IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Skinner 2015 NSPC 28

Date: May 15, 2015

Docket: 2663078 (amended); 2663083; 2663092

Registry: Halifax

Between:

Her Majesty the Queen

v.

Shaquille David Skinner

SENTENCING DECISION

Judge:	The Honourable Judge Anne S. Derrick
Heard:	May 15, 2015
Decision:	May 15, 2015
Charges:	sections 244, 117.01(1), and 145(3) of the *Criminal Code*.
Counsel:	Rick Woodburn, for the Crown
	Trevor McGuigan, for Shaquille Skinner

By the Court:

Introduction

[1] Shaquille Skinner has pleaded guilty to three offences committed on June 25, 2013:

1) With intent to endanger the lives of Decoda Levon White, Nathaniel Dominique White, and Nakaya Jaylene Downey, discharging a firearm, a Colt 1903 Pocket Hammer .32 calibre semi-automatic pistol, contrary to section 244 of the *Criminal Code*;

2) Having in his possession a prohibited weapon while he was prohibited from possession by a *Criminal Code* section 109 Order of Prohibition dated March 27, 2012, contrary to section 117.01(1) of the *Criminal Code*; and

3) Breaching the "keep the peace and be of good behaviour" condition of a court Undertaking dated April 18, 2013, contrary to section 145(3) of the *Criminal Code*.

[2] On June 25, 2013 Mr. Skinner fired off six rounds at a parked car in the north end of Halifax. The car was occupied. There were other people in the area at the time. Miraculously no one was hurt. Mr. Skinner fled the scene.

[3] The next day, June 26, Mr. Skinner was arrested by police acting on information that he was in possession of a gun. A search incidental to his arrest produced a loaded .32 calibre semi-automatic pistol. It was later determined to be the pistol used in the June 25 shooting.

[4] On October 23, 2013 Mr. Skinner was sentenced for the June 26 firearms offences. He received a mandatory minimum five year prison sentence for the section 95(1) offence of being in possession of a loaded prohibited firearm.

[5] This is the context for my sentencing of Mr. Skinner today. I must determine the sentences for the three June 25 offences. There is a mandatory minimum sentence of five years for the section 244 offence – shooting at the occupants of the Lexus. And once I have determined the sentence for the June 25 offences, I must

consider whether Mr. Skinner's new sentence should be consecutive to the sentence he is currently serving or concurrent to that sentence.

[6] The Crown is seeking a sentence of 12 years for the June 25 offences – 11 years for the section 244 offence and one year consecutive for the section 117.01(1) offence. Mr. Woodburn's position is that the global sentence this would produce, when Mr. Skinner's current sentence is factored in, of 17 years, is an excessive sentence. Therefore he recommends a reduction of his proposed 12 year sentence to 7 years through the application of the totality principle. This would have the effect of Mr. Skinner serving a further 7 years once he has reached warrant expiry on his October 23, 2013 sentence.

[7] The Defence submits that the June 25 and June 26 offences should be sentenced on a concurrent not a consecutive basis. In the submission of the Defence, Mr. Skinner's total sentence for the two sets of offences combined should be between 6 and 7 years. As I just noted, the Crown proposes a global sentence for Mr. Skinner of 12 years.

Facts

[8] The essential facts about the events of June 25, 2013 are quite simple. Mr. Skinner was a passenger in a Hyundai Sonata. Janelle Clayton was driving. On Joseph Howe Drive Mr. Skinner observed a white Lexus being driven by Decoda White. He directed Clayton to "follow that car." Clayton followed the Lexus to the Hydrostone in north end Halifax. The Lexus pulled over in front of a convenience store called the Hydrostone Market. The Sonata parked a distance behind it. Shiquan Upshaw-Paris got out of the Lexus, walked across the road and yelled at the occupants of the Sonata. He had earlier yelled at them when walking with his girlfriend on Dutch Village Road.

[9] The Sonata pulled out and drove by the parked Lexus. Mr. Skinner pulled out a .32 calibre semi-automatic pistol camouflaged by a bandana and with an outstretched arm fired six shots in the direction of the Lexus. Decoda White, Nathaniel White and Nakaya Downey were all seated in the Lexus at the time. Six shell casings were recovered from the scene and five bullets were found lodged in the driver's door of the Lexus.

[10] The shooting happened at eleven o'clock in the morning in a busy residential neighbourhood. There were people in the vicinity going about their business. Seconds before a delivery driver had got into his van and pulled away. A young child was inside the Hydrostone Market at the time.

[11] After the shooting, Mr. Skinner directed Clayton to drive on and not to stop, not even at stop signs. Once at his home in Dartmouth, Mr. Skinner was observed wrapping the handgun in a t-shirt in his room. Before doing so he inspected the clip from the pistol, noting that it was empty and that he would need to "buy more ammunition."

[12] The next day, June 26, Mr. Skinner was pulled over by police acting on information from two separate reliable sources that he was in possession of a firearm. A loaded .32 calibre Colt pistol wrapped in a bandana was found tucked into his waistband. Ballistic testing confirmed that the five bullets from the Lexus and all six shell casings recovered from the Hydrostone Market scene had been fired by the gun seized from Mr. Skinner on June 26.

[13] Mr. Skinner pleaded guilty on October 23, 2013 to three *Criminal Code* offences arising from his June 26 arrest: a section 94(1) offence - being the occupant of a motor vehicle in which there is a firearm; a section 95(1) offence – possession of a restricted firearm with ammunition; and a section 117.01(1) offence – possession of a firearm while prohibited.

[14] Mr. Skinner was sentenced for the three offences on the basis of a joint recommendation to a total of five years on top of four months of remand. The section 95(1) offence from June 26, 2013 carried a mandatory minimum sentence of three years for a first offence and five years for a subsequent offence. As I will discuss, on October 23, 2012 Mr. Skinner had a youth record for section 95(1) offences so the June 26 section 95(1) offence was a subsequent offence attracting a five year mandatory minimum prison term.

Circumstances of the Offender – Information from the Pre-sentence Report Dated March 20, 2015

[15] In late June 2013, Mr. Skinner was 19 years old. He completed Grade 11 at Citadel High School in Halifax. He showed athletic and creative ability, playing on

the school's basketball team as well as in metro leagues and performing in a Neptune Theatre play.

[16] Other than a one month long job with his father in 2012 and six months of work from October 2012 to April 2013, Mr. Skinner has no employment history.

[17] Mr. Skinner describes his family as loving and supportive. His parents both worked although his father struggled with a crack cocaine addiction and served time in prison for offences committed while addicted. Mr. Skinner's mother remains very supportive of him and has remained in close contact during his incarceration. She blames herself in part for her son's circumstances, indicating to the author of the pre-sentence report that she moved into low-income housing to save some money. She now considers the move to have been a mistake.

[18] Both Mr. Skinner's mother and his long-term "on-again-off-again" girlfriend view him as a good person who has made some very bad choices. In the pre-sentence report Ms. Skinner described her son as a "very caring, thoughtful" person who gets along well with other people. She notes that when he was 11, Mr. Skinner saved his two little brothers and her from a house fire, and was recognized for his heroism by the Province.

[19] As revealed by his youth record, Mr. Skinner made some very bad choices during his adolescence that led to a lifestyle he described in the pre-sentence report of selling drugs on the street and being involved with guns. He says he wants to change.

[20] In his pre-sentence report interview, Mr. Skinner took full responsibility for his actions and did not deflect blame onto anyone else. He told the author of the pre-sentence report that he "was aware that the decisions he made were not right and he does not want to live this lifestyle anymore." He indicated he has had a lot of time to think during his current prison sentence. The pre-sentence report notes that Mr. Skinner acknowledged he "could have ruined his life and many others. He thanked God that no one was hurt." He expressed remorse, saying he had not intended to hurt the occupants of the Lexus and hopes they have not been traumatized by what he did.

[21] In the pre-sentence report, Mr. Skinner described being in prison as "the real deal", an experience that has been "an eye opener" for him. He says he wants to return to his family, get a real job and set a better example for his younger brothers, aged 14 and 18. He has been participating in institutional programming and produced recent certificates for institutional programs which appear to have primarily concerned various types of cleaning. He would like to complete some upgrading and study a trade. In December 2014 while in Springhill Penitentiary Mr. Skinner completed his General Equivalency Diploma.

[22] The pre-sentence report notes that during his current incarceration, Mr. Skinner has been participating in "the Moderate Program" which is the program I described in an earlier sentencing decision, based on evidence from the Correctional Service of Canada. (*R. v. X, [2014] N.S.J. No. 609, paragraphs 229 - 231*) It is a cognitive/behavioural, group-based model of programming. Offenders are assigned to either the moderate intensity or high intensity program depending on the assessment of their risk. The moderate intensity program is 50 sessions taking approximately 4 months. The program is full-time, about 3 to 4 hours per day in a classroom setting. Offenders are given worksheets and required to prepare journals and relapse prevention plans. There are individual sessions with program facilitators as well. Participation in programming is voluntary.

[23] Mr. Skinner's institutional parole officer was interviewed for the pre-sentence report. He has had Mr. Skinner on his case load since May 13, 2014 and sees him every couple of weeks. Mr. Skinner is always polite and cooperative. His parole officer described him as very well spoken and intelligent but having a quick temper.

[24] I will note that in oral submissions, Mr. Woodburn referred to comments by Mr. Skinner's parole officer in the pre-sentence report as an indication that Mr. Skinner is not genuinely interested in reforming himself. The comments disclose that Mr. Skinner has been subject to segregation placements. He is described as "a known member" of a "security group and closely associated with active gang members." Mr. McGuigan cautioned that these statements cannot be interpreted to mean that Mr. Skinner is engaged in criminal activity at Springhill. There is no evidence of that. There can be many reasons why a prisoner is placed in segregation. In Mr. McGuigan's submission, the institution may have segregated

Mr. Skinner on occasion due to concerns about "incompatibles." Given that Mr. Skinner was involved in criminal activity in the community, this would not be surprising. It is a reality that prison officials confront in their management of a large offender population. I am not prepared to treat the statements in Mr. Skinner's pre-sentence report as evidence that he is not committed to his rehabilitation.

Mr. Skinner's Prior Criminal Record

[25] Mr. Skinner has 22 prior convictions, including the three offences committed on June 26, 2013 – being an occupant of a motor vehicle in which there was a firearm (section 94(1)); possession of the .32 calibre semi-automatic handgun (section 95(1)); and possession of a firearm while prohibited. (section 117.01(1))

[26] In addition, Mr. Skinner has three other section 95(1) convictions. His first section 95(1) conviction was in June 2011. The offence was committed on March 22, 2011 when he was arrested for carrying a loaded .357 magnum handgun. He was almost 17 at the time. The handgun was tucked into the front of his waistband. He was placed on probation for a year under the *Youth Criminal Justice Act* (*YCJA*).

[27] In March 2012, on the basis of a joint recommendation Mr. Skinner received a six month Custody and Supervision Order followed by six months' probation under the *YCJA* for offences committed in November 2011. A police search of his room at his parents' house located a .12 gauge shotgun with ammunition and a loaded .38 calibre revolver. He was also sentenced for possession of crack cocaine for the purpose of trafficking. The custodial portion of his six month sentence was served at the Youth Facility in Waterville.

[28] Mr. Skinner's March 2012 Youth Court sentence included a five-year section 109 prohibition order. It is this order that he violated on June 25, 2013 when he used the .32 calibre handgun to shoot up the Lexus.

[29] Mr. Skinner's Youth Criminal Justice record also includes breaches and non-compliance of various kinds – release conditions and sentence orders (12); mischief (1); and failing to attend court (1).

[30] Mr. Skinner's first adult sentence for a gun-related offence was in October 2013 when he pleaded guilty to his June 26 possession of the handgun used in the June 25 shooting. The shooting on June 25 is his first offence involving violence.

The March 26, 2012 Sentencing

[31] Mr. Skinner's last youth sentencing was on March 26, 2012. Less than two weeks later Mr. Skinner turned 18. I sentenced Mr. Skinner on March 26, 2012. The Provincial Crown prosecuting the gun offences and the Federal Crown prosecuting the drug offences made impassioned submissions about the high-risk lifestyle that Mr. Skinner had been choosing as a youth. Warnings were delivered about the mandatory minimums that would apply if he was convicted of gun possession offences once he had turned 18. Mr. Skinner's significant potential was acknowledged by both Crown and Defence. I am saddened to be sentencing Mr. Skinner again, now as a young adult, saddened that Mr. Skinner squandered his opportunities in the youth criminal justice system and failed to put his bad choices "firmly and completely" behind him as I urged him to do at the time. As his lawyer said at Mr. Skinner's sentencing on October 23, 2013 about his involvement in the youth criminal justice system, he just did not get the message. He is paying a very heavy price for that now.

The Purpose and Principles of Sentencing

[32] In sentencing Mr. Skinner I am guided by the sentencing provisions of the *Criminal Code*. Section 718 of the *Criminal Code* sets out the objectives a sentence must achieve: denunciation, deterrence – both specific and general, separation from society where necessary, rehabilitation of the offender, reparations by the offender, and the promotion of a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[33] Sentencing is profoundly subjective. (*R. v. Ipeelee,[2012] S.C.J. No. 13, paragraph 39*; *R. v. Wust, [2000] S.C.J. No. 19 paragraph 21*; *R. v. M. (C.A.), [1996] S.C.J. No. 28, paragraph 92; R. v. Shropshire, [1995] S.C.J. No. 52*) In determining a fit sentence, "…the sentencing judge should take into account any relevant aggravating or mitigating circumstances (s. 718.2(*a*) of the *Criminal Code*), as well as objective and subjective factors related to the offender's personal

circumstances." (*R. v. Pham, [2013] S.C.J. No. 100, paragraph 8*; *R. v. Nasogaluak, [2010] S.C.J. No. 6, paragraph 44*)

[34] Assessing moral culpability is a fundamental aspect of determining the appropriate sentence: a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. (*section 718.1*, *Criminal Code*) Proportionality is "closely tied to the objective of denunciation", promotes justice for victims, and seeks to ensure public confidence in the justice system. The principle of proportionality,

> …ensures that a sentence does not exceed what is appropriate, given the blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other. (*Ipeelee, paragraph 37*)

Aggravating and Mitigating Factors

[35] There are several mitigating factors to be taken into account in sentencing Mr. Skinner – his age, the guilty pleas and his expressions of remorse. I disagree with Mr. Woodburn's submission that Mr. Skinner's prior related record and his failure to learn his lesson in the youth criminal justice system mean that his youth should not be considered in mitigation.

[36] Mr. Skinner's age is a mitigating factor because he is still young enough to turn away from his anti-social choices and lifestyle, which he has said he wants to abandon. He has said before that he wants to change. That does not mean I should ignore the potential for him to make good on these claims as he matures.

[37] Mr. Skinner's prospects for rehabilitation must not be extinguished by too onerous a sentence. Requiring him to mature during many years in the harsh and dangerous environment of prison carries the risk of entrenching him in a criminal mindset. When these offences were committed, Mr. Skinner was only 19.

[38] The guilty pleas and Mr. Skinner's acceptance of full responsibility, and his expressions of remorse in the pre-sentence report indicate that he is not inclined to

justify the shooting and the peril in which he placed the victims and other people. This is a foundation on which rehabilitation can be built. Mr. Skinner acted like a gangster: he does however say that is not the person he wants to be.

[39] The aggravating factors in this case are quite pronounced: Mr. Skinner had the time and opportunity to reflect on his initial reaction to the white Lexus and abandon the pursuit or drive by without shooting. He shot at close range. There were people in the vicinity who could have been injured or killed if a shot had ricocheted. Mr. Skinner has a prior record for gun-related offences.

Victim Impact Statements

[40] Mr. Woodburn has explained that the victims were uncooperative with the police investigation. There are no victim impact statements.

Emphasizing Denunciation and Deterrence

[41] The emphasis in sentencing Mr. Skinner has to be on denunciation and deterrence. The statutory sentencing range in June 2013 for a section 244 offence was from the mandatory minimum of five (5) years to a statutory maximum of fourteen (14) years. As I said in *R. v. Clayton, [2013] N.S.J. No. 552*:

> [31] Gun violence is of grave concern to the courts and the citizenry. It is a deadly form of violence that has spilled into the streets. It is indiscriminate, mindless violence; bullets wound or kill whomever they hit. *(R. v. Brown, [2007] O.J. No. 5659 (S.C.J.), paragraph 20)* Handguns are a clear and present danger in our communities and, in sentencing for offences in relation to them, denunciation operates as a powerful expression of a "symbolic, collective statement" rejecting an offender's conduct. *(M. (C.A.), [1996] S.C.J. No. 28, paragraph 81)*

[42] Mr. Skinner is exactly right when he observes that he could have ruined lives, his own and others. He could have killed or seriously wounded the occupants of the Lexus and/or killed or wounded a bystander as a result of a ricochet. It is reasonable to infer that he was reacting to some kind of slight or insult and went out of his way to follow and then fire on the Lexus. There was nothing to stop him

from ignoring a perceived provocation and going home. No one would have been placed at risk and he would not be growing into adulthood in prison. How much he must regret now his hot-headed reaction, his singular focus on settling a score.

The Section 244 Mandatory Minimum and the Concept of the "Inflationary Floor"

[43] Mr. Skinner is subject to the mandatory minimum sentence that applies to a section 244 conviction. At a minimum he faces a five year sentence. The Supreme Court of Canada in *R. v. Morrisey*, [2000] S.C.J. No. 39, had this to say about mandatory minimum sentences for firearms offences:

> **75** …the mandatory minimum sentences for firearms-related offences must act as an inflationary floor, setting a new minimum punishment applicable to the so-called "best" offender whose conduct is caught by these provisions. The mandatory minimum must not become the standard sentence imposed on all but the very worst offender who has committed the offence in the very worst circumstances. The latter approach would not only defeat the intention of Parliament in enacting this particular legislation, but also offend against the general principles of sentencing designed to promote a just and fair sentencing regime and thereby advance the purposes of imposing criminal sanctions.

[44] I am bound by the direction of the Supreme Court of Canada. Its most recent pronouncement on mandatory minimums for firearms offences – *R. v. Nur*, [2015] S.C.J. No. 15 - has not altered the "inflationary floor" concept. This is even though the Court expressly confronted the deterrent value of mandatory minimum sentences for gun crimes:

> **113** The government has not established that mandatory minimum terms of imprisonment act as a deterrent against gun-related crimes. Doubts concerning the effectiveness of incarceration as a deterrent have been longstanding. *Sentencing Reform: A Canadian Approach -- Report of The Canadian Sentencing Commission* (1987), concludes as follows:

a) Even if there seems to be little empirical foundation to the deterrent efficacy of legal sanctions, the assertion that the presence of some level of legal sanctions has no deterrent effects whatsoever, has no justification. The weight of the evidence and the exercise of common sense favour the assertion that, taken together, legal sanctions have an overall deterrent effect which is difficult to evaluate precisely.

b) The proper level at which to express strong reservations about the deterrence efficacy of legal sanctions is in their usage to produce particular effects with regard to a specific offence. For instance, in a recent report on impaired driving published by the Department of Justice, Donelson asserts that "law-based, punitive measures alone cannot produce large, sustained reductions in the magnitude of the problem" (Donelson, 1985; 221-222). Similarly, it is extremely doubtful that an exemplary sentence imposed in a particular case can have any perceptible effect in deterring potential offenders.

c) The old principle that it is more the certainty than the severity of punishment which is likely to produce a deterrent effect has not been invalidated by empirical research. In his extensive review of studies on deterrence, Beyleveld (1980; 306) concluded that "recorded offence rates do not vary inversely with the severity of penalties (usually measured by the length of imprisonment)" and that "inverse relations between crime and severity (when found) are usually smaller than inverse crime-certainty relations". [Emphasis added; 136-37.]

114 Empirical evidence suggests that mandatory minimum sentences do not, in fact, deter crimes: see, e.g., A. N. Doob and C. M. Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" (2003), 30 *Crime & Just.* 143; M. Tonry, "The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings" (2009), 38 *Crime & Just.* 65.

> The empirical evidence "is clear: mandatory minimum sentences do not deter more than less harsh, proportionate, sentences" (A. N. Doob and C. Cesaroni, "The Political Attractiveness of Mandatory Minimum Sentences" (2001), 39 Osgoode Hall L.J. 287, at p. 291).

[45] These pronouncements, acknowledging the "frailty of the connection between deterrence and mandatory minimum sentence provisions", do not provide any relief to Mr. Skinner. The mandatory minimum sentence of five years, as "an inflationary floor" applies to him even though its effectiveness as a deterrent, and the effectiveness of severe penalties generally in relation to crime prevention, has been recognized by the Supreme Court of Canada as "extremely doubtful."

Determining Mr. Skinner's Sentence

[46] Crafting Mr. Skinner's sentence has required me to deliberate on five main components : (1) I have had to determine a sentence for the section 244 offence involving the shooting at the occupants of the Lexus; (2) I have had to determine a sentence for Mr. Skinner's section 117.01(1) conviction, his possession of the .32 calibre semi-automatic pistol when he was subject to a weapons' prohibition order; (3) I have had to determine if Mr. Skinner's sentence for his section 117.01(1) conviction should be consecutive or concurrent to his sentence for the section 244 offence; and (4) I have had to determine if his new sentence should be consecutive or concurrent to the five year sentence he is serving currently for the June 26 offences.

[47] And finally, I have had to examine Mr. Skinner's sentence through the lens of the totality principle.

[48] I have followed the approach to sentencing for multiple offences as reflected in the decision of our Court of Appeal in *R. v. Adams*, [2010] N.S.J. No. 275 which aligned its reasoning with that of the Supreme Court of Canada in *R. v. M.(C.A.)*, [1996] S.C.J. No. 28.

> The judge is to fix a fit sentence for each offence and determine which should be consecutive and which, if any, concurrent. The judge then takes a final look at the aggregate sentence. Only if

> concluding that the total exceeds what would be a just and appropriate sentence is the overall sentence reduced. (*Adams, paragraph 23)*

Section 244 Offences - Case Law

[49] Mr. Woodburn provided me with a number of cases to consider in relation to Mr. Skinner's section 244 conviction. The ones that are most relevant I have summarized below:

[50] On November 3, 2012, Shea Alexander Durnford pleaded guilty in the Provincial Court in Halifax to a section 244.2 offence that occurred in circumstances where, as the passenger in a pursuit vehicle, he shot at a passenger in a cab, apparently motivated by previous animosity. Durnford had been summoned by several confederates to the Halifax Casino. Upon arriving, he exchanged places in the car permitting someone else to drive. They followed the victim who had left in a cab. Once alongside the cab, Durnford opened fire. No one was injured although the cab was hit. There was a joint recommendation for ten (10) years less Durnford's remand time.

[51] At the time of the shooting incident, Durnford was 24 and a half years old. He was on a weapons prohibition order and received a two year concurrent sentence for that offence. He had a record for twenty-three (23) prior offences as an adult. His prior offences included break and enters and assaults. In August 2007, Durnford had received a federal penitentiary term for offences that included break and enter and theft over $5000.

[52] Patrick Bevin shot up a house in Fall River on April 14, 2011 believing it to be the home of someone he felt animus toward. No one was injured. It turned out to have been the wrong house. Bevin received a ten (10) year sentence in Provincial Court in Dartmouth for the section 244.2 offence with a one year consecutive sentence as he had been subject to a weapons prohibition order at the time. His sentences were on top of the time he had spent in remand.

[53] Bevin was significantly older than either Durnford or Mr. Skinner. In April 2011, Bevin was 36 years old. He had forty (40) prior convictions as an adult, including for weapons offences, drug offences, and violence. He had been sentenced to federal penitentiary time on more than one occasion.

[54] In a New Brunswick case, *R. v. MacKenzie, [2006] N.B. J. No. 88 (Q.B.)*, Andrew MacKenzie was a passenger in a car being followed by Gerald LeBlanc and a passenger. Mr. MacKenzie's vehicle made a sudden turning manoeuvre so that it was roughly positioned to face the LeBlanc vehicle. At this same time, MacKenzie pulled out a pistol, stuck it out of the passenger side front window and began to shoot at LeBlanc and his passenger. There was a pursuit and more shooting by MacKenzie in a parking lot of an apartment building. LeBlanc suffered a superficial head injury as a result of being shot.

[55] MacKenzie had a "very extensive" criminal record with approximately forty (40) convictions. He had very recently been serving time. *(MacKenzie, paragraph 24)* The Crown sought an eight (8) to ten (10) year sentence and the Defence recommended a sentence in the range of four (4) to five (5) years. *(MacKenzie, paragraphs 10 and 11)* A nine (9) year sentence was imposed, denunciation being the Court's primary emphasis.

[56] The case of *R. v. Chan, [2011] N.S.J. No. 711 (S.C.)* involved the firing of shots in close quarters with no injuries. In April 2010, Chan went to a barber shop to get a haircut but instead got into an altercation with another patron. The incident escalated and Chan fired three rounds from a Glock 9 mm handgun at the other man, two of which pierced the wall of an adjacent clothing store. No one was injured.

[57] Chan had a record of at least 27 offences, including offences committed when he was a youth. He had been sentenced to forty (40) months in a federal penitentiary for a robbery and had firearms and drug convictions as well. His record included violence. In addition to his record, the Court viewed as aggravating the circumstances of the shooting - the "brazen and reckless behaviour" of Chan and his disregard for the life and safety of innocent bystanders. *(Chan, paragraph 31)* Emphasizing denunciation and deterrence, the Court imposed a sentence of seven (7) years for the section 244.2 offence. In the judge's

view, there was a "complete absence of mitigating factors" and that "All things considered…something more than the minimum term of imprisonment is called for with respect to the s. 244 offence." *(Chan, paragraphs 34 and 35)*

[58] The case of *R. v. Nguyen, [2009] A.J. No. 1009 (C.A.*) also seems relevant to me. Nguyen, aged 23, fired five shots from a .45 calibre pistol into a stationary Honda and then fired other shots at one of the Honda passengers who was fleeing on foot. Numerous innocent bystanders were present. Nguyen had no adult record. The Alberta Court of Appeal upheld the sentence of five (5) years, at the time, one year above the mandatory minimum for the offence. The factors that were emphasized were Nguyen's youth and prospects for rehabilitation, the fact that he brought a loaded firearm to a busy shopping area during business hours, and that he acted in total disregard of the danger he created for the occupants of the Honda and the innocent bystanders. *(Nguyen, paragraphs 4 and 11)*

[59] In October 2013, I sentenced Kojo Clayton to six years for firing a handgun at a man he was chasing in the bar area of downtown Halifax. I found it aggravating that Mr. Clayton fetched the gun after an altercation with the victim and then pursued him through the streets. There were people out for a night on the town in the area. Mr. Clayton was older than Mr. Skinner, did not have a related record, and was facing his first penitentiary sentence. The section 244.2 offence was his first conviction involving a firearm. (*R. v. Clayton, [2013] N.S.J. No. 552*)

