NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Phinn***, 2015 NSCA 27

Date: 20150313
Docket: CAC 421417
Registry: Halifax

Between:

Jermaine Phinn

Appellant

v.

Her Majesty The Queen

Respondent

Judges:	Saunders, Farrar and Bourgeois, JJ.A.
Appeal Heard:	September 12, 2014, in Halifax, Nova Scotia
Held:	Leave to appeal sentence granted but the appeal is dismissed per reasons for judgment of Saunders and Bourgeois, JJ.A.; Farrar, J.A. dissenting.
Counsel:	Roger A. Burrill, for the appellant James A. Gumpert, Q.C., for the respondent

Reasons for judgment (Saunders and Bourgeois, JJ.A.):

[1] Jermaine Tirando Phinn was convicted of two **Criminal Code** firearms offences, s. 94(1) - being an occupant of a vehicle in which he knew there was a firearm, and s. 90(1) - carrying a concealed weapon. On October 22, 2013, he was sentenced by Judge Alanna Murphy of the Nova Scotia Provincial Court to serve a seventy-two (72) month term of imprisonment for the conviction under s. 94(1) and a further term of twenty-five (25) months, concurrent, in relation to the s. 90(1) offence. He was given a "credit" for time spent on remand of nineteen (19) months which left a remaining custodial sentence of fifty-three (53) months on a "go forward" basis. He now appeals the sentence of seventy-two (72) months he received for the s. 94(1) conviction. For the reasons that follow, we would dismiss the appeal.

BACKGROUND

[2] The events giving rise to the charges against Mr. Phinn occurred on April 1, 2012. On that day, shortly after 6 p.m., the appellant and Ms. Tylene Marie Smith (the driver of the car in which Mr. Phinn was a front seat passenger) were pulled over in a "high risk take-down". Both were arrested and subsequently charged in a 13-count Information. Three of those counts charged only Ms. Smith and related to her operating a motor vehicle when she was prohibited from doing so, and her conduct which was said to have breached the good behaviour and curfew conditions of an earlier Recognizance. Of the remaining ten counts, eight jointly charged Mr. Phinn and Ms. Smith with a variety of firearms offences, all relating to the storage and possession of the loaded revolver found inside the car at the time of their arrest. The other two counts charged Mr. Phinn personally for possessing a prohibited weapon, thereby breaching the terms of an earlier Prohibition Order.

[3] At the start of the trial Ms. Smith changed her plea to guilty on Count #6, which charged her with being an occupant of a motor vehicle in which she and Mr. Phinn knew there was a firearm, contrary to s. 94(1) of the **Criminal Code**. Following her change of plea the Crown offered no evidence on the other counts. On November 27, 2012, she appeared before Judge Flora Buchan and was sentenced to a term of one year in jail which, after taking into account a credit for the 208 days spent on remand, left a remaining custodial sentence of 157 days.

[4] Mr. Phinn's trial started in 2012 and carried over into 2013. The Crown called ten witnesses, nine of whom were police officers involved directly or indirectly in the arrest of Mr. Phinn on April 1, 2012. The Crown also called Ms. Tina Surette, the registered owner of the 2007 Ford Fusion in which Ms. Smith and Mr. Phinn were seated at the time of their arrest.

[5] The appellant did not testify at his trial but called three witnesses in his own defence: Ms. Caroline Phinn, the appellant's mother; Ms. Chiree Johnson, his ex-girlfriend and the mother of his child; and, Ms. Tylene Smith, another ex-girlfriend and his co-accused.

[6] The material facts which led to Mr. Phinn's arrest and prosecution are summarized in his factum:

> **11** The evidence disclosed that Constables McIsaac and Hayes of the Halifax Regional Police attended at 2541 Brunswick St., Halifax, Nova Scotia, on April 1, 2012, at 18:07 hours, regarding a disturbance call and a large group of people fighting.
>
> **12** Cst. MacIsaac observed the appellant at the scene. The appellant was detained, handcuffed, and placed in the rear of the police patrol wagon. After ten minutes of police detention, the appellant was released from custody without further incident.
>
> **13** Cst. MacIsaac testified that the police then left the immediate area. The police patrol wagon was moved, but did not leave the city block. Cst. MacIsaac then testified that he was approached by Shonda Johnson and advised that "there may have been a gun". The officers then returned to the area at 2541 Brunswick Street in the patrol wagon.
>
> **14** Cst. Jules Laraque testified that on April 1st, at around 19:10 hours, he responded to a "possible weapon related call" in the Brunswick Street and Hamilton Lane area of Halifax.
>
> **15** Cst. Laraque testified that he saw the police patrol wagon proceed to the area. He then observed a black Ford Fusion come up Artz Street, make a right turn onto Hamilton Lane, and pull up in front of 2541 Brunswick Street. Cst. Laraque identified the driver as Tylene Smith.
>
> **16** Cst. Laraque testified that he saw the appellant run awkwardly over a distance of approximately ten metres from the sidewalk on the east side of Brunswick Street toward the black Ford Fusion while holding his waistband. The appellant entered the black Ford Fusion, got into the front passenger seat, and then it drove away. Cst. Edwards, Cst. Laraque's partner at the time, testified that he saw the appellant walking very quickly, bow-legged, and holding his waist-band.

> **17** There were further police witnesses called to describe the route taken by the black Ford Fusion driven by Tylene Smith from Brunswick Street in Halifax to Hester Street in Dartmouth. The vehicle was intercepted by police and a "high risk traffic stop" was conducted.
>
> **18** Cst. Laraque testified that after the appellant was taken into custody, a search of the vehicle was conducted. Cst. Laraque looked under the passenger seat and saw the butt end of a handgun. Cst. Paul Jessen of the Forensic Identification Section seized the firearm from the scene and took photographs. These photographs were introduced into evidence as Exhibit C-1 by consent of the parties. The firearm was marked, by agreement, as Exhibit C-3. Further, trial counsel admitted that Exhibit C-3 was identified as a "Rast and Gasser firearm, serial #145087" and as a "firearm" within the definition of s. 2 of the Criminal Code. Notably, the Crown did not call evidence from a Forensic Firearms Analyst at the trial. There was no evidence called to establish that the ammunition located was "capable of being discharged in the firearm" per s. 95(1) of the *Criminal Code*. At sentencing, the Trial Judge referred to this exhibit as "an old style revolver loaded with eight bullets".
>
> **19** Cst. Parent of HRP took the appellant into custody and handcuffed him. The appellant was then placed in a police vehicle and transported to Halifax Police headquarters.

[7] Further material facts were also admitted. The Agreed Statement of Facts entered at trial says:

> The Crown, on behalf of the Attorney General of Nova Scotia, and Jermaine Phinn admit, for the purpose of dispensing with proof thereof, the following facts:
>
> i. A loaded Rast & Gasser, Model 1898 Austrian Service type, 8 mm Grasser calibre revolver bearing serial number ML 145087, was seized from the vehicle.
>
> ii. The firearm and ammunition were analyzed by Forensic Technologist, George Bent. The firearm is a firearm within the meaning of Section 2 of the *Criminal Code*. Furthermore, the eight rounds of ammunition are ammunition within the meaning of section 84 of the *Criminal Code*.

[8] On July 31, 2013, after hearing all of the evidence, including rebuttal evidence called by the Crown, and after considering counsels' final arguments, Murphy, P.C.J. convicted the appellant on five of the ten counts for which he was tried. The defence asked for a pre-sentence report. The case was adjourned to October 4, 2013, for sentencing. Before the hearing, counsel filed written briefs which addressed not only the range of sentence they proposed, but also the application of the principle enunciated in **R. v. Kienapple**, [1975] 1 S.C.R. 729,

which Judge Murphy had identified and raised with counsel before court adjourned.

[9] While Mr. Phinn has not appealed his conviction, we will make some reference to the evidence at his trial and to the judge's reasons for convicting him, as it offers further insight into the judge's analysis and disposition on sentence.

[10] As noted earlier, evidence was called by both the Crown and the defence. After hearing the lawyers' final submissions, Judge Murphy delivered a comprehensive oral decision. In it she carefully reviewed the evidence put forward by the Crown and defence as it related to the issues before her. She said she accepted the police officers' testimony concerning the events leading up to the appellant's arrest. She rejected much of the testimony offered by the defence witnesses as being preposterous. To the extent the evidence of Ms. Phinn, Ms. Johnson, and Ms. Smith was offered to exonerate the appellant, Judge Murphy said she disbelieved their testimony and rejected it.

[11] For example, Judge Murphy described the testimony given by the appellant's mother, Ms. Caroline Phinn as:

> …having a main purpose of establishing that the vehicle that Mr. Phinn was found in by the police with a gun was not his vehicle and had no significant association to him. I found her evidence, based on the totality of all of the evidence that I do accept, as incredulous. … I found her evidence to be untrue and misleading.

[12] Similarly, when describing the testimony of Ms. Chiree Johnson, who had had a four year relationship with the appellant and who was the mother of his child, the judge said:

> I find the evidence of Ms. Johnson as to the degree of continuous visual observation she had of Mr. Phinn during the entirety of this event incredulous. … The idea that she never took her eyes off Mr. Phinn during the entirety of this very confusing scenario is not believable and I do not believe it. … It defies logic, common sense, to the point of being unbelievable.

[13] Of Ms. Smith, the driver of the car at the time Mr. Phinn was arrested, Judge Murphy said:

> Ms. Smith's evidence also is problematic. She is a person with a criminal record, which undermines her credibility. … I reject Ms. Smith's explanation as to why the accused was bending over to look at the firearm that she was pointing out as that defies credulity. ….

[14] The trial judge was impressed with the Crown witness, Ms. Tina Surette who described how she came to purchase the vehicle. The judge found her to be a credible witness whose testimony contradicted the three defence witnesses and corroborated the evidence given by the many police officers who appeared for the Crown. Judge Murphy put it this way:

> Ms. Tina Surette testified as a witness for the Crown that she had this arrangement with Ms. Caroline Phinn about the purchase of the Ford Fusion. Her explanation as to how she came to purchase this vehicle, at first blush, I have to say did seem quite unusual. I can say that, after heard (sic) Ms. Surette testify, that I found her to be a credible, albeit somewhat naive, witness and person. She provided evidence about how the Ford Fusion in which Mr. Phinn was found with Ms. Smith was a vehicle which was registered to her, but was, in reality, the vehicle Ms. Caroline Phinn frequently used and in the possession of Jermaine Phinn.
>
> It is clear to the court that Ms. Surette was a reluctant witness. She was an individual who had made, no doubt, a bad decision with negative consequences for her. I think she did testify as to some negative impact on her credit rating as a result of the whole incident, or something similar, but she had done this to assist someone she had considered a friend. The evidence of Ms. Surette was disputed by defence witness Caroline Phinn in most material ways, and rebuttal evidence, which I accept, supports the version set out by Ms. Surette, which contradicts the evidence of Ms. Phinn.

[15] For convenience, we have attached a copy of the 13-count Information as Appendix "A" to this decision. This will facilitate our reference to the request made by counsel at trial for directed verdicts on certain counts, and the judge's decision to grant judicial stays, on others.

[16] In the course of his final submissions at trial the Crown Attorney asked for a directed, not guilty verdict, on five counts, those being Counts #5, #7, #8, #9, and #10 on the basis that the Crown had not offered sufficient or any evidence to establish those charges beyond a reasonable doubt. Judge Murphy agreed and she entered verdicts of not guilty on those five counts.

[17] The judge then went on to explain in detail the basis for her convicting Mr. Phinn on the five remaining counts: Count #1 – s. 86(1); Count #2 – s. 86(2); Counsel #3 – s. 88(1); Count #4 – s. 90(1); and Count #6 – s. 94(1). She alerted counsel to her concerns about the impact of **R. v. Kienapple, supra**, on certain counts and invited them to address that issue in their sentencing briefs.

[18] As mentioned earlier, the defence then requested a pre-sentence report. The case was adjourned to October 4, 2013, for sentencing. On that date, after considering counsels' written and oral submissions, Judge Murphy entered judicial stays in relation to three of the convictions – s. 86(1); s. 86(2); and s. 88(1), on the basis of the principles enunciated in **Kienapple**.

[19] This left two counts, being Count #4 and Count #6 (s. 90(1) and s. 94(1) respectively) for which Mr. Phinn had been convicted and was to be sentenced. We will say more about Judge Murphy's reasoning and disposition in the Analysis section of this judgment.

[20] These then are the material facts and procedural background which led to Mr. Phinn's conviction and sentencing. We will turn now to the issues he has raised in his sentence appeal.

Issues

[21] Reading from the appellant's Amended Notice of Appeal filed May 29, 2014, Mr. Phinn says:

> …the sentencing judge imposed an excessive sentence for the offence for which the appellant was convicted after trial.

[22] His factum goes on to explain:

> [30] This sentence appeal invokes a consideration of the proper range of sentence for the s. 94(1) offence and, correspondingly, whether the imposition of a seventy-two (72) month sentence is "manifestly excessive". It combines both an "error of principle" and "demonstrably unfit" standard. …

[23] In his submissions at the appeal hearing, Mr. Phinn's counsel (not his lawyer at trial), made two principal arguments. First he said that the judge had erred by sentencing Mr. Phinn for the s. 94(1) offence as if he had been convicted of the more serious s. 95(1) charge. Second, he argued that the judge failed to appreciate or explain the disparity between the 72-month sentence she imposed for the s. 94 conviction, as compared to the 25-month concurrent sentence handed out for the s. 90 conviction. These, the appellant says, amount to errors in principle which warrant our intervention. Further, and in any event, he says his sentence must be reduced because it is, on its face, demonstrably unfit.

[24] During the appeal hearing, the panel raised an important issue that counsel had not identified in their written submissions, nor thoroughly addressed in their oral arguments during the course of the hearing. Concerned, as we were, that this issue might raise a new basis for potentially finding error in the decision under appeal, beyond the grounds of appeal as framed by the parties, we directed the Deputy Registrar to send a letter to counsel asking for further submissions, in accordance with the Supreme Court of Canada's directions in **R. v. Mian**, 2014 SCC 54. A copy of that letter to counsel dated December 3, 2014, is attached to these reasons as Appendix "B".

[25] We are grateful to counsel for their helpful post-hearing submissions.

[26] From all of this, it appears to us that the disposition of Mr. Phinn's appeal requires answers to the following questions:

i. Did the sentencing judge err in principle by conflating the s. 94(1) conviction for which he was sentenced, with the "more serious" s. 95(1) charge on which he had been acquitted?

ii. Did the sentencing judge err in principle by failing to appreciate or explain the disparity in sentence imposed as between the s. 90(1) and s. 94(1) convictions?

iii. Did the sentencing judge err by taking into account the two possession of a prohibited weapon orders which gave rise to Mr. Phinn being charged with two counts pursuant to s. 117.01(1) of the **Criminal Code**, as an aggravating factor in his sentencing, given that she had acquitted him on both counts?

iv. Is the sentence of 72 months for the s. 94(1) conviction demonstrably unfit?

[27] Before addressing each of these issues we wish to comment briefly on the appropriate standard of appellate review when considering Judge Murphy's sentencing decision.

Standard of Review

[28] Justice Oland described our role in **R. v. J.J.W.**, 2012 NSCA 96:

[13] The standard of review for sentence appeals is well established. The approach to be taken on appellate review is a deferential one. In *R. v. L.M.*, 2008 SCC 31, LeBel J. writing for the majority stated:

> [14] In its past decisions, this Court has established that appellate courts must show great deference in reviewing decisions of trial judges where appeals against sentence are concerned. An appellate court may not vary a sentence simply because it would have ordered a different one. The court must be "convinced it is not fit", that is, "that ... the sentence [is] clearly unreasonable" (*R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 46, quoted in *R. v. McDonnell*, [1997] 1 S.C.R. 948, at para. 15). This Court also made the following comment in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 90:
>
> > ...absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.
>
> (See also *R. v. W. (G.)*, [1999] 3 S.C.R. 597, at para. 19; A. Manson, *The Law of Sentencing* (2001), at p. 359; and F. Dadour, *De la détermination de la peine: principes et applications* (2007), at p. 298.)
>
> [15] Owing to the profoundly contextual nature of the sentencing process, in which the trier of fact has broad discretion, the standard of review to be applied by an appellate court is one based on deference. The sentencing judge has "served on the front lines of our criminal justice system" and possesses unique qualifications in terms of experience and the ability to assess the submissions of the Crown and the offender *(M. (C.A.)*, at para. 91). In sum, in the case at bar, the Court of Appeal was required -- for practical reasons, since the trier of fact was in the best position to determine the appropriate sentence for L.M. -- to show deference to the sentence imposed by the trial judge.

[14] In *Shropshire* and M. (C.A.), the Supreme Court of Canada held that an appellate court should only vary a sentence if the sentence is "clearly unreasonable" or "demonstrably unfit". In *R. v. W. (G.)*, [1999] 3 S.C.R. 597, Lamer C.J. emphasized at ¶ 19 that those two standards mean the same thing.

[15] In *R. v. Nasogaluak*, 2010 SCC 6, the Supreme Court affirmed the sentencing principles in Shropshire and *M. (C.A.)*. At ¶ 46, LeBel J. stated:

> [46] Appellate courts grant sentencing judges considerable deference when reviewing the fitness of a sentence. In *M. (C.A.)*, Lamer C.J. cautioned that a sentence could only be interfered with if it was "demonstrably unfit" or if it reflected an error in principle, the failure to consider a relevant factor, or the over-emphasis of a relevant factor (para. 90; see also *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at paras. 14-15; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at paras. 123-26; *R. v. McDonnell*, [1997] 1 S.C.R. 948, at paras. 14-17; *R. v. Shropshire*, [1995] 4 S.C.R. 227). As Laskin J.A. explained in *R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, however, this does not mean that appellate courts can interfere with a sentence simply because they would have weighed the relevant factors differently:
>
> > To suggest that a trial judge commits an error in principle because in an appellate court's opinion the trial judge gave too much weight to one relevant factor or not enough weight to another is to abandon deference altogether. The weighing of relevant factors, the balancing process is what the exercise of discretion is all about. To maintain deference to the trial judge's exercise of discretion, the weighing or balancing of relevant factors must be assessed against the reasonableness standard of review. Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should an appellate court interfere with the sentence on the ground the trial judge erred in principle.

[29] The reasons why trial judges enjoy such a wide discretion, and why considerable deference is paid to it on appeal, are well known but bear repeating. Front line judges acquire a vast experience in presiding over criminal trials. They occupy a preferred seat in hearing the evidence and appraising the people and cases that come before them. Just as important is the understanding they acquire, from viewing life "on the ground" in the streets of their communities. The advantages of such personal insight and familiarity – which are so essential to the act of sentencing – were underscored by Chief Justice Lamer in **R. v. M.(C.A.)**, [1996] 1 S.C.R. 500 at ¶92:

> .... courts of appeal must still exercise a margin of deference before intervening in the specialized discretion that Parliament has explicitly vested in sentencing judges. It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. ... Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred. ... (Emphasis added)

See as well **R. v. Knockwood**, 2009 NSCA 98 at ¶11 and **R. v. MacDonald**, 2014 NSCA 102 at ¶50. These are the principles which will guide our review of the impugned sentence in this case.

Analysis

[30] Before addressing the four discrete issues identified at ¶26, we think it useful at this juncture to outline what aspects of the sentencing decision the appellant does not challenge. Mr. Phinn does not dispute the appropriateness of the sentence imposed for the s. 90(1) offence. The appellant concedes that the factual foundation for many of the aggravating factors considered by the sentencing judge finds full support in the record. He does not argue that the sentencing judge misdirected herself when articulating the appropriate principles of sentencing. His complaint on appeal focuses on the judge's application of those principles to his case and the quantum of sentence imposed for the s. 94(1) conviction.

i. Did the sentencing judge err in principle by conflating the s. 94(1) conviction for which he was sentenced, with the "more serious" s. 95(1) charge on which he had been acquitted?

[31] The appellant says the judge erred by sentencing him for the s. 94(1) offence as if he had been convicted of the more serious s. 95(1) charge.

[32] The appellant says he should not be sentenced for an offence for which he was acquitted, only those for which convictions were entered. Of course one cannot disagree with such a proposition. However, we must first be satisfied the sentencing judge, in fact, made such an error.

[33] We begin by considering the offence for which the appellant was convicted and sentenced. Section 94(1) provides:

> **94.** (1) Subject to subsections (3) and (4), every person commits an offence who is an occupant of a motor vehicle in which the person knows there is a firearm, a prohibited weapon, a restricted weapon, a prohibited device, other than a replica firearm, or any prohibited ammunition, unless
>
> *(a)* in the case of a firearm,
>
> (i) the person or any other occupant of the motor vehicle is the holder of
>
> (A) a licence under which the person or other occupant may possess the firearm, and
>
> (B) in the case of a prohibited firearm or a restricted firearm, an authorization and a registration certificate for it,
>
> (ii) the person had reasonable grounds to believe that any other occupant of the motor vehicle was the holder of
>
> (A) a licence under which that other occupant may possess the firearm, and
>
> (B) in the case of a prohibited firearm or a restricted firearm, an authorization and a registration certificate for it, or
>
> (iii) the person had reasonable grounds to believe that any other occupant of the motor vehicle was a person who could not be convicted of an offence under this Act by reason of sections 117.07 to 117.1 or any other Act of Parliament; and
>
> *(b)* in the case of a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition,
>
> (i) the person or any other occupant of the motor vehicle is the holder of an authorization or a licence under which the person or other occupant may transport the prohibited weapon, restricted weapon, prohibited device or prohibited ammunition, or
>
> (ii) the person had reasonable grounds to believe that any other occupant of the motor vehicle was
>
> (A) the holder of an authorization or a licence under which the other occupant may transport the prohibited weapon, restricted weapon, prohibited device or prohibited ammunition, or
>
> (B) a person who could not be convicted of an offence under this Act by reason of sections 117.07 to 117.1 or any other Act of Parliament.

[34] As noted earlier, the appellant was acquitted of a charge under s. 95(1). That section provides:

> **Possession of prohibited or restricted firearm with ammunition**
>
> **95.** (1) Subject to subsection (3), every person commits an offence who, in any place, possesses a loaded prohibited firearm or restricted firearm, or an unloaded prohibited firearm or restricted firearm together with readily accessible ammunition that is capable of being discharged in the firearm, without being the holder of
>
> *(a)* an authorization or a licence under which the person may possess the firearm in that place; and
>
> *(b)* the registration certificate for the firearm.

[35] A conviction under s. 95(1) requires proof that an accused knew the firearm in question was loaded, or ammunition was readily accessible that was capable of being discharged. A conviction under s. 94(1) does not require proof of those particular elements. The appellant says that in imposing sentence for the s. 94(1) offence, the judge wrongfully considered that the added elements for a s. 95(1) conviction were present, and weighted the disposition accordingly.

[36] Based upon our review of the record, we are not persuaded that the judge failed to turn her mind to the offence for which the appellant was actually convicted, or confused it with another. Her reasons demonstrate that she was well aware she was only sentencing the appellant for the offences for which convictions had been entered. She said so explicitly. The transcript of her comprehensive oral decision reads:

> ... Moreover, some firearm offences are more serious than others, as reflected in the imposition of a range of minimum punishments by Parliament. Mr. Phinn is not being sentenced for those types of offences today. The individual circumstances of each case and each offender need to be considered in their own light. ...

From this, and reading the judge's reasons as a whole, we do not think it can be seriously suggested that the judge was confused and ended up sentencing the appellant under s. 95(1) instead of under s. 94(1). While later in her reasons the judge expresses her concern that the gun in question was loaded, that fact had been formally admitted by the defence and she was certainly entitled to take that admission into account when considering the aggravating circumstances of this case.

[37] Accordingly, we are not persuaded the sentencing judge erred in the manner alleged.

ii. Did the sentencing judge err in principle by failing to appreciate or explain the disparity in sentence imposed as between the s. 90(1) and s. 94(1) convictions?

[38] The appellant says the judge erred by imposing a twenty-five (25) month sentence for the s. 90 offence, and then jumping to a seventy-two (72) month sentence for the s. 94 offence without offering any explanation or justification for the disparity in disposition. The appellant says the conviction for walking with a concealed weapon in his waistband is no more serious than being in a motor vehicle where a weapon is found.

[39] We have some difficulty with the appellant's assertion that the two offences are substantially similar in seriousness, and as such should attract similar dispositions. A reading of the offence provisions suggests otherwise. A conviction under s. 90 attracts a maximum sentence of 5 years, whereas s. 94 carries a maximum sentence of double that, implicitly suggesting Parliament viewed the latter offence as being more serious in nature. Further, although weapons are dangerous in most contexts, adding quick portability to the mix by virtue of having a gun in a vehicle, expands the potential for more widespread consequences of misuse. We find no error in the judge's treatment of the two offences. Although some indication of her rationale would have been helpful, the judge's failure to explain why the concurrent sentence attracted a much lesser penalty does not, in the circumstances of this case, constitute reversible error.

[40] Accordingly we are not persuaded the judge erred, as alleged.

iii. **Did the sentencing judge err by taking into account the two possession of a prohibited weapon orders which gave rise to Mr. Phinn being charged with two counts pursuant to s. 117.01(1) of the Criminal Code, as an aggravating factor in his sentencing, given that she had acquitted him on both counts?**

[41] As noted earlier, this question was posed to the parties post-hearing as an issue which had arisen during the panel's deliberations. The appellant's response to our query was an emphatic "yes".

[42] In his post-hearing factum, the appellant submits that the decision in **R. v. Brown**, [1991] 2 S.C.R. 518 is "controlling". He argues that **Brown**, and those authorities that follow the principle enunciated therein must lead this Court to the conclusion that the sentencing judge erred in principle by referencing the previous prohibition orders as aggravating factors.

[43] Counsel for the appellant concisely puts forward the import of **Brown** and similar authorities in his post-hearing factum as follows:

> 10. In *Brown* the accused was tried for dangerous driving causing death and bodily injury. The jury acquitted him of dangerous driving causing death and bodily injury, finding only that he had committed the included offence of dangerous driving *simpliciter*. Despite the jury's verdict, the trial judge made reference to the death and injuries in imposing sentence. Mr. Brown appealed. At the Supreme Court of Canada, Stevenson, J. explained that it was improper for the sentencing judge to rely on aggravating facts for which the appellant was acquitted. In this respect he stressed: "[T]he sentencee is bound by the express and implied factual implications of the jury's verdict." Accordingly, the appellant had to be sentenced without consideration of the death and injuries arising from the motor vehicle collision.
>
> 11. The principle in *Brown* remains good law. For example, in *R. v. Druken*, the appellant was acquitted of first degree murder. The Crown successfully appealed, and thereafter the accused entered into a plea bargain with the Crown for a guilty plea to manslaughter and a five year sentence – being time served. The sentencing judge rejected the proposed sentence and substituted a 12 year period of incarceration. The Court of Appeal overturned the sentence. Rowe, J.A. concluded that it was an error to reject the joint recommendation by pointing to aggravating factors suggestive of murder, especially since those facts were not on the record and were contradicted by an agreed statement of fact put forward by the parties at sentencing.
>
> . . .
>
> 14. Returning to the present case, the appellant was acquitted because no evidence of any prohibition orders was tendered at this trial. Accordingly, the trial judge was bound by the principles in *Brown* not to consider the alleged facts underlying the acquittals as an aggravating factor.

[44] Although we take no issue with the proposition put forward in **Brown**, in our view, it is not determinative of the case at hand. There are two primary reasons for this. Firstly, **Brown** and the other authorities cited to us by the appellant have a common factual matrix – all involved scenarios where the improperly considered aggravating facts on sentencing, were embedded within the *actus reus* giving rise to the offences for which a conviction had been entered.

[45] In **Brown**, the sentencing court improperly considered that the accused, acquitted of dangerous driving causing death, had in fact caused the death of two people. In **R. v. Druken**, 2006 NLCA 67, it was an error for the sentencing judge to consider that the offence was "close" to murder, when sentencing for manslaughter. Similarly, in **R. v. Smyth**, [2007] O.J. No. 1946 (S.C.J.) the court in sentencing for manslaughter and concurrently considering a dangerous offender application, concluded **Brown** prohibited him from considering the sexual motives of the accused for the attack leading to death, when that theory had been advanced and rejected at trial. In the case before us, the prohibition orders considered by the sentencing judge as aggravating factors, pre-dated the events giving rise to the offences before the court.

[46] There is, however, a more compelling reason that the case before us is distinguishable from **Brown** and similar authorities. In our view, the submissions of the appellant's counsel at the sentencing hearing served to place the existence of the previous prohibition orders before the court, and as such, permitted the sentencing judge to consider same for the purpose of crafting an appropriate disposition. Before examining in detail what was placed before Judge Murphy, it is instructive to consider the **Criminal Code** provisions governing the sentencing hearing, and in particular, the procedure for ascertaining the facts required to render an appropriate sentence. Sections 723 and 724 together create a framework for what information can be considered by a sentencing court and are, given their importance to the analysis that follows, set out in their entirety:

> **723**(1) Before determining the sentence, a court shall give the prosecutor and the offender an opportunity to make submissions with respect to any facts relevant to the sentence to be imposed.
>
> (2) The court shall hear any relevant evidence presented by the prosecutor or the offender.
>
> (3) The court may, on its own motion, after hearing argument from the prosecutor and the offender, require the production of evidence that would assist it in determining the appropriate sentence.
>
> (4) Where it is necessary in the interests of justice, the court may, after consulting the parties, compel the appearance of any person who is a compellable witness to assist the court in determining the appropriate sentence.
>
> (5) Hearsay evidence is admissible at sentencing proceedings, but the court may, if the court considers it to be in the interests of justice, compel a person to testify where the person
>
> (a) has personal knowledge of the matter;

(b) is reasonably available;

(c) is a compellable witness.

724(1) In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentence proceedings and any facts agreed on by the prosecutor and the offender.

(2) Where the court is composed of a judge and jury, the court

(a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and

(b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.

(3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,

(a) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;

(b) the party wishing to rely on a relevant fact, including a fact contained in a presentence report, has the burden of proving it;

(c) either party may cross-examine any witness called by the other party;

(d) subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and

(e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.

[47] The task of interpreting the above provisions and applying them to the matter at hand is aided by the case authorities. Two are of particular assistance. For over thirty years, the Supreme Court of Canada's decision in **R. v. Gardiner**, [1982] 2 S.C.R. 368 has stood for the proposition that the Crown has the burden of proving aggravating facts beyond a reasonable doubt for the purpose of sentencing. Although not an incorrect statement of principle, the court's reasons display a much more nuanced approach than that single proposition would at first blush suggest. Dickson, J. (as he then was) for the majority writes at pp. 414-15:

> One of the hardest tasks confronting a trial judge is sentencing. The stakes are high for society and for the individual. Sentencing is the critical stage of the criminal justice system, and it is manifest that the judge should not be denied an opportunity to obtain relevant information by the imposition of all the restrictive

> evidential rules common to a trial. Yet the obtaining and weighing of such evidence should be fair. A substantial liberty interest of the offender is involved and the information obtained should be accurate and reliable.
>
> It is commonplace that the strict rules which govern at trial do not apply at a sentencing hearing and it would be undesirable to have the formalities and technicalities characteristic of the normal adversary proceeding prevail. The hearsay rule does not govern the sentencing hearing. Hearsay evidence may be accepted where found to be credible and trustworthy. The judge traditionally has had wide latitude as to the sources and types of evidence upon which to base his sentence. He must have the fullest possible information concerning the background of the accused if he is to fit the sentence to the offender rather than to the crime.
>
> . . .
>
> It should also be recalled that a plea of guilty, in itself, carries with it an admission of the essential legal ingredients of the offence admitted by the plea, and no more. Beyond that any facts relied upon by the Crown in aggravation must be established by the Crown. If undisputed, the procedure can be very informal. If the facts are contested the issue should be resolved by ordinary legal principles governing criminal proceedings including resolving relevant doubt in favour of the offender.

[48] As the last paragraph suggests, the court certainly contemplated that in many instances, aggravating facts may not be disputed, and as such, the procedure to introduce same to the sentencing court may be "very informal". It is when alleged aggravating facts are contested where the burden of proof rests with the Crown.

[49] We have found the recent decision of the British Columbia Court of Appeal in **R. v. Ladue**, 2011 BCCA 101 instructive. There, the appellant had provided the sentencing court with excerpts from correctional services reports. The judge asked to view the entire reports, and in her sentencing, referenced information beyond what the appellant had initially submitted in the excerpts. On appeal the appellant submitted the sentencing judge improperly considered the broader contents of the reports, as the Crown had failed to prove those particular contents. Although the appeal was allowed for other reasons, the court found no merit in that argument. Justice Bennett writes:

> 30. Mr. Ladue submits that the judge should not have considered the parts of the reports which he did not rely upon as they were disputed, and the Crown bore the onus of proving the contents.
>
> 31. There is no question that the Crown has the obligation to prove any aggravating fact beyond a reasonable doubt: see s. 724(3)(e) and *R. v. Gardiner*,

> [1982] 2 S.C.R. 368. Any party wishing to rely on a relevant fact, including a fact in a pre-sentence report, has the burden of proving the fact: see s. 724(3)(b). However, these provisions do not come into play until the fact is disputed. What constitutes a dispute may differ depending on the circumstances, but any dispute over the facts presented on a sentencing hearing must be clear and unequivocal: see *R. v. Ford*, 2010 BCCA 105, 254 C.C.C. (3d) 442; and *R. v. Hodwitz*, [1985] B.C.J. No. 1676 (C.A.).

[50] Respectfully, we think this is a proper statement of the law, which is particularly relevant in the circumstances of this case. **Ladue** confirms what appears to us to be the clear meaning of s.724(3) - the Crown's obligation to prove aggravating factors beyond a reasonable doubt is only triggered by a clear and unequivocal factual dispute. Further, there is nothing in the authorities or on a plain reading of the two provisions themselves which suggest that the term "information" contained in s.724(1) is intended to convey anything other than the common meaning of that term. As such, the nature and type of "information" which a sentencing court may consider, especially where introduced with the consent of both parties, is broad.

[51] Turning to the matter before us, it is clear that Judge Murphy considered that the appellant was subject to two prior orders prohibiting him from possessing firearms, as an aggravating factor on sentencing. Based on the submissions of the appellant's counsel at the sentencing hearing, in our view, the existence of the prohibition orders, including at least one at the time of the offence for which she was sentencing, constituted "information" she was entitled to consider as proven pursuant to s. 724(1). Further, given the absence of any clearly raised dispute of fact, the obligation for the Crown to prove their existence as aggravating factors as required by s. 724(3) never arose.

[52] At this juncture, a review of what information was placed before the sentencing judge is helpful. Notwithstanding the acquittals of breaching same, the existence of pre-existing prohibition orders were placed squarely before the court by virtue of two submitted documents, the appellant's recently prepared pre-sentence report, and the sentencing decision of Wright, J. who had sentenced the appellant for two gun-related offences in 2010. The pre-sentence report was dealt with at the very outset of the sentencing hearing. The transcript discloses the following exchange:

> **THE COURT**: All right. Mr. Phinn is before the court now in relation to his sentencing hearing. In relation to the presentence report that was prepared, Mr. Tan, does Mr. Phinn have any issues with any of the contents?

> **MR. TAN**: No, Your Honour. I reviewed the presentence report with Mr. Phinn this morning and read to him the bulk of the report, and there is no -- he took no issue with what was related to him.
>
> **THE COURT**: All right. I have -- I am in receipt of some material that was provided by counsel in relation to submissions and cases. Were you planning on calling any evidence during the sentencing submission, either counsel?
>
> **MR. BORDEN**: No, Your Honour. The Crown did intend to read in the particulars of Mr. Phinn's earlier convictions though.
>
> **THE COURT**: All right. And is that something that's acknowledged, Mr. Tan?
>
> **MR. TAN**: It is, Your Honour. That could go in by consent.

[53] The appellant's counsel makes no objection to the pre-sentence report being introduced, nor more importantly, does he raise any concerns with respect to any objectionable information contained therein. He clearly references the report himself in the course of his own submissions, and again, gives no indication to the sentencing judge that there is any information which is disputed, and in fact alludes to the very "criminal history" which the sentencing judge ultimately considered to be an aggravating factor. At page 468 of the Appeal Book, he submits:

> … Mr. Phinn does have a related criminal history. That's not argued. However, in this case it is relatively brief, particularly in comparison with the other accused in similar circumstances . . .
>
> With respect to the presentence report itself, Your Honour, what I would suggest, that it is not particularly positive or negative. I would characterize it as being neutral. There are no particular red flags. Other than the criminal history, there don't seem to be any red flags raised by this -- by the presentence report.

[54] In light of the law and the submissions made to her, it was patently reasonable for the sentencing judge to consider information contained in the pre-sentence report, including the attached "Offender Summary" listing the appellant's recent offences and the resulting dispositions. If any of the facts contained in the report were disputed for the purposes of sentencing, it was up to the appellant to make that clear. That did not occur; to the contrary, the submissions of counsel would reasonably lead the sentencing judge to conclude that the information contained in the report was NOT disputed. Although not containing any offences for which he was convicted as a youth, the information placed before the sentencing judge disclosed the appellant was convicted of a charge under s. 95(1) of the **Code** which arose in February of 2009, and that his sentence in February of 2010 included "*Firearms Prohibition period: 26-Feb-2010 to 26-Feb-2020*".

[55] Turning to the second source of "information" respecting the appellant's prohibition orders, the sentencing hearing transcript discloses the following exchange in relation to an older pre-sentence report, and the appellant's counsel's concerns about some troublesome comments contained therein.

> **MR. TAN**: …I would like to address the presentence report that my friend has handed forward this morning that was submitted for the sentencing of February 4th, 2010. I was actually Mr. Phinn's counsel on that occasion. Certainly there are elements to this presentence report that perhaps would be relevant, but I wish to caution in that it was a contested sentencing and, in fact, there were elements of this particular report which were contested by Mr. Phinn and if my -- respectfully...
>
> **THE COURT**: Sorry, I don't mean to interrupt you, and I'll give it limited weight, because I'm not privy to the submissions that were made at the sentencing hearing, so I think I do have to. But I think is there not a written decision by Justice Wright? When I was reviewing the cases, I...
>
> **MR. TAN**: Yeah. I believe...
>
> **THE COURT**: ...in relation to sentencings of matters of this type, I did come up with a decision by Justice Wright involving Mr. Phinn.
>
> **MR. TAN**: There is. Yes. Yes, that's correct.
>
> **THE COURT**: I take it you don't take any issue with any of the contents of Justice Wright's decision?
>
> **MR. TAN**: No, not of Justice Wright's decision, no.
>
> **THE COURT**: Okay.
>
> **MR. TAN**: The presentence report...
>
> **THE COURT**: I think that probably conveys exactly what you probably want.
>
> **MR. BORDEN**: Yes, Your Honour.
>
> **THE COURT**: So maybe I'll just -- unless the Crown...
>
> **MR. BORDEN**: No issue, Your Honour.
>
> **THE COURT**: ...wants me to believe...
>
> **MR. BORDEN**: No.
>
> **THE COURT**: ...make significant -- maybe we'll just not have Mr. Phinn's presentence report from 2010 be an exhibit. And I haven't had an opportunity to read it, so...
>
> **MR. TAN**: Thank you, Your Honour. And I would -- to my recollection, I would recall that Justice Wright did make some comments on -- with respect to

> that presentence report, so I would be much more comfortable relying upon Justice Wright's decision.

[56] From the above it is obvious that the appellant's counsel was alive to the importance of reminding the sentencing judge that she ought not to consider facts which the appellant disputed in the older 2010 report. As a result of his submissions in this regard, the sentencing judge did not consider that material. Counsel, however, proceeded to confirm with the court that he took no issue with "any of the contents of Justice Wright's decision". Such is a far cry from raising, unequivocally, a disputed fact. Counsel, having represented the appellant before Justice Wright on that prior occasion, would have known precisely what was in that particular decision, and should have brought to the sentencing judge's attention any facts which were disputed for the purposes of her deliberations. No attempt was made to parse out acceptable information from objectionable information from within Justice Wright's decision; as such, it was open to the sentencing judge to consider the contents thereof. Several aspects of that earlier sentencing decision are particularly important. Sentenced orally on February 26, 2010, and subsequently reported at 2010 NSSC 99, Wright, J. notes:

> [1] On his scheduled trial date of November 9, 2009 the accused, Jermaine Tirando Phinn, entered a plea of guilty to two counts of a 13 count indictment, namely, possession of a loaded prohibited firearm without authorization or license or registration certificate, contrary to s. 95(1) of the Criminal Code, and **breach of a condition of his Recognizance dated October 31, 2008 prohibiting the possession of such a weapon**, contrary to s. 145(3) . . .
>
> [2] The essential facts are that on February 25, 2009 the police, acting on source information that Mr. Phinn was involved in criminal activity, approached him on Creighton Street in Halifax whereupon Mr. Phinn immediately fled on foot . . .In any event, he was eventually subdued by the police who then retrieved the handgun and cleared it by removing six live rounds from the chamber. Mr. Phinn was then arrested and has remained in custody ever since.
>
> . . .
>
> [4] At the time of his arrest, Mr. Phinn was on a Recognizance dated October 31, 2008 prohibiting him having in his possession any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition or explosive substance. He was then subject as well to a s. 109 weapons prohibition order and a related probation order as a result of a conviction for this same s.95(1) offence in Hamilton, Ontario in 2007. On that occasion, Mr. Phinn was sentenced as a youth to eight months in jail and four months of community service.
>
> . . .

> [13] Crown counsel also underscores the aggravating factors present in this case. The first is that Mr. Phinn was not only in possession of a loaded prohibited firearm but was also carrying it in a concealed fashion. Moreover, Mr. Phinn has a previous conviction for the same offence in 2007 and was **thereby subject to a weapons prohibition order and a probation order that were still in effect at the time of the commission of the present offence**. As noted earlier, he was also then bound by a recognizance from the Nova Scotia Courts dated October 31, 2008 and breached the condition which **prohibited him from having such a weapon in his possession**.
>
> [21] I therefore impose an overall sentence of three and a half years imprisonment, less credit for time served on a 2 for 1 basis. That means that Mr. Phinn is to now serve the remaining term of imprisonment of one and a half years from this day onward.
>
> [22] In addition, Mr. Phinn is to concurrently serve 30 days imprisonment for breaching the condition of his recognizance, a charge to which he also plead guilty. Lastly, **the court imposes on Mr. Phinn a weapons prohibition order under s.109(2) of the Criminal Code** along with an order of forfeiture of the handgun as sought by the Crown. (Emphasis added)

[57] From the above, it is clear that Justice Wright issued a firearms prohibition order as part of his sentencing. Given the provisions of s. 109(2) of the **Code**, it is abundantly clear that the appellant was still subject to that prohibition order when he committed the offences for which he was being sentenced on April 1, 2012. Further, by placing Justice Wright's decision before the sentencing judge, she was made aware that, at least on February 25, 2009, the appellant had been subject at that time, to two other prohibitions – one arising from a youth charge in 2007 and the second by virtue of a Recognizance. The sentencing judge was told by counsel that he had breached both.

[58] While our colleague has raised the spectre that it may have been impossible for Mr. Phinn's 2007 prohibition to have still been in effect, and that the trial lawyers as well as Justice Wright and Judge Murphy were wrong to have referred to it, we would characterize such an oversight as trivial in the circumstances. A close reading of Justice Wright's decision satisfies us that the second prohibition order referred to by Judge Murphy is <u>not</u> the Youth Prohibition Order at all, but rather an entirely separate Recognizance with a firearms prohibition, which was in place in 2009. Whether there were one or two prohibition orders in place at the time of the latest offence is really immaterial. What is significant is that Mr. Phinn has been subject to three firearms prohibition orders, at some time or another, and has managed to breach them all. By all accounts the appellant has repeatedly

defied various courts' sanctions and refused to take advantage of opportunities for rehabilitation.

[59] To conclude on this point, there was never any dispute about the material facts in the case. No controversy had arisen. There was nothing to trigger the application of s. 724(3). The only issue was how long Mr. Phinn should serve in prison. At most, the lawyers were a year or two apart in the range each proposed. In the face of such explicit concessions on the part of Mr. Phinn's trial counsel, there was no need for Judge Murphy to cross-examine him on the extent and nature of his unambiguous consent. Placing such demands upon a trial judge would be tantamount to imposing a standard of perfection. What constitutes a dispute over material facts will depend upon the circumstances in any given case. But to trigger s. 724(3), the presence of a dispute must be obvious and unmistakeable. Its manifestation must be self-evident.

[60] Nothing of the sort occurred here. Accordingly we are not persuaded the judge erred, as alleged.

iv. Is the sentence of 72 months for the s. 94(1) conviction demonstrably unfit?

[61] The appellant says the sentence of seventy-two (72) months imposed for the s. 94(1) conviction was demonstrably unfit, and that the sentencing judge erred in identifying the range of sentences available for that offence. He argues that the length of his sentence would have been appropriate following a s. 95(1) conviction, underscoring what he says amounts to a misapprehension on the part of the judge as to what offence she was actually considering.

[62] With great respect to those who hold a contrary opinion, we do not accept the assertion that Judge Murphy's decision is flawed and ought to be set aside because she believed the sentencing range following a conviction under s. 94(1) extended from a "low" of 12 months to a "high" of more than eight years. To our minds such a complaint (which, respectfully, our colleague Justice Farrar has accepted in his minority reasons) misinterprets Judge Murphy's remarks and ignores the context in which they were expressed.

[63] After carefully considering the whole of Judge Murphy's decision, together with the pre-hearing written briefs filed by the Crown attorney and the appellant's (then) trial counsel, as well as the transcript of counsels' oral submissions, we are satisfied that Judge Murphy's use of the words "... the sentencing range can be

anywhere from 12 months to in excess of eight years ..." was not to suggest that in her view such a range applied to the appellant's case following his s. 94(1) conviction; rather, the phrase was intended to more broadly reflect the range of penalties for weapons' offences, in general.

[64] All of this is borne out by the series of paragraphs which precede the impugned eight words and characters our colleague has excised from the judgment. The typed version of her comprehensive oral decision is 23 pages long. We will reproduce those parts which lend context to what the judge said and obviously meant, when she spoke of a "range":

> In the present case, the objectives of denunciation and deterrence are particularly pressing. Therefore, it is imperative in the totality of the circumstances of both the accused and the offences that a period of incarceration be imposed.
>
> As previously stated, it is of significance that Mr. Phinn was subject to two firearm prohibitions which had been imposed in 2010. While I'm mindful that he was in possession of a firearm, and there's no evidence that it was discharged, the risk to the public is still present as a handgun can easily be used in a lethal and deadly manner. This firearm was loaded with ammunition. It was in a state of preparedness for use. There's no other reasons to have bullets in a firearm. The risk to the public in the circumstances, as found by the court, is very real. The risk to law enforcement officers in the circumstances, as found by the court, is very real. The possession of the firearm is, in this way, a very grave and serious offence.
>
> A custodial sentence is required here to ensure that Mr. Phinn and like-minded individuals understand and appreciate that possessing guns in circumstances such as this, especially while prohibited by court order from doing so, will have severe consequences. Mr. Phinn is a person for whom previous sentences have not acted as a deterrent, and these sentences have included a period of incarceration which totalled in excess of three years. The two offences for which Mr. Phinn is being sentenced here today do not have minimum sentences. However, maximum punishment for section 94(1) is imprisonment for a term not exceeding 10 years.
>
> As has been stated by the Provincial Court in the *Hill* decision and recently by Judge Hoskins in the *Miguel Brown* case, and others, the proliferation of firearms in our community in the Halifax Region, especially the use of handguns by individuals in committing serious violent offences, has been an ongoing concern regarding issues of public safety. It is with alarming regularity that this use of handguns is done by persons travelling in and shooting from motor vehicles. Unfortunately, very often the province's courts are called on to enunciate the need to express society's abhorrence of guns in our communities.
>
> For example, in *R. v. Johnson* (2009), Justice Cacchione observed the increasing frequency of shooting offences where handguns have been used, and commented

on those who think of the use of handguns as part of the regular way of doing business and resolving disputes. He reiterated the need for a sentence that needs to be imposed to reflect society's abhorrence of those who decide to live by the gun and use guns to settle disputes.

Judge Hoskins also referenced in the *Hill* decision to the commentary of Justice Armstrong, writing for the Court of Appeal in Ontario in the case of *R. v. Danvers*, which recognized a similarly serious problem of handguns in Toronto. Writing for the court, Justice Armstrong at paragraphs 77 through 78 expressed the following conclusion:

> In conclusion, I fully endorse the following comments made by the trial judge in sentencing the appellant. It is my view that the circumstances of this murder and this offender bring into play the principles of deterrence, both general and more especially individual, the principles of denunciation and protection of society. Death by firearm in public places in Toronto plague the city and must be deterred, denounced and stopped. Only the imposition of exemplary sentences will serve to deter criminals from arming themselves with handguns. In particular, the use of handguns in public places cries out for lengthy increased periods of parole eligibility. Society must be protected from criminals armed with deadly handguns. There is no question that our courts have to address the principles of denunciation and deterrence for gun related crimes in the strongest possible terms. The possession and use of illegal handguns in the greater Toronto area is a cause for major concern in the community and must be addressed.

The frequent use of firearms, especially handguns, in this community, the urban part of Halifax Regional Municipality, has also been a grave concern for the Dartmouth Provincial Court for a number of years and has not abated since the *Hill* decision. The courts in this building still see with disquieting regularity the offences involving firearms and handguns specifically. Oftentimes, as commented on in the *Hill* case, these offences are connected with other *Criminal Code* and *Controlled Drugs and Substances Act* offences, including such offences as murder, assault, robbery, trafficking in illicit substances. Handguns, especially those which are loaded with ammunition, are inherently dangerous to the community as they are small, easily transportable and easily accessed. They can turn a relatively mild incident into a tragedy within seconds.

I have reviewed the cases referenced by counsel, as well as other judges on other decisions dealing with these type of offences, and the sentencing range can be anywhere from 12 months to in excess of eight years, depending upon the aggravating and mitigating factors in the particular case. Moreover, some firearm offences are more serious than others, as reflected in the imposition of a range of minimum punishments by Parliament. Mr. Phinn is not being sentenced for those types of offences today. The individual circumstances of each case and each offender need to be considered in their own light. [Underlining mine]

[65] From all of this, the judge's reasoning emerges. After the judge properly identified the purposes and principles of sentencing and quoted from certain sections of the **Criminal Code**, she went on to correctly recognize that in the case of crimes involving firearms, the principles of deterrence and denunciation are paramount. Judge Murphy explained why, in Mr. Phinn's case, a custodial sentence was required. She spoke of two other recent cases in this province where the presiding judges in those cases had spoken out with regards to the increased frequency of shootings in this city. She went on to express her own alarm over the frequency with which she has had to deal "with disquieting regularity the offences involving firearms and handguns specifically" in her community. She properly pointed out that such "offences" involving firearms and handguns are:

> Oftentimes .... connected with other *Criminal Code* and *Controlled Drugs and Substances Act* offences, including such offences as murder, assault, robbery, trafficking in illicit substances ...

[66] This then is the context in which Judge Murphy introduced the phrase "12 months to in excess of eight years". It was not intended to express or set a range for s. 94(1) offences but rather to describe the broad range of penalties which can follow convictions for weapons offences, in general.

