimate relationships.

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*, for example, the offender was convicted of sexual assault for nonconsensual intercourse with his wife.<sup>124</sup> The Newfoundland and Labrador Court of Appeal upheld a sentence of six months with probation.<sup>125</sup> The trial judge stressed that the couple had continued to cohabit and to have consensual sexual relations after the sexual assault and before ultimately ending the relationship. The trial judge also held that it was mitigating that the sexual assault was "more for sexual gratification as opposed to violence towards the victim."<sup>126</sup> The Court of Appeal agreed

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<sup>119</sup> Holly Johnson, "Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault" in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 613 at 613.

<sup>120</sup> Statistics Canada, *Measuring Violence Against Women: Statistical Trends 2006*, by Holly Johnson, Catalogue No 85-570-XIE (Ottawa: Statistics Canada, 2006) at 53.

<sup>121</sup> Balfour & Du Mont, "Confronting Restorative Justice", *supra* note 81.

<sup>122</sup> *Code*, *supra* note 3, s 742.1(f)(iii).

<sup>123</sup> *R v DD*, 2006 QCCA 1323, 221 CCC (3d) 57 (offender acquitted of sexual assault charge); *R v DNM*, 1999 BCCA 420, 128 BCAC 86 (sexual assault charge was stayed); *R v McIntosh*, 2004 NSCA 19, 697 APR 147 (sexual assault charge was dismissed for want of evidence); *TEC*, *supra* note 51 (offender acquitted of sexual assault).

<sup>124</sup> 2003 NLCA 73 at para 2, 232 Nfld & PEIR 273.

<sup>125</sup> *Ibid* at para 20.

<sup>126</sup> *Ibid* at para 5.

with the Crown that it is wrong in principle to treat sentencing differently for MIPSVW. However, it agreed with the trial judge that, in this case, the fact that she had stayed with the offender was mitigating despite the fact that the statement of facts indicated that the victim did not know that a husband could be charged for sexually assaulting his wife.<sup>127</sup> The notion that sexual assault is just about sexual gratification when the victim is an intimate partner of the accused, and not power and control, is a particularly insidious stereotype because it trivializes the harm of MIPSVW as compared to other sexual assaults and makes it more difficult for this group of women to come forward.

The suggestion that MIPSVW is somehow less culpable than stranger sexual assaults found some support in the Newfoundland and Labrador Court of Appeal in *Squires*, although it did not carry the day.<sup>128</sup> Justice Welsh, writing the majority reasons on other grounds, 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—explicitly creating a discount for MIPSVW. Justice Welsh went on to list relevant factors in crafting a sentence for MIPSVW, 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 does not itself make a relationship abusive. Justice Rowe (as he then was) 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 and why it contradicted the legislative intent behind s 718.2(a)(ii).

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.<sup>129</sup>

The Newfoundland and Labrador Court of Appeal has since repudiated the position of Welsh JA, noting that only one judge in *Squires* had supported a lower starting point.<sup>130</sup> However, the intimate-partner discount can be seen (more subtly) in other cases. In *Woods*, the offender, jealous about rumours

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<sup>127</sup> *Ibid* at para 14.

<sup>128</sup> *Squires*, *supra* note 31.

<sup>129</sup> *Ibid* at para 105.

<sup>130</sup> *R v Branton*, 2013 NLCA 61, 341 Nfld & PEIR 329.

that his partner was seeing another man, had nonconsensual intercourse with her in a particularly demeaning fashion.<sup>131</sup> This violence continued over “some considerable time” before he fell asleep.<sup>132</sup> The following day, she agreed to have sexual intercourse with him because, as she testified, “I had to let him because I didn’t want to get hurt by him again.”<sup>133</sup> 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.<sup>134</sup> 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.”<sup>135</sup> The Court held that the trial judge erred in allowing the accused to serve the sentence in the community but upheld the sentence of two years less a day with no explanation for going below the three-year starting point. The Court offered no condemnation of the trial judge’s approach, leaving the impression that it was the lack of a profound impact on the victim that justified the lower sentence or that this simply was not a major or serious sexual assault.

Two recent appellate decisions demonstrate that the trend towards lower sentences at trial for MIPSVW continues and that s 718.2(a)(ii) is important in correcting those cases on appeal. In *R v DJA*, the trial judge imposed 12 months plus probation for a man who had nonconsensual anal intercourse on his common-law partner.<sup>136</sup> The offender had a record of violent offences including violence against former spouses.<sup>137</sup> The very brief reasons of the trial judge gave no explanation for why the sentence was so discrepant with authorities. The Alberta Court of Appeal increased the sentence 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.”<sup>138</sup>

In *GGS*, 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 partner to her infant’s crib, burned her with a lighter and anally raped her.<sup>139</sup> Despite the violent nature of the offences and the offender’s history of violence,

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<sup>131</sup> *Woods*, *supra* note 35 at para 8.

<sup>132</sup> *Ibid* at para 9.

<sup>133</sup> *Ibid* at para 10.

<sup>134</sup> *Ibid* at para 26.

<sup>135</sup> *Ibid* at para 30.

<sup>136</sup> 2016 ABCA 282 at para 2, 2016 CarswellAlta 1826 (WL Can).

<sup>137</sup> *Ibid* at para 8.

<sup>138</sup> *Ibid* at para 10, citing *R v Arcand*, 2010 ABCA 363 at para 279, 499 AR 1.

<sup>139</sup> *Supra* note 50 at para 4.

the trial judge characterized the incident as “a spontaneous act of violence between two people involved in an ongoing intimate relationship,”<sup>140</sup> 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.”<sup>141</sup> While the trial judge had been given incorrect information about his history of violence against this particular victim, she was aware of the fact that the offender had a history of violence against female partners. The Court of Appeal held that a six-year sentence would have been appropriate but reduced it to four years on the basis of *Gladue*.<sup>142</sup> The jump from a suspended sentence imposed at trial to a four-year penitentiary sentence highlights the egregiousness of the suspended sentence imposed at trial and the degree to which the trial judge was out of touch with sentencing for MIPSVW.

Remnants of stereotypes about intimate violence 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 is not seen with nonsexual offences. This study suggests that, while appellate courts may have overcome many of these problematic assumptions in the context of nonsexual offences, these views still linger when dealing with male sexual violence. 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 MIPSVW. The idea that sexual assault within a relationship is only about sexual gratification trivializes the violence involved and its devastating impact on its female victims. The fact that the victim stays in the relationship, or feels compelled to have sex with the offender on another occasion, has nothing to do with the culpability of the offender for the prior sexual assault(s).

#### 4. Conclusion

The cases reviewed in this paper suggest that appellate courts are generally taking MIPSVW seriously, at least for those cases that get to the sentencing stage. Outside of the sexual assault context, there were almost 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. Male violence against women was not treated as something that was in the private sphere of the family, but rather as something that should be strongly denounced through the sentencing process.

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<sup>140</sup> *Ibid* at para 11.

<sup>141</sup> *Ibid* at para 29.

<sup>142</sup> See *ibid* at para 60.

By contrast, stereotypes about intimate violence were more prevalent in the context of sexual assault, particularly at the trial level. In the context of sexual violence, myths about women who stay in abusive relationships linger. Would she have stayed if he had really sexually assaulted her? Would she have consented to subsequent sexual intercourse if the previous incident had been nonconsensual? These stereotypes are operating subtly because the fact of conviction should have settled the non-consent issue. The message in these cases is that sexual assault within an intimate relationship is less serious than outside of such relationships. This is particularly true for level I sexual assaults. It is only where cases involve considerably more violence, beyond that inherent in the sexual assault, that courts seem to grasp the seriousness of these offences. More needs to be done by judges, Crown and defence counsel, at the trial level and on appeal, to avoid stereotypes about whether it was “a real sexual assault” and to acknowledge the insidious harm done by MIPSVW.<sup>143</sup> The sexual assault cases in this study demonstrate the ongoing need for a statutory aggravating factor such as s 718.2(a)(ii).

One important function of s 718.2(a)(ii) may be as a tool for appellate courts to correct the most egregious trial-level sentencing decisions. For example, when s 718.2(e) shifts the focus to restorative principles, it is important to have a statutory provision that at least brings the seriousness of MIPSVW at least back into the discussion. 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 MIPSVW, unless there are particularly compelling reasons for prioritizing other sentencing principles. While non-custodial sentences are no longer the norm, no clear criteria have evolved for determining when a non-custodial sentence is appropriate. Nor is there any discussion of the remedial purpose of s 718.2(a)(ii) as a response to the history of trivializing MIPSVW and to the urgent need to protect women from violence. 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. 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 task becomes even more difficult. The trial decisions underlying some of these appellate cases clearly suggest that trial judges need more guidance beyond the somewhat vague instruction of prioritizing deterrence and denunciation.

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<sup>143</sup> Melanie Randall, “Sexual Assault Law, Credibility, and ‘Ideal Victims’: Consent, Resistance, and Victim Blaming” (2010) 22:2 CJWL 397 at 409 (where Randall describes how “wives”, like “prostitutes”, are presumed to be in a perpetual state of consent); Elaine Craig, “The Ethical Obligations of Defence Counsel in Sexual Assault Cases” (2014) 51:2 Osgoode Hall LJ 427.

Given that overreliance on non-custodial sentences has historically been a result of the trivialization of MIPVW, it would be easy to assume that longer sentences, and courts taking this violence more seriously, are the solution to MIPVW. However, simply locking some men up for longer periods of time will not bring an end to MIPVW. Sentencing is an after-the-fact response to violence against women. Many of the offenders in the cases under study had previously served periods of incarceration that clearly did not deter them or protect their future partners. Thus, the significance of providing safe and affordable housing, employment, childcare, effective policing and other supports to help women extricate themselves from violent relationships should not be overshadowed by sentencing reform.<sup>144</sup> Having said this, the criminal justice system response to these cases still has an important role to play. MIPVW cannot be discounted in the sentencing process as compared to other forms of violence, such that the intimate relationship is effectively treated as mitigating. Non-custodial sentences in response to serious violence do not provide adequate protection for women who are victims of male violence. Removing these men from the community at least provides women with some breathing room and the opportunity to try to reimagine their lives without violence. These cases reveal how devastating and pervasive MIPVW is for women. When women have the courage to seek out the criminal justice system, they need to be confident that courts, and other processes within the criminal justice system, will acknowledge and denounce this devastation, and do what they can to keep women safe.

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<sup>144</sup> The proposed new s 718.3 in Bill C-75, *supra* note 26, would allow a judge to increase the maximum sentence for an offender convicted of a violent crime against an intimate partner where he has a prior conviction involving violence against an intimate partner. While Bill C-75 takes important steps towards treating intimate violence more seriously, the government has provided no evidence to suggest that judges are unduly constrained by the existing maximum sentences in the *Code*. It is not clear why such a provision is needed given that maximum sentences are almost never imposed for MIPVW under the current law. Such a provision runs the risk of having a disproportionate impact on the most marginalized offenders without having a significant impact on sentencing for intimate violence generally.