PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v Smith*, 2023 NSPC 65

Date: 20231020
Dockets: see table below
Registry: Dartmouth

Between:

His Majesty the King

v.

Araya Smith

Judge: The Honourable Judge Theodore Tax

Heard: August 23, 2023, in Dartmouth, Nova Scotia

Decision: October 20, 2023

Dockets: 8460976, 8460977, 8460978, 8460979, 8460980, 8460981, 8460982, 8460983, 8460984

Charge: Section 221, 87(1), 95(1), 92(1), 91(1), 90(1), 88(1), 86(1), 86(2) of the **Criminal Code of Canada**

Counsel: Robert Fetterly, Q.C., for the Nova Scotia Public Prosecution Service
Nicholas Fitch, for the Defence Counsel

By the Court:

[1] Following a three-day trial, which included a *voir dire* in relation to a section 10(b) **Charter of Rights and Freedoms** Application, which was dismissed by the Court, Mr. Araya Smith was found guilty of five offences. He was found guilty of criminal negligence causing bodily harm contrary to section 221(a) of the **Criminal Code,** unlawful pointing of a firearm at another person, contrary to section 87(1) of the **Code,** possession of a loaded restricted or prohibited firearm without being the holder of an authorization or license to possess that firearm in that place contrary to section 95(1) of the **Code,** carrying a concealed weapon contrary to section 90(1) of the **Code,** and the offence contrary to section 86(2) of the **Code** for the contravention of the regulations under paragraph (para.) 117(h) of the **Firearms Act** respecting the storage, handling and transportation of firearms and restricted weapons.

[2] In addition, Mr. Smith had been charged with three additional offences for which the Court entered a conditional judicial stay under the ***Kienapple*** principle in relation to the offences contrary to section 91(1) of the **Code** in relation to the unauthorized possession of a firearm without being the holder of a license to possess it or in the case of a prohibited firearm or a restricted firearm, without being the holder of a registration certificate for that firearm, the offence contrary to section 88(1) of the **Code** for possession of a weapon for a purpose dangerous to the public peace or for the purpose of committing an offence, and finally, the offence contrary to section 86(1) of the **Code** in relation to the careless use of a firearm, prohibited weapon or restricted weapon.

[3] All of the offences before the Court were alleged to have occurred on or about August 13, 2020, at or near Dartmouth, Nova Scotia. The Crown had proceeded by indictment on all charges before the Court.

Positions of the Crown and the Defence:

[4] At the outset, the Crown Attorney noted that the key difference in the positions of the parties is that the Crown recommends that the just and appropriate global sentence would, given the sentencing precedents referred to by him, result in a range of incarceration from 38 months to 64 months. He

notes that Defence Counsel recommends a two-year less one-day conditional sentence order followed by lengthy period of probation based upon the NSCA decisions in ***Anderson*** and ***Wournell*** as well as the IRCA factors that are present in Mr. Smith's case.

[5] The Crown Attorney also notes that, at the time when these offences occurred, a Conditional Sentence Order (CSO) of imprisonment in the community would not have been an "available" sanction because of the bodily harm and the lengthy maximum sentences for the most serious offences which were prosecuted by indictment. However, since those **Criminal Code** provisions were amended in 2022, he agrees with Defence Counsel that, pursuant to the provisions of section 11(i) of the **Charter**, Mr. Smith is entitled to have the benefit of the lesser punishment. There was no minimum term of imprisonment for the section 221 offence of criminal negligence causing bodily harm and the former section 742.1(e) of the **Code** which would have restricted the imposition of a CSO for that offence, prosecuted by indictment, has been repealed.

[6] In addition, with respect to the section 95 of the **Code** offence, in ***R. v. Nur,*** the Supreme Court of Canada (SCC) determined that the minimum sentence provisions of section 95 of the **Code** were unconstitutional, and that provision has been removed from the **Criminal Code**. As a result, he acknowledges that, with the repeal of the former section 742.1(e) and (f) of the **Code**, a CSO could be ordered under section 742.1 of the **Code** if the current pre-conditions are met. However, in order to do so, pursuant to subsections 742.1 (a) and (b) of the **Code**, the Court would have to impose a sentence of imprisonment of less than two years and be satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in section 718 to 718.2 of the **Code**,

[7] It is the position of the Crown that, in setting a range of sentence for these offences, the Court may consider the ***R. v. Downes*** (ONCA) factors, and that Mr. Smith should receive some credit for being on very restrictive bail conditions for a significant period as well as the **IRCA** factors present in this case. However, he submits that the just and appropriate sentence for Mr. Smith should be well above two years in jail and as such, a CSO would not be an "available" option. Furthermore, the Crown Attorney submits that, in assessing the range of sentence as to whether CSO is available, the Court must determine

that the appropriate sentence would be less than two years without considering any ***Downes*** credit. He points out that ***R. v. Fice***, [2005] 1 SCR 742 established that the ***Downes*** credit cannot be utilized to make a CSO an "available" sentencing option.

[8] In support of his sentencing recommendations the Crown Attorney referred to several similar offences committed by similar offenders in similar circumstances. He noted that the five offences, for which this sentence must be determined, involved a continuing transaction, inside a small and confined space of a hotel room where the criminally negligent shot was fired at Mr. Smith. He agrees with Defence Counsel that some of the offences for which Mr. Smith is to be sentenced, may be concurrent with the other sentences imposed. However, he submits that the sentences imposed for the two most serious charges, namely, the section 95 of the **Code** offence for possession of a loaded restricted firearm without being licensed should be in the range of 20 to 40 months and that the appropriate range for the section 221 of the **Code** offence for criminal negligence causing bodily harm should be in the range of 18 to 24 months and they should be served on a consecutive basis. The Crown Attorney submits that the remaining sentences for the other offences may be imposed on a concurrent basis,

[9] Based upon sentencing precedents to establish a range of between 38 to 64 months in prison, the Crown Attorney acknowledges that the Court will also have to consider the Totality principle to ensure that total sentence imposed by consecutive sentences would not be excessive. In addition, the Crown Attorney submits that the Court should apply a ***Downes*** credit for the 629 days [about 20.5 months] that Mr. Smith was on house arrest. He recommends that the appropriate deduction from the jail sentence for the ***Downes*** credit should be six months. However, he reiterