

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Robicheau*, 2021 NSPC 62

Date: 20211222

Docket: 8495704, 8495704, 8495706, 8495707, 8495708,
8495709, 8495710, 8495711, 8495712, 8495713

Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Raphael Robicheau

Judge:	The Honourable Judge Theodore Tax,
Heard:	December 7, 2021, in Dartmouth, Nova Scotia
Decision	December 22, 2021
Charge:	Section 86(1), 90(1), 91(1), 92(1), 94(1), 145(5)(a), x2, 117.01(1), 355(b) and 95(1) of the Criminal Code of Canada
Counsel:	Tiffany Thorne, for the Nova Scotia Public Prosecution Service Drew Rogers for the Counsel for the Defence, Nova Scotia Legal Aid

By the Court:

Introduction:

[1] Mr. Raphael Robicheau has entered guilty pleas to six firearms offences contrary to sections 86(1), 90(1), 92(1), 94(1), 117.01(1) and 95(1) of the **Criminal Code**. Those offences are alleged to have occurred on or about January 1, 2021, at or near Dartmouth, Nova Scotia. The Crown proceeded by indictment on all charges.

[2] The six offences for which guilty pleas have been entered relate to: (1) the carrying or handling of a restricted weapon, to wit, a handgun in a careless manner or without reasonable precaution for the safety of other persons, (2) carrying a firearm which was concealed while not authorized under the **Firearms Act** to carry it concealed, (3) possessing a restricted firearm without being the holder of a registration certificate for that firearm, (4) being the occupant of a motor vehicle in which he knew there was a firearm, (5) having possession of a firearm while prohibited from doing so by an Order of Release and (6) possessing a loaded prohibited or restricted firearm or possession of an unloaded prohibited or restricted firearm together with readily accessible ammunition that was capable of being discharged without being the holder of a registration certificate for that firearm.

Positions of the Parties:

[3] The Crown Attorney and Defence Counsel agree that, as a result of the Supreme Court of Canada decision in **R v. Nur**, 2015 SCC 15, the Court is not bound by the 3-year mandatory minimum sentence stipulated in section 95(2)(a) of the **Criminal Code** as it violates section 12 of the **Charter** and has been declared to be of no force and effect under section 52 of the **Constitution Act, 1982**. They are also both in agreement, in making their sentencing submissions with respect to Mr. Robicheau that this is a “highly unusual” case.

[4] Mr. Robicheau had entered relatively early guilty pleas to the charges before the Court, however, the sentencing hearing was adjourned as there was a dispute between the parties with respect to potentially aggravating circumstances. The

Court scheduled a date for a **Gardiner** hearing, however, just prior to that date, the parties resolved the disputed issues.

[5] The Crown Attorney submits that considering the unusual, but very dangerous circumstances in which Mr. Robicheau had possession of a handgun with readily accessible ammunition and the other offences, the Court must emphasize specific and general deterrence as well as the denunciation of the unlawful conduct. Although there are several mitigating circumstances in this case, there are some particularly aggravating circumstances, and the offences are very serious and Mr. Robicheau's degree of responsibility for the offences is also very high, which militate in favour of a significant sentence of imprisonment. The Crown Attorney recommends a sentence of three years of imprisonment, less remand credit and seeks a DNA order and a section 109 **Code** firearms prohibition order.

[6] Defence Counsel submits that his 35-year-old client has a very limited and unrelated criminal record, there are several mitigating circumstances and points out that the Crown has acknowledged, in not proceeding with the **Gardiner** hearing, that they could not establish other potential aggravating circumstances beyond a reasonable doubt, pursuant to section 724(3)(e) of the **Criminal Code**. He takes the position, based upon sentencing precedents provided to the Court, that in some circumstances, the offender has been sentenced to community-based dispositions or shorter terms of imprisonment for firearms offences.

[7] Defence Counsel acknowledges that Mr. Robicheau did have possession of a handgun while he was in the custody of the Deputy Sheriffs and being transferred to the Central Nova Scotia Correctional Facility in a Sheriff's van. However, despite those "highly unusual" circumstances, he submits there was no indication that Mr. Robicheau ever intended to use the firearm. In fact, both counsel have noted in their submissions that, upon their review of the surveillance video of the compartments at the back of the Sheriff's van, Mr. Robicheau actually removed the clip from the loaded handgun, then removed the ammunition from the clip and placed it in a location where it was not readily accessible.

[8] It is the position of the defence that, in considering the "total context" of the circumstances of the offences and several mitigating circumstances, the just and appropriate sentence would be a prison sentence equal to the "time served" to date and going forward a period of probation to be determined by the Court. Defence Counsel submits that the Court should also consider the fact that Mr. Robicheau

has already spent the equivalent of 14½ months in custody, especially under the limited opportunities for programming due to the Covid-19 restrictions which have been in place at the jail. He does not take issue with the ancillary orders sought by the Crown.

Circumstances of the Offences:

[9] On Friday, January 1, 2021, Nova Scotia Deputy Sheriffs drove a Sheriff's van to Digby, Nova Scotia to pick up two individuals who had recently been arrested by the police, to be transported and held at the Central Nova Scotia Correctional Facility in Burnside, Nova Scotia. Mr. Rafael Robicheau was one of the two individuals who had been remanded into custody for the weekend and he was taken to the Digby RCMP detachment to be turned over to Deputy Sheriffs for transportation to the Burnside jail.

[10] During the sentencing hearing, the Crown Attorney filed 9 photographs [Exhibit 1] which show the back compartments of the Sheriff's van, an indented space which appears to be a padlocked door between the two compartments which was where the handgun was discovered, wedged in that indented space/door between the two compartments. There are also photographs of the firearm after it was removed from that indented space, the firearm out of its holster, and the magazine removed, plus pictures of an empty magazine and bullets which had been placed in those holes along the bottom of the wall separating the two compartments at the back of the Sheriff's van. Mr. Robicheau was the only person placed in the compartment where the handgun and ammunition were located by Deputy Sheriffs.

[11] The Crown Attorney advised the Court that Mr. Robicheau and another individual were picked up at the Digby RCMP detachment by the Deputy Sheriffs. Mr. Robicheau was placed in the compartment at the rear of the passenger side of the Sheriff's van at about 2:18 PM on January 1, 2021. After leaving Digby, the Deputy Sheriffs stopped at 2:55 PM at the Bridgetown RCMP detachment to conduct a search for contraband. At that location, the Deputy Sheriffs conducted a "loose pat down search" of the two individuals being transported to the Burnside jail. After that pat down search, at 3:01 PM, Mr. Robicheau and the other individual were returned to the same compartments that they had earlier occupied, and the Deputy Sheriffs proceeded to the Burnside jail.

[12] The Crown Attorney indicated that, according to video surveillance of the rear compartment in the Sheriff's van, between 3:34 PM and 3:36 PM, Mr.

Robicheau could be seen placing a black object in the indented space/door of the metal wall separating the two compartments at the rear of the Sheriff's van. In addition, between 3:39 PM and 3:49 PM, the video surveillance of Mr. Robicheau's compartment showed him hunched over the vents at the bottom of the metal wall where the ammunition was eventually located. The video also showed him adjusting a black object in the indented space/door in the metal wall between the two compartments at the rear of the Sheriff's van.

[13] At 5:07 PM on Friday, January 1, 2021, the Deputy Sheriffs arrived at the Central Nova Scotia Correctional Facility in Burnside and turned over custody of Mr. Robicheau and the other individual to correctional staff at the jail. Shortly after leaving the Burnside jail to return to Digby, Nova Scotia, the Deputy Sheriffs received a call from a correctional officer at the jail. The Deputy Sheriffs were informed that the other individual who had been in the Sheriff's van with Mr. Robicheau had advised them that there was a handgun in the compartment where Mr. Robicheau had been placed. After receiving that information, the Deputy Sheriffs immediately stopped their van and conducted a search of the compartment where Mr. Robicheau had been placed. They located a handgun in that indented space in the metal wall separating the two compartments.

[14] There is no dispute between the parties that the firearm, which was located by the Deputy Sheriffs in the compartment where Mr. Robicheau had been placed and was the sole occupant, was a 45 calibre Sig Sauer handgun. The handgun had an empty magazine, however, there were 10 bullets of the calibre that would fit in the magazine for that handgun located in the holes at the bottom of the metal wall which separated the two compartments at the back of the Sheriff's van.

[15] The firearm was sent to a laboratory for testing, and it was confirmed to be a "restricted firearm" according to the **Criminal Code**. In addition, the forensic lab also obtained and tested five of the cartridges which were located near the handgun, and it was confirmed that those bullets were "ammunition" in accordance with section 84 of the **Criminal Code** which were designed for use in that Sig Sauer handgun.

[16] In addition, swabs taken from the handgun, the holster and the ammunition for DNA analysis established that Mr. Robicheau's DNA was located on the handgun as well as its holster, but insufficient data could be obtained to conduct a DNA analysis of the cartridges.

[17] Finally, although Mr. Robicheau had a non-restricted firearms licence, he had been placed on a Release Order, pursuant to section 515 of the **Criminal Code** on May 25, 2020, as varied on July 27, 2020. The terms and conditions of that Order prohibited him from possessing any firearms. As a result, the Crown Attorney pointed out that those facts and circumstances established the offence contrary to section 117.01(1) of the **Criminal Code**.

[18] The Sig Sauer handgun was eventually identified by the police as having been stolen during a break and enter at a location in Meteghan, Nova Scotia in March 2020. The police were able to identify the legal owner of that firearm.

[19] Defence Counsel does not dispute any of the facts and circumstances which were related to the Court by the Crown Attorney. However, to provide some additional background to the facts and circumstances of this case, he indicated that Mr. Robicheau was subject to a Release Order which contained a curfew clause. An RCMP officer attended at his residence to conduct a curfew compliance check and determined that Mr. Robicheau was not in his residence as required at that time. While the officer was still on scene, Mr. Robicheau arrived at the house after the designated curfew time and was immediately arrested for breach of that curfew condition on January 1, 2021. The police officer transported Mr. Robicheau to the Digby RCMP detachment where he was held until the Deputy Sheriffs transported him to the Burnside jail.

[20] On January 4, 2021, Mr. Robicheau was released from custody on the charge of breach of the curfew, which was a condition in the May 25, 2020 Release Order. He was subsequently arrested on February 23, 2021, and formally charged with the 10 **Criminal Code** offences before the court when this Information was sworn on February 24, 2021. The parties agree that from February 24, 2021 to December 7, 2021, when they made their sentencing submissions in court, Mr. Robicheau had been in custody for a total of 288 days. They also agree that with an enhanced credit of 1½ days for each day of pre-sentence custody served, he has now served the equivalent of 432 days in custody, which equals about 14½ months in jail.

Circumstances of the Offender

[21] Defence Counsel advised the Court that Mr. Robicheau is 35 years old and resides in the Plymouth/Ashmore area of Nova Scotia.

[22] At the request of Defence Counsel, who wished to proceed with the sentencing hearing shortly after the entry of the guilty pleas by his client, neither

the Crown Attorney nor the Court requested the preparation of a Pre-Sentence Report. Defence Counsel indicated that he would provide the information relating to the personal circumstances of the offender. In addition to some background information provided by Defence Counsel, he filed five character reference letters, which had been prepared by friends and family of Mr. Robicheau.

[23] Mr. Robicheau's mother indicated that she and her husband had raised their son in a stable, happy, and loving household. Unfortunately, her husband suddenly and unexpectedly passed away when Mr. Robicheau was 10 years old, and she noted that it had a profound effect on him. However, she was greatly assisted in raising Mr. Robicheau and his brother by their extended family who lived nearby as well as many friends in the community. She indicated that her son is a "good person" with the potential to do well.

[24] The manager of Riverside Lobster International Inc. (Us Four Fisheries Limited) indicated that he has known Mr. Robicheau personally since he was a young boy as well as an employee at his business. Although, the plant manager did not indicate how long Mr. Robicheau had worked at that business, he noted that the offender got along very well with his coworkers, contributed to the team aspect of the job and always did his job without hesitation in a cheerful manner.

[25] A similar employment reference was provided by the manager of Cape Shellfish Inc. who indicated that he has known Mr. Robicheau for the last 23 years, on a personal level as well as his employer. The reference letter did not indicate how long Mr. Robicheau had worked for that employer, but the author indicated that, on a personal level, he is a kind and caring person who is always willing to help a friend or family member. As the employer, he stated that Mr. Robicheau was always efficient in completing assigned tasks and had a good relationship with his fellow employees.

[26] The final reference letter was from a woman who has known Mr. Robicheau for the last 16 years. They met at Us Four Fisheries where they worked together, with her being a quality control manager and having a supervisory role. She said that the offender was a good worker and willing to learn new duties, and they remained friends after the offender left that employment. About two years ago, she separated from her husband and Mr. Robicheau offered her a place to stay. Mr. Robicheau has been very supportive and that has had a positive effect on her confidence, which gave her strength to secure new job. She added that, for the last 17 months, she and the offender have been romantically involved.

[27] Mr. Robicheau does have a limited prior criminal record which consists of four recent offences of failing to comply with a condition in a Release Order contrary to section 145(5)(a) of the **Criminal Code** which occurred on May 24, 2020, between May 25 and May 29, 2020, on September 27, 2020, and on December 31, 2020. Those offences as well as a resist/obstruct a peace officer contrary to section 129(a) of the **Criminal Code** were dealt with by the Court on May 17, 2021, with the sentence imposed to have been deemed to be “time served” based upon remand credits.

Purposes and Principles of Sentencing

[28] The fundamental purpose of sentencing stated in section 718 of the **Criminal Code** is to protect society and to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions. The imposition of just sanctions requires the Court to consider one or more of the sentencing objectives set out in section 718 of the **Code**. Those objectives are denunciation of the unlawful conduct, specific and general deterrence, rehabilitation of the offender, separating offenders from society, where necessary, providing reparations for harm done to victims and promoting a sense of responsibility in the offender.

[29] The Crown Attorney submits that specific and general deterrence as well as clear denunciation of Mr. Robicheau’s unlawful conduct should be the primary purposes considered by the Court in the imposition of a just sanction. She acknowledges that following a period of incarceration, a just sanction should include measures to assist in rehabilitating the offender.

[30] For his part, Defence Counsel does not take serious issue with those primary sentencing purposes, but submits that, given the length of Mr. Robicheau’s pre-sentence custody, specific and general deterrence has been accomplished by that period of custody and there is no need to continue to separate him from society. Therefore, a just sanction should focus on assisting in his rehabilitation and promoting a sense of responsibility in the offender.

[31] The fundamental principles of sentencing to be applied by the Court in sentencing decisions, are set out in sections 718.1 and 718.2 of the **Code**.

The Principle of Proportionality – Section 718.1 Code

[32] The principle of proportionality is the fundamental or cardinal principle in considering the fitness of the sentence imposed on an offender. The principle set out in section 718.1 of the **Criminal Code** states that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Put another way, the imposition of a just and appropriate sentence should not be disproportionate to the gravity or seriousness of the consequences of the offence and the offender's degree of responsibility or moral blameworthiness.

[33] The gravity of the offence is primarily determined at the time when the offence was committed and is informed by a range of sentence – both minimum and maximum – provided for by Parliament in the **Criminal Code**. Similarly, the degree of responsibility or moral blameworthiness of the offender is primarily informed by the circumstances existing at the time of the offence. Subsequent events such as remorse or rehabilitation, do not inform the moral blameworthiness or degree of responsibility of the offender but their presence or absence may be considered as aggravating or mitigating circumstances in determining the just and appropriate sentence for the offender.

[34] In terms of the gravity of these offences, I find that the Parliament has determined that, where the Crown has proceeded by indictment, the section 95(1) **Code** offence of possessing a loaded prohibited or restricted firearm or an unloaded prohibited or restricted firearm with readily accessible ammunition capable of being discharged without being the holder of an authorization or licence, is a very serious offence for which Mr. Robicheau has pled guilty. In that circumstance, the maximum term of imprisonment for which an offender could be liable is 10 years in prison, with a minimum punishment of imprisonment for term of three years for a first offence.

[35] However, as mentioned, in **R v. Nur**, *supra*, although the Supreme Court of Canada struck down that mandatory three-year minimum sentence, the Court also noted at para. 13:

“[13] A review of the firearms offences in the **Criminal Code** reveals that section 95 carries a more serious penalty than any other simple possession offence. The mandatory minimum terms of imprisonment found in section 95 reflect two aggravating factors. It applies to prohibited and restricted firearms, which present the most significant danger to public safety. It only applies if the firearm is loaded and if ammunition for the firearm is readily available.”

[36] In terms of the objective gravity or seriousness of the offences for which Mr. Robicheau has entered guilty pleas, it should also be noted that the offence of possession of a weapon for a dangerous purpose contrary to section 88(1) of the **Code** as well as the offence contrary to section 94(1) **Code** of having unauthorized possession of a restricted or prohibited firearm in a motor vehicle where the Crown has proceeded by indictment are also subject to a maximum term of imprisonment of 10 years, but they do not have a minimum term of imprisonment. Likewise, the offence of possession of a prohibited or restricted firearm knowing its possession is unauthorized without having a license to do so contrary to section 92(1) **Code** is an indictable offence and subject to a maximum term of imprisonment of 10 years, but that offence does not have a minimum term of imprisonment for a first offence.

[37] Therefore, when I consider that Mr. Robicheau has pled guilty and accepted responsibility for four very serious unauthorized possession of prohibited or restricted firearms, without being the holder of a licence to do so, in the circumstances where that possession was in a motor vehicle, which happened to be the Sheriff's transportation van, there can be no doubt that the objective gravity or seriousness of those offences is very high.

[38] As mentioned, degree of responsibility or moral blameworthiness of Mr. Robicheau is primarily informed by the circumstances existing at the time of the offence. In this regard, it is important to note that the Crown has acknowledged that they could not establish that Mr. Robicheau had any involvement in the theft of the firearm prior to him being in possession of the firearm, in the Sheriff's van, on the date in question.

[39] Furthermore, the Crown acknowledged that they could not establish that Mr. Robicheau had concealed the firearm somewhere on him before being placed into his compartment at the back of the Sheriff's transportation van. As a result, it is possible that the firearm may have been left in the rear of the van during the transportation of a previous prisoner, without the Deputy Sheriffs noticing the firearm when they placed Mr. Robicheau in that compartment.

[40] While there is agreement that certain aggravating factors could not be established beyond a reasonable doubt, I find that the facts and circumstances of these offences established that, while being transported to the Burnside jail, Mr. Robicheau did take possession of the firearm. There is no dispute between the parties that the video surveillance evidence referred to by the Crown Attorney confirmed that Mr. Robicheau possessed and handled that firearm while being

transported to the Burnside jail in the HRM and while he was subject to a court order which prohibited him from possessing any firearm.

[41] In those circumstances, Mr. Robicheau's possession and handling of that firearm would certainly indicate a very high degree of responsibility and moral blameworthiness. However, it is also significant to note that the Crown Attorney acknowledged that while Mr. Robicheau was seen to be handling the firearm, a subsequent search of the van verified that he had removed the clip from the firearm, then removed the ammunition from the clip and placed the bullets in a location where they were no longer readily accessible.