Determining Mr. Skinner's Sentence for the section 244 Offence

[60] Mr. Skinner, at 19, fired at the parked Lexus from close range, embedding five bullets in the driver's door. It seems to have been a deliberate but impulsive act. It was pure gangster-ism played out in broad daylight with no thought for the potential consequences. Mr. Skinner has a high degree of moral culpability for his actions. The sentencing emphasis has to be on denunciation and deterrence. I find that a sentence of seven (7) years is appropriate taking into account his guilty plea, his age, a more limited prior record than Durnford, Bevin, MacKenzie, and Chan, and the fact that, despite the potential lethality of his actions, no one was injured.

Determining a Sentence for Mr. Skinner's section 117.01(1) Offence and Whether it Should be Consecutive or Concurrent to his section 244 Sentence

[61] When Mr. Skinner fired at the occupants of the white Lexus, he was subject to a weapons prohibition order imposed when he was sentenced in March 2012 as a young person for the possession of the loaded .38 calibre revolver and the shotgun with ammunition. Despite the weapons prohibition order, Mr. Skinner not only had the .32 calibre semi-automatic pistol in his possession on June 25, 2013, he used it.

[62] The Crown is seeking a one year consecutive sentence for Mr. Skinner's violation of the prohibition order. In the recent cases of *Chan* and *Cranthorne*, one year sentences were imposed. (*R. v. Chan, [2011] N.S.J. No. 711 (S.C.); R. v. Cranthorne, [2015] N.S.J. No. 27 (P.C.)*) And in both cases the one year section 117.01(1) sentence was made consecutive to other custodial time imposed.

[63] In *Chan*, Wright, J., sentencing Mr. Chan for discharging a firearm with intent to endanger life while subject to a prohibition order, observed that the sentence for the section 117.01(1) offence "should be made consecutive to reflect the seriousness of flouting court orders aimed at controlling firearms." (*Chan, paragraph 40*)

[64] Chisholm, P.C.J. sentencing in *Cranthorne* for the unlawful possession of a prohibited weapon and for the violation of a weapons prohibition order found Wright, J.'s determination that a consecutive sentence was appropriate "highly persuasive". He noted however that the requirement for the sentencing court to consider the totality principle may mean the ultimate sentence is no longer than it would have been if the section 117.01(1) sentence was concurrent. (*Cranthorne, paragraph 48*)

[65] I am satisfied that Mr. Skinner should receive a one year sentence of imprisonment to be served consecutively to his sentence for shooting at the Lexus. Court orders prohibiting possession of firearms are intended to mean something. In most cases, the sentence for a breach should not simply disappear.

[66] There is a third offence to which Mr. Skinner has pleaded guilty – a section 145(3) offence, the breach of an Undertaking. I am imposing a six month custodial sentence to be served concurrently with his sentence on the section 244 charge.

Determining Whether Mr. Skinner's Sentence for the June 25 Offences Should be Consecutive or Concurrent to the Sentence He is Serving for the June 26 Offences

[67] As Mr. McGuigan has pointed out, the determination of whether sentences should be concurrent or consecutive is discretionary. (*R. v. McDonnell, [1997] S.C.J. No. 42, paragraph 46*) As noted in *McDonnell*, "In both setting duration and the type of sentence, the sentencing judge exercises his or her discretion based on his or her first-hand knowledge of the case…" The exercise of discretion must still produce a sentence that has taken all relevant factors and is not demonstrably unfit.

[68] Mr. McGuigan has also drawn my attention to the decision of our Court of Appeal in *R. v. Hatch*, [1979] N.S.J. No. 520 where it was observed that,

> …**7** The choice of consecutive versus concurrent sentences does not matter very much in practice so long as the total sentence is appropriate. Use of the consecutive technique, when in doubt as to the closeness of the nexus, ensures in many cases that the total sentence is more likely to be fit than if concurrent sentences alone are used. Conversely, unthinking use of concurrent sentences may obscure the cumulative seriousness of multiple offences.

[69] The determination of whether concurrent sentences are appropriate requires consideration of the "reasonably close" nexus between the offences and, related to that issue, an assessment of whether the offences were committed "as part of a continuing criminal operation in a relatively short period of time." (*Hatch, paragraph 6*)

[70] Our Court of Appeal in *R. v. T.E.H., [2011] N.S.J. No. 677 (C.A.)* sets out the factors to be considered in determining whether a sentence should be concurrent or consecutive: the time frame within which each offence occurred, the similarity of the offences, whether a new intent or impulse initiated each of the offences, and whether the total sentence is fit and proper under the circumstances. *(T.E.H., paragraph 37)*

[71] T.E.H. was sentenced for sexual offences he committed on two separate days against the same victim. The Court of Appeal upheld the sentencing judge's

order that he serve the eight month jail terms consecutively. The Court found that the offences committed on the second occasion were far more serious and held that T.E.H. "…renewed his illegal intentions on the second visit…" (*T.E.H., paragraph 37*) T.E.H.'s argument for concurrent sentences on the basis that he had committed "a single continuous offence", was rejected.

