PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Rhodenzier*, 2019 NSPC 85

Date: 20190501
Docket: 8214556; 8214595; 8214598; 8214601; 8214604; 8214607; 8214613 & 8214537
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Kyle St. Clair Rhodenizer

Judge:	The Honourable Judge Theodore Tax,
Heard:	May 1, 2019, in Dartmouth, Nova Scotia
Decision	May 1, 2019
Charge:	Sections 86(1), 91(2), and 92(1) x 4 of the **Criminal Code of Canada** and Section 4(1) of the **Controlled Drugs and Substances Act**
Counsel:	Bryson McDonald and William Mathers, for the Nova Scotia Public Prosecution Service David Hirtle, for the Defence Counsel

By the Court:

Kyle Rhodenizer - Sentencing - Firearms Offences - Gladue Factors

[1] Mr. Kyle Rhodenizer is before the court for sentencing after having pled guilty to seven (7) firearms offences contained in an Information which alleged that those offences had occurred on or about February 23rd, 2018 in Lower Sackville, Nova Scotia.

[2] The Information contains a total of 39 counts, however, many of those counts related to allegations against his brother, Mr. Steven Rhodenizer or were counts which related to charges where Mr. Kyle Rhodenizer was charged with his brother and Ms. Megan Hann. Neither Ms. Hann nor Mr. Steven Rhodenizer are before the court for sentencing in relation to these firearms offences.

[3] The 7 charges before the Court for sentencing relate to the following offences, as enumerated in the Information:

[4] Count 1: without lawful excuse storing "firearms" or prohibited weapons or restricted weapons or prohibited devices or ammunition or prohibited ammunition, to wit, "firearms", in a careless manner or without reasonable precaution for the safety of other persons, contrary to section 86(1) of the **Criminal Code;**

[5] Count 14: possession of a prohibited weapon, to wit, a 30-round magazine, without being the holder of a license under which he may possess it, contrary to section 91(2) of the **Criminal Code**;

[6] Count 15: possession of a firearm, to wit, a sawed-off shotgun, knowing that he was not the holder of a license under which he might possess it or in the case of a prohibited firearm or restricted firearm, without being the holder of a registration certificate for the firearm, contrary to section 92(1) of the **Code**;

[7] Count 16: possession of a firearm, to wit, a .22 calibre, Cooey rifle, knowing that he was not the holder of a license under which he might possess it or in the case of a prohibited firearm or restricted firearm, without being the holder of a registration certificate for the firearm, contrary to section 92(1) of the **Code**;

[8] Count 17: possession of a firearm, to wit, a Remington .22 calibre rifle, knowing that he was not the holder of a license under which he might possess it or in the case of a prohibited firearm or restricted firearm, without being the holder of a registration certificate for the firearm, contrary to section 92(1) of the **Code**;

[9] Count 18: possession of a firearm, to wit, a .40 calibre semi-automatic rifle, knowing that he was not the holder of a license under which he might possess it or in the case of a prohibited firearm or restricted firearm, without being the holder of a registration certificate for the firearm, contrary to section 92(1) of the **Code**; and

[10] Count 22: having in his possession firearms and ammunition while he was prohibited from doing so, by reason of an Order of Prohibition, pursuant to section 109 of the **Criminal Code** dated July 25, 2012, which is an offence contrary to section 117.01 (1) of the **Criminal Code**.

[11] Mr. Kyle Rhodenizer has also pled guilty, with the consent of the Crown Attorney to the lesser or included offence of simple possession of cocaine, a substance included in schedule I of the **Controlled Drugs and Substances Act (CDSA)**, which is an offence contrary to section 4(1) of that **Act**. The **CDSA** Information had jointly charged Mr. Kyle Rhodenizer, his brother Steven and Megan Hann with, unlawfully having possession of cocaine for the purpose of trafficking, contrary to section 5(2) of the **CDSA,** on or about February 23, 2018 in Lower Sackville, Nova Scotia.

Positions of the Parties:

[12] The Crown Attorney had forwarded a written brief of his sentencing position prior to the date set for oral submissions on December 18, 2018. However, during that hearing, there was a dispute between the parties with respect to the facts and circumstances of the s. 4(1) **CDSA** charge and there was insufficient time to hear the Crown and Defence sentencing positions. As a result, the Court adjourned the sentencing submissions of counsel to December 21, 2018.

[13] With respect to Mr. Kyle Rhodenizer's **CDSA** charge of being in simple possession of a "small amount of cocaine" contrary to section 4(1) of the **CDSA**, the Federal Crown Attorney and Defence Counsel jointly recommend a period of custody of 10 days in prison.

[14] Defence Counsel submits that, with respect to the **Criminal Code** charges, a fit and appropriate sentence for Mr. Kyle Rhodenizer would be 18 months in

prison less enhanced pre-sentence custody credit, which as of December 21, 2018 was 302 actual days in custody and with a credit of 1½ days for each day of pre-sentence custody, there would be a total of 453 days or roughly 15 months of pre-sentence custody credit. It is the position of the defence that, given what was then a 15-month credit for presentence custody, the go forward sentence for Mr. Rhodenizer should be 3 months in prison.

[15] On December 21, 2018, the Crown Attorney submitted that the just and appropriate sentence for Mr. Kyle Rhodenizer, considering the need to emphasize deterrence and denunciation and public safety given the number of **Criminal Code** weapons offences, would be 3 years or 36 months in a federal penitentiary. It is the position of the Crown that some of the offences should be served concurrently and others consecutive to each other. In the final analysis, once the Court deducts the enhanced pre-sentence custody credit of about 15 months, then, the Crown Attorney recommends a "go forward" sentence for Mr. Kyle Rhodenizer of 21 months in prison.

[16] The Crown Attorney also seeks the ancillary orders of a lifetime section 109 **Criminal Code** Prohibition of possession of any firearms, a section 491 **Code** order for forfeiture of any weapons and ammunition that were seized and detained by the police and finally, a section 487.051 **Criminal Code** DNA order as the firearms charges are secondary designated offences under that section.

[17] During Defence Counsel's submissions with respect to the mitigating circumstances present in this case, he advised the Court that Mr. Rhodenizer has had ties to the aboriginal community. Defence Counsel also noted that Mr. Rhodenizer did not mention that fact to the Probation Officer when she prepared the pre-sentence report.

[18] After hearing counsel on the issue of whether a **Gladue** report should be prepared, the Court concluded that the wording of section 718.2(e) of the **Criminal Code** and the requirements to pay particular attention to the circumstances of aboriginal offenders militated in favour of ordering a **Gladue** report. Given Mr. Rhodenizer's ties to the aboriginal community and the significant disparity in the sentencing positions of the parties, the Court ordered the preparation of a **Gladue** report and adjourned the balance of the sentencing submissions until that report was prepared.

[19] The **Gladue** report was forwarded to the Court and the parties on February 20, 2019 and the continuation of the sentencing submissions was scheduled for March 8, 2019.

[20] On March 8, 2019, a further dispute between the parties arose with respect to some of the information contained in the **Gladue** report which was attributed to Mr. Kyle Rhodenizer. The Crown Attorney had requested a **Gardiner** hearing to clear up the dispute in relation to Mr. Kyle Rhodenizer's comments, which were quoted by the writer of the **Gladue** report, which appeared to indicate that they were his exact comments with respect to the timing of his possession of the firearms.

[21] Instead of adjourning to schedule a **Gardiner** hearing, the Court asked the parties to meet with the **Gladue** report writer who was in court, to see if they could agree on corrections or excisions of any mistaken information contained in the report.

[22] Ultimately, the two Crown Attorneys, Defence Counsel with Mr. Rhodenizer's instructions and the **Gladue** report writer were able to reach an agreement to clarify the disputed facts. As a result, two paragraphs which were in quotations on page 15 of the **Gladue** report were excised and the parties reached an agreed statement of facts which were then read into the record.

[23] Unfortunately, there was insufficient time to conclude the sentencing submissions on March 8, 2019 and the Court scheduled March 22, 2019 for a continuation of the sentencing submissions. On March 21, 2019, the Crown Attorney filed a written brief which revised his sentencing position, based upon information contained in the **Gladue** report and mitigating factors and he now recommends a total sentence of 2½ years of incarceration, less credit for time served.

[24] As a result, when the parties appeared before the Court to conclude their sentencing submissions on March 22, 2019, the Crown Attorney advised the Court that all of his supplementary submissions were contained in the written brief. Prior to Defence Counsel's submissions, an issue arose with respect to whether Mr. Rhodenizer would be seeking additional enhanced credit for his pre-sentence custody. After further consultations with his client, Defence Counsel advised the Court that he would not be advancing that position and agreed that he would make some additional closing submissions, in writing, with respect to the **Gladue** report and the mitigating factors on sentencing.

[25] Defence Counsel submits that the **Gladue** factors present in this case provide an outline of Mr. Rhodenizer's prior difficulties and challenges, which have contributed to him being before the court at this time. He further submits that when the Court considers that. as of the sentencing date, Mr. Rhodenizer will have been in custody for 432 days, which amounts to 648 days with an enhanced presentence custody credit of 1.5 days for each day served, then the global sentence going forward should be 648 days, equal to the time already served by Mr. Rhodenizer.

[26] Given the fact that there would be further written submissions from Defence Counsel, the Court reserved its decision until May 1, 2018.

Circumstances of the Offences:

[27] On February 23, 2018, police officers executed a warrant, issued the previous day, to enter 276 Beaverbank Rd. in Lower Sackville, Nova Scotia. Upon entry, Steven Rhodenizer was located and arrested in the living room of the house. Mr. Kyle Rhodenizer was located by police officers inside the stand-up shower attached to the master bedroom of the house. White powder was on the floor of the bathroom along with empty plastic bags around the toilet as shown in Exhibit 2, which contained photographs of the house and the items located and/or seized by police from the house.

[28] After the occupants of the house were arrested and removed from the house, police officers conducted a detailed search of all rooms in the house. In the house, police officers located and seized several firearms and ammunition which were photographed by the police in Exhibits 1 and 2, which were filed by the Crown during the sentencing hearing.

[29] The following firearms and ammunition were seized during the search of 276 Beaverbank Rd. on February 23, 2018:

(a) One 20-gauge sawed-off shotgun (a prohibited firearm) with its serial number obliterated;

(b) One Cooey .22 calibre rifle (a non-restricted firearm);

(c) One loaded semi-automatic Remington .22 calibre rifle (a non-restricted firearm);

(d) One .40 calibre semi-automatic rifle (a non-restricted firearm) with a 30 round capacity cartridge magazine (a prohibited device) along with .40 calibre ammunition for that rifle;

(e) Varying quantities of American Eagle ammunition and Remington ammunition in their boxes as well as other ammunition contained in a Tylenol bottle which contained .22 calibre ammunition were located in various locations in the house.

[30] Police officers located the sawed-off shotgun under the sofa in the living room, while the other 3 firearms were located in the bedroom occupied by Mr. Kyle Rhodenizer. The ammunition contained in the Tylenol bottle was located in the closet of Mr. Kyle Rhodenizer's bedroom, which was also occupied by his girlfriend, Ms. Megan Hann.

[31] Given the location and manner in which the firearms were stored when they were seized by the police, the firearms were stored both unsafely and contrary to the *Storage, Display, Transportation and Handling of Firearms by Individuals Regulations.* There was no dispute between the parties that the "items" seized by the police on February 23, 2018 were "firearms" or "ammunition" within the meaning of sections 2 and 84 of those *Regulations*.

[32] Mr. Kyle Rhodenizer was prohibited from possessing the firearms and ammunition by virtue of a section 109(1) of the **Criminal Code** prohibition order, which was issued by Judge Lenehan on July 25, 2012. A certified copy of the section 109 (1) **Criminal Code** Firearms prohibition order was filed during the sentencing hearing as Exhibit 3.

[33] With respect to the facts surrounding the firearms possessed by Mr. Kyle Rhodenizer, the parties had reached an agreed statement of facts which were read into the record on March 8, 2019. As part of those agreed facts, certain comments attributed to Mr. Rhodenizer in the **Gladue** report were excised. In the amendment of one paragraph, Mr. Rhodenizer stated that he had forgotten that he had placed a shotgun under the couch and that the .22 calibre rifle which he possessed in Lower Sackville, Nova Scotia, was similar to one he had previously used to hunt rabbits with his grandfather.

[34] The second part of the agreed facts which were read into the record on March 8, 2019 confirmed that the guns which were seized by the police in the

Lower Sackville house on February 23, 2018, were obtained by Mr. Rhodenizer after the firearms prohibition order had been made in 2012.

[35] In addition, it was agreed between the parties that the information provided by the National Weapons Enforcement Support Team (NWEST) would be read into the record as part of the background facts to this sentencing decision.

[36] The NWEST information confirmed that the .40 calibre JR carbine rifle had a serial number which was traced in a summary report by the United States Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) as having been shipped from the United States to a business located in Toronto Ontario on May 19, 2014. As a result, Mr. Kyle Rhodenizer could only have obtained possession of that rifle after that time.

[37] Furthermore, the US Bureau of ATF did a trace summary report of the .22 calibre Remington rifle with its serial number which indicated that the rifle had been shipped from the United States to the Cabela's Canada store located in Winnipeg Manitoba on June 12, 2014. Police contact with the Cabela's store in Winnipeg confirmed that the .22 calibre Remington rifle had been purchased by a resident of Shelburne, Nova Scotia on November 26, 2014. Once again, Mr. Kyle Rhodenizer could only have obtained possession of that rifle, subsequent to that date.

[38] With respect to the facts and circumstances in relation to Mr. Kyle Rhodenizer's guilty plea to the included offence of simple possession of cocaine contrary to section 4(1) of the **CDSA**, there was a dispute between the parties with respect to the quantity of cocaine possessed by him.

[39] After some discussions between the parties, the Crown Attorney and Defence counsel agreed that it was not necessary to hold a **Gardiner** hearing to determine the exact quantity of cocaine possessed by Mr. Rhodenizer. The parties jointly submitted, as an agreed fact, that Mr. Kyle Rhodenizer was in simple possession of a "small amount" of the cocaine that was located in the house that he shared with his brother, Steven.

Circumstances of the Offender:

[40] Mr. Kyle Rhodenizer is now 26 years old. The **Gladue** report writer confirmed he is a non-status Mi'kmaq through his mother. His parents divorced when he was 2 years old and his mother raised him, although he has always

maintained regular contact with his father. Ms. Elaine Rhodenizer, the offender's mother, advised the writer of the **Gladue** report that her husband beat her throughout their relationship and that was the reason for their divorce.

[41] While Mr. Rhodenizer was raised by a single mother with limited income, he confirmed that he was not a victim of any type of abuse nor did he witness any substance abuse within the home. However, Ms. Rhodenizer advised the writer of the **Gladue** report that his mother relied on social assistance to raise the children and due to her limited education and work experience, the family was raised in extreme poverty. The poverty made their life difficult and Ms. Rhodenizer said that her neighbours had reported her to Child Protection Services out of concerns that the children were malnourished.

[42] In the **Gladue** report, the writer notes that when Mr. Rhodenizer was about 12 years old, his mother began a second common-law relationship. Ms. Rhodenizer reported that her common-law husband had substance abuse issues and became violent when drinking. The relationship with that man ended after he placed a loaded gun to Mr. Kyle Rhodenizer's head and told him that he was going to shoot him.

[43] Ms. Rhodenizer reported the incident to the police and her common-law husband was arrested. He was released a few days later and returned to his home, resulting in Ms. Rhodenizer and her 2 children moving into a women's shelter until community services could arrange for housing.

[44] At age 15, Mr. Rhodenizer left the family home to reside with his then girlfriend at her parent's house. He stayed there until he received a federal sentence in July 2012 for drug trafficking. After his release from prison in 2014, Mr. Rhodenizer moved into an apartment with a new girlfriend, but about a year later, he was stabbed during an incident. After that, the couple moved in with family friends until he recovered. During that time, Mr. Rhodenizer was prescribed Dilaudid to deal with the pain and ended up developing an addiction to that drug. The drug addiction led to the end of his relationship with that girlfriend.

[45] In 2016, his mother returned to Nova Scotia after living elsewhere for a couple of years and then, Mr. Rhodenizer, his girlfriend, Megan, his mother and his brother Steven moved into a house in Beaverbank, Nova Scotia. Mr. Rhodenizer plans to return to residing with his girlfriend when he is released from prison.

[46] The **Gladue** report notes that Mr. Rhodenizer's maternal grandfather was a violent alcoholic, who caused injury to his mother's eye when she was a child. When Mr. Rhodenizer's mother was 6 years old, the maternal grandfather threw his wife and their 7 children out of their family home. Mr. Rhodenizer's grandmother moved into a residence of a family member and in total, there were 15 people living in a three-bedroom house, with his grandmother and her children sleeping on the living room floor.

[47] Mr. Rhodenizer's mother advised the probation officer that she was not aware of what led her son to drug use and that when he is sober, he is a great person. However, when he is high on drugs, he is hateful. She noted that Mr. Rhodenizer started getting into trouble when he was 16 or 17 years old and then got into harder drugs in his early 20's.