[42] When I consider this final aspect of the facts and circumstances of this case, I find that Mr. Robicheau's moral blameworthiness and his degree of responsibility should be attenuated as his actions are certainly consistent with Defence Counsel's submission that they indicate an absence of any intention to use that firearm while being transported or upon arrival at the Burnside jail. In fact, the firearm was left in the indented, locked door located between the two compartments at the back of the Sheriff's van, when Mr. Robicheau exited from the van at the Correctional Centre.

[43] In **R. v. C.A.M.**, [1996] SCJ No 28 at para. 91, Chief Justice Lamer stated that the determination of a just and appropriate sentence is a delicate art which attempts to carefully balance the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times, taking into account the needs and current conditions of and in the community.

[44] The Supreme Court of Canada also stated in **C.A.M.**, *supra*, at para. 92, that there is no such thing as a uniform sentence for a particular crime and that sentencing is a highly contextual and an inherently individualized process. While there is a principle of parity that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances, it may be as a "fruitless exercise" to locate those similar situations, given the unique circumstances of the offender and the offence itself in a highly and inherently individualized process.

[45] In **R. v. Suter**, 2018 SCC 34 at para. 4, the Supreme Court of Canada reiterated that sentencing is "a highly individualized process." A delicate balancing of various sentencing principles and objectives is called for, in line with the overriding principle that a "sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."

[46] In **R. v. Lacasse**, 2015 SCC 64 (Canlii), Justice Wagner (as he then was) of the Supreme Court of Canada speaking for the majority, reiterated the very delicate nature and balancing required by a judge in making a sentencing decision:

“[1] Sentencing remains one of the most delicate stages of the criminal justice process in Canada. Although this task is governed by ss. 718 et seq. of the **Criminal Code** RSC 1985, c. C-46, and although the objectives set out in those sections guide the court and are clearly defined, it nonetheless involves, by definition, the exercise of a broad discretion by the courts in balancing all the relevant factors in order to meet the objectives being pursued in sentencing.”

[47] Furthermore, in **Lacasse**, *supra*, at paras. 53-54, Wagner J. pointed out that the determination of a fit sentence requires that the sentencing Judge to consider and properly weigh the sentencing purposes, proportionality and the other sentencing principles set out in section 718.2 of the **Code**. Justice Wagner observed that their relative importance will necessarily vary with the nature of the crime and the circumstances in which it was committed. However, Wagner J, concluded that the principle of parity of sentences is secondary to the fundamental principle of proportionality found in section 718.1 of the **Code**, since a sentence must be “proportionate to the gravity of the offence and the degree of responsibility of the offender.”

[48] Justice Wagner added, in **Lacasse**, *supra*, at para. 53, 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 offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate: sections 718.2(a) and (b) of the **Criminal Code**.

Aggravating and Mitigating Circumstances:

[49] The sentencing principle contained in section 718.2(a) of the **Code** requires the Court to consider that the sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or to the offender.

[50] I find that the Aggravating Circumstances are:

- The possession of the restricted firearm which was either loaded with ammunition or its ammunition was close by, in the Deputy Sheriff’s van by

the offender which presented a real risk of serious injury to the Deputy Sheriffs or any other police or correctional officers who interacted with the offender;

- The offender actively made efforts to conceal the restricted firearm in the compartment at the back of the Sheriff's transportation van so that it could not be located during the cursory search of him or of that compartment;
- The offender possessed and then concealed the restricted firearm while he was prohibited from doing so by a court order.

[51] I find that the Mitigating Circumstances are:

- Mr. Robicheau entered a relatively early guilty plea and he has accepted full responsibility for the offences;
- Mr. Robicheau has excellent character references that show him to be a kind and caring person who has strong support from family and members of the community;
- Mr. Robicheau's employers who have known him for over 20 years have noted his work ethic, his genial personality and willingness to help others in the community or working in a team environment;
- Mr. Robicheau has the full support of his partner with whom he has lived for the past 17 months, and she has highlighted his personal qualities of helping others, being always supportive to her and members of the community;
- Although not being a youthful first-time offender, Mr. Robicheau is in his mid-30s and only has a limited number of recent convictions, primarily for breaches of court orders.

[52] In highlighting those aggravating and mitigating circumstances, it is important to note, as mentioned previously, the Crown had initially considered holding a **Gardiner** hearing in relation to potential aggravating circumstances. As a result of not proceeding with that hearing, the Crown Attorney pointed out that the following circumstances are **not** to be considered as aggravating circumstances:

- (a) The Crown conceded that they could not prove, beyond a reasonable doubt that Mr. Robicheau knew or had any involvement in the break and enter of the location from which the restricted firearm was stolen.
- (b) The Crown Attorney also confirmed that they could not prove beyond a reasonable doubt that Mr. Robicheau brought a loaded firearm, concealed somewhere on him, into the compartment of the Sheriff's van where he was placed by the Deputy Sheriffs.