[72] Mr. Woodburn has indicated in his submissions that other Courts of Appeal have held that "separate and distinct" offences should attract separate, consecutive sentences with the ultimate sentence being subject to the principle of totality. (*R. v. Awasis, [2009] B.C.J. No. 582 (C.A.), paragraph 22; R. v. Wozny, [2010] M.J. No. 384 (C.A.), paragraphs 46, 59*)

[73] Transparency in sentencing is required; however the cumulative sentence must not exceed the "overall culpability of the offender, and the normative character of the offender's conduct." (*Wozny, paragraphs 44 and 59*)

[74] In Mr. Skinner's case the arguments that can be marshalled for either proposition each have their merits. For his position that Mr. Skinner's June 26 sentence should be consecutive to the sentence he is serving for the June 25 offences, Mr. Woodburn points to the fact that Mr. Skinner had to have acquired additional ammunition for the pistol, re-loaded it, wrapped it in a new bandana (the June 25th one having been lost at the scene of the shooting), and then set out once again, a day later, carrying a loaded firearm. Mr. McGuigan says these factors do not warrant treating the June 25 and June 26 offences as dissimilar and due to a new intent or impulse.

[75] I am unable to conclude that Mr. Skinner's possession on June 26 of the same pistol used in the June 25 shooting was not part of a continuous criminal transaction. The passage of time is negligible, and unlike the situation in *Chan* where Mr. Chan was sentenced for a section 95(1) offence that arose six days after the shooting at the barber shop. (*Chan, paragraph 43*) Here there is a close nexus of time involving the same gun. I find Mr. Skinner's possession of the pistol has a continuity to it that justifies concurrent sentencing for the June 25 and June 26 offences. It is not irrelevant that had Mr. Skinner been arrested with the pistol hours after shooting at the Lexus but on the same day, his possession of it and the discharging of it with intent to endanger life would have been treated as all part of

a "single, continuous criminal transaction." (*Wozney, paragraph 46*) The facts in this case are very unlike the facts in *T.E.H.*

[76] I will conclude my analysis by saying that the consecutive versus concurrent issue is fundamentally about Mr. Skinner's moral culpability. I am satisfied my determination that Mr. Skinner's new sentence should be concurrent to the one he is serving is proportionate to his moral culpability for the June 25 and June 26 offences. It is my considered view that on the facts of those offences, consecutive sentencing would produce a disproportionate sentence.

Mr. Skinner's Aggregate Sentence

[77] I am sentencing Mr. Skinner for three offences: I am imposing a seven (7) year sentence on the section 244 charge – discharging the .32 calibre semi-automatic pistol at the Lexus; a one (1) year sentence, to be served consecutively, for possessing the pistol in contravention of a section 109 weapons' prohibition order; and for the breach of an undertaking to keep the peace and be of good behaviour, a six (6) month sentence to be served concurrently with the sentence on the section 244 charge. This adds up to a sentence of eight (8) years for the June 25, 2013 offences. As I have determined that this sentence should be concurrent to the sentence Mr. Skinner is presently serving – the five year sentence he received in October 2013 for the June 26, 2013 offences, most notably the possession of the .32 calibre pistol – he faces a total sentence of eight (8) years running from October 2013. This sentence has to now be assessed in accordance with the totality principle.

The Principle of Totality

[78] I have followed the well-established procedure for sentencing multiple offences by fixing a sentence for each offence and determining which should be consecutive and which, if any, concurrent. Now I must take a "final look" at the aggregate sentence. If, in taking this final look, I determine that the total sentence exceeds what would constitute a fit and appropriate sentence, I then reduce the overall sentence. *(R. v. Adams, [2010] N.S.J. No. 275 (C.A.), paragraph 23; see,*

also: R. v. Chan, [2011] N.S.J. No. 711 (S.C.)) That is the application of the totality principle.

[79] Totality is a significant component of the "foundational principle" of proportionality. Proportionality, which requires that the degree of punishment reflect the gravity of the offence and the moral blameworthiness of the offender, is fundamental to society having confidence in the law and the fairness and rationality of the legal system.

[80] The principle of totality finds statutory expression in section 718.2 (c) of the *Criminal Code*:

> A court that imposes a sentence shall also take into consideration the following principles:
>
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.

[81] Application of the totality principle requires that "a combined sentence must not be unduly long or harsh in the sense that its impact simply exceeds the gravity of the offences in question or the overall culpability of the offender." (*R. v. Johnson, [2012] O.J. No. 2255, paragraph 18; see also, R. v. Adams, paragraph 19*) Also, "... a sentence must punish an offender no more than is necessary to express society's condemnation of the offence." (*Nasogaluak, paragraph 42)*

[82] I am dealing with a young man who in June 2013 was just 19. His first penitentiary sentence was a five year sentence imposed for possession of a loaded handgun. Prior to that he had served one custodial sentence, a Custody and Supervision Order (CSO) under the *Youth Criminal Justice Act*. That six month sentence placed him in a youth facility for four months – the custodial portion, with the remaining two months being served in the community - the supervision portion.

[83] When Mr. Skinner was sentenced as an adult for the section 95(1) offence committed on June 26, 2013, the option to tailor the length of his first penitentiary sentence to reflect his youth and the principle of restraint was unavailable. His five year sentence was a mandatory minimum sentence. Mandatory minimum sentences do not allow the principle of restraint its full scope. Mr. Skinner received a five

year sentence because he had a prior record for section 95(1) offences, the possession of the shotgun and handgun for which I sentenced him in March 2012 as a young person.