[48] Mr. Rhodenizer's girlfriend has been in a relationship with him for over one year, but has known him for about 6 years. At the time of the offences before the court, she acknowledged that the two of them were heavily involved in drug use and the lifestyle that goes along with it. She noted that since Mr. Rhodenizer has been incarcerated, he has become sober and wants to remain so when he is released.

[49] Mr. Rhodenizer last attended grade 10 when he was 16 years old, but stopped going to school due to difficulties that he was experiencing and by choosing to work instead. He would like to take a barbering course at the community college. His last place of employment was as a lobster fisherman in 2014, but since the stabbing in 2015, he has not been able to work as a fisherman. Mr. Rhodenizer has done some construction work in the past and would like to return to that work after his release from custody. He presently has no source of income, but owes over $30,000 in outstanding fines.

[50] In terms of his health and lifestyle, Mr. Rhodenizer advised the probation officer that his life has been "a blur" from 2015 until 2018. He fell off a ladder while working and has experienced pain ever since. At that time, he was prescribed morphine for the pain and according to him, that is when his drug abuse commenced. He has also been taking medications for nerve pain as well as a sleep aid.

[51] Mr. Rhodenizer advised the writer of the **Gladue** report that he never received any counselling after his mother's common-law husband placed a loaded gun to his head. The incident had a great impact on him and he had nightmares and

no longer felt safe in his home. Mr. Rhodenizer confirmed that he started smoking marijuana and drinking alcohol at age 15 and his drug dependency escalated to crack cocaine and intravenous drug use very quickly.

[52] By age 16, he was no longer receiving prescriptions for opioid medication, so he began purchasing the drug on the street as there was no aftercare program to address his addiction. He advised the **Gladue** report writer that in order to continue to pay for the drugs that he was using, he began selling drugs and was sentenced to a period of incarceration at age 18. Mr. Rhodenizer's mother added, in the **Gladue** report that her son, Kyle gave her money from his drug trafficking to assist with the monthly bills.

[53] Mr. Rhodenizer advised the probation officer that he is presently on a waitlist for the Methadone treatment program. He has already completed the intake program for Siboxin and intends to start taking that drug once he is released from custody. As part of Defence Counsel's recent submissions on sentence, he included Mr. Rhodenizer's certificate of completion for the Substance Abuse Management Program on March 11, 2019 while incarcerated, as part of his plan to address substance abuse issues.

[54] According to the JEIN report attached to the Pre-Sentence Report, Mr. Kyle Rhodenizer's prior adult criminal record starts with a sentence on July 25, 2012 for two charges contrary to section 5(2) **CDSA** for possession of a **CDSA** substance for the purpose of trafficking offences. He received a two-year sentence and a one-year sentence to be served concurrently for those offences. The 10-year firearms prohibition order was one of the ancillary orders made at that time.

[55] In addition, on October 15, 2012, he was sentenced to a total of 15 days in prison for two charges of failing to comply with an undertaking contrary to section 145(5.1) of the **Code**.

[56] On June 19, 2018, he was sentenced on several offences which occurred between November 6, 2017 and February 8, 2018 as part of a sentencing consolidation. Mr. Rhodenizer was sentenced on 3 charges of simple possession of **CDSA** substances contrary to section 4(1) of the **CDSA**, 4 charges of failing to comply with the recognizance or undertaking or failing to attend court contrary to section 145 of the **Criminal Code**, impaired operation of a motor vehicle contrary to section 253(1)(a) of the **Code** and resisting or obstructing a peace officer contrary to section 129(a) of the **Code**. For those offences, taking into account his

enhanced pre-sentence custody credits, two offences were deemed to be concurrently served by his presence in court on June 19, 2018.

[57] In addition, on June 19, 2018, Mr. Rhodenizer was also sentenced for theft under contrary to section 334(b) of the **Criminal Code** which occurred on December 13, 2017. For that offence, he received a suspended sentence and was placed on probation for 12 months.

Gladue Factors:

[58] Mr. Rhodenizer has personally experienced the adverse impact of many factors which continue to plague aboriginal communities across Canada, including:

- substance abuse personally, in the immediate family and among peers;
- family deterioration, separation and absent parents;
- low income and unemployment due to lack of education and substance abuse;
- poverty as well as overt and covert racism;
- domestic violence;
- physical, mental and emotional abuse; and
- prior personal and family involvement in the criminal justice system as well as involvement with Child and Family Services.

Analysis:

[59] In all sentencing decisions, determining a just and appropriate sentence is highly contextual and is necessarily an individualized process which depends upon the circumstances of the offence and the particular offender. The Supreme Court of Canada has stated in **R. v. M (C.A.),** [1996] 1 SCR 500 at paras. 91 and 92 that the determination of a just and appropriate sentence requires the trial judge to do a careful balancing of the societal goals of sentencing against the moral blameworthiness of the offender and the gravity of the offence, while at the same time, taking into account the victim or victims and the needs of and the current conditions in the community.

[60] The fundamental purposes and principles of sentencing are set out in sections 718 to 718.2 of the **Criminal Code**. Section 718 of the **Code** states that

the fundamental purpose of sentencing is to contribute to respect for the law and maintenance of a just, peaceful and safe society by imposing just sanctions that have, as their goal, one or more of the following objectives: denunciation of the unlawful conduct; specific and general deterrence; separation from society where necessary; rehabilitation of the offender; promotion of responsibility in offenders; and acknowledgement of the harm done to victims and to the community.

[61] Section 718.1 of the **Criminal Code** sets out the fundamental principle of proportionality in sentencing. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. In other words, the severity of a sanction for a crime should reflect the seriousness of the criminal conduct. A disproportionate sanction can never be a just sanction.