[67] It is settled law, but perhaps bears repeating, that when it comes to sentencing, one does not establish the "range" for an offence by traversing the distance or gap between "zero" and the maximum penalty expressed by Parliament in the **Criminal Code**. Such a divide between "nothing" and the theoretical upper limit fixed by statute is a meaningless orbit. A much more refined and particularized trajectory is needed. To fulfil their responsibilities in the often very difficult task of crafting a fit and proper sentence, trial judges look for guidance by seeking meaningful precedents which have some similarity, relevance and application to the circumstances before them. That is precisely the point made by Justice Bateman in **R. v. Cromwell**, 2005 NSCA 137 when she said:

> [26] ...In my opinion the range is not the minimum to maximum possibilities for the offence but is narrowed by the context of the offence committed and the circumstances of the offender. ... The actual punishment may vary on a continuum taking into account aggravating and mitigating factors, the remedial focus required for the particular offender and the need to protect the public. This variation creates the range.

To like effect see **R. v. A.N.**, 2011 NSCA 21 at ¶34; and **R. v. E.M.W.(No. 2)**, 2011 NSCA 87 at ¶29.

[68] We are confident that Judge Murphy understood and followed this Court's directions. She appreciated that in conceiving a range in Mr. Phinn's case she was obliged to focus on the aggravating and mitigating factors which applied to him and the crimes for which he had been convicted, while having proper regard for the principles and objectives of sentencing as well as the obvious need to protect the public from the alarming and increasing prevalence of people carrying concealed, loaded handguns on our city streets. See for example **MacDonald, supra**; and **R. v. Cater**, 2014 NSCA 74.

[69] Having regard to these factors, we think that in sentencing the appellant under s. 94(1) it was entirely appropriate for Judge Murphy to have initially considered a range of between four and eight years based on counsels' submissions, less suitable credit for time spent on remand. We see no error in her ultimate conclusion that, on the facts in this case, a sentence of 72 months for the s. 94(1) offence was fit and proper, less 19 months for remand "credit" leaving a 53 month custodial sentence on a "go forward basis", coupled with the 25 months' sentence following his conviction under s. 90(1) to be served concurrently.

[70] Her decision reflects a careful consideration and application of the objectives and principles of sentencing which, in Mr. Phinn's case, included: denunciation; protection of the public; specific deterrence; general deterrence; rehabilitation; proportionality; parity; attention paid to the "jump" "rule"; restraint; proper credit given for time spent on remand; and judicial notice taken of the frequency and increasing number of shootings and gun crimes in her community.

[71] Based upon Mr. Phinn's formal admissions, and having rejected much of the testimony offered by the defence witnesses as being preposterous, and having accepted the police officers' description of events leading to the appellant's arrest, it was hardly a stretch for the trial judge to infer, as she did, that the loaded revolver found under the passenger seat in which he was seated, would explain the bulge in the appellant's pants when he was observed earlier, walking very quickly and bow-legged, holding his waistband.

[72] Judge Murphy's strong findings of fact and the inferences she was entitled to draw from those facts are clearly expressed in her reasons. In her decision convicting the appellant, Judge Murphy found as a fact that at the time of his arrest

the appellant was a passenger in the car he owned and that he and the driver were attempting to evade the police before being pulled over.

> I find that the driver of the vehicle took evasive action when she became aware that the police were following them ... I find that her manoeuvre on to Jamieson Street was not for the purpose of lighting a cigarette but, rather, to evade the police who were following her. ... I find at the time when the accused got out of the police vehicle, he no longer had the bulge in his pants, and I infer that the bulge was the gun which had been placed underneath the seat of the car. ... It was owned by Ms. Phinn and Mr. Phinn ... there is only one reasonable conclusion, and that is that the accused was in possession of the firearm and removed it and put it under the seat in the vehicle where it was seized ultimately by Constable Jessen. I'm satisfied of this beyond a reasonable doubt, that this is the only reasonable conclusion that I can draw, and that as the accused entered the vehicle he was holding the gun that was observed as a bulge near his waistband, and that he became aware that the police were behind, he placed the firearm under the seat. ...
>
> ... I am prepared to make findings of guilt... that the weapon is a prohibited weapon; it was ... stored in a careless manner; ... the only purpose in having a loaded firearm would be for a purpose dangerous to the public peace ... the revolver was concealed;... there was no authorization ...
>
> ... he was an occupant of a vehicle with that firearm. ...

We are satisfied that Judge Murphy's conclusions find full support in the record.

[73] In our analysis of issue (iii) we have already explained why, in our view, Judge Murphy did not err when she referred to the fact that Mr. Phinn had been subject to two prior firearms prohibition orders, during the course of her sentencing remarks. It will be recalled that at the conclusion of his trial the Crown asked for, and the court directed, verdicts of acquittal for Count #9 (s. 117.01(1)) and Count #10 (s. 117.01(1)). But it must be emphasized that those two counts were not dismissed because the judge found that the prohibition order(s) did not exist, or had been incorrectly issued, or because the conviction for which the prohibition order(s) had been made, never occurred. Rather, those two counts were dismissed after the Crown acknowledged that it had not discharged its onus to prove beyond a reasonable doubt the element of the offence that a prohibition order had, in fact, been made. In our opinion this lack of proof did not undermine, for sentencing purposes, the fact that a prohibition order or orders existed.

[74] At the sentencing hearing Mr. Phinn was not being sentenced for a s. 117.01(1) offence. Rather he was being sentenced for a s. 94(1) offence, after

being found to have been an occupant of a vehicle knowing that there was a firearm inside. The sentencing judge could not close her eyes and refuse to consider or choose to ignore the prior criminal record of the appellant.

[75] As noted earlier, s. 724(1) of the **Criminal Code** states:

> **724.** (1) In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentencing proceedings and any facts agreed on by the prosecutor and the offender.

[76] In this case, Mr. Phinn's criminal record (which included his sentences for each offence) was admitted by the defence. Mr. Eugene Tan, who acted for the appellant at his trial, told the judge at the start of the sentencing hearing that his client took no issue with what was related to him in the pre-sentence report. At p. 4 of the pre-sentence report under the heading "Corrections History" the appellant is shown to have prior offences as illustrated in the attached report. The criminal conviction report attached to the pre-sentence report notes that on February 26, 2010, Mr. Phinn was sentenced for a s. 95(1) conviction to three years and six months in jail (less credit for time spent on remand). The report also states that Mr. Phinn was sentenced for that offence to a firearms prohibition order from February 26, 2010, to February 26, 2020.

[77] At the start of the sentencing hearing, defence counsel consented to the admission of the particulars of the appellant's earlier criminal convictions. Because the defence admitted the contents of the prior criminal record for the purposes of sentencing, the Crown was not obliged to prove the contents of the record and the judge was perfectly free to consider it at sentencing (s. 724(1) of the **Criminal Code**).

[78] The s. 117.01(1) charges against Mr. Phinn were dismissed at trial for the reasons we have noted. However, that does not mean that his previous criminal convictions and firearms prohibition(s) did not exist for sentencing purposes. Especially where, as here, the defence admitted to their existence.

[79] A sentencing hearing is a discrete part of the criminal trial process. It occurs after the trial is concluded and is partly governed by s. 724(1). By virtue of that section, a sentencing judge is entitled to rely upon facts agreed to by the Crown and the defence for the purposes of the sentencing hearing. That is precisely what Judge Murphy did in this case in relation to Mr. Phinn's prior criminal record.

[80] To find otherwise would have deleterious consequences that Mr. Gumpert described very well in his supplementary factum:

> **Far Reaching Consequences**
>
> 26. To rule that the dismissal of the firearms prohibition order violation offence in effect declares that the underlying prohibition did not exist for sentencing purposes would have far reaching consequences on plea agreements and sentencing hearings.
>
> 27. Such a ruling would affect every case where an accused is charged with a criminal offence for specific criminal behavior and also with the offence of violation of a court order which bars that criminal behaviour.
>
> 28. Court orders would include probation orders or undertakings and recognizances on bail.
>
> 29. By way of example, the following scenario occurs in trial courts across Canada each day.
>
> 30. The accused appears in trial court and pleads not guilty to (1) a charge of theft and (2) a separate charge of probation violation for not abiding by the condition in his probation order to keep the peace and be of good behaviour because he committed the theft.
>
> 31. On the day of his trial, the accused pleads guilty to the theft charge and the Crown offers no evidence on the probation violation charge. The probation violation charge is then dismissed.
>
> 32. The Crown should not be precluded from referring to the accused having been on probation for the purposes of the sentencing hearing. This is especially so if the defence has admitted to the prior criminal record at the sentencing hearing.
>
> 33. While the accused cannot be sentenced for probation violation, the fact that he was on probation at the time he committed the theft is relevant to his character. It is part of his criminal record which has to be considered at the sentence hearing.
>
> 34. In the case at Bar, the admitted prior record (including sentence) of the Appellant is a relevant factor to the sentence he should have received.
>
> **No error committed by the Sentencing Judge**
>
> 35. It is respectfully submitted that the sentencing judge did not err in considering the admitted prior criminal record of the Appellant as an aggravating factor on sentencing.

[81] We agree with and adopt the Crown's submission.

[82] Quite apart from any previous prohibition order(s) made against the appellant was the fact that Mr. Phinn had already been convicted of two earlier very serious firearms offences, the latter of which had led to a prison term of 3 ½ years imposed by Nova Scotia Supreme Court Justice Robert W. Wright. We know from the record in this case that on February 26, 2010, Mr. Phinn appeared before Wright, J. for sentencing, after pleading guilty to possession of a loaded prohibited firearm contrary to s. 95(1) and a related charge for breach of his Recognizance. He also had a prior conviction for a s. 95(1) offence in 2007 as a result of which he was subject to a weapons prohibition order. Wright, J. imposed an overall sentence of 3 ½ years' imprisonment (less credit for time served on remand on a 2:1 basis). The court also imposed a s. 109(2) weapons prohibition order and an order for forfeiture of the handgun seized from the offender.

[83] To get a sense of the very dangerous circumstances surrounding Mr. Phinn's arrest on *that* occasion, we will reproduce three paragraphs from Justice Wright's decision (2010 NSSC 99):

> [2] The essential facts are that on February 25, 2009 the police, acting on source information that Mr. Phinn was involved in criminal activity, approached him on Creighton Street in Halifax whereupon Mr. Phinn immediately fled on foot. The police officers chased him in hot pursuit and tackled him to the sidewalk. Either just before he was taken down, or during the ensuing struggle, a .32 calibre Smith & Wesson revolver fell to the sidewalk from a holster worn by Mr. Phinn. The police officer believed that Mr. Phinn was reaching for the revolver during the struggle but Mr. Phinn, who was called to testify on this sentencing hearing, denies that. In any event, he was eventually subdued by the police who then retrieved the handgun and cleared it by removing six live rounds from the chamber. Mr. Phinn was then arrested and has remained in custody ever since.
>
> …
>
> [4] At the time of his arrest, Mr. Phinn was on a Recognizance dated October 31, 2008 prohibiting from him having in his possession any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition or explosive substance. He was then subject as well to a s. 109 weapons prohibition order and a related probation order as a result of a conviction for this same s. 95(1) offence in Hamilton, Ontario in 2007. On that occasion, Mr. Phinn was sentenced as a youth to eight months in jail and four months of community supervision.
>
> …
>
> [13] Crown counsel also underscores the aggravating factors present in this case. The first is that Mr. Phinn was not only in possession of a loaded prohibited

> firearm but was also carrying it in a concealed fashion. Moreover, Mr. Phinn has a previous conviction for the same offence in 2007 and was thereby subject to a weapons prohibition order and a probation order that were still in effect at the time of the commission of the present offence. As noted earlier, he was also then bound by a recognizance from the Nova Scotia Courts dated October 31, 2008 and breached the condition which prohibited him from having such a weapon in his possession.

[84] What is significant in this appeal is that when he appeared for sentencing before Judge Murphy, his defence counsel told Judge Murphy explicitly that he did not "take any issue with any of the contents of Justice Wright's decision".

[85] None of this was lost on Judge Murphy. In her decision the judge dealt squarely with the grave risk to public safety brought about by Mr. Phinn's criminal conduct and his obvious distain for previous court orders and sanctions:

> ...Mr. Phinn was subject to two firearm prohibitions which had been imposed in 2010. While I'm mindful that he was in possession of a firearm, and there's no evidence that it was discharged, the risk to the public is still present as a handgun can easily be used in a lethal and deadly manner. This firearm was loaded with ammunition. It was in a state of preparedness for use. There's no other reasons to have bullets in a firearm. The risk to the public in the circumstances, as found by the court, is very real. The risk to law enforcement officers in the circumstances, as found by the court, is very real. The possession of the firearm is, in this way, a very grave and serious offence.

[86] From the evidence before her, it was entirely reasonable for the judge to conclude, as she did, that the revolver Mr. Phinn was carrying concealed in the crotch of his pants when first observed on the streets of Halifax and which he later tried to hide under the seat of the car in which he was arrested, was loaded with ammunition designed to be fired from a gun. Judge Murphy was entitled to take into account as an aggravating feature of the case, the fact that Mr. Phinn's revolver held eight bullets and the gun was in a state of readiness to expel lethal force.

[87] She was also right to emphasize in her reasons that:

> In relation to specific deterrence, it can be said without reservation that the sentences imposed previously have done little to deter Mr. Phinn from an unlawful lifestyle. Despite his purported plans for lawful and productive changes claimed at his last sentencing hearing, he has done little, if anything, of the positive that he had planned to do and, in fact, appears to have returned to

> unlawful ways. It appears that Mr. Phinn is well on his way, if not already immersed in the criminal subculture.
>
> General and specific deterrence, as well as denunciation and protection of the public, all have very strong roles to play in the sentencing of Mr. Phinn for these crimes. Because of his relative youth, there is also a role of rehabilitation. Mr. Phinn certainly had time to turn his life around. There has been, as I say, very little done by Mr. Phinn since his last sentencing to contribute to his own rehabilitation. There are these new offences before the court since he was last sentenced, and since that time he's not been employed, although he claims excellent health without any substance abuse issues. There is no evidence that he's done anything in terms of efforts towards training or education to help him in the pursuit of his employment, and he does not claim to have any current involvement with the care of either of his two children. No evidence of him contributing to society in any positive way has occurred since he was sentenced by Justice Wright. ...

[88] She went on to describe in some detail the appellant's education and employment history, his health, the fact that he was the father of two young children with whom he had no contact whatsoever. She made reference to his vocational training and future educational goals outlined in his "not .... particularly positive presentence report". Judge Murphy rightly observed that there were really only two mitigating factors in Mr. Phinn's case; the fact that he was "quite a youthful offender" and that he had "been on remand after having been denied bail and ... in pretrial custody for almost 19 months".

[89] We, like Judge Murphy, are always interested in what an offender said on his or her own behalf, at previous sentencing hearings. When the appellant appeared before Justice Wright in February, 2010, he professed to have changed his ways, to have come to his senses and said he would make every effort to turn his life around. What he told the judge is reflected in Justice Wright's decision (2010 NSSC 99):

> [17] In his testimony at the sentencing hearing, Mr. Phinn acknowledged that he didn't learn his lesson from his first offence in 2007 but that he has now, after spending the past year in adult jail. He says he now wants to change his lifestyle from being around drug dealers and gangsters which he fell into when he left home at age 16. He is now 20 years of age with a grade 11 education and spoke of new influences that will get him away from his prior lifestyle. In particular, he spoke of his plan on release from prison to join his extended family members in Montreal where he wants to complete his high school education and get a job working in a family brick laying business. He also has the support of his mother and his girlfriend. He also spoke of his young son who he has seen very little of

> since his son was taken by his mother to live in Ontario. Mr. Phinn says that he needs to get his life on track to be a better role model for his son. Only time will tell whether the sincerity with which Mr. Phinn expressed his intention to turn his life around holds true.

[90] Obviously the sincerity queried by Wright, J. in 2010 never materialized. A mere two years later Mr. Phinn was not back in school, or supporting his son, or laying bricks in Montreal. Instead he was arrested during a high risk takedown and found to have concealed a loaded handgun under his seat in the car.

[91] To recap, the sentence under appeal in this case involves Mr. Phinn's third firearms conviction in five years. In each case there was a grave risk to public safety. For his first s. 95(1) firearms offence he received eight months in jail and four months community supervision. For his second s. 95(1) firearms conviction the appellant was sentenced to a term of imprisonment of 3 ½ years, less remand time. From this disturbing history one can only agree with Judge Murphy's assessment that:

> Mr. Phinn certainly had time to turn his life around. There has been ... very little done by Mr. Phinn since his last sentencing to contribute to his own rehabilitation... There is no evidence that he's done anything in terms of efforts towards training or education ... No evidence of him contributing to society in any positive way. ... since he was sentenced by Justice Wright.

Obviously the lengthy prison term imposed in 2010 did nothing to deter the appellant or lead to his rehabilitation.

[92] For all of these reasons, we are not convinced that the sentence in this case is clearly unreasonable. Rather, after due regard to the record, the circumstances surrounding this offence and this offender, and the principles and objectives of sentencing, we think the sentence imposed by Judge Murphy is sound and we would not disturb it.

