**<u>IN THE PROVINCIAL COURT OF NOVA SCOTIA</u>**

R. v. Cater 2012 NSPC 38

Date: May 4, 2012

Docket: 1997530,
1997536, 1997539,
1997542, 1997545,
1997548;

2035773 to 2035780

Registry: Halifax

**BETWEEN:**

**Her Majesty The Queen**

**v.**

**Kyle Cater**

# DECISION ON SENTENCING

**JUDGE:** The Honourable Anne S. Derrick

**HEARD:** April 18, May 3, 2012

**DECISION:** May 4, 2012

**CHARGES:** Sections 88(1) x1; 95(1) x 2; 92(1) x 2; 92(2) x 1; 100(2) x 5; 99(2) x 4; of the *Criminal Code*

**COUNSEL:** Richard Hartlen, for the Crown

**DEFENCE:** Elizabeth Cooper, for Kyle Cater

**By the Court:**

*Introduction*

[1] On March 14, 2012, I convicted Kyle Cater of six offences relating to the illegal possession of three firearms and eight offences related to firearms trafficking. This is my decision on sentencing for those offences.

[2] The section 95(1) firearms possession offences – Count 7 in Information #582433 (the January 15, 2009 Information), the unlawful possession of the loaded prohibited Cooey sawed off shotgun, and Count 8 in that same Information, the unlawful possession of the unloaded prohibited AA Arms AP9 handgun together with readily accessible ammunition, carry mandatory minimum penitentiary terms of three years.

[3] All the firearms trafficking offences – Counts 1, 2, 3, 4, 5, 6, 7 and 8 in Information #575549 (the April 29 Information) – carry mandatory minimum penitentiary terms of three years.

*Application of the Kienapple Principle*

[4] The Crown has submitted that I should stay the unauthorized possession of the sawed-off Cooey shotgun and the unauthorized possession of the AA Arms AP 9, Counts 9 and 10 in the January 15, 2009 Information. On the firearms trafficking Information, the Crown has suggested Counts 2, 3, 6 and 7 should be stayed by application of *Kienapple*. *([1975] 1 S.C.R. 729)*

[5] In *R. v. Prince ([1986] S.C.J. No. 63* the Supreme Court of Canada clarified the scope of *Kienapple*, finding that:

> There must be a relationship of sufficient proximity firstly as between the facts, and secondly as between the offences, which form the basis of two or more charges for which it is sought to invoke the rule against multiple convictions. *(paragraph 24)*

[6] Where an element of an offence is "substantially the same as, or adequately corresponds to" an element in an offence for which the offender has been convicted, then a *Kienapple* stay is justified. *(Prince, paragraph 31)* For *Kienapple* to be applicable, a factual nexus is not enough, there must also be correspondence

of elements and a determination that the offences being compared are designed to protect the same societal interests. *(Prince, paragraph 39)*

[7] Applying these principles leads me to conclude that Counts 9 and 10 of the January 15, 2009 firearms possession Information and Count 2 of the April 29, 2009 firearms trafficking Information should be judicially stayed. I am of the view that Counts 3, 6 and 7 - firearms trafficking offences - should not be stayed under *Kienapple*. While I can see a rationale for applying *Kienapple* to these three counts as a factual nexus exists, staying them would suggest that the offences of possessing firearms for the purpose of offering to transfer them and offering to transfer them do not possess distinctly different elements. I think they do even though there is an argument that would justify a *Kienapple* approach. To illustrate my thinking on the issue in this case, I note that although I found Mr. Cater had possession of a .45 calibre handgun for firearms trafficking purposes and accordingly convicted him, I acquitted him of offering to transfer that handgun because I found there was no evidence to support the charge, a conclusion the Crown had also reached. *(R. v. Cater, [2012] N.S.J. No. 139, paragraph 198)* On each Count relating to specific firearms, the Crown had to prove the purpose for Mr. Cater's possession was trafficking, and separately establish proof that Mr. Cater offered to traffick the firearms. I do not see any injustice in Mr. Cater being convicted of each of these wrongs, where the evidence established proof beyond a reasonable doubt. As held in *Prince*:

> No element which Parliament has seen fit to incorporate into an offence which has been proven beyond a reasonable doubt ought to be omitted from the offender's accounting to society, unless that element is substantially the same as, or adequately corresponds to, an element in the other offence for which he or she has been convicted. *(paragraph 31)*

[8] I remain of the opinion that there is a difference between possessing a firearm for the purpose of trafficking it and actually offering to traffick it and so will not be "Kienappling" Counts 3, 6 and 7 on the firearms trafficking Information.

*Crown and Defence Positions*

[9] The Crown submits that Mr. Cater should receive a total sentence of four and a half (4.5) years in prison on the firearms possession charges, and five (5) years in total for the firearms trafficking charges, the 5 year sentence to be served consecutively. This produces a total sentence of 9.5 years. The Crown acknowledges the appropriateness of a remand credit of two (2) years (a 2:1 credit) being applied to reduce the sentence to a "go forward" penitentiary term of 7.5 years.