[84] Mr. Skinner's first sentencing as an adult did not permit consideration of the principle that:

> ... The length of a first penitentiary sentence for a youthful offender should rarely be determined solely by the objectives of denunciation and deterrence. Where, as here, the offender has not previously been to penitentiary or served a long adult sentence, the courts ought to proceed on the basis that the shortest possible sentence will achieve the relevant objectives...(*R. v. Borde, [2003] O.J. No. 354 (C.A.), paragraph 36; see also: R. v. Priest, [1996] O.J. No. 3369 (C.A.); and R. v. Best, [2005] N.S.J. No. 347 (S.C.), paragraph 25*))

[85] On April 14, 2015, the Supreme Court of Canada's decision in *R. v. Nur* struck down the post-2008 mandatory minimum sentencing regime that governed Mr. Skinner's October 2013 sentencing for the section 95(1) offence. The Court's declaration captured the mandatory minimum that was imposed on Mr. Skinner: as the majority in *Nur* says: "The mandatory minimum *sentences* imposed by s. 95(2)(a) are inconsistent with s. 12 of the Charter and are therefore of no force or effect under s. 52 of the *Constitution Act, 1982*." (*R. v. Nur, [2015] S.C.J. No. 15, paragraph 119*) Nur himself had received a three year mandatory minimum as a first offender. Mr. Skinner's five year sentence was due to him having committed "a second or subsequent offence". (section 95(2)(a), *Criminal Code*)

[86] When *Nur* was decided, I wondered what relevance the determination of unconstitutionality might have to Mr. Skinner's sentencing. I sent an email to Mr. Woodburn and Mr. McGuigan inquiring after their views on the matter. They have advised that *Nur* does not change their positions, in the Crown's submission, "…given the nature of the offence, the principles of sentencing, and Mr. Skinner's previous record…" (*email from Mr. Woodburn dated April 23, 2015*) Mr. McGuigan indicated his position in an email dated May 14, 2015:

> I have had a chance to review R v. Nur. Though Mr. Skinner's 5 year sentence cannot now change (absent a successful appeal) I believe your honour can consider the impact of Nur on the total sentence Mr. Skinner ought to receive for the two matters. In other words, the consecutive versus concurrent issue is guided by totality and proportionality which requires the court to consider what is a just sentence for both matters. The new Nur decision is an authority that can be relied on in fixing that total sentence. I believe this is similar to Mr. Woodburn's comments on this issue.

[87] I have concluded that the Supreme Court of Canada's decision in *Nur* does not re-configure the analytical process I have had to undertake in applying the totality principle to Mr. Skinner. Mr. Skinner is serving a five year sentence. That is a fact. It is a fact for me to take into account in fixing his sentence once I have taken a "final look" at the aggregate sentence of eight (8) years to be served concurrently with the five (5) he is serving.

[88] Mr. Skinner is already serving a heavy sentence for a young man. And while it is fair, I think, to consider that he may not have received as much as five years for the June 26 section 95(1) offence had the post-2008 mandatory minimum sentencing provisions not been in place, I cannot speculate as to what his sentence might have been. The Supreme Court of Canada did not disturb Nur's three-year sentence and went on to say that, "It remains appropriate for judges to continue to impose weighty sentences" for cases involving loaded handguns possessed for illegal purposes. (*Nur, paragraph 120*)

[89] Nonetheless, in applying the principle of totality in Mr. Skinner's case it is legitimate for me to recognize that he received a lengthy prison sentence while still a teenager and has considerable potential to rehabilitate himself if he disengages from the anti-social lifestyle and associates he defined himself by in the community.

[90] Notwithstanding his serious offences and his criminal involvement with guns even as a young person, Mr. Skinner's rehabilitation is not to be marginalized. Mr. Skinner is growing up, into adulthood, in prison. Too lengthy a sentence in the harsh environment of the federal penitentiary system has the real

potential to socialize him in ways that are not conducive to his ability to successfully reintegrate into the community as a productive, law-abiding citizen. It jeopardizes his motivation and opportunity to change. His rehabilitation is what will ultimately serve the fundamental purpose of sentencing – protection of the public.

Conclusion – The Fit and Proper Sentence after the "Final Look"

[91] I have concluded that an aggregated sentence of eight (8) years for the June 25 offences is excessive. I find it appropriate to take into account Mr. Skinner's age and the importance of not crushing his hopes for rehabilitation to make an adjustment in the sentence I am imposing today.

[92] I have concluded that Mr. Skinner's sentence for the June 25 offences should total five and a half (5.5) years to run, as I have indicated, concurrently with the sentence he is serving. That means he will serve a further two years in prison at the conclusion of his current sentence. This represents a very lengthy sentence for a young man who went to the penitentiary at the age of 19. In order to give effect to my application of the totality principle, I will have to arbitrarily reduce Mr. Skinner's sentence for the section 244 offence by 2.5 years so that the sentence calculation is: section 244 offence – 4.5 years (This is six months below the mandatory minimum for section 244 offences. In *R. v. Wust*, [2000] S.C.J. No. 19, at paragraphs 22 and 23, the Supreme Court of Canada held that "mandatory minimum sentences must be understood in the full context of the sentencing scheme" which the Court held includes the principles of proportionality and totality.); section 117.01(1) offence – 1 year consecutive; and the section 145(3) breach – 6 months concurrent.

[93] Counsel will be addressing me with respect to any ancillary orders. In light of Mr. Skinner's continued incarceration I will not be imposing the victim surcharge as it would impose an undue hardship. I will conclude by recommending that the Correctional Service of Canada support Mr. Skinner's connection with his family, provide Mr. Skinner with opportunities to develop marketable employment skills, and encourage and support the development in Mr. Skinner of a pro-social orientation.