[62] Pursuant to section 718.2 of the **Criminal Code**, a court that imposes a sentence is required to consider several other sentencing principles in determining the just and appropriate sanction.

[63] Section 718.2(a) of the **Code** requires the court to consider the aggravating and mitigating circumstances which may either increase or reduce the appropriate sentence.

[64] The parity principle found in section 718.2(b) of the **Code** requires the court to consider that the sentence imposed should be similar to sentences imposed on similar offenders for similar offence is committed in similar circumstances. However, Justice Wagner (as he then was) stated in **R. v. Lacasse**, 2015 SCC 64 (Canlii) at paras. 53-54, that the principle of parity is secondary to the fundamental principle of proportionality. He added that proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar fences committed in similar circumstances.

[65] In this case, the Crown Attorney submits that the Court should have, as its primary focus, the specific deterrence of Mr. Rhodenizer and the general deterrence of like-minded individuals as well as denunciation of his unlawful conduct.

[66] Defence Counsel does not take serious issue with those primary purposes. However, he also submits that the court should also focus on the purposes of restraint and efforts towards Mr. Rhodenizer's rehabilitation, given the fact that he is a youthful, aboriginal offender. Defence Counsel also submits that the Court

should consider the principle of totality found in section 718.2(c) of the **Code**, that is, where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.

Aggravating and Mitigating Circumstances:

[67] Section 718.2(a) of the **Criminal Code** requires the court to consider the aggravating and mitigating circumstances which may increase or reduce the sentence imposed by the Court.

[68] I find that the Aggravating Circumstances are as follows:

- Mr. Kyle Rhodenizer unlawfully possessed four (4) firearms, including a prohibited class sawed-off shotgun and a semi-automatic rifle with an expanded capacity magazine, while he was prohibited from possessing any firearms pursuant to a section 109 **Criminal Code** Firearms Prohibition Order;

- Mr. Kyle Rhodenizer's firearms were possessed and carelessly stored in a house where he possessed a small amount of cocaine for personal use and where his brother, Steven Rhodenizer also resided and has admitted to possessing cocaine for the purpose of trafficking. I find that the presence of firearms and a **CDSA** substance in the same residence, is an aggravating factor as it creates a very significant concern for the safety of members of the public safety;

- He has a prior related record for simple possession of **CDSA** substances as well as a prior conviction for possession of a **CDSA** substance for the purpose of trafficking.

[69] I find that the Mitigating Circumstances are as follows:

- Mr. Rhodenizer is a youthful offender who is now only 26 years old;

- Mr. Rhodenizer is an aboriginal offender who has personally experienced and been affected by many **Gladue** factors, which have plagued aboriginal communities, including family breakdown; domestic violence; physical mental and emotional abuse; poverty; prior and personal involvement in the criminal justice system, as well as Child and Family Services;

- He entered a guilty plea, albeit not at the earliest opportunity, but certainly saved a significant amount of court time and relieved the Crown of the burden of proving the charges beyond a reasonable doubt;
- Mr. Rhodenizer has been held in pre-sentence custody since his arrest.

Principle of Proportionality [Section 718.1 Code]:

[70] I find that the gravity or seriousness of Mr. Rhodenizer's firearms offences is high. He has pled guilty to 5 offences of possession of a firearm knowing its possession was unauthorized contrary to section 92(1) of the **Code**. Parliament has indicated the relative seriousness or gravity of those 5 offences, which were prosecuted by indictment, by legislating that he is liable to a maximum term of imprisonment of 10 years for each of those offences. However, it is significant to note that those offences are not subject to a minimum term of imprisonment, in the circumstances of this case.

[71] For the other two offences, which were also prosecuted by indictment, that is, the section 86(1) **Code** offence relating to careless use or storage of firearms contrary to regulations, Mr. Rhodenizer faces a maximum of 2 years in prison, while the section 91(2) **Code** offence, which relates to unauthorized possession of a prohibited weapon, renders him liable to a maximum punishment of 5 years in prison. Once again, those offences are not subject to any minimum term of imprisonment.

[72] While Parliament has determined that the potential penalties for these offences are not subject to life imprisonment or up to 14 years in prison or a minimum term of imprisonment, I find that these charges are objectively serious as Parliament has legislated that an offender may be subject to a maximum sentence of 10 years in prison. As a result, I find that the seriousness or gravity of the majority of the offences for which Mr. Rhodenizer has entered guilty pleas is high, as these are serious offences which have significant impact on the safety and security in the community.

[73] In this case, the background facts which were read into the record on the sentencing hearing as well as the Exhibits filed by the Crown during the review of the background facts, leave no doubt that Mr. Kyle Rhodenizer was in possession of several prohibited weapons while his brother, Steven Rhodenizer possessed cocaine for the purpose of trafficking. In addition, Mr. Kyle Rhodenizer possessed

a small amount of cocaine for his personal consumption in the residence that he shared with his brother.

[74] I find that the gravity of these offences is heightened by the fact that Mr. Kyle Rhodenizer possessed four (4) firearms, including a prohibited class sawed-off shotgun with an obliterated serial number and a semi-automatic rifle with an expanded capacity magazine in the same residence as a person engaged in the trafficking of cocaine, which is a very addictive schedule I **CDSA** substance. In those circumstances, I find that Mr. Kyle Rhodenizer's possession of those prohibited firearms, contrary to an order which had already prohibited him from possessing any firearms, once again, created a very significant public safety concern.

[75] Moreover, given the section 109 **Code** firearms prohibition order for 10 years, I find that none of those firearms could have been legally possessed by Mr. Kyle Rhodenizer in February 2018 for hunting purposes. In those circumstances, I find that his decision to possess those four (4) firearms amounts to a very flagrant disregard of that prohibition order. As a result, I find that his degree of responsibility or moral blameworthiness for the firearms offences, is very high.