[10] Mr. Hartlen explained in his oral submissions that he factored totality into his recommendations for the appropriate sentences on the firearms possession and firearms trafficking charges. He also assessed the issue of concurrent and consecutive sentencing through the totality lens.

[11] Even in light of my decision to summarily dismiss her *Charter* motion, Ms. Cooper persisted in submitting that Mr. Cater should receive absolute discharges for the firearms possession offences and time served for the firearms trafficking offences, once Mr. Cater's remand time and house arrest has been taken into account. She had originally made these submissions in the context of her section 12 *Charter* application. *(see, R. v. Cater 2012 NSPC 37)* In Ms. Cooper's one page brief on sentencing dated April 27, 2012 she argued that in light of Mr. Cater's house arrest and then pre-sentence custody, the mandatory minimums should not apply and he "should not be given any further sentence." She made oral submissions that I should find that the Ontario Superior Court decision in *R. v. Smickle, [2012] O.J. No. 612* has rendered the section 95(1) mandatory minimum of no force and effect. I do not find that *Smickle* can be applied in the manner suggested by Ms. Cooper and I note again, I summarily dismissed her application for *Charter* relief under section 12.

*Remand Credit*

[12] There is consensus that Mr. Cater should receive double credit for the time he has served on remand. These offences were committed prior to the recent amendments to section 719.3 of the *Criminal Code*. Mr. Cater has been in custody for a year on these offences since his arrest on May 4, 2011. His release on these charges was revoked following a bail hearing before Chief Judge Curran on May 13, 2011.

*Strict House Arrest as a Mitigating Factor*

[13] Ms. Cooper is also seeking to have Mr. Cater "given credit for approximately 10 months for his time on house arrest." She cites the Ontario Court of Appeal decision of *R. v. Downes, [2006] O.J. No. 555* in support of her position.

[14] Starting on January 21, 2009 and until his bail was revoked, Mr. Cater was on a recognizance with a strict house arrest condition. Onerous pre-trial release conditions can be a legitimate mitigating factor in determining a sentence although it is not to be calculated as a "credit". *(R. v. Carvery, [2012] N.S.J. No. 93 (S.C.), paragraph 6; R. v. Knockwood, [2009] N.S.J. No. 448 (C.A.), paragraph 29; R. v. Voeller, [2008] N.B.J. No. 354 (C.A.), paragraphs 1, 22)*

[15] The first authoritative discussion about the factoring of pre-trial release into a sentence calculation is found in *Downes*. *Downes* used the term "credit" although also talked about treating bail under house arrest as a "mitigating factor" in sentencing. *(paragraphs 36 – 37).* In any event, *Downes* has subsequently had its scope narrowed, as is explained in *Voeller, paragraphs 15 – 20*, and *Knockwood, paragraphs 29 – 32*. In *Knockwood*, the Nova Scotia Court of Appeal determined the "present state of the law to be such that the impact of strict release conditions may be considered or 'put into the mix', together with all other mitigating factors, in arriving at a fit sentence." *(paragraph 33)*

[16] For bail conditions to be considered in mitigation, they must impose significant hardship and restrictions on liberty. *(Voeller, paragraph 22)* In *Knockwood*, it was held that the impact of the particular conditions of release upon the offender "must be demonstrated in each case." The Court was quite unequivocal about this:

> …there must be some information before the sentencing court which would describe the substantial hardship the accused *actually suffered* while on release because of the conditions of that release. *(paragraph 34, emphasis in the original)*

[17] A sentencing judge is not required to infer from the conditions of the release themselves, "without more", that the offender suffered mitigating hardship. *(Knockwood, paragraph 36)*

[18] There is also the consideration, identified in *Voeller*, that the offender bears some responsibility to have addressed the harsh conditions of pre-trial release by way of a variation application or bail review:

> Surely, there is an onus on an accused in these circumstances to not idly sit by and later be able to argue that conditions, which likely would have been varied if an application had been made, caused him significant consequences so as to warrant being considered a significant mitigating factor. *(paragraph 24)*

[19] I have evidence about Mr. Cater's experience of his house arrest from his mother, Barbara Chase, in the form of a can-say statement that was filed at this sentencing by agreement and also the testimony Ms. Chase gave at the hearing into the section 11(b) *Charter* delay motion last November. I will refer to this evidence later in these reasons.