[93] Before concluding these reasons we wish to emphasize, again, three sentencing principles which have particular application to this case. The first is that ranges of sentence are guidelines, not fixed rules. Simply because the range is exceeded does not make the sentence unfit. The second principle is that besides the circumstances of the offence and the offender, a sentence must also reflect the current conditions and particular needs of the community where the crime occurred. The third principle is that considerations of parity must be addressed carefully and not given any kind of special or exalted status among the other well-

known principles of sentencing. This means that the principle of parity is not to be given priority over the principle of appellate deference paid to a judge's broad discretion to fashion a reasonable sentence to best suit the circumstances of the offence, the offender, and one's community.

[94] We see the first principle expressed in **Nasogaluak**, **supra**, where the Supreme Court of Canada reminded judges that ranges are only guidelines and that even if a sentence were to fall outside the regular range (which we say this does not), it is not necessarily unfit. Writing for a unanimous Court, LeBel, J. said:

> 44 The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the Code. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred. [Underlining mine]

[95] We see the second principle reflected in Chief Justice Lamer's seminal judgment **R. v. M.(C.A.)**, **supra**, which we repeat here:

> 92 … Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred. ... [Underlining mine]

[96] Finally, having satisfied ourselves that a term of imprisonment of 72 months is a fit sentence for *this* offence and *this* offender, and *this* community, and that the sentence is not the product of any error in principle, it would be an unwarranted interference in the proper exercise of Judge Murphy's discretion, were we to reduce the sentence in the manner our colleague Justice Farrar suggests, for reasons of parity. Expression of this, the third principle, may be found in the reasons of LeBel, J. (for the 8:1 majority) in **R. v. L.M.**, 2008 SCC 31:

> (4) *Unwarranted Intervention by the Court of Appeal*

[33] As I mentioned above, the majority of the Court of Appeal erred in varying a sentence that was not unreasonable. Their finding that penetration had not been proven beyond a reasonable doubt constitutes an improper reassessment of the evidence in the absence of a reviewable error in the Court of Québec's assessment of the facts.

[34] Moreover, the majority of the Court of Appeal attached great importance to the principle that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances (paras. 41 et seq.), which is one of the normative sentencing principles provided for in the *Criminal Code* (s. 718.2 Cr. C.). Although this principle permits an appellate court to temper the discretionary aspect of the sentencing process, it was applied incorrectly by the majority of the Court of Appeal.

[35] This exercise of ensuring that sentences are similar could not be given priority over the principle of deference to the trial judge's exercise of discretion, since the sentence was not vitiated by an error in principle and the trial judge had not imposed a sentence that was clearly unreasonable by failing to give adequate consideration to certain factors or by improperly assessing the evidence (*M. (C.A.)*, at para. 92, quoted in McDonnell, at para. 16; *W. (G.)*, at para. 19; see also Ferris, at p. 149, and Manson, at p. 93). This Court has clearly confirmed the "trial judge's traditionally broad sentencing discretion" (*M. (C.A.)*, at para. 56). Furthermore, this principle has been codified in s. 718.3 Cr. C.

[36] Owing to the very nature of an individualized sentencing process, sentences imposed for offences of the same type will not always be identical. The principle of parity does not preclude disparity where warranted by the circumstances, because of the principle of proportionality (see *Dadour*, at p. 18). As this Court noted in *M. (C.A.)*, at para. 92, "there is no such thing as a uniform sentence for a particular crime". From this perspective, an appellate court is justified in intervening only if the sentence imposed by the trial judge "is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes" (*M. (C.A.)*, at para. 92). [Underlining mine]

Conclusion

[97] We have, as the law requires, paid great deference to the judge's sentencing decision. We are not persuaded that she erred in principle, or exercised her discretion unreasonably by failing to consider a relevant factor, or by over-emphasizing other factors. Neither are we convinced that the sentence is demonstrably unfit.

[98] While we certainly agree that 72 months is a lengthy sentence for a s. 94(1) offence, we do not – for the reasons stated – consider it to be outside the range. In any event, ranges are only guidelines and a sentence falling outside the regular range will not be necessarily unfit. It is not demonstrably unfit in the case of Mr. Phinn. He is hardly a neophyte. He is a young man who, over a relatively short period of time, has acquired a disturbing criminal record for very serious gun offences. Despite opportunities to rehabilitate himself, he has instead chosen to continue his criminal lifestyle and seems set on a very dangerous course which, all too often, leads to tragic consequences. This was the offender upon whom Judge Murphy was obliged to impose a fit and proper sentence, based upon proper legal principles. We are satisfied she did exactly that.

[99] This Court has spoken out many times concerning the scourge of loaded firearms on the streets of our communities, and the risk they pose to the police and the law-abiding citizens they are sworn to protect. We see nothing here which would cause us to intervene.

[100] While we would grant leave to appeal sentence, we would dismiss the appeal.

Saunders J.A.

Bourgeois, J.A.

Dissenting Reasons for judgment (Farrar, J.A.):

Introduction

[101] I have had an opportunity to review the majority's decision. I take no issue with their decision on the first two issues, as identified in these reasons. However, with respect, I cannot agree with either their analysis or conclusions on the final two.

[102] The majority identifies the following issues on this appeal:

i. Did the sentencing judge err in principle by conflating the s. 94(1) conviction for which he was sentenced, with the "more serious" s. 95(1) charge on which he had been acquitted?

ii. Did the sentencing judge err in principle by failing to appreciate or explain the disparity in sentence imposed as between the s. 90(1) and s. 94(1) convictions?

iii. Did the sentencing judge err by taking into account the two possession of a prohibited weapon orders which gave rise to Mr. Phinn being charged with two counts pursuant to s. 117.01(1) of the **Criminal Code**, as an aggravating factor in his sentencing, given that she had acquitted him on both counts?

iv. Is the sentence of 72 months for the s. 94(1) conviction demonstrably unfit?

[103] With respect to issue (iii), in my view, the sentencing judge erred in considering the existence of the prohibition orders as an aggravating fact.

[104] With respect to issue (iv), I would frame it differently as follows:

(iv) Did the sentencing judge err in principle in failing to consider s. 718.2(b), i.e., that the sentence being imposed be similar to the sentence imposed on similar offenders for similar offences committed in similar circumstances?

[105] In my view, the sentencing judge failed to do so.

[106] Since I am of the view that the sentencing judge erred in principle in failing to consider s. 718.2(b) of the **Criminal Code**, it is not necessary for me to

conclude that the sentence is unfit because it is manifestly excessive. However, I am of the opinion that it is.

[107] I would allow the appeal and impose a penalty of 36 months minus remand credit of 19 months.

Analysis

(iii) Did the sentencing judge err by taking into account the two possession of prohibited weapon orders which gave rise to Mr. Phinn being charged with two counts pursuant to s. 117.01(1) of the Criminal Code, as an aggravating factor in his sentence, given that she had acquitted him on both counts?

[108] The majority concludes that the sentencing judge did not commit any error in taking the prohibition orders into account. In so doing, they reach conclusions which are not supported by the record.

[109] At ¶58 above, the majority says this:

> [58] … Whether there were one or two prohibition orders in place at the time of the latest offence is really immaterial. What is significant is that Mr. Phinn has been subject to three firearms prohibition orders, at some time or another, and has managed to breach them all. By all accounts, the appellant has repeatedly defied various court sanctions and refused to take advantage of opportunities for rehabilitation.

[110] First, to suggest that whether there was one or two prohibition orders in place as being "immaterial" was clearly not the view of the sentencing judge. She considered the existence of two prohibition orders to be a significant aggravating fact. I will discuss this in more detail later.

[111] Further, to suggest that Mr. Phinn had at some time or another breached all of the prohibition orders is again not supported by the record. In fact, he was acquitted of breaching any prohibition order in this proceeding and has never been convicted of breaching a prohibition order.

[112] Thirdly, it is unclear to me what the majority is referring to when they say the appellant "has repeatedly defied various court sanctions". What sanctions and how were they relevant to the sentencing judge and what impact do they have on the majority's consideration of the appeal? These questions are unanswered in the

majority's reasons. This characterization, with respect, colours the majority's analysis and ignores the real issue on this appeal – what had been proven at the sentencing hearing with respect to the prohibition orders which the sentencing judge relied on as an aggravating fact in sentencing Mr. Phinn.

[113] Although the majority has set out in some detail the procedural background relating to the charges against Mr. Phinn, I think it is worthwhile to briefly review the history of these proceedings.

[114] The appellant faced 10 charges at trial. The Information charged him with:

- Carrying a concealed weapon (s. 86(1) of the **Criminal Code);**
- Careless storage of a firearm (s. 86(2));
- Possession of a weapon for a purpose dangerous to the public peace (s. 88(1));
- Carrying a concealed weapon (s. 90(1));
- Possessing a firearm knowing that he was not the holder of a license or registration certificate for it (s. 92(1));
- Occupying a motor vehicle in which he knew there was a firearm (s. 94(1));
- Possession of a loaded prohibited firearm together with readily accessible ammunition capable of being discharged in the same firearm (s. 95(1));
- Possession of a firearm knowing that it was obtained by commission of an offence (s. 96(1));
- Having in his possession a prohibited weapon while he was prohibited from doing so by reason of an order of prohibition (s. 117.01(1)); and
- A second charge for possession of a prohibited weapon while he was prohibited by an order (s. 117.01(1)).

[115] After trial, Mr. Phinn was found guilty in relation to ss. 86(1), 86(2), 88(1), 90(1) and 94(1) of the **Criminal Code**.

[116] The charges under ss. 86(1), 86(2), and 88(1) were stayed. Mr. Phinn was acquitted on the s. 95(1) charge (possession of a loaded prohibited firearm together with readily accessible ammunition); the s. 96(1) charge, possession of a weapon knowing it was obtained by the commission of an offence; and the two s. 117.01(1) charges (possession of a weapon while prohibited).

[117] There is some confusion with respect to the two s. 117.01(1) charges (Counts #9 and #10 of the Information). The wording of Counts #9 and #10 is identical and specify a breach of a weapons prohibition order dated February 26, 2010. The wording of the Information suggests that Mr. Phinn may have breached two weapons prohibition orders imposed in February, 2010. However, a closer look at Counts #9 and #10 reveal that Count #9 of the Information refers to a breach of s. 109 (prohibited from possessing a weapon) whereas Count #10 refers to a breach of s. 114. Section 114 relates to a requirement for a party to surrender anything that is prohibited by a prohibition order. Count #10 does not even identify an offence in law since a prohibition order cannot be made under s. 114.

[118] I make this point because, while parts of the record suggests that Mr. Phinn was subject to one or more prohibition orders at the time of this offence for which he was being sentenced, that is not clear from the record. This confusion permeates the sentencing judge's and the majority's reasons. There was no evidence before this Court or the court below (other than Justice Wright's decision) about the 2007 prohibition order made in Ontario and no evidence (other than Justice Wright's decision and the JEIN record) of Justice Wright's 2010 prohibition order.

[119] Confusion can also be seen about the prohibition orders in the majority's reasons at ¶58 above which says:

> [58] … A close reading of Justice Wright's decision satisfies us that the second prohibition order referred to by Judge Murphy is <u>not</u> the Youth Prohibition Order at all, but rather an entirely separate Recognizance with a firearms prohibition, which was in place in 2009. …

[120] With respect, no interpretation of Judge Murphy's decision could lead to this conclusion. The 2008 recognizance and its terms were not before Judge Murphy or this Court. She refers repeatedly to s. 109 prohibition orders, not a firearms prohibition pursuant to a recognizance under s. 145(3).

[121] The recognizance is referred to in Wright, J.'s decision but there is no evidence that Judge Murphy took into account a breach of a recognizance.

[122] In discussing dismissal of the two s. 117 charges, the majority says this:

> [73] In our analysis of Issue (iii) we have already explained why, in our view, Judge Murphy did not err when she referred to the fact that Mr. Phinn had been subject to two prior firearms prohibition orders, during the course of her sentencing remarks. It will be recalled that at the conclusion of his trial the Crown asked for, and the court directed, verdicts of acquittal for Count #9 (s. 107.01(1)) and Count #10 (s. 117.01(1)). But it must be emphasized that those two counts were not dismissed because the judge found that the prohibition order(s) did not exist, or had been incorrectly issued, or because the conviction for which the prohibition order(s) had been made, never occurred. Rather, those two counts were dismissed after the Crown acknowledged that it had not discharged its onus to prove beyond a reasonable doubt the element of the offence that a prohibition order had, in fact, been made. In our opinion this lack of proof did not undermine, for sentencing purposes, the fact that a prohibition order or orders existed.

[123] Again, with respect, the two s. 117.01 counts were dismissed after the Crown failed to prove that the prohibition order had, in fact, been made. But the majority says this lack of proof does not undermine the fact that the probation order exists. How can it not?

[124] The Crown failed to prove the prohibition order had been made, as a result it has failed to prove that it existed. I do not understand the distinction the majority is attempting to make in this passage or the impact of the distinction on this appeal.

[125] In any event, the majority says that all of this is of no consequence because Mr. Phinn's counsel at sentencing consented to the information going before the sentencing judge which established the existence of the two prohibition orders. Therefore, it was not necessary for the Crown to prove anything. In particular, they say it was not necessary for them to prove the aggravating facts (i.e., the prohibition orders) beyond a reasonable doubt pursuant to s. 724(3) of the **Code** because none of the facts in this case are "disputed".

[126] The majority relies in **R. v. Leduc**, **supra**, a decision of the British Columbia Court of Appeal to the effect that the Crown only has to meet the standard under s. 724(3)(e) if the dispute about the facts is "clear and unequivocal" (¶31). However, the difficulty here is that Mr. Phinn was acquitted at trial of breaching a prohibition order under s. 117.01 since a prohibition order was never

proven. Despite their omission at trial, the Crown did not take steps to prove the existence of a prohibition order, if any, at sentencing.

[127] As I will explain further below, defence counsel's concession that "the particulars of Mr. Phinn's earlier convictions" can go in by consent does not include the firearms prohibition orders because prohibition orders are not regarded as convictions in law. The law is clear that prohibition orders are an ancillary order on sentencing. There are no other concessions upon which one can infer that there was an agreement between the prosecutor and the offender regarding the prohibition orders.

[128] Even if one were to disagree with my interpretation of defence counsel's concession, it is impossible to conclude that this was a "fact agreed upon by the prosecutor and the offender" so that the judge could accept the fact as proven so that s. 724(1) of the **Code** applies. This is for three reasons.

[129] First, agreeing that "the particulars of Mr. Phinn's earlier convictions" can go in by consent cannot be divorced from the trial that took place. Mr. Phinn was acquitted at trial because the Crown never proved the existence of a prohibition order. Thus, without an express agreement at sentencing about the existence and terms of the prohibition orders how can it be said that this was a "fact" that was agreed upon by the prosecution and the accused so that the judge could accept it as proven for the purposes of sentencing?

[130] Second, the Crown was well aware that Mr. Phinn had been acquitted under s. 117.01 because it had not proven the existence of the prohibition orders. Therefore, if it wanted to rely on the prohibition orders for the purposes of sentencing, it knew that, absent an agreement with the accused, it had a duty to prove this fact under s. 724(3)(b) or (e) which state:

> **724**(3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,
>
> **…**
>
> (b) the party wishing to rely on a relevant fact, including a fact contained in a presentence report, has the burden of proving it;
>
> …
>
> (e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.

[131] If the Crown wanted to establish the prohibition orders as an "aggravating fact," s. 724(3)(e) would apply so that they would have to prove the prohibition orders beyond a reasonable doubt. Section 724(3)(e) also provides that the Crown must prove "previous convictions" beyond a reasonable doubt. This would not include the Ontario prohibition order for the reasons given above, but it would include the s. 95(1) conviction in Ontario. I agree that defence counsel's consent to adducing "the particulars of Mr. Phinn's earlier convictions" meant that Mr. Phinn's s. 95 conviction in Ontario properly fell under s. 724(1) rather than s. 724(3)(e).

[132] When the Crown then chooses not to adduce proof of the ancillary orders flowing from the convictions, it has not met the standard in ss. 724(3)(b) or (e). Further, the Crown does not say in oral submissions that it is relying on the existence of any prohibition order as an aggravating fact. In my view, the prohibition orders were never proven to any standard nor were they entered into evidence by the consent of the parties.