The Parity Principle [section 718.2(b) Code]

[76] The parity principle found in section 718.2(b) of the **Code** provides the court with a range of sentences involving similar offenders who have committed similar offences in similar circumstances. The range established by a review of previous appellate and trial decisions, but does not preclude a greater sentence on grounds of denunciation, deterrence or the gravity of the offence, nor does it preclude a lesser sentence because of special circumstances. The range is simply a guideline for trial judges, it is not a hard and fast rule.

[77] During his submissions, the Crown Attorney provided several recent sentencing decisions to support the range of sentences for possession of restricted or prohibited weapons without being the holder of a registration certificate or license contrary to section 92(1) of the **Code.** He submits that the range for those offences is 1 to 2 years of imprisonment. In this case, the Crown Attorney recommends a one-year sentence in prison for three of the section 92(1) **Code** offences which involved non-restricted firearms. He recommends a slightly higher sentence of 18 months for Count 15 with respect to the sawed-off shotgun, which is a prohibited firearm.

[78] Furthermore, the Crown Attorney also provided recent sentencing decisions to establish a range of 4 months to one year for the offence of having possession of firearms and ammunition while prohibited from doing so contrary to section 117.01(1) of the **Code**. Since a prohibition order is specifically aimed at controlling firearms in the community, in this case, the Crown Attorney has recommended a sentence at the higher end of that range given the fact that Mr. Rhodenizer flagrantly contravened that order by possessing four (4) firearms after being prohibited from possessing any firearms for a 10-year period on July 25, 2012.

[79] However, after reviewing the **Gladue** report and taking into account the **Gladue** factors present in this case, the Crown Attorney amended his sentencing recommendation for this offence. For the section 117.01(1) **Code** offence, the Crown Attorney now recommends that a sentence of 6 months consecutive to the other sentences being imposed by the Court would be a just and appropriate sentence for that offence.

[80] Furthermore, the Crown Attorney submits that his sentencing recommendations also take into account the principle of totality from the perspective of which sentences ought to be served consecutive to each other and which ones should be served on a concurrent basis since there is a close nexus between those offences, in order to be seen as part of one continuing criminal operation or transaction.

[81] For those reasons, I agree with the Crown Attorney that the section 86(1) **Code** offence for the careless and unsafe storage of firearms should be served concurrently with all of the sentences imposed by the Court. The Crown Attorney recommends a 6-month sentence to be served concurrently with the other sentences for that section 86(1) **Code** offence.

[82] With respect to the section 92(1) **Code** charges, I agree with the Crown Attorney that they should be served concurrently with each other, but consecutive to the other sentences imposed by the Court.

[83] The Crown Attorney also recommends a sentence of 6 months consecutive to the other sentences being imposed for Count 14, which is a section 91(2) **Code** offence relating to the possession of a prohibited device, being an expanded 30 round magazine without being a holder of a licence.

[84] In support of the Crown Attorney's sentencing position, I have reviewed the recent Nova Scotia cases of **R. v Power**, 2016 NSSC 198, **R.v Crathorne**, 2015 NSPC 1, an unreported decision of Judge Curran in **R. v. Brimicombe** on March 10, 2017 as well as **R. v. Chan**, 2011 NSSC 471. I find that the Crown's sentencing recommendations are within the just and appropriate range of sentences for similar offenders who have committed similar offences in similar circumstances.

[85] In addition, I find that the sentencing recommendations made by the Crown Attorney take into account those offences for which there is a close nexus and where a concurrent sentence would be just and appropriate. I also find that the recommendations for consecutive sentences are consistent with a sentence for an offence that aims to deter and denounce offences committed at different times or places or which involve a delict of a different and distinct nature.

The Totality Principle [Section 718.2(c) Code]:

[86] The Supreme Court of Canada, in **R. v. M. (C.A.),** 1996 Canlii 230 (SCC); [1996] 1 SCR 500 at para. 42 discussed the totality principle as follows:

> 42. In the context of consecutive sentences, this general principle of proportionality expresses itself through the more particular form of the "totality principle." The totality principle, in short, requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. As D.A. Thomas describes the principle in *Principles of Sentencing* (2nd ed. 1979), at page 56:
>
> > The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate sentence is "just and appropriate."

[87] In **R. v. Adams**, 2010 NSCA 42 at paras. 23 and 24, the Nova Scotia Court of Appeal clearly endorsed the Supreme Court of Canada's approach in **C.A.M.** to the application of the totality principle:

> [23] In sentencing multiple offences, this Court has, almost without exception, endorsed an approach to the totality principle consistent with the methodology set out in **C.A.M.**, **supra**. (see for example **R. v. G.O.H.** (1996),

> 148 N.S.R. (2d) 341 (C.A.); **R. v. Dujmovic**, [1990] N.S.J. No. 144 (Q.L.) (C.A.); **R. v. Arc Amusements Ltd.** (1989), 93 N.S.R. (2d) 86 (S.C.A.D.) and **R. v. Best**, 2006 NSCA 116, but contrast **R. v. Hatch** (1979), 31 N.S.R. (2d) 110 (C.A.)). 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. (See for example, **R. v. G.O.H., supra** at para. 4 and **R. v. Best**, **supra**, at paras. 37 and 38).
>
> [24] This Court has addressed and rejected any approach that would suggest that, when sentenced for a collection of offences, the aggregate sentence may not exceed the "normal level" for the most serious of the offences (see **R. v. Markie**, 2009, at paras. 18 to 22, per Hamilton, J.A.).