*Degree of Moral Culpability*

[20] Kyle Cater was centrally involved in all the offences for which he has been convicted. He was well aware of how illegal his activities were. The evidence at trial established how careful he was about having any firearms in his actual possession. He was conscious of the police presence in his neighbourhood and told an associate looking to have him supply a gun that it would be "crazy" for him to have a firearm on him. *(R. v. Cater, [2012] N.S.J. No. 139, paragraphs 134, 135)* Three of the firearms he had a significant interest in were kept at his father's residence. After the police raid on January 15, 2009, Kyle mused with a friend about how the AP 9 had "never really ever got mentioned over the phone ever before" revealing his knowledge about how careful he, his father and his stepmother had tried to be about concealing the presence of that gun. *(Cater, paragraph 166)*

[21] Although Mr. Cater had a very poor grasp of the meaning of "possession" in law, he showed a keen appreciation for the penalties that attach to unlawfully possessing an illegal firearm. The intercept evidence and a text on his cell phone confirm that Mr. Cater recognized his father was facing at least three years in prison as a result of the police search of 80 Cavendish Road. *(Cater, paragraph*

*163)* To use an expression that seems apt in this case, he plainly thought he had cleverly dodged this bullet.

[22] The evidence also revealed that Mr. Cater was a gun trafficker. As I noted in my decision convicting Mr. Cater, the intercepted communications revealed the commercial nature of his activities. *(see, for example, R. v. Cater, [2012] N.S.J. No. 139, paragraph 186)* In relation to all the offences, Mr. Cater was not a naïve school boy merely caught up in the criminal conduct of others. He was a controlling force, a “player”, to borrow a term he used in one of the intercepts.

*Aggravating Factors*

[23] Mr. Cater exercised significant control over three illegal firearms stashed at his father’s home and his commercial firearms-trafficking enterprise was operating at a steady pace during the period when the Part VI intercepts were running. His involvement was not in relation to one firearm or one transaction. I convicted him of firearms trafficking offences in relation to four separate firearms – a .410 gauge shotgun, a Derringer, a .308 calibre rifle, and a .45 calibre handgun. Mr. Cater was a hub for firearm acquisition activity throughout November and December 2008 and, by my count, he had conversations with at least twelve criminal associates during that time about receiving or supplying illegal firearms.

[24] The intercepts make it plain that the guns that figured in Mr. Cater’s enterprise were to be used for criminal purposes, potentially deadly criminal purposes. Mr. Cater showed no reluctance about his participation in supplying guns to people with criminal and violent intentions.

*Mitigating Factors*

[25] There is not much in the way of mitigating factors in this case. Mr. Cater is young, just 18 at the time of these offences, and only 21 now. His record is unrelated, which is to say, he has no previous firearms-related offences. As an adult he has been sentenced twice before. In December 2010 he received a $100 fine for a section 4(1) *Controlled Drugs and Substances Act* offence and a three month suspended sentence for two recognizance breaches. In March 2011, he was sentenced to his first and only custodial sentence, twenty days concurrent for each of two further recognizance breaches. All these offences were committed

subsequent to the offences I am sentencing him for. In my view, Mr. Cater is effectively a first offender.

[26] Mr. Cater's pre-sentence report contains favourable comments from his mother and his Grade 12 English teacher. Barbara Chase, Mr. Cater's mother, with whom he has lived since his parents separated over ten years ago, described him as pleasant, easy-going, and an excellent student. Ms. Chase indicated her opinion that her son had been influenced by both criminal associates and pro-social peers. She wants to see Mr. Cater upgrade his education and move away from Spryfield which she feels has had a negative impact on him. Mr. Cater seems to agree: echoing the point about needing to upgrade his education, develop a work history, and "go on my own and begin a positive new life."

[27] Mr. Cater's academic success is indicated by his acceptance to the Nova Scotia Community College business programme. Having graduated with his Grade 12 foundation courses in 2010, he was scheduled to start his NSCC courses in September 2011 but was unable to do so as a result of being remanded into custody in May. Mr. Cater has career ambitions: he advised in the pre-sentence report that he wants to take a business degree at university, open his own clothing store, barber shop, and eventually, a restaurant.

[28] Mr. Cater made a very positive impression on Jean Wright-Popescul, his Grade 12 English teacher. She described him in the pre-sentence report as respectful, honest, helpful toward others, and academically gifted with a 90% average. She observed: "Kyle was the best student and I do not know why he ended up taking general courses." She told the author of the pre-sentence report that she was having difficulty "correlating" Mr. Cater's offences and the "demeanor" he demonstrated in her classroom." She concluded by saying that Mr. Cater has "a lot of potential as a person and educationally" and expressing her hopes that "when the opportunity presents itself" he will pursue post secondary schooling.

[29] In a letter dated May 26, 2010, that had been tendered into evidence at the section 11(b) delay hearing, Ms. Wright-Popescul commented on Mr. Cater's "mature opinion", his "quiet confidence that is both impressive and refreshing", his studiousness, and the fact that he helped "to create a very positive climate in the

classroom." She noted that he was "always busy, always working hard, and always willing to do more to improve himself." She described his character, in school, as being "commendable." The Vice-Principal of Mr. Cater's high school confirmed in a letter dated March 8, 2010 that not only was Mr. Cater an excellent student, he was "always extremely respectful and cooperative" with staff.