The Just and Appropriate Sentence

[53] As mentioned previously, I find that the gravity or seriousness of these offences is very high considering the potential for violence, serious injury or death that may result from the possession of a loaded firearm, which, in this case, was also a restricted firearm and, especially in the circumstances and location where Mr. Robicheau was in possession of that firearm.

[54] As I indicated previously, the parity principle which is found in section 718.2(b) of the **Code** requires the court to consider that a sentence imposed should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. A review of the sentencing precedents provided by counsel or reviewed by the Court may be considered to establish a range of sentence, as a guideline for the trial judge. The range of sentences imposed by courts in those other situations, do not, however, create any hard and fast rules as to the just and appropriate sentence. Similarly, the consideration of an appropriate range does not preclude a greater sentence where the emphasis is upon deterrence and denunciation of the unlawful conduct or a lesser sentence based upon special or significant mitigating circumstances.

[55] In support of the Crown Attorney's recommendation for a three-year sentence of imprisonment, she refers to **R. v. Nur**, *supra*, and while noting that the Supreme Court of Canada struck down the mandatory minimum 3-year sentence as a violation of section 12 of the **Charter**, the Court also concluded at paragraphs 4 and 5 as follows:

“[4] ...In most cases, including those of Nur and Charles, the mandatory minimum sentences of three and five years respectively do not constitute cruel and unusual punishment. But in some reasonably foreseeable cases that are caught by section 95 (1) they may do so. This has not been shown to be justified under section 1 of the **Charter**.

[5] This does not prevent judges from imposing exemplary sentences that emphasize deterrence and denunciation in appropriate circumstances. Nur and Charles fall into this category. Like the Court of Appeal, I would uphold the sentences imposed by the trial judges in their cases.”

[56] The Crown Attorney pointed out that Mr. Nur was only 19 years old at the time of the offences, was in high school, had no prior record and a very positive pre-sentence report. He had pled guilty to one count of possession of a loaded prohibited firearm contrary to section 95(1) of the **Criminal Code**. The charge related to a person entering a community centre and stating that someone was outside waiting to get him. The supervisor of the centre put the building into a lockdown and called the police. The police arrived at the centre and saw Mr. Nur and others run off. They chased Mr. Nur and saw him throw a 22-calibre semiautomatic gun, with one bullet in the chamber and 23 bullets in its oversized ammunition clip. The gun was a functioning prohibited firearm.

[57] The Crown Attorney submits that an “exemplary” sentence should be ordered in these circumstances because gun related crime poses a grave danger to the public generally, and that danger is heightened in the circumstances of this case, where the offender was in possession of a restricted firearm while being transported in a Sheriff’s van to a Correctional Centre. She submits that the cases cited by Defence Counsel are distinguishable and do not reflect the unusual and very serious context of these offences.

[58] The Crown Attorney also referred to **R. v. Chowdhury**, 2018 ABPC 22, which involved the offender driving his vehicle with two other individuals, who he had recently picked up, to a casino in Calgary. Unknown to the offender, the police were actively conducting surveillance on those two people for other crimes, including a recent drive-by shooting just before the offender picked them up in his vehicle. The police arrested all three people in the casino parking lot and the subsequent search of the offender’s vehicle located a 9 mm pistol in a compartment on the left side of the vehicle’s dashboard which was readily accessible to the driver. The offender was found guilty of several firearms offences, which included, possession of a prohibited or restricted firearm without registration certificate [s.86(2)], knowing occupation of a motor vehicle containing a prohibited or restricted firearm [s.94(1)] and possessing a a loaded prohibited or restricted firearm [s.95(1)].

[59] In **Chowdhury**, the judge determined that the most serious offence under consideration was the one contrary to section 95(1) of the **Criminal Code** and

noted the comments of the Supreme Court of Canada in **Nur**, which were cited by the Crown Attorney in this case. The trial judge determined that even though the offender was youthful, being only 26 years old with no prior criminal record, an “exemplary sentence” that emphasized deterrence and denunciation was just and appropriate, in ordering a 40-month sentence of imprisonment.

[60] In support of Defence Counsel’s sentencing position, he provided the following cases:

1. **R. v. Crathorne**, 2015 NSPC 1- The offender had boarded a bus carrying a duffel bag which contained a sawed-off shotgun. He showed the gun to another passenger and later removed the gun from the bag and placed it under his coat. He fell asleep on the bus, but when he was awoken by the driver, the shotgun fell on the floor. The driver secured the shotgun, and the offender left the bus. He was arrested a short time later and advised the police that he was involved in a gang, had a price on his head and claimed that the shotgun was for protection.

The offender was 25 years old, had recently been living on the streets prostituting himself and abusing drugs. He had limited education, was diagnosed with ADHD as well as mental health issues, and had 12 prior convictions, primarily for breaches of probation. The Court ordered 10 months in prison for the possession of the prohibited weapon and 5 months incarceration consecutive for possession of a firearm while prohibited, less remand credit.