[133] Third, the Honourable Justice Eugene Ewaschuk in *Criminal Pleadings and Practice in Canada*, 2nd ed., vol. 3, loose-leaf, (Toronto: Canada Law Book, Last Updated: December 2014) states with respect to s. 724(1) (at 18:1017):

> …the court may "accept as proven" any *information* disclosed at trial or at the sentencing hearing as well as any "facts agreed on" by the Crown and defence.
>
> *Code*, s. 724(1)
>
> *R. v. Protz* (1984), 13 C.C.C. (3d) 107 (Sask. C.A.) (court is entitled to rely on the accused's admission of a previous conviction during his testimony at trial)
>
> *R. v. Black* (2010), 261 C.C.C. (3d) 343 (N.B.C.A.), leave to appeal to S.C.C. refused 264 C.C.C. (3d) iv. (at para. 25 – s. 724(1) is intended to avoid the re-hearing of trial evidence at the sentencing hearing).
>
> Under s. 724(1), a sentencing judge is *not* limited to findings of fact made at the trial. The defence may put forth a "less aggravated version of the facts", so long as the version is consistent with the charge. The Crown may contest that version by introducing evidence to support the "more aggravated version". Of course, the defence may also tender evidence in support of his or her version. Even though facts established at trial *cannot* be disputed at sentencing, counsel may attempt to establish "additional facts" relating to the circumstances of the offence so long as they are *consistent* with the findings of fact at trial. [Underlining mine]

R. v. Ewanchuk, (2002), 164 C.C.C. (3d) 193 (Alta. C.A.), at paras. 21-23.

[134] Crown counsel could not adduce additional facts about Mr. Phinn's prohibition orders under the guise of submissions when those facts are inconsistent with the findings of fact at trial. The sentencing judge acquitted Mr. Phinn on the charge of breaching the prohibition order and then used the fact that there were two prohibition orders in force (which was a finding of fact that is inconsistent with her verdict at trial) as an aggravating fact. This she could not do.

[135] As noted above, it is telling that the Crown never asked the sentencing judge to treat the previous prohibition order(s) as an aggravating fact and never tried to prove their existence. It is difficult to escape the conclusion that the sentencing judge determined the prohibition orders were an aggravating fact on her own motion. Mr. Phinn was acquitted at trial because the prohibition orders were not proven, he could never have expected that the judge could then take the same unproven prohibition orders from trial and treat them as proven beyond a reasonable doubt for the purposes of sentencing, particularly when the Crown has taken absolutely no steps to prove the existence of the prohibition orders and did not suggest they ought to be considered an aggravating fact.

[136] In his written submissions to the sentencing judge, the Crown, Mr. Borden, says the following at ¶3 and 4:

> It is respectfully submitted that this offense if (sic) Mr. Phinn's third conviction with respect to a prohibited weapon. On August 28, 2007, Mr. Phinn received 8 months custody followed by 4 months community supervision for a Section 95 C.C. offense. It is respectfully submitted that conviction is captured by Section 119(2)(h) of the *YCJA*.
>
> As referenced in the Pre-Sentence Report, Mr. Phinn was sentenced on February 26, 2010, on another 95(1) charge. It is respectfully submitted that given his record for prohibited/restricted weapon offenses, and his inability to refrain from engaging in such behavior, public safety and specific deterrence are the primary sentencing objectives. It is respectfully submitted that the following caselaw is in tandem with this sentencing recommendation.

[137] In those submissions, the Crown makes no reference to the firearms prohibition order.

[138] The Crown made the following oral submissions on the facts underlying the Ontario offence before Judge Murphy:

> Your Honour, this matter was before the court on many days, so I'm not going to go through the facts of this matter as Your Honour is fully apprised of the same. But I want to start first with the first in time conviction of Mr. Phinn when he was a youth. This arises out of Ontario.
>
> December 16th at 2010, I believe, there was a home invasion at 709 Ramey Street in Hamilton. The victim, 15 year old Karen (sic) MacLean, was home alone. Tyrone, an unrelated accused, and another gentleman forced their way into the house with a knife. They took a PS2 and a PSP from the backpack of -- within the house. He told Karen that he was looking for his older brother, Kyle MacLean. He said that he had guns too and was demanding to know where the weed money was. Tyrone punched and kicked Karen when he was laying on the ground. Karen then ran downstairs and alerted his stepfather. The two suspects fled and Karen and his stepfather went looking for the suspects. It was a Honda that they had stopped.
>
> Later that same day at approximately 4:55 p.m. Karen and his brother Kyle MacLean and his step dad, Ted Turner, went out for coffee. Ted showed Kyle where they'd last seen the Honda. At that point a black Nissan similar to the Honda stopped and they were writing down the license plate. As they were doing so, they were approached in the front by Tyrone Abrahams and a guy named Jermaine Phinn. Jermaine Phinn passed what appeared to be a sawed-off rifle to Tyrone. Tyrone fired three to four shots at the car and the bullets pierced the window, hit the passenger rear seat, just missing the occupant of the same. Those are the facts in relation to that matter.
>
> **THE COURT**: And I'm sorry, in relation to that matter the...
>
> **MR. BORDEN**: Mr. Phinn was subsequently stopped and he had a sawed-off .22 calibre rifle in his vehicle.
>
> **THE COURT**: Okay. And the charges were?
>
> **MR. BORDEN**: Mr. Phinn was convicted of a section 95 offence. He received eight months custody and four months supervision in the community and a mandatory order under section 51 of the YCJA, prohibition order that is, probation for one year as well. [Emphasis added]

[139] It is completely unclear where Crown counsel received his information about the offence in Ontario. Justice Wright's decision does not go into this level of detail. It seems apparent that the Crown is mistaken about the date of that offence. The particulars may be in the pre-sentence report following the 2010 Nova Scotia offence, however, that report was not made an exhibit in this proceeding and was not before Judge Murphy, nor is it before this Court.

[140] This is the only mention by the Crown in its submissions about any firearms prohibition order. We know that both the Crown and the defence declined to offer

any further evidence under s. 723(2) of the **Code**, other than the agreement between counsel that Mr. Phinn's earlier convictions "could go in by consent":

> **THE COURT**: All right. I have -- I am in receipt of some material that was provided by counsel in relation to submissions and cases. Were you planning on calling any evidence during the sentencing submission, either counsel?
>
> **MR. BORDEN**: No, Your Honour. The Crown did intend to read in the particulars of Mr. Phinn's earlier convictions though.
>
> **THE COURT**: All right. And is that something that's acknowledged, Mr. Tan?
>
> **MR. TAN**: It is, Your Honour. That could go in by consent.

[141] Even if I am wrong and these submissions are not evidence but "information disclosed at … the sentencing proceedings" that the trial judge was entitled to rely upon as facts that were proved under one or more of ss. 724(1), 723(1) or 726.1, the fact is that she did not rely on these submissions. Instead, as I will explain, she ignored the Crown's submission and appears to have mistakenly considered Mr. Phinn to be subject to a s. 109 firearm prohibition order instead of a s. 51 prohibition order under the **Youth Criminal Justice Act** (**YCJA**).

[142] Consequently, by taking unproven prohibition orders into account and apparently finding them proven beyond a reasonable doubt, the sentencing judge erred in principle when she said that "The fact that Mr. Phinn was on two firearm prohibition orders is particularly aggravating" (p. 7).

[143] Moreover, Mr. Phinn's criminal record is incomplete: it is a JEIN record that only shows convictions in Nova Scotia. There is no evidence in the record before Judge Murphy that proved Mr. Phinn's previous conviction in Hamilton, Ontario. The only "evidence" of this conviction and the sentence imposed is the prior judgment of Justice Wright. Judge Murphy acknowledges the scant nature of the record in her decision:

> … There was an offence in relation to firearms, I believe it was a 95(1), but I am not 100% sure, and I think the Crown had mentioned a date of 2010 in Ontario, but I think Justice Wright referred to an offence in 2007 in his decision. I'm presuming that is the same incident. …

[144] With respect, even if the 2007 prohibition order exists, the reasons above certainly disclose a reasonable doubt about the nature of that conviction and sentence. Plus the YOA Disposition in the same JEIN summary says that Mr. Phinn has no YOA Dispositions.

[145] It was an error in principle for the sentencing judge to have concluded that Mr. Phinn was on two firearm prohibition orders since the "evidence" of a second prohibition order was not proven and, even if Judge Murphy was entitled to regard the judgment of another court as proof, it could in no way be said to meet the standard of proof beyond a reasonable doubt.

[146] The majority relies heavily on the decision of Justice Wright in a previous sentencing of Mr. Phinn to prove the prohibition orders. I will explain why such reliance is ill-founded.

[147] Justice Wright's decision states the following with respect to Mr. Phinn's conviction in Ontario:

> 4 At the time of his arrest, Mr. Phinn was on a Recognizance dated October 31, 2008 prohibiting from him having in his possession any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition or explosive substance. He was then subject as well to a s. 109 weapons prohibition order and a related probation order as a result of a conviction for this same s. 95(1) offence in Hamilton, Ontario in 2007. On that occasion, Mr. Phinn was sentenced as a youth to eight months in jail and four months of community supervision.
>
> * * *
>
> 13 Crown counsel also underscores the aggravating factors present in this case. The first is that Mr. Phinn was not only in possession of a loaded prohibited firearm but was also carrying it in a concealed fashion. Moreover, Mr. Phinn has a previous conviction for the same offence in 2007 and was thereby subject to a weapons prohibition order and a probation order that were still in effect at the time of the commission of the present offence. As noted earlier, he was also then bound by a recognizance from the Nova Scotia Courts dated October 31, 2008 and breached the condition which prohibited him from having such a weapon in his possession.

[148] Justice Wright's decision clearly states that Mr. Phinn was subject to a s. 109 weapons prohibition order "as a result of a conviction for this same s. 95(1) offence in Hamilton, Ontario in 2007." With respect, it seems likely that this is an error. Mr. Phinn could not have been subject to a s. 109 weapons prohibition order for the offence in Ontario because he was sentenced as a youth. Mr. Phinn was born on December 20, 1989; it appears likely that the Ontario offence was committed on December 16, 2006, when he was just 16 years of age. As noted above. Judge Murphy was less than certain about what occurred in Ontario,

[149] Justice Wright's decision is inconsistent with the Crown's submission, which I will repeat:

> Mr. Phinn was convicted of a section 95 offence. He received eight months custody and four months supervision in the community and a mandatory order under section 51 of the YCJA, prohibition order that is, probation for one year as well. [Emphasis added]

[150] The firearms prohibition order under s. 51(1) of the **YCJA** is mandatory following a guilty finding under s. 95(1). Section 51(2) of the **YCJA** deals with the duration of the firearms prohibition order. It provides for a minimum duration of two years and no maximum:

> (2) **Duration of prohibition order** – An order made under subsection (1) begins on the day on which the order is made and ends not earlier than two years after the young person has completed the custodial portion of the sentence or, if the young person is not subject to custody, after the time the young person is found guilty of the offence.

[151] Because Mr. Phinn's criminal record from Ontario is not in evidence, this presents further problems. We know from the Crown prosecutor, Mr. Borden's written submissions that "On August 28, 2007, Mr. Phinn received 8 months custody followed by 4 months community supervision for a Section 95 C.C. offense." The date of the 2007 Ontario conviction cannot be found anywhere else in the record.

[152] However, this Court has no knowledge about the duration of the prohibition order. There is only one clue, which does not really assist. Justice Wright's decision states that at the time of his arrest on February 25, 2009 for his eventual 2010 conviction under s. 95(1), Mr. Phinn "was thereby subject to a weapons prohibition order and a probation order that were still in effect at the time of the commission of the present offence." Therefore, one can conclude that the s. 51(1) **YCJA** prohibition order was still in effect on February 25, 2009. This does not help, however, because we already knew that it must have been in effect at that time. August 28, 2007 to February 25, 2009 is less than eighteen months and s. 51(2) specifies that a s. 51(1) prohibition order "ends not earlier than 2 years after the young person has completed the custodial portion of his sentence."

[153] We can perhaps infer that Mr. Phinn "completed the custodial portion of the sentence" eight months after August 28, 2007. This would be April 28, 2008. Pursuant to s. 51(2) of the **YCJA**, the clock would then have started ticking for at

least two years. This takes us to April 28, 2010. Thus, the firearms prohibition order imposed under s. 51(1) of the **YCJA** in August 2007 may have expired in April 2010 or it may have been of longer duration. We do not know and there is nothing in the record to assist. The date of the offence for which Judge Murphy sentenced Mr. Phinn is April 1, 2012. Therefore, there is no evidence before this Court or before Judge Murphy that Mr. Phinn was subject to two firearms prohibition orders at the time of this offence in April, 2012.

[154] Thus, Mr. Phinn has never been subject to two firearms prohibition orders under s. 109. At best, he was subject to the one imposed by Justice Wright.

[155] What effect did this error have on Judge Murphy's decision? In her 23-page sentencing reasons, Judge Murphy treats it as an aggravating fact and refers, on no less than three occasions, to the fact that Mr. Phinn was subject to two firearms prohibition orders when there is no evidence before her that he was:

> In the matter before the court there are several aggravating circumstances of the offence and the offender, including the nature of this offence, that is the possession of a firearm, a handgun, in a motor vehicle in a public place, in circumstances with great inherent danger to the public; the accused has a criminal record and one for related offences; and at the time of the commission of these offences the accused was subject to two firearm prohibition orders.
>
> ***
>
> The fact that Mr. Phinn was on two firearm prohibition orders is particularly aggravating.
>
> ***
>
> As previously stated, it is of significance that Mr. Phinn was subject to two firearm prohibitions which had been imposed in 2010. [Emphasis added]

[156] On three occasions Judge Murphy erroneously referred to the fact that Mr. Phinn was subject to a s. 109 firearms prohibition order for the offence in Ontario when, as I have already discussed, there was no evidence of that prohibition order before her:

> Mr. Phinn has a previous criminal record, which was noted by the Crown. There was an offence in relation to firearms, I believe it was a 95(1), but I'm not 100 percent sure, and I think the Crown had mentioned a date of 2010 in Ontario, but I think Justice Wright referred to an offence in 2007 in his decision. I'm presuming that is the same incident. Mr. Phinn at that time received a period of custody that

> involved, as a youth, eight months in jail and then four months of community service, as well as a section 109 prohibition order. [Emphasis added]

[157] As noted earlier, this excerpt is particularly telling as Judge Murphy appears to admit that she does not know what offence Mr. Phinn was convicted of in Ontario. This is not surprising given the paucity of the record before her and no evidence of Mr. Phinn's record in Ontario. She only had the submissions of Mr. Borden and the decision of Justice Wright to confirm this fact. However, the sentencing judge continues by pointing out on two additional occasions that Mr. Phinn was subject to a s. 109 prohibition order when he was sentenced by Justice Wright:

> [A] 95(1) offence that was the subject matter of Justice Wright's decision on February 26, 2010, and he received a sentence of one year and six months concurrent, which was in addition to one year and six months that he had done of remand time, and he had been credited, I think, for some increased remand time at that point in time, two for one, and so the total sentence was a three year six month sentence by Justice Wright. At that time he was also prohibited from having in his possession a firearm pursuant to section 109.
>
> As I understand the Crown's position, the 2007 offences in Ontario while the accused was still a young person consisted of him handing a firearm, a sawed-off rifle, to someone who fired shots in a public place at persons who were victims or witnesses in a home invasion as they were writing down the license plate of a car. I gather that Mr. Phinn was either in the car or associated to someone in the car. The shots were fired into the car, just missing the passenger. The police seized the gun from Mr. Phinn at the time of his arrest and he was later sentenced for that, receiving the sentence I spoke of, plus the 109 prohibition order. [Emphasis added]

The Concessions

[158] But what of defence's concessions that "the particulars of Mr. Phinn's earlier convictions" can go in by consent and that he had "no issue" with the contents of Justice Wright's decision? As I will explain, these concessions do not alter my conclusion.

[159] Mr. Tan agreed that "the particulars of Mr. Phinn's earlier convictions" could go in by consent. With respect, this concession cannot include the firearms prohibition order because a firearms prohibition order is not a "conviction", but an ancillary order that is part of a sentence. An individual could be convicted for breaching a prohibition order under s. 117.01, but there is no evidence that Mr.

Phinn has ever been convicted of this crime; he was acquitted of this offence by Judge Murphy.

[160] As the British Columbia Court of Appeal found in **R.A.T. v. British Columbia (Attorney General)**, 2011 BCCA 263, "a s. 109(1) firearms prohibition fits easily within the concept of sentence as that word is used in the *Criminal Code*" (¶20). An appeal of a firearms prohibition order under ss. 673 or 785 of the **Code** is an appeal against sentence (see **R.A.T., supra** at ¶14).

[161] The context of what was occurring during the sentencing hearing supports the view that defence counsel's concession related only to convictions.

[162] The sentencing judge asked whether the Crown was planning on calling any evidence during the sentencing submissions following which this exchange took place:

> **MR. BORDEN:** No, Your Honour. The Crown did intend to read in the particulars of Mr. Phinn's earlier convictions though.
>
> **THE COURT:** All right. And is that something that's acknowledged, Mr. Tan?
>
> **MR. TAN:** It is, Your Honour. That could go in by consent. [Emphasis added]

[163] Mr. Tan is simply agreeing to Mr. Phinn's prior convictions going into evidence. Crown counsel did not, at any time, indicate to the court that it intended to prove any prohibition order as an aggravating fact nor did the Crown request that defence counsel consent to the sentencing judge considering the prohibition orders as an aggravating fact.

[164] One can only imagine Mr. Tan's response if it was put to him that by agreeing to allow Mr. Phinn's previous convictions to be put before the sentencing judge he was agreeing that the prohibition orders, which were not proven at trial, would be considered to be proven as an aggravating fact for the purposes of sentencing.

[165] Absent something more, and with respect to the majority, this exchange cannot be taken as admitting something as important as an aggravating fact at the sentencing hearing.