[30] Other letters have also been filed for my consideration. Mr. Cater is consistently described as kind, respectful, polite, honest, dependable, and selfless. It is noted that he values having an education and has career goals, also reflected, as I just mentioned, in his pre-sentence report. One supporter indicates her experience of Mr. Cater as "an all around loveable person" whom she has been in contact with on "multiple occasions" during his time in custody. She says he has told her that "he now has learned who his friends really are and that he has certainly learned from his mistakes." Another supporter refers to Mr. Cater being "so smart" and having "tons of potential." She indicates his family and "true friends" will help Mr. Cater avoid a negative lifestyle.

[31] The young man depicted in the support letters, which I want to say I have no reason to question, is not the young man I was introduced to through the evidence in this case. At no time has Mr. Cater expressed any responsibility for what was starkly revealed in the intercepts. He continued to deny responsibility in his pre-sentence report interview, describing himself as "just a kid from Spryfield." Kyle Cater, the Boy Scout, a persona also reflected in Ms. Cooper's submissions, does not square with the intercepts. What, for example, does Mr. Cater suppose I should make of his statement on November 21, 2008 (Intercept 3, session #119) where he tells a friend looking for "a clip", that he's not to worry because he can "get those myself…I got people that live out Edmonton and they send them down like it's nothing, cuz." ? What does he think the people who wrote the support letters would say if they listened to the intercepts? They might well say that a person conducting themselves as Mr. Cater did is not a person they would want living in their neighbourhood. The person they express such genuine fondness and respect for is not in evidence in the intercepts.

[32] In continuing my canvas of the mitigating factors, there is also the issue of Mr. Cater's house arrest. Mr. Cater spent 28 months on strict house arrest. Only once, on May 4, 2011 did he pursue a variation of his conditions. In my opinion

there is no reason he could not have done so otherwise. *(R. v. Cater, [2011] N.S.J. No. 610, paragraph 112)*

[33] Mr. Cater's mother testified at the section 11(b) delay hearing that after he finished high school (which he was allowed to attend as an exception to his house arrest), there was no exception that permitted him to work and therefore he could not support himself. It does not appear that Mr. Cater viewed this as a particular hardship. *(R. v. Cater, [2011] N.S.J. No. 610, paragraph 107)* He told me on May 4, 2011, he didn't really care if he was allowed to work, he just needed to get out of his mother's house, something he hoped to be able to achieve by securing social assistance." *(R. v. Cater, [2011] N.S.J. No. 610, paragraph 79)*

[34] In her can-say statement (Exhibit 2 at the sentencing hearing), Ms. Chase provided further details of the family and social interactions her son missed out on, funerals he was unable to attend, and other ways in which he was separated from his friends and relatives.

[35] In my decision on the delay application, I reached the following conclusions about Mr. Cater's bail conditions:

> **113** There is no question that Mr. Cater was on stringent house arrest conditions for many months that restricted his liberty and interfered with aspects of his family and social life. House arrest meant he was subject to frequent compliance checks by police. He was unable to visit his ailing grandmother or attend her funeral. He missed out on seeing his extended family. According to his mother he could not sustain his relationship with his girlfriend as he was unable to participate in normal activities with her. However, Ms. Cater's evidence confirmed that friends and family, including his father, did come to visit him so it was not an entirely austere existence.

[36] In order to factor house arrest into the mitigating mix at sentencing, I must be satisfied that Mr. Cater actually suffered a substantial hardship. I previously accepted that "Mr. Cater's bail conditions, particularly his house arrest, made aspects of his life difficult and stressful and curtailed many of his normal routines…" *(R. v. Cater, [2011] N.S.J. No. 610, paragraph 114)* That, I will note, is the nature of house arrest. Mr. Cater did nothing however to alleviate the disruption created by his house arrest either by asking to have the condition varied

or by bringing an application for a bail review. He did not seem to care he had no exception that would allow him to work. In my view, his experience of house arrest brings little mitigation to the table.

[37] In conclusion on the issue of mitigating factors, Mr. Cater does not get the benefit of having entered a guilty plea or even making any significant admissions that would have streamlined his trial, or of expressing remorse or showing any recognition of the significance of these offences and his role in them. Unlike some of the firearms sentencing cases I have reviewed, Mr. Cater gets no discounting of his sentence for acceptance of responsibility or undertaking steps toward rehabilitation. On the mitigation scorecard, these factors register as a zero.

*Sentencing Purpose and Principles – Denunciation and Deterrence*

[38] The purpose and principles of sentencing are found in sections 718, 718.1 and 718.2 of the *Criminal Code*. The objectives of sentencing encompass deterrence, denunciation, rehabilitation, and protection of society. "The relative weight and importance of these multiple factors will frequently vary depending on the nature of the crime and the circumstances of the offender." *(R. v. C.A.M., [1996] S.C.J. No. 28, paragraph 82)* The Supreme Court of Canada in *C.A.M.* observed:

> In the final analysis, the overarching duty of a sentencing judge is to draw upon all the legitimate principles of sentencing to determine a "just and appropriate" sentence which reflects the gravity of the offence committed and the moral blameworthiness of the offender. *(paragraph 82)*

[39] This passage from *C.A.M*. invokes the principle of proportionality, which finds legislative expression in section 718.1of the *Criminal Code.* As I have already made clear from these reasons, the offences here are serious and Mr. Cater has a high degree of moral culpability for them.