[88] More recently, in **R. v. Skinner**, 2016 NSCA 54, at para. 41, Justice Saunders succinctly summarized the sequential steps to follow when sentencing an offender for multiple offences. Saunders JA confirmed that in **Adams**, *supra*, the Court had directed that when sentencing for multiple offences, sentencing judges should proceed in the following order:

- Fix a sentence for each offence;
- Determine which should be consecutive and which, if any, concurrent;
- Take a final look at the aggregate sentence; and
- Only if the total exceeds what would be a just and appropriate sentence, is the overall sentence reduced.

[89] In **Skinner**, *supra*, at para. 42, Saunders JA added that the sequence outlined above had been mandated in **Adams,** *supra*, at para. 23, but he noted further, and in any event, the Nova Scotia Court of Appeal has "always cautioned against a slavish, mathematical and formulaic approach to sentencing for multiple offences."

[90] In looking at the sequential steps to follow when sentencing an offender for multiple offences as outlined by our Court of Appeal in **Skinner**, *supra*, I find that the Crown Attorney has recommended a just and appropriate sentence for each of the offences outlined above. I also find that the sentences which were recommended to be served on a concurrent basis do take into account the closeness of the nexus between the time and place of those offences or that they were part of one criminal operation or transaction.

[91] In those circumstances, I find that the sentences which were recommended by the Crown Attorney to be on a consecutive or concurrent basis are certainly within a just and appropriate range of sentences for these offences. Furthermore, I find that the Crown Attorney's sentencing recommendations are just and appropriate when I consider the principle of totality and that, the total aggregate sentence ought not to be unduly long or harsh.

[92] Defence Counsel does not take issue with the Crown Attorney's recommendation as to which offences should be served on a concurrent or a consecutive basis. However, Defence Counsel submits that the length of each individual sentence as recommended by the Crown Attorney should be reduced to take into account the fact that Mr. Kyle Rhodenizer will have served as of May 1, 2019, actual custody of 432 days. It is the position of the Defence that the Court must also consider when Mr. Rhodenizer's enhanced pre-custody credits are calculated at the rate of 1.5 days for each one day served, he will have a total pre-sentence custody credit of 648 days.

[93] The position of the defence is that the total sentence recommended by the Crown for the offences amounts to 30 months in prison and a sentence of that length is not necessary to achieve the purposes of specific deterrence, general deterrence or denunciation of the unlawful conduct. Defence Counsel submits that the 648 days of enhanced presentence custody credits, which roughly equates to 21 ½ months of imprisonment would be a just and appropriate sentence in all the circumstances of this case. In that event, Defence Counsel recommends that those presentence custody credits when coupled with Mr. Kyle Rhodenizer's appearance in court on May 1, 2019, is a just and appropriate sentence, which ought to be deemed served by his presence in court.

[94] As I have indicated previously, I find that the Crown Attorney has recommended a just and appropriate sentence for each one of the offences in terms of the parity principle, as well as the principle of totality. When I consider the fundamental principle of proportionality in sentencing, I also find that the Crown Attorney's sentencing recommendations are more in line with what I have found to be Mr. Kyle Rhodenizer's very high moral blameworthiness or degree of responsibility as well as the high gravity or seriousness of the firearms offences which were committed by him.

[95] As indicated previously, I find that people who possess firearms of this nature, including a sawed-off shotgun, which is a prohibited firearm and a

semiautomatic rifle equipped with a prohibited device, namely a 30 round capacity cartridge magazine, which is a prohibited device, have done so for the purpose of dealing with other humans. Firearms of that nature are not used for hunting or other sport. Unfortunately, in this community, there are far too many incidents where the safety and security of the community is shattered by people firing bullets at houses, cars or people on the street, to intimidate targeted individuals, cause property damage or injury to those individuals or innocent bystanders and from time to time, the death of a person.

[96] In this case, Mr. Rhodenizer was in possession of the above-noted firearms, but he also had possession of non-restricted firearms – one being a loaded semi-automatic Remington .22 calibre rifle - with various types of ammunition for those firearms located in different places in his residence, in other words, readily available to be loaded into one or more of those weapons at a moment's notice. His possession of all of those firearms in the circumstances of this case was, in my opinion, designed to amass an arsenal which would, if necessary, be produced to intimidate or confront others.

[97] Moreover, when I consider that four (4) firearms were possessed by Mr. Kyle Rhodenizer after he was prohibited from possessing any firearm, effective July 25, 2012 for a period of 10 years, I find it is not only a flagrant disregard for that prohibition order, but once again, leads me to conclude that those firearms were possessed as weapons for the purpose of dealing with other humans.

[98] For those reasons, when I consider the purpose and principles of sentencing set out in section 718 of the **Code**, I find that this sentencing decision must emphasize that the fundamental purpose of sentencing is to protect society, to contribute to respect for the law and the maintenance of a "just, peaceful and safe society" by imposing just sanctions. In this case, I find that the primary emphasis in this sentencing decision is the specific deterrence of Mr. Kyle Rhodenizer and the general deterrence of other like-minded individuals by clearly and unequivocally denouncing his unlawful conduct.

[99] While I acknowledge that Mr. Rhodenizer has, as of today's date, effectively spent a total of 648 days in pre-sentence custody which is roughly equivalent to 21 ½ months, as I indicated previously, I find that the Crown Attorney's revised sentencing recommendations which took into account the **Gladue** factors, represents a just and appropriate sanction in all the circumstances of this case. When I consider the fundamental principle of proportionality in sentencing and the

parity principle, I find that it is necessary to continue to separate Mr. Rhodenizer from society.