[166] The majority emphasizes that Mr. Tan took no issue with the pre-sentence report filed in this case. Again, this concession must be taken in context. The following exchange took place:

> **THE COURT**: All right. Mr. Phinn is before the court now in relation to his sentencing hearing. In relation to the presentence report that was prepared, Mr. Tan, does Mr. Phinn have any issues with any of the contents?
>
> **MR. TAN**: No, Your Honour. I reviewed the presentence report with Mr. Phinn this morning and read to him the bulk of the report, and there is no -- he took no issue with what was related to him.

[167] Attached to the pre-sentence report is the JEIN Offender's Summary which contains the notation "firearms prohibition. 26 Feb – 2010 to 26 Feb – 2020" which was referenced under the sentence portion of the JEIN report. The majority says that this is an acknowledgement by the defence counsel that the prohibition order is not in dispute and that it can be taken into consideration by the judge as an aggravating fact.

[168] With respect, I again disagree. The context of the admission is such that it is relating to the narrative of the report and not the attachment to it.

[169] Again, it would take much more to acknowledge the prohibition order as an aggravating fact. The existence of the prohibition order was not proven at trial and was, based on the trial evidence, an issue in dispute. To suggest that this exchange negatives the trial evidence is a considerable stretch.

[170] Finally, I will turn to the suggestion that Mr. Tan's concession with respect to Justice Wright's decision amounts to an acknowledgement of the existence of the two prohibition orders. Again, this must be contextualized.

[171] Mr. Borden sought to introduce the pre-sentence report that was before Justice Wright in 2010 to contradict a statement which was made by Mr. Phinn in the pre-sentence report before the sentencing judge in this instance. In particular, the Crown refers to what Mr. Phinn said in the pre-sentence report presented to Judge Murphy as follows:

> **MR. BORDEN**: According to Mr. Phinn, programs for him are not beneficial as he learns from his mistakes and thinks things through. I would respectfully submit that little weight should be given to that statement from Mr. Phinn as in an earlier presentence report involving the last matter (inaudible due to not at microphone).

THE COURT: Thank you. Did you want this made as an exhibit, Mr. Borden?

MR. BORDEN: Please, Your Honour.

THE COURT: It is highlighted. I mean, I certainly feel I have the ability to ignore the highlights, but...

MR. BORDEN: I only intend on making one reference to the presentence report, Your Honour.

THE COURT: Yes.

MR. BORDEN: And that is found at page 5, paragraph 5, wherein commenting on the offence that was before the court at that time:

> "He said that it was stupid. He had seen the light and was ready to put his criminal lifestyle behind him as he did not want to be back in jail again."

That's the only comment I intend on making with respect to that presentence report. … [Emphasis added]

[172] We then fast forward to Mr. Tan when he is making submissions to the sentencing judge. On this issue Mr. Tan starts out as follows:

MR. TAN: … I would like to address the presentence report that my friend has handed forward this morning that was submitted for the sentencing of February 4th, 2010. I was actually Mr. Phinn's counsel on that occasion. Certainly there are elements to this presentence report that perhaps would be relevant, but I wish to caution in that it was a contested sentencing and, in fact, there were elements of this particular report which were contested by Mr. Phinn and if my -- respectfully...

THE COURT: Sorry, I don't mean to interrupt you, and I'll give it limited weight, because I'm not privy to the submissions that were made at the sentencing hearing, so I think I do have to. But I think is there not a written decision by Justice Wright? When I was reviewing the cases, I...

MR. TAN: Yeah. I believe...

THE COURT: ...in relation to sentencings of matters of this type, I did come up with a decision by Justice Wright involving Mr. Phinn.

MR. TAN: There is. Yes. Yes, that's correct.

THE COURT: I take it you don't take any issue with any of the contents of Justice Wright's decision?

MR. TAN: No, not of Justice Wright's decision, no.

THE COURT: Okay.

MR. TAN: The presentence report...

THE COURT: I think that probably conveys exactly what you probably want. (*Here the judge is speaking to Mr. Borden about what he wanted to convey to the court.*)

MR. BORDEN: Yes, Your Honour.

THE COURT: So maybe I'll just -- unless the Crown...

MR. BORDEN: No issue, Your Honour.

THE COURT: ...wants me to believe...

MR. BORDEN: No.

THE COURT: ...make significant -- maybe we'll just not have Mr. Phinn's presentence report from 2010 be an exhibit. And I haven't had an opportunity to read it, so...

MR. TAN: Thank you, Your Honour. And I would -- to my recollection, I would recall that Justice Wright did make some comments on -- with respect to that presentence report, so I would be much more comfortable relying upon Justice Wright's decision. [Emphasis added]

[173] So reading the exchange in context, what is happening is that Mr. Tan does not want the pre-sentence report from 2010 to go into evidence. He would prefer to rely on what Justice Wright said in his decision with respect to the 2010 pre-sentence report. Mr. Borden agrees.

[174] What Justice Wright said about the 2010 pre-sentence report is contained in his decision reported as 2010 NSSC 99 as follows:

> [17] In his testimony at the sentencing hearing, Mr. Phinn acknowledged that he didn't learn his lesson from his first offence in 2007 but that he has now, after spending the past year in adult jail. He says he now wants to change his lifestyle from being around drug dealers and gangsters which he fell into when he left home at age 16. He is now 20 years of age with a grade 11 education and spoke of new influences that will get him away from his prior lifestyle. In particular, he spoke of his plan on release from prison to join his extended family members in Montreal where he wants to complete his high school education and get a job working in a family brick laying business. He also has the support of his mother and his girlfriend. He also spoke of his young son who he has seen very little of since his son was taken by his mother to live in Ontario. Mr. Phinn says that he needs to get his life on track to be a better role model for his son. Only time will tell whether the sincerity with which Mr. Phinn expressed his intention to turn his life around holds true.

[175] The agreement between the parties is that what Justice Wright said about the 2010 pre-sentence report conveyed what Mr. Borden wanted to put before the court. Mr. Borden simply wanted to show that Mr. Phinn's statement that he wanted to turn his life around rang hollow. To read into the exchange between counsel that the court could then use Justice Wright's decision for any purpose, including proof of aggravating facts beyond a reasonable doubt, is not consistent with either the intentions of Crown, the defence or the sentencing judge.

[176] Defence counsel's comments cannot signify his agreement to everything in Justice Wright's decision.

[177] Further, as I have clearly demonstrated above, Justice Wright appears to have made an error by referring to the firearms prohibition order as a s. 109 order, and Judge Murphy has compounded that error by ignoring the Crown's submissions about the s. 51 **YCJA** order and relying exclusively on Justice Wright's decision to find that Mr. Phinn was subject to two s. 109 firearms prohibition orders and then using this as an aggravating fact.

[178] In sum, we are left with two pieces of "evidence" about whether a prohibition order was made after the 2007 Ontario conviction. There is no direct evidence of either the conviction or the firearms prohibition order. The Crown's submission is that a s. 51 **YCJA** order was made and Justice Wright indicated that Mr. Phinn was subject to a s. 109 prohibition order. The fact that Mr. Borden mentioned s. 51 of the **YCJA** in his oral submissions leads to an inference that Mr. Phinn was properly sentenced in Ontario under the **YCJA** but there is no evidence that any party or judge took any steps to ascertain the duration of the 2007 firearms prohibition order. Thus, it appears more probable than not that Justice Wright's small error in his 2010 decision has compounded itself over time so that Judge Murphy treated two s. 109 firearms prohibition orders as an aggravating factor when: a) it seems Mr. Phinn was never subject to two s. 109 orders; b) the Court has no evidence whether the s. 51 **YCJA** order was granted; c) the Court has no evidence that the Ontario prohibition order was in effect at the time of the 2012 offence for which Judge Murphy sentenced Mr. Phinn; and d) Mr. Tan never agreed that details regarding the firearms prohibition orders could go in by consent.

[179] With respect to the second prohibition order, that which was imposed by Justice Wright, as explained above, the concession made by Mr. Tan with respect to Justice Wright's decision does not go so far as to allow the sentencing judge to

consider that it amounted to an admission that the prohibition order, which was not proven at trial, could be considered on sentencing.

[180] Finally, at no time in its written submissions or at the sentencing hearing does the Crown suggest that the prohibition orders should or could be considered an aggravating fact. Contrast this to the submissions made by Crown counsel in the previous case involving Mr. Phinn before Justice Wright. In that sentencing hearing, Crown counsel referred to the prohibition order and a recognizance which prohibited Mr. Phinn from having a weapon in his possession as aggravating facts:

> [13] Crown counsel also underscores the aggravating factors present in this case. The first is that Mr. Phinn was not only in possession of a loaded prohibited firearm but was also carrying it in a concealed fashion. Moreover, Mr. Phinn has a previous conviction for the same offence in 2007 and was thereby subject to a weapons prohibition order and a probation order that were still in effect at the time of the commission of the present offence. As noted earlier, he was also then bound by a recognizance from the Nova Scotia Courts dated October 31, 2008 and breached the condition which prohibited him from having such a weapon in his possession. (**R. v. Phinn, supra**)

[181] In conclusion on this point, the sentencing judge erred in considering the two prohibition orders as an aggravating fact in reaching her decision. Even if I were to accept that Justice Wright's decision could be proof of the second prohibition order issued in February 2010, it would still be an error in principle for the sentencing judge to have considered there were two prohibition orders in effect. There is no basis upon which she could have reached this conclusion.

[182] For these reasons, alone, I would allow the appeal.

[183] I will discuss what I consider to be the appropriate sentence in these circumstances under the next ground of appeal.

iv. Did the sentencing judge err in principle in failing to consider s. 718.2(b), i.e., that the sentence being imposed be similar to the sentence imposed on similar offenders for similar offences committed in similar circumstances?

[184] The sentencing judge was left to sentence Mr. Phinn on the s. 94(1) charge and the s. 90(1) charge.

[185] A sentence of 25 months concurrent was imposed on the s. 90(1) charge. That sentence is not an issue on the appeal.

[186] The sentencing judge sentenced Mr. Phinn to six years on the charge relating to being in an automobile in which he knew there was a weapon.

[187] I disagree with the sentencing judge and the majority that six years is an appropriate sentence in these circumstances. To explain my disagreement I will start by referencing some of the purposes and principles of sentencing set out in s. 718-718.2:

> **718.** The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.
>
> **...**
>
> **718.2** (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> ...

[188] With these provisions in mind, I will turn to the sentence imposed in this case.

[189] The sentencing judge correctly set out the principles of sentencing and, indeed, referenced aggravating and mitigating factors with respect to Mr. Phinn. Where she falls into error is when she says:

> I have reviewed the cases referenced by counsel, as well as other judges on other decisions dealing with these type of offences, and the sentencing range can be anywhere from 12 months to in excess of eight years, depending upon the aggravating and mitigating factors in the particular case. ... The individual

> circumstances of each case and each offender need to be considered in their own light.

[190] The majority suggests that I have parsed the words of the sentencing judge saying that the sentencing judge was not suggesting that "in her view such a range applied to the appellant's case following his s. 94(1) conviction; rather, the phrase was intended to more broadly reflect the range of penalties for weapons' offences, in general" (¶63 above).

[191] This is precisely my point. It does not reflect the range for the offence for which Mr. Phinn was being sentenced. As a result, the sentencing judge's analysis was fundamentally flawed. With respect, both the sentencing judge and the majority ignore s. 718 as set out above and the established case law from this Court which addresses ranges of sentences. In particular, I refer to the comments of Bateman, J.A. in **R. v. Cromwell**, 2005 NSCA 137 (also cited by the majority at ¶67 above) where she discussed the meaning of the range:

> [26] ... [Counsel] broadly defines the range of sentence, in these circumstances, as all sentences that might be imposed for the crime of impaired driving causing bodily harm. I disagree. In my opinion the range is not the minimum to maximum possibilities for the offence but is narrowed by the context of the offence committed and the circumstances of the offender (" . . . sentences imposed upon similar offenders for similar offences committed in similar circumstances . . ." per MacEachern, C.J.B.C. in **R. v. Mafi** (2000), 142 C.C.C. (3d) 449 (C.A.)). The actual punishment may vary on a continuum taking into account aggravating and mitigating factors, the remedial focus required for the particular offender and the need to protect the public. This variation creates the range. [Emphasis added]

[192] To similar effect, see **R. v. A.N.**, 2011 NSCA 21:

> [34] Unless expressed in the *Code*, there is no universal range with fixed boundaries for all instances of an offence: [Authorities omitted]. The range moves sympathetically with the circumstances, and is proportionate to the *Code*'s sentencing principles that include fundamentally the offence's gravity and the offender's culpability. ...

(See also **R. v. E.M.W. (No. 2)**, 2011 NSCA 87, ¶29)

[193] Therefore, sentencing judges must look for offenders in similar circumstances to this case and then consider the aggravating factors, mitigating

factors and the need for specific and general deterrence in order to arrive at the appropriate sentence.

[194] I recognize that considerable deference is owed to a sentencing judge. I take no issue with the cases cited by the majority to support that view. However, when a sentencing judge errs in law or in principle, no deference is owed (**R. v. MacDonald**, 2014 NSCA 102, ¶105). With respect, neither the majority nor the sentencing judge attempts to determine a range based on existing jurisprudence for similar offenders in similar circumstances.

[195] The majority says the following:

> Having regard to these factors, we think that in sentencing the appellant under s. 94(1) it was entirely appropriate for Judge Murphy to have initially considered a range of between four and eight years based on counsels' submissions, less suitable credit for time spent on remand. … (¶69)

[196] With respect, I cannot see anywhere in the sentencing judge's decision where she "initially considered" a range of four to eight years for the s. 94 offence. The sentencing judge, simply, did not say this. Nor do I find any support in the majority's decision or in the case law, which I will discuss in some detail, for this range of sentence. While I recognize it is not necessary to cite case law in support of a range of sentences, however, when a sentencing judge chooses a range of sentence for an offence, it must be supportable. I also agree with the majority that ranges of sentences are guidelines and a sentencing judge may impose a sentence outside of the guidelines. However, a judge cannot do so with impunity. In my view, the sentence imposed here is neither supportable nor justified in these circumstances.

[197] The majority refers also to "counsels' submissions" to suggest that the sentencing judge was somehow justified in accepting those submissions as determining the range of sentence. As I will illustrate, even a cursory review of the cases submitted by both counsel in support of their position show that they have little or no relevance to Mr. Phinn's circumstances and do not support a range of sentence of four to eight years.

[198] The Crown, in a 2-page pre-hearing brief, referred to two case. The first was **R. v. Brown**, 2010 ONCA 745. In **Brown**, the accused was convicted of a s. 95(1) offence as well as a breach of a lifetime firearms prohibition.

[199] This was the third occasion upon which Mr. Brown was convicted of a s. 95(1) offence and the third time he was convicted of a firearms prohibition offence. The minimum sentence that could be imposed in **Brown** was five years. Mr. Brown was in the country illegally and his record revealed 34 prior convictions. He received a sentence of seven years, six months for the s. 95(1) offence and a consecutive one year imprisonment on the firearms prohibition offence.

[200] The Crown conceded in argument that **Brown** was not analogous to Mr. Phinn's position, yet Mr. Phinn received just 18 months less than Mr. Brown for a less serious offence.

[201] The second case referred to by the Crown was **R. v. Johnson**, 2010 ONSC 3213. Again, the Crown conceded that this case was not on all fours with Mr. Phinn. In **Johnson**, Mr. Johnson was convicted of possessing a restricted firearm contrary to s. 95(1), possession of a firearm knowing that he was not licensed, contrary to s. 92(1), possession of a firearm while prohibited and breaches of four firearms prohibition orders which had been imposed previously on him. In addition, he had been previously convicted of a s. 95 offence and the five year statutory minimum applied to him. Finally, Mr. Johnson had a significant criminal record both as a young person and as an adult. He had convictions for trafficking, robbery, extortion and assault, possession for the purpose of trafficking and assault causing bodily harm. He received a 7½ year sentence on the s. 95(1) offence. Again Mr. Phinn received just 18 months less than Mr. Johnson.

[202] With respect, Crown counsel's "submissions" cannot be taken as supporting the range of sentence of between four and eight years.

[203] I will now turn to defence counsel's submissions. Mr. Tan suggested that the appropriate range of sentence would be four to six years. With respect to Mr. Tan, he was, in my view, clearly mistaking. I will address the range in more detail later. For his part, he cited six cases to the sentencing judge. In **R. v. Muise**, **infra**, the accused was convicted of a s. 95(1) offence, a s. 90(1) offence and a s. 94(1) offence. There was a joint recommendation and Mr. Muise received two years in a federal institution. Mr. Muise had a prior criminal record as a youth which included three counts of robbery and three counts of possession of a weapon for a purpose dangerous to the public peace. I will discuss this case in more detail later, but it does not support a range of sentence of four to six years.

[204] The remainder of the cases cited by Mr. Tan are equally distinguishable. In **R. v. Bashir**, 2010 ONCJ 548, the accused was convicted of a s. 94(1) offence and eight other offences including a s. 95 and s. 96 offence. He had 25 prior convictions and had been sentenced yearly for eight years. He was sentenced to six years less remand credit. The sentence was affirmed on appeal (2012 ONCA 793). In that case, the Crown and the court agreed that six years was the upper end of the appropriate range.

[205] In **R. v. Ho**, 2011 ABPC 47, the accused was not even convicted of a s. 94(1) offence. He was convicted of 33 weapons-related offences in relation to seven loaded handguns in the glove box of his car and in a backpack. He was sentenced to six years imprisonment.