[40] For offences involving firearms, the sentencing emphasis has consistently been on denunciation, deterrence and protection of the public. *(see, for example, R. v. Brown, [2010] O.J. No. 4704 (C.A.), paragraph 14; R. v. Mullings, [2012] O.J. No. 1401, (S.C.J.) paragraph 37; R. v. Canepa, [2011] O.J. No. 924 (S.C.J), paragraph 13; R. v. Hamilton, [2011] O.J. No. 5466 (S.C.J.), paragraph 22;R. v. Lambert, [2011] O.J. No. 3389 (S.C.J.), paragraph 47; R. v. Ivanic, [2009] B.C.J.*

*No. 1397 (S.C.), paragraph 45; R. v. Porsch, [2008] B.C.J. No. 2553 (C.A.), paragraph 22; R. v. Jarsch, [2007] B.C.J. No. 738 (C.A.), paragraph 18; R. v. Smith, [2006] N.S.J. No. 310 (C.A.), paragraph 34; R. v. Danvers, [2005] O.J. No. 3532 (C.A.), paragraph 77; R. v. Nguyen, [2005] B.C.J. No. 407 (C.A.), paragraph 5)*

[41] In the context of possession of, and trafficking in, illegal firearms, denunciation operates as a powerful expression of a "symbolic, collective statement" rejecting an offender's conduct. *(C.A.M., paragraph 81)* Illegal firearms represent a clear and present danger to our communities and it is instructive to remember that firearms are often indiscriminate. They are as capable of killing or injuring entirely innocent people as they are of causing harm to a person who is embroiled in criminal activity and rivalries. *(R. v. Johnston, [2009] N.S.J. No. 349 (S.C.), paragraph 45; R. v. LeBlanc, [2010] N.S.J. No. 490 (S.C.), paragraphs 5 and 7)*

[42] Mr. Cater will have noticed that certain individuals with whom he was involved during the period of the Part VI interceptions are now serving lengthy penitentiary sentences because of their use of handguns. *(R. v. Jeremy LeBlanc, [2010] N.S.J. No. 490 (S.C.); R. v. Aaron Marriott, [2011] N.S.J. No. 602 (S.C.)* Another target of the Part VI investigation is also doing a long prison sentence for multiple firearms offences. *(R. v. Joseph Chan, [2011] N.S.J. No. 711 (S.C.))*

[43] Anyone familiar with the LeBlanc, Marriott, and Chan cases will know their crimes involved intentionally shooting at their victims. Mr. Cater is not charged with ever using any of the guns referred to in the Informations nor has he been charged in relation to any of the shootings that have occurred in the Halifax Regional Municipality. But what the intercepts make clear is that he was a source for guns, valued as a potential supplier by individuals looking for working guns, guns that offered his confederates the opportunity to employ deadly force. My point is this: Mr. Cater was not possessing and trafficking guns so that friends and associates could engage in recreational target practice at a local gun club. He fitted into a network of criminal associates whose interest in firearms included using them for violent purposes.

[44] The culpability of the gun trafficker is effectively described in *R. v. Howell*, a decision of the Ontario Superior Court of Justice:

> **21** Those who engage in the unlawful trafficking of firearms can only expect stern treatment from the courts. Many of the murders, and much of the violent crime in this city involve the use of firearms. Many of our citizens feel insecure in their communities because of the presence of guns. The offender lived in one such community. No one who sells guns illegally can pretend not to know that their actions contribute to this reality. Sentences in such cases must emphasize denunciation, and general and specific deterrence…*([2007] O.J. No. 4585)*

*Other Sentencing Principles*

[45] Where firearms offences are concerned, rehabilitation is usually treated as a secondary sentencing objective after denunciation and deterrence have been emphasized. That being said, sentencing Mr. Cater still requires factoring in his relative youth, his unremarkable record, and the principles of restraint and totality.

[46] Despite his young age and his success as a high school student, Mr. Cater's prospects for rehabilitation are presently little more than theoretical. While I hope fervently that he will begin to take a long, hard look at the choices he was making in 2008 and 2009, he has demonstrated no acceptance of responsibility even now, three years on. There is nothing to indicate that his offences were driven by mental health, addictions, or "sad life" issues. Indeed the pre-sentence report discloses nothing of the kind. Presumably then, Mr. Cater made calculated choices and was likely motivated by greed and peer identification and emulation.

[47] That being said, a sentence must not crush rehabilitation prospects and the ability to successfully reintegrate into society, a principle that is particularly germane in the case of a youthful offender like Mr. Cater.

*Mandatory Minimums and Concurrent and Consecutive Sentences*

[48] In sentencing Mr. Cater I am obliged to apply the mandatory minimum penalties and will have to determine which sentences should be consecutive and which should be concurrent. I will make a few comments about these issues before moving on to address the calculus for Mr. Cater's sentence.

[49] Mandatory minimum sentences have been described as 'an inflationary floor, setting a new minimum punishment applicable to the so-called "best" offender…" They are not to be treated as the new norm for all but "the very worst offender who has committed the offence in the very worst circumstances." *(R. v. Morrisey, [2000] S.C.J. No. 39, paragraph 75)* Arbour, J., whose words I just quoted, has been shown to be prescient in her expectation that the inflationary "floor" created by mandatory minimums would have an inflationary effect, increasing all penalties for the offences to which they apply.

[50] Even from the early days of mandatory minimums, their incompatibility with well-established sentencing principles was readily understood. Arbour, J. observed in *R. v. Wust, [2000] S.C.J. No. 19, paragraph 18*:

> Mandatory minimum sentences are not the norm in this country, and they depart from the general principles of sentencing expressed in the Code, the case law, and in the literature on sentencing. In particular, they often detract from what Parliament has expressed as the fundamental principle of sentencing in s.718.1 of the Code: the principle of proportionality…

[51] Increasingly mandatory minimums are becoming the unfortunate norm in Canada but they are no more compatible with settled principles that emphasize the individualized and nuanced nature of sentencing.

[52] The principles of proportionality, restraint, and totality all guide the sentencing judge's hand even where mandatory minimum penalties apply. Where consecutive sentences are imposed, the totality principle requires that the combined sentence should not be "unduly long or harsh." *(R. v. Adams, [2010] N.S.J. No. 275 (C.A.), paragraph 19)* And, "…a sentence must punish an offender no more than is necessary to express society's condemnation of the offence." (*R. v. Nasogaluak, [2010] S.C.J. No. 6, paragraph 42)*

[53] In deciding whether sentences should be concurrent or consecutive, the following factors are to be considered: the time frame within which the offences 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. *(R. v. T.E.H., [2011] N.S.J. No. 677(C.A.), paragraph 37)*

[54] The procedure for sentencing multiple offences is well established: I am required to fix a sentence for each offence and determine which should be consecutive and which, if any, concurrent, and then I am to 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. *(Adams, paragraph 23; see, also: R. v. Chan, [2011] N.S.J. No. 711 (S.C.))* The most recent appellate endorsement of this approach is the Newfoundland and Labrador Court of Appeal decision in *R. v. Hutchings, [2012] N.J. No. 12, paragraph 84)*

*Sentence Quantum - Guidance from Case Law*

[55] Although I have reviewed a significant number of cases, there are only a few I will review in this decision. (Others I have looked at are: *R. v. Hamilton, [2011] O.J. No. 5466 (S.C.J.); R. v. Balatoni, [2004] O.J. No. 5311 (S.C.J.); R. v. Johnson, [2010] O.J. No. 2327 (S.C.J.); R. v. McKenzie, [2011] O.J. No. 156 (C.A.); R. v. Mullings, [2012] O.J. No. 1401 (S.C.J.); R. v. Porsch, [2008] B.C.J. No. 2553 (C.A.); R. v. Fletcher, [2008] O.J. No. 697 (S.C.J.); and R. v. Ivanic, [2009] B.C.J. No. 1397 (S.C.)*

[56] *R. v. Dene, [2010] O.J. No. 5192* from the Ontario Superior Court of Justice is a useful reference on the firearms possession charges. Mr. Dene was convicted of possessing a loaded prohibited firearm, which is not identified. He was subject to the three year mandatory minimum. He had a supportive family, was 21 years old and in the process of finishing high school. He had a prior record for trafficking in cocaine and had received a conditional sentence. He received four years for the possession of the prohibited firearm and a total sentence of 5.5 years when related charges were added in. The Ontario Court of Appeal upheld the sentence although said it appeared to be "at the high end." *(R. v. Dene, [2010] O.J. No. 5012, paragraph 8)*

[57] In *Nur*, Code, J. characterized *Dene* as having set the "new high water mark" in Ontario at least for possession of a prohibited firearm. *(Nur, paragraph 147)* He also found *Dene* to be "clearly a worse situated offender" than Nur, who had had possession of a prohibited firearm for an undetermined period of time one evening outside a community centre. When police arrived and approached, Nur fled and

threw the gun under a parked car. *(Nur, paragraphs 24, 27, 148)* Nur had no criminal record. *(paragraph 35)*

[58] A week after the *Nur* decision, the Ontario Superior Court of Justice in *R. v. D.A.J., [2011] O.J. No. 4026*, levied, in the context of the three year mandatory minimum, a sentence for possession of a prohibited firearm of 45 months, taking into account D.A.J.'s demonstration of "genuine remorse and regret for his previously criminally oriented lifestyle…" The court saw some potential for rehabilitation and considered the fact that D.A.J. , still in his early 20's, was "relatively youthful". *(paragraphs 17, 20 39)*