2. **R. v. Croft**, 2013 NSPC 100 - The offender had pled guilty to assault and possession of a prohibited weapon. The offender believed that the victim, who was a relative of his wife, had been stalking his family. The offender had punched the victim and the ring that he was wearing had caused a cut on the victim’s forehead. When the police searched the offender’s home, they located a sawed-off rifle hidden behind a wall in a bedroom closet. There was no ammunition in the rifle. The offender did not have a license to possess that firearm.

The offender was 25 years old at the time of the offence, had worked steadily since age 12 and was self-employed. He had a prior but dated record for an assault, but most of his convictions had occurred while he was a “troubled youth” when he was 16 to 18 years old. In that case, I noted that, although the prohibited weapon was not involved in

the commission of the assault, the presence of illegal firearms in the community created a dangerous situation which increased the potential for serious injury or death. Looking at the very positive nature of the pre-sentence report, I concluded that the objectives of specific and general deterrence as well as denunciation of the unlawful conduct could be achieved by a 15-month CSO of imprisonment in the community.

3. **R. v. Perry**, 2018 NSSC 16 - The offender pled guilty to five weapons offences, including possession of a loaded restricted firearm and possession of 43 g of marijuana. During a search of his residence, police located a loaded handgun with five rounds of ammunition in the clip and an air pistol, a push dagger and three throwing knives. The offender did not have a license or registration to possess any firearm or the push dagger. He was also subject to an order prohibiting him from possessing any firearm or any prohibited or restricted weapon or ammunition. The Crown recommended a five-year sentence while the Defence submitted that the only ongoing punishment should be a suspended sentence.

The offender had both aboriginal and African Nova Scotian heritage, was 35 years old and had a prior criminal record. He had struggled with his mental health but had begun to move forward in a positive fashion and the Court concluded that rehabilitation was a real possibility. The fact that the offender had a loaded gun in his apartment while subject to a prohibition was an aggravating factor. He had 622 days of remand credit and the Court concluded that the sentence should be “time served” for all offences other than the possession of the loaded restricted firearm for which he was sentenced to 20 months less one day CSO of imprisonment in the community and 12 months probation.

4. **R. v. Redden**, 2017 NSSC 172 - The offender was a 66-year-old man who pled guilty to 10 weapons offences. The police had executed a search warrant and found several firearms and related items in a locked shed. The offender had been subject to a firearms prohibition order at the time. He had a previous related record. He was a gun collector and he used some of them for historical re-enactments. The offender and his wife both had health issues and his wife depended on him to drive her to and from their rural home.

While the Court noted that the offender's related prior record was an aggravating factor, there were the mitigating factors of his guilty plea, remorse, and community support as well as the fact that the offender did not present a threat to society. Moreover, the Court regarded his offences as being "regulatory in nature." The court ordered a CSO of two years less one day followed by 24 months probation.

5. **R. v. Buffalo**, 2020 ABQB 41- The offender pled guilty to several weapons offences in relation to possession of prohibited or restricted weapons or ammunition at a time when he was subject to a prohibition order. The police saw the offender carrying a red duffel bag from another vehicle and placing it in his car. He was arrested at that point on outstanding warrants and in a search of the duffel bag found in his vehicle, the police located six restricted handguns, two boxes of ammunition of about 100 rounds and other gun accessories. He told the police that he had been informed that the duffel bag contained antique firearms which he believed to have been stolen. He was subject to a lifetime weapons prohibition.

The offender was an Aboriginal offender who had a continuous record of convictions as a youth and thereafter until his mid-30s when he was convicted of manslaughter with the firearm. He had been released in 2011 and then embarked on a restorative path, becoming the owner of two businesses which employed Indigenous people. He was a devoted family man and character evidence established that he was a positive influence within the indigenous community. The Crown recommended a global sentence of three years in jail, while the Defence recommended a CSO of two years less one day. The Court ordered a CSO of 18 months less a day for the offences of possession of a restricted handgun and a concurrent sentence of the same duration for being the occupant in a motor vehicle knowing there was a restricted firearm in the vehicle, followed by two years probation.

[61] Defence Counsel submits that those similar sentences for the commission of similar offences, but not necessarily by similar offenders in similar circumstances, have resulted in a wide range of sentences from provincial periods of incarceration to lengthy conditional sentence orders (CSO) of imprisonment in the community of two years less one day, followed by a lengthy period on probation to ensure the safety of the community and to promote the rehabilitation of the offender.

[62] As of the date of this sentencing decision, Mr. Robicheau has served the equivalent of slightly over 15 months in custody [based upon 303 days of actual custody with enhanced credits of 152 days for a total of 455 days]. In those circumstances, Defence Counsel submits that the just and appropriate sentence would be a custodial sentence equal to the “time served” by Mr. Robicheau with a period of probation to follow as determined by the Court.

[63] While there are several significant aggravating circumstances in this case which could support the imposition of an “exemplary sentence” of up to a three years in prison as recommended by the Crown Attorney, I find that it is equally significant that the Crown could not establish beyond reasonable doubt that Mr. Robicheau was the person who brought the loaded firearm, concealed somewhere on him, into the Sheriff’s van, as an aggravating circumstance. In those circumstances, Defence Counsel submits that Mr. Robicheau’s degree of responsibility or moral blameworthiness should be based upon his failure to immediately advise the Deputy Sheriffs of the presence of the firearm in the van when he was placed in that compartment and thereafter, by only temporarily taking possession of it, which ought to reduce the just and appropriate range of sentence.

[64] However, there is no doubt that Mr. Robicheau was in possession of a loaded restricted firearm for more than a momentary period of time while he was in the custody of Deputy Sheriffs and being transported in their van to the Central Nova Scotia Correctional Facility in Burnside, Nova Scotia. Mr. Robicheau’s possession and handling of that restricted firearm which was loaded with live ammunition presented an incredibly dangerous situation for the safety of the Deputy Sheriffs, the correctional staff upon arrival at the Correctional Facility and the other person being transported in the van.

[65] When I consider the parity principle, it is apparent that similar offenders who have committed similar offences in different circumstances have been ordered to serve sentences ranging from 15 months in custody to two-year conditional sentence orders of imprisonment in the community, followed by a probation. Based upon those sentencing precedents and the gravity or seriousness of this offence in these circumstances, I find that a just and appropriate range of sentence in this case could certainly be from 15 months to 24 months in prison.

[66] While I have found that the gravity or seriousness of these offences is very high, I have also concluded that Mr. Robicheau’s moral blameworthiness or degree of responsibility is somewhat attenuated by his actions to remove the bullets from

the loaded, restricted firearm and by virtue of the fact that it could not be established that he brought the firearm into the van on his person. In those circumstances, I find that a just and appropriate sanction for his possession of the firearm in the circumstances which have been established beyond a reasonable doubt, would be to order a sentence of imprisonment at the lower end of that 15-to-24-month range of sentence of imprisonment for these offences.

[67] In the final analysis, I conclude that the imposition of a sentence of 15 months of imprisonment is the just and appropriate sanction for the most serious of the offences for which he has entered guilty pleas, namely, the offence of possession of a restricted firearm with readily accessible ammunition capable of being discharged without being the holder of a license for that firearm contrary to section 95(1) of the **Criminal Code**. Since the other offences were committed at the same time and in the same manner, I conclude that it would be appropriate to order the 15 months of imprisonment to be served on a concurrent basis for the offences contrary to sections 86(1), 90(1), 92(1), 94(1) and 117.01(1) of the **Criminal Code**.

[68] Therefore, when I consider Mr. Robicheau's pre-sentence custody and enhanced custody credits, which equaled 455 days as of today's date which is roughly equivalent to slightly over 15 months in custody, I find that his presence in court today and those enhanced pre-sentence custody credits place him in a "time served" situation with respect to the custodial sentence ordered by the Court.

[69] In addition to the "time served" custodial sentence imposed by the Court, I hereby order Mr. Robicheau to be subject to a period of two years of probation from the date of this order with the requirement to comply with the following terms and conditions:

- Keep the peace and be of good behaviour,
- Appear before the court as and when required to do so by the court,
- Notify the Court or Probation Officer in advance of any change of name, address, employment or occupation,

[70] And, in addition:

- Report to the Probation Officer at 277 Pleasant St., Dartmouth, NS, within two days from today and thereafter as directed by the Probation Officer,

- Remain within the province of Nova Scotia unless you receive written permission from your Probation Officer,
- Not to have in your possession a firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition or explosive substance,
- Complete 40 hours of community service work as directed by the Probation Officer by June 22, 2023,
- Have no direct or indirect contact or communication with Andrew Comeau,
- Do not be on or within 20 m of the premises known as the residence or place of employment of Andrew Comeau,
- Make reasonable efforts to locate and maintain employment or an educational program as directed by your Probation Officer,
- Attend for assessment, counselling or a program directed by your Probation Officer, and
- Participate in and cooperate with any assessment, counselling or program directed by the Probation Officer.

[71] In addition, I am also granting the ancillary orders sought by the Crown Attorney and I hereby order the section 109(2) **Criminal Code** mandatory firearms prohibition orders which prohibits the possession of any firearm, other than a prohibited firearm or restricted firearm and any crossbow, restricted weapon, ammunition or explosive substance for a period of 10 years and the possession of any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life.

[72] Furthermore, pursuant to section 487.051 of the **Criminal Code**, I hereby order Mr. Robicheau to provide a sample of his DNA by virtue of his conviction for the firearms offences which are listed as “secondary designated offences” for the purposes of obtaining a sample of Mr. Robicheau’s DNA.

[73] Finally, with respect to the Victim Fine Surcharge for all of the offences for which Mr. Robicheau has entered guilty pleas, I find that it would be an undue hardship to impose that surcharge in all the circumstances of this case, and I hereby waive the imposition of that surcharge for all of the charges before the Court.

Theodore Tax, JPC