[100] As indicated previously, I have found that the Crown Attorney sentencing recommendations of 30 months in total was within the range of a just and appropriate sentence for the **Criminal Code** offences. Therefore, in accordance for the framework established for dealing with a sentencing decision involving multiple offences, I will summarize the sentence to be ordered for each offence and whether it is to be served concurrently with other offences or consecutive to other offences:

> Count 1 - unlawful and careless storage of firearms - section 86(1) of the Code – 6 months concurrent;
> Count 14 - possession of a prohibited class magazine - section 91 (2) of the **Code** – 6 months consecutive;
> Count 15 - possession of a prohibited firearm [sawed-off shotgun] - section 92 (1) **Code** – 18 months consecutive to the other offences;
> Count 16 - possession of the .22 calibre Cooey rifle - section 92(1) **Code** - 12 months concurrent;
> Count 17 - possession of the Remington .22 calibre rifle - section 92(1) **Code** - 12 months concurrent;
> Count 18 - possession of the .40 calibre semi-automatic rifle - section 92 (1) **Code** - 12 months concurrent;
> Count 22 - possession of firearms and ammunition while prohibited by an order of prohibition - section 117.01(1) **Code** - 6 months consecutive to the other sentences.

[101] Therefore, for the offences in relation to those Counts in the Information which involved the **Criminal Code** offences, I find that the total period of incarceration shall be 30 months.

[102] In addition to the Provincial Crown Attorney's recommendation with respect to the **Criminal Code** offences, it must also be remembered that there was a joint recommendation made by the Crown Attorney representing the Public Prosecution Service of Canada and Defence Counsel for a sentence of 10 days in prison for the section 4(1) **CDSA** offence of simple possession of cocaine. I agree with that joint recommendation and will order a period of 10 days to be served consecutive to the total sentence of 30 months which the Court has imposed for the above-noted 7 **Criminal Code** offences.

[103] If I consider the 30-month sentence is in reality 2½ year sentence and calculate that sentence in days, I find that it would amount to a total of 912 days. When I add the jointly recommended 10-day sentence to be served on a consecutive basis for the section 4(1) **CDSA** offence, then the total number of days of imprisonment that the Court has ordered would be 922 days in prison.

[104] As the Nova Scotia Court of Appeal has clearly pointed out the last step with the process when the trial judge is determining the "just and appropriate" sanction for multiple offences, requires the judge to then take a "last or final look" at the total sentence, to ensure that it is not unduly long or harsh.

[105] In taking that "last or final look," the judge should consider what he or she has previously determined in the earlier analysis of the fit sentence for the most serious of the offences. In doing so, the judge may conclude that the total sentence for the most serious of the offences is broadly commensurate with the overall gravity of the offences and the offender's moral culpability. Then, if some adjustment is necessary, the judge may make adjustments to the length of the consecutive sentences as s.718.2(c) of the **Code** stipulates that "(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh."

[106] In taking that "last look" at the totality of consecutive sentences imposed, I find that the total sentence is commensurate with the overall gravity of the 7 offences and reflects the very high moral culpability of the offender. In accepting the Crown Attorney's recommendations relating to which of those sentences ought to be served concurrently and which ought to be served on a consecutive basis to the other sentences, I cannot conclude that the total sentence is unduly long or harsh or crushing any realistic prospects of rehabilitation for Mr. Kyle Rhodenizer.

[107] Section 718.2(e) of the **Code** imposes a statutory duty on a sentencing judge to consider the unique circumstances of aboriginal offenders. The procedure for considering **Gladue** factors in sentencing was addressed by the Supreme Court of Canada in **R. v. Ipeelee**, 2012 SCC 13 (CanLii) at para. 60:

> "To be clear, court must take judicial notice of such matters as the history of colonialism, displacement, residential schools and how that history continues to translate to lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they

> provide the necessary *context* for understanding and evaluating the case specific information presented by counsel." (Emphasis in original text)

[108] As indicated previously, the Crown Attorney initially recommended a total sentence of 36 months, which, in my opinion, could have also been considered a just and appropriate sanction based upon my analysis of the fundamental principle of proportionality in sentencing and the parity principle as being a similar sentence imposed on similar offenders who had committed similar offences in similar circumstances. However, when the **Gladue** report was prepared, the Crown Attorney revised his sentencing position to recommend a total sentence of 30 months taking into account several **Gladue** factors which, in all likelihood, contributed to Mr. Kyle Rhodenizer's involvement in this criminal activity.

[109] Given that fact, I find that the Crown Attorney made reasonable recommendations as to which sentences should be served concurrently and others which ought to be served consecutively. In those circumstances, I find that ordering several sentences to be served on a concurrent basis and others, for the reasons outlined above, on a consecutive basis, has had a significant impact on the totality of the sentence imposed by the Court. Moreover, I find that the Crown Attorney's revised sentencing recommendations which took into account several **Gladue** factors present in this case and reflect the particular attention to the circumstances of aboriginal offenders. For all of those reasons, I find that the total sentence of 30 months is a "just and appropriate" sanction without making any further adjustments on this "last look" at the total sentence.

[110] In the sentencing of multiple offences, the Court of Appeal has indicated that the final step for the trial judge to determine, once the Court has concluded what the global sentence will be, the Court should deduct any pre-sentence custody credits from that total to reach the final "go forward" sentencing decision.

[111] In order to determine that final "go forward" sentence, as I have indicated previously, given the number of actual days of pre-sentence custody served by Mr. Kyle Rhodenizer together with enhanced credit at 1½ days for each day of pre-sentence custody, I find that he has earned a total enhanced pre-sentence custody credit of 648 days. Therefore, when I deduct the pre-sentence custody credits from the total sentence of 922 days, I find that the "go forward" sentence which I hereby order Mr. Kyle Rhodenizer to serve, is an additional 274 days which is roughly equivalent to 9 months in prison.

[112] I hereby order the ancillary orders requested by the Crown Attorney, namely, a DNA (secondary designated offence) order pursuant to section 487.051 of the **Code** as well as a section 109 **Code** firearms prohibition order for life and a section 491 **Code** order for forfeiture of the weapons and ammunition to Her Majesty.

Theodore Tax, JPC