[59] Ms. Cooper asked me to conclude that Mr. Cater's degree of moral culpability was less than that of Dene, Nur and D.A.J. It is obvious when one compares the facts of these cases of prohibited firearms possession and the offenders' circumstances that Mr. Cater does not compare favourably. Ms. Cooper also continued to insist during the sentencing hearing that Mr. Cater should be compared to Mr. Snobelen who received an absolute discharge for firearms possession charges that were prosecuted by summary proceedings. I already indicated that I found no comparability between Mr. Cater and Mr. Snobelen. *(R. v. Cater 2012 NSPC 37, paragraphs 16 and 22)*

[60] In her submissions, Ms. Cooper directed me to *R. v. Howell, [2007] O.J. No. 4585 (S.C.J.)*, a case the Crown supplied, where more firearms were seized than were found at 80 Cavendish Road. Mr. Howell, a youthful offender of 22, had no criminal record. He did however have possession of the firearms intending to traffick them. *(paragraph 17)* At a time when the mandatory minimum sentence for possession of a prohibited firearm was one year, the Court sentenced Mr. Howell to four years, taking into account his decision to break with his past, good prospects for rehabilitation, and the need to avoid a sentence that would be "crushing." *(paragraph 23)* Nonetheless, in sentencing Mr. Howell, the Court observed: "Given the seriousness of these offences, I would not ordinarily recoil from imposing a five to seven year sentence as recommended by Crown counsel." I note that Mr. Howell was not convicted of offering to traffick any of the firearms he possessed although he admitted to having sold a couple of guns in the past. *(paragraph 8)*

[61] I will make the following observations about *Howell* by way of saying, with due respect, that it is not an especially helpful case. The court in *Howell* did not follow an approach that fixed a sentence for each offence, then moving on to assess totality. No consecutive sentencing was employed. The court simply imposed "a four year sentence less time served for the firearms trafficking offence, and shorter concurrent sentences for all remaining offences." *(paragraph 31)* The "shorter concurrent sentences" for the firearms possession charges were two years each. The result is that Mr. Howell received a four year sentence for possessing firearms for the purpose of trafficking and two year sentences for possession of prohibited firearms, served concurrently. This bears no resemblance to the appropriate sentencing approach, quantum or calculation that must apply in Mr. Cater's case.

[62] Finally, I will comment on *R. v Whyte, [2011] O.J. No. 98*, a more recent case involving firearms trafficking, where the Ontario Superior Court of Justice sentenced a 24 year old for four counts of possession of restricted firearms that were either loaded or had readily accessible ammunition, and one count of possession of a restricted firearm for the purpose of trafficking. The firearms were in a rental car in which Mr. Whyte was a passenger. *(paragraphs 1 and 2)* The Court found it aggravating that: "…there were 3 handguns, two of which were semiautomatics, one of which was loaded and there was ammunition immediately available to be sold with the handguns." *(paragraph 35)* Mr. Whyte received a 6.5 year sentence on the single firearms trafficking count. He received sentences of 5 and 4 years on the firearms possession offences, with all sentences running concurrently because they were all found to "arise from the same transaction and serve the same societal interests." *(paragraph 40)*

*Calculating Kyle Cater's Sentence*

[63] I will first of all deal with the firearms possession charges. Given my application of *Kienapple* earlier in these reasons, I must sentence Mr. Cater on 4 firearms possession charges. The Crown has recommended a four (4) year sentence for the unlawful possession of the Cooey shotgun and four (4) years for the unlawful possession of the AP 9 handgun, to be served concurrently. I accept the Crown's view that the appropriate quantum is 4 years for unlawful possession of the sawed off Cooey (Count 7) and 4 years for unlawful possession of the AP 9

(Count 8), concurrent to each other. The unlawful possession of the Lakefield rifle (Count 5) garners Mr. Cater a six (6) month sentence concurrent to Counts 7 and 8.

[64] Count 11, the unlawful possession of the over-capacity magazines warrants a sentence of 6 months to be served consecutively to Counts 7, 8 and 5. Despite Defence submissions that Count 11 should be stayed under *Kienapple* principles, I find a stay is not warranted and that a consecutive sentence is appropriate. *(R. v. Lambert, [2011] O.J. No. 3389 (S.C.J.), paragraph 69; R. v. Dene, [2010] O.J. No. 5192 (S.C.J.), paragraphs 5 and 43)* The over-capacity magazines amplify the level of dangerousness, especially in the context of the AP 9 which, as a fully automatic weapon equipped with extra ammunition represented an amped-up level of potential lethality. *(Nur, paragraph 60)*

[65] On the firearms possession offences therefore, Mr. Cater's sentence totals 4.5 years in prison.