[206] **R. v. Durrive**, 2011 BCPC 130 was another case where the accused was not convicted of a s. 94(1) offence. The accused had a very lengthy and related record including prior weapons-related charges. He was convicted of a s. 95 offence and possession of a controlled substance, in particular, cocaine. He had previously been convicted of carrying a concealed weapon, breach of a probation order, trafficking in a controlled substance, possession of a prohibited weapon and breaching probation orders five times. He received a sentence of 4½ years as a total sentence on all counts, 18 months less than Mr. Phinn.

[207] The defence also referred to **R. v. Jones**, 2011 ONSC 5330. The accused was convicted of a s. 95 offence as well as possession of a controlled substance. He had a lengthy criminal record including two prior weapons convictions. The court imposed a sentence of 4½ years.

[208] The last case referred to by the defence was **R. v. Whyte**, 2011 ONSC 181. In that case, the accused was convicted of four s. 95(1) offences as well as a s. 94 offence. He was also convicted of trafficking in weapons. He received a sentence of 6½ years.

[209] As can be seen, none of the submissions of counsel nor the cases referred to by them support a range of sentence of four to eight years for this type of offence. If anything, a review of those cases should have brought the sentencing judge to the realization that six years was well outside the range.

[210] Finally, on this point, I would add that the sentencing judge does not refer to any of the cases referred to by either counsel in her decision. To suggest that it

was appropriate for her to "initially consider" the range of four to eight years simply not borne out by the record.

[211] Since I am of the view that the sentencing judge erred in principle in failing to take into account the context of the offence committed and the circumstances of the offender. I will now turn to what I consider to be the appropriate sentence in this particular case.

[212] It is useful to refer again to **R. v. Cromwell, supra**, and the fact that the range is not the maximum or minimum for any given offence, but is "narrowed" by:

i. The circumstances of the offender; and

ii. The context of the offence committed.

#1 The Circumstances of the Offender

[213] Mr. Phinn's circumstances are such that the evidence did not link the possession of the firearm to any other criminal behaviour other than what was brought on by its possession, nor was there any suggestion that Mr. Phinn was committing other offences while in possession of the firearm. At the time of sentencing, Mr. Phinn was 23 years old and he had two previous convictions for firearms' offences. In 2007, he was convicted of a s. 95(1) offence and received eight months in jail and four months community supervision.

[214] In 2010, he had another s. 95(1) offence and was sentenced to three and a half years imprisonment less remand time. The previous convictions certainly call for specific deterrence and the sentence must also reflect general deterrence for firearms offences. However, we cannot lose sight of the fact that Mr. Phinn is being sentenced for being in a vehicle where he knew there was a weapon – nothing more.

[215] It is also instructive that his co-accused received a one year sentence for the same offence.

[216] The Crown prosecutor, in making submissions to the sentencing judge when referring to Mr. Phinn's prior conviction under s. 95(1), says this:

> Interestingly enough, 25 months later that's exactly where Mr. Phinn finds himself, committing the exact same kind of crime. [Emphasis mine]

[217] With respect, s. 94.1 and s. 95(1) are not the exact same type of offences. Under s. 95(1) it is necessary to prove the accused possessed a firearm and knew the firearm was loaded or ammunition that was capable of being discharged in the firearm was readily accessible. Under s. 94(1) it is only necessary to show the accused was an occupant of the vehicle in which they knew there was a firearm. The circumstances are clearly different.

[218] The fact a firearm weapon was loaded can be an aggravating fact on sentencing. However, Mr. Phinn was acquitted of the s. 95(1) charge. Therefore, knowledge that the gun was loaded cannot be an aggravating factor (**R. v. Blagdon, infra**, ¶20).

#2 Context of the Offence

[219] The circumstances of the offence are detailed in the majority's decision at ¶2-7. I will not repeat them here.

[220] I will now turn to cases which I consider establish the range for this type of offence. I would point out that it is difficult to find cases under s. 94 where the offender is also not being sentenced under s. 95. This makes it difficult under the parity principle as quite often we are not comparing apples and apples. Therefore, s. 94 cases need to be read carefully to ensure that judges are not sentencing on s. 95 and then giving the same concurrent sentence on s. 94.

[221] In **R. v. Blagdon**, 2013 NSPC 61, Mr. Blagdon was 29 years of age. The circumstances of the offence were that Mr. Blagdon and Mr. Clayton (see below) were driving away from downtown Halifax in Blagdon's grandmother's car. They were fleeing following an altercation at a bar where Mr. Clayton chased after and fired shots at a man in the street. The police pulled over their car, Blagdon was sitting in the passenger seat and a loaded revolver was found in the glove compartment in front of him. He was convicted of three firearms' offences including a s. 94(1) offence.

[222] He received an 18 month conditional sentence. Mr. Blagdon had a prior criminal record for breaking and entering, refusing a breathalyzer and driving while prohibited. He had a positive pre-sentence report. He had no previous firearms convictions.

[223] In **R. v. Clayton**, 2013 NSPC 94, Mr. Clayton was Mr. Blagdon's companion, he was convicted of five weapons offences including intentional

discharge of a firearm, carrying a concealed weapon, careless storage, a s. 94(1) offence and possession with no license or registration. He had a prior criminal record for eight offences (including robbery, theft and assault). He was on a recognizance with a no weapons condition at the time of the commission of these offences. He received a two year concurrent sentence for the s. 94(1) offence.

[224] In **R. v. Hill**, 2011 NSPC 28, Mr. Hill was the driver of a truck where a 32 calibre revolver was located following a motor vehicle stop. He pled guilty to offences under s. 94(1) and s. 117.01 (possession of a firearm while prohibited from doing so). He had nine prior criminal convictions, including a five year penitentiary sentence for possession of drugs for the purpose of trafficking for which he was on parole when he committed the offences. He was subject to a lifetime firearms prohibition order at the time of committing these offences. He was sentenced to 12 months imprisonment on the s. 94(1) offence and a 12 month concurrent sentence for the s. 117.01 offence.

[225] **Hill** is very important when considering Mr. Phinn's circumstances. First, it is an example of a conviction and sentencing on a s. 94 case without a conviction under s. 95 from Nova Scotia. Second, the offender, with a criminal record that is arguably worse than Mr. Phinn's, got 12 months for the s. 94 offence and 12 months concurrent for the s. 117.01 offence. Third, it appears that Judge Murphy took her error about the range directly from Judge Hoskins' decision in **Hill** where he stated:

> [72] The sentences imposed range from 12 months to eight years, depending upon the aggravating and mitigating factors in the particular cases. Moreover, some firearm offences are more serious than others, as reflected in the imposition of the range of minimum punishments.

[226] This is almost identical to the wording of Judge Murphy when she says:

> …and the sentencing range can be anywhere from 12 months to in excess of eight years, depending upon the aggravating and mitigating factors in the particular case. Moreover, some firearm offences are more serious than others, as reflected in the imposition of a range of minimum punishments by Parliament.

It is difficult to reconcile the 12 month sentence in **Hill** with the 6 years given to Mr. Phinn.

[227] In **R. v. Smith**, 2013 NSSC 77, Mr. Smith pled guilty to possession of drugs for the purpose of trafficking and several weapons offences including offences

under ss. 95 and 94 of the **Code**. Justice Felix A. Cacchione accepted a six year joint recommendation: six years for the s. 95 offence, two years concurrent for the trafficking offence, one year concurrent for the s. 94 offence and six months concurrent for the offence under s. 117.01. Smith had prior convictions for very similar offences five years previously for which he received a 42 month sentence.

[228] In **R. v. Ali**, 2012 ONSC 7013, the accused was being sentenced, following a guilty plea, for careless use of a firearm, and unauthorized possession of a firearm in a motor vehicle and carrying a concealed weapon. The accused was an occupant of a vehicle while carrying a handgun inside his waistband. He was carrying the gun for protection as he intended to purchase drugs. He was a first-time offender. He was sentenced to an 18 month conditional sentence.

[229] **R. v. D.A.J.,** 2011 ONSC 5330 is probably closest to Mr. Phinn. D.A.J. was convicted under s. 95(1), s. 94(1), s. 108, and s. 107.01(3) and with possession of crack cocaine. He was 20 years old at the time of the offence and had a significant criminal record including convictions for various weapons offences and crimes of violence. The three year statutory minimum came into play on the s. 95(1) offence and the trial judge sentenced him to 45 months in jail on that offence and ordered that the other firearms' offences be served concurrently.

[230] Unfortunately, the sentencing judge in **D.A.J.** did not indicate how much time she was giving for the s. 94 offence or the s. 108 offence (tampering with the serial number) - the other firearms offences. The Crown suggested a five year sentence which the judge said was excessive in these circumstances.

[231] In **R. v. Muise**, 2008 NSSC 340, Mr. Muise pled guilty to various charges related to the possession of a loaded handgun including that he was an occupant of a motor vehicle in which he knew there was a firearm or prohibited weapon contrary to s. 94(1). Mr. Muise was also under a previous prohibition order and was also convicted of a s. 117 offence for possession of a firearm while prohibited. Although Muise was a joint recommendation, Beveridge, J. (as he was then) found that the two year recommended sentence was "plainly within the acceptable range of sentence for this offender and the circumstances of these offences".

[232] Even if I were to accept that the prohibition order, which I say was not proven at the sentencing hearing, was an aggravating fact, the range of sentences still does not reach anywhere near six years in prison. In **Hill, Blagdon**, **Smith** and **Muise, supra**, all of the accused were subject to prohibition orders. The

sentences, even when they were convicted of a s. 117 offence, as well as a s. 94(1) offence, do not come anywhere near the sentence imposed on Mr. Phinn.

[233] I have been unable to locate any case law, and none has been cited by either the Crown, the sentencing judge or the majority that would support the imposition of a sentence of six years in these circumstances. Nor does it support the range of four to eight years referred to by the majority. There is simply no precedent for a six year sentence where s. 94 is the most serious offence. The three reported decisions that I have been able to find where s. 94 was the most serious offence have resulted in two x 18 conditional sentence: (**R. v. Blagdon, supra** and **R. v. Ali, supra**) and 12 months (**Hill, supra**). The unreported case of **R. v. Smith**, Mr. Phinn's co-accused, resulted in a one year sentence where s. 94(1) was the only offence.

[234] The decision of **R. v. Elie**, 2015 ONSC 300 demonstrates how far outside the range this sentence is. Elie received a 5.5 year total sentence in that case for a s. 95 (5 years); a s. 92(1) and s. 94 (4 years, 3 months concurrent on both); and a s. 117.01 (6 months consecutive). Elie had a far worst criminal record than Phinn; he had a previous six year sentence for offences including a s. 95 and a lifetime weapons prohibition. Yet his sentence was less than Mr. Phinn's.

[235] The range of sentences for this type of offence in these circumstances is between 18 months and three years. Considering the aggravating facts (including the previous prohibition order), general and specific deterrence which I had referred to earlier, the appropriate sentence for Mr. Phinn would be 36 months, the upper end of the range.

[236] As I said at the beginning of these reasons that even if I had not found two errors in principle, I would have found that the sentences are also demonstrably unfit because they are manifestly excessive. The reason the majority and the sentencing judge could not refer to the parity principle or any case law is because there are simply no reported cases in Canada where anyone has got anywhere close to six years for a s. 94 offence when it is the most serious offence, regardless of the circumstances of the offender or the context of the offence committed.

Conclusion

[237] I would grant leave to appeal, allow the appeal and impose a sentence of 36 months minus remand credit of 19 months.

Farrar, J.A.

Appendix "A"

This is the information of Cst. Susan Godfrey, a Member of the Royal Canadian Mounted Police...who says that she has reasonable grounds to believe and does believe that JERMAINE TIRANDO PHINN ... and TYLENE MARIE SMITH ... being an adult ... On or about the 1st day of April, 2012 at, or near Dartmouth, Nova Scotia, did

1. without lawful excuse carry a prohibited weapon, to wit., a revolver, in a careless manner, contrary to Section 86(1) of the Criminal Code.
2. AND FURTHER that they at the same time and place aforesaid, did without lawful excuse store a firearm, to wit., a revolver, in a careless manner, contrary to Section 86(2) of the Criminal Code.
3. AND FURTHER that they at the same time and place aforesaid, did unlawfully have in their possession a weapon or an imitation of a weapon, to wit., a revolver, for a purpose dangerous to the public peace or for the purpose of committing an offence, contrary to Section 88(1) of the Criminal Code.
4. AND FURTHER that they at the same time and place aforesaid, not being authorized under the Firearms Act to carry a concealed weapon, to wit "a revolver," did carry it concealed, contrary to Section 90(1) of the Criminal Code of Canada.
5. AND FURTHER that they at the same time and place aforesaid, did possess a firearm, to wit., a revolver, knowing they were not the holder of a license or the holder of a registration certificate for the firearm, under which they may possess it, contrary to Section 92(1) of the Criminal Code.
6. AND FURTHER that they at the same time and place aforesaid, were occupants of a motor vehicle, to wit., a 2013 Ford Fusion, in which they knew that there was a firearm, to wit., a revolver, contrary to Section 94(1) of the Criminal Code.
7. AND FURTHER that they at the same time and place aforesaid, did possess a loaded prohibited firearm together with readily accessible ammunition capable of being discharged in the same firearm and was not the holder of an authorization or license and registration certificate under which they may possess the said firearm, contrary to Section 95(1) of the Criminal Code.
8. AND FURTHER that they at the same time and place aforesaid, did possess a firearm to wit., a revolver, knowing that it was obtained by the Commission in Canada of an offence contrary to Section 96(1) of the Criminal Code of Canada.
9. AND FURTHER that Jermaine Tirando Phinn at the same time and place aforesaid, did have in his possession a prohibited weapon while he was prohibited from doing so, by reason of an Order of Prohibition, pursuant to

Section 109 of the Criminal Code dated at Halifax, Nova Scotia, on the 26th day of February, 2010, contrary to Section 117.01(1) of the Criminal Code.

10. AND FURTHER that Jermaine Tirando Phinn at the same time and place aforesaid, did again have in his possession a prohibited weapon while he was prohibited from doing so, by reason of an Order of Prohibition, pursuant to Section 114 of the Criminal Code dated at Halifax, Nova Scotia, on the 26th day of February, 2010, contrary to Section 117.01(1) of the Criminal Code.

11. AND FURTHER that Tylene Marie Smith at the same time and place aforesaid, did operate a motor vehicle while prohibited from doing so by an order pursuant to Section 259 of the Criminal Code, contrary to Section 259(4) of the Criminal Code.

12. AND FURTHER that Tylene Marie Smith at the same time and place aforesaid, being at large on her Recognizance entered into before a Justice on the 5th day of March, 2012, and being bound to comply with a condition of the Recognizance directed by the said Justice fail without lawful excuse to comply with that condition, to wit., "KEEP THE PEACE AND BE OF GOOD BEHAVIOUR", contrary to Section 145(3) of the Criminal Code.

13. AND FURTEHR that Tylene Marie Smith at the same time and place aforesaid, being at large on her Recognizance entered into before a Justice on the 5th day of March, 2012, and being bound to comply with a condition of the Recognizance directed by the said Justice fail without lawful excuse to comply with that condition, to wit., "CURFEW: REMAIN IN YOUR RESIDENCE FROM 7:00 P.M. UNTIL 7:00 A.M. THE FOLLOWING DAY, SEVEN DAYS A WEEK EXCEPT WHEN DEALING WITH A MEDICAL EMERGENCY", contrary to Section 145(3) of the Criminal Code.

Appendix "B"

December 3, 2014

By Email

Roger Burrill

Roger.burrill@nslegalaid.ca

James Gumpert, Q.C.

gumperja@gov.ns.ca

Dear Counsel:

Re: CAC 421417 – Jermaine Phinn v. The Queen

The panel has directed me to notify you that a new issue has arisen during the course of its deliberations which raises a new basis for potentially finding error in the decision under appeal beyond the grounds of appeal as framed by the parties. Although this issue was first identified by the panel during its questioning of counsel, it is felt that counsel were not prepared to address it meaningfully, or at all, during the course of the hearing.

Now, having had the benefit of the Supreme Court of Canada's clear directions in its recent decision in **R. v. Mian**, 2014 SCC 54, the panel asks that counsel provide further submissions on this new issue. Subject to counsels' views, it is felt that the best way for the appellant and the Crown to have their responses considered, will be to request further written submissions, and that because this is a single discrete issue, there is no need to "sequence" the responses. Rather, the appellant's and the respondent's post-hearing written briefs would each be filed by the close of business Friday, January 16, 2015.

The Panel asks that counsel address three questions:

i. Did the judge take into account the two possession of a prohibited weapon prohibition orders for which Mr. Phinn had been charged contrary to s. 117.01(1) of the **Criminal Code**, as an aggravating factor in determining his sentence, notwithstanding the fact that the judge had acquitted Mr. Phinn on both counts?

ii. If so, did the judge err in principle?

iii. If so, how does that error impact upon the merits of Mr. Phinn's sentence appeal?

Kindly acknowledge receipt of this correspondence. Should you have any questions or concerns I will alert the panel immediately. Otherwise the panel looks forward to receiving your written submissions on or before January 16, 2015.

Your assistance and co-operation are appreciated.