[66] In relation to the firearms trafficking charges, the following are the offences Mr. Cater is being sentenced for:

**Count 1** – possession of a firearm (a .45 calibre handgun) for the purpose of trafficking

**Count 3** – possession of a .410 gauge shotgun for the purpose of trafficking

**Count 4** – offer to transfer a .410 gauge shotgun

**Count 5** – possession of a Derringer handgun for the purpose of trafficking

**Count 6** – offer to transfer a Derringer handgun

**Count 7** – possession of a .308 calibre rifle for the purpose of trafficking

**Count 8** – offer to transfer a .308 calibre rifle

[67] I have been explicit about the seriousness of the firearms trafficking offences and the degree of Mr. Cater's moral culpability for them. Firearms trafficking represents a level of criminality that casts simple possession of illegal firearms in an amateur role. Criminally-inclined members of the community wanting to arm themselves for violence, intimidation or coercion need a Kyle Cater to supply

them. He chose to do so. The consequence for his aggressively anti-social choice is a substantial term of incarceration.

[68] The Crown has recommended I sentence Mr. Cater to five (5) years for each firearms trafficking offence, to run concurrently. Given the aggravating factors in this case, I agree that is an appropriate sentence. I impose a five (5) year penitentiary sentence on Count 1, with five (5) years on each of Counts 3, 4, 5, 6, 7, and 8 to run concurrently.

[69] The sentence for the firearms trafficking charges is to be consecutive to the firearms possession charges. I do not accept Ms. Cooper's submission that I cannot impose these sentences consecutively. Ms. Cooper told me in her oral submissions that the Crown had made out its case against her client on the basis that "it was all one continuing offence." Indeed the Crown did not. The offences occurred in the same time frame but they are very distinct offences.

[70] In fact, at the end of the trial, Mr. Hartlen abandoned an argument that Counts 1 and 2 in the firearms trafficking Information (possession of a firearm for the purpose of trafficking and offering to transfer a firearm, no specific firearm being identified) related to the firearms at 80 Cavendish. As the Crown embarked upon making this argument, Ms. Cooper objected on the grounds that the Crown had charged Mr. Cater on separate Informations for the 80 Cavendish Road offences and the firearms trafficking offences and could not, late in the trial, endeavour to blend them together. It is very much the case that these are separate and distinct criminal acts. They do not arise from the same transaction nor are the same societal interests served by all the charges. There is no justification for making the sentence for the firearms trafficking offences concurrent to the sentence for the firearms possession offences.

[71] The total sentence my calculations produce is 9.5 years, which is the quantum recommended by the Crown. The sentences that produced this total reflect the "inflationary" effect of mandatory minimums and the fact that Mr. Cater is not "the best offender."

[72] My task is not finished yet. I must apply the remand credit and take a "final look" at the total sentence. It is at this point that I bring the principle of totality to

bear: the mitigating factors in this case went into my assessment of the sentences I have imposed on each of the charges before me.

[73] In my view, given Mr. Cater's age and the prospects for rehabilitation and reintegration as he matures, which surely he will, 9.5 years is too harsh a sentence even if it has already been moderated by the application of concurrent sentences for the firearms trafficking charges. (Arguably these offences could justifiably attract consecutive sentences but even the Crown agrees that would produce a "crushing" sentence.)

[74] I regard a fit and proper total sentence for Mr. Cater to be eight (8) years. He is entitled to receive a two (2) year credit for his year in pre-sentence custody. Mr. Cater's "go-forward" sentence is therefore six (6) years.

[75] In sentencing Mr. Cater, I am mindful that although he has not accepted responsibility, his pre-sentence report and the letters of support indicate he has considerable potential for rehabilitation. He was eighteen when these offences were committed. They are very serious offences in which he played a defining role. But his rehabilitation must not be marginalized. In the words of one of his support letters, he is not "a lost cause." This is not only his first penitentiary sentence, it is his first custodial sentence of any duration. Eight (8) years, with six (6) left to serve, amply reflects his culpability in these offences without choking off his hopes for the future.

[76] Mr. Cater, we have spent a considerable amount of time together as a result of these charges. This has not helped me acquire a real sense of who you are or where you are headed with your life. You seem to be a young man brimming with promise yet you have chosen, at least to this point in your life, to squander your potential. You are at a place in your life now where you have to make critical choices, including with respect to your associates and, speaking candidly, judging from the intercepts, even your own brother. You cannot afford to make any more wrong choices. It is a bitter task I have of sending you, a 21 year old, to the penitentiary on a lengthy sentence but what pains me the most is that today's sentencing was avoidable. You are bright enough, surely, to recognize this. You have to drop the pretence of being "just a kid from Spryfield." You can serve yourself very well now by keeping your head down, doing your time in a positive

and disciplined way, and emerging from this experience wiser and ready to contribute to society as a productive, law-abiding citizen.

[77] I recommend that during your sentence the Correctional Service of Canada assist and support you to upgrade your educational qualifications and strengthen your pro-social attitudes and values.

[78] Mr. Cater, I hope you will face up to your mistakes, take responsibility for them, recognize that a penitentiary sentence is not an accomplishment or a badge of honour, rebuild your life, and make a fresh start. I hope the man who returns to the community will be the man I read about in the letters of support and not the man in the intercepts. The choice will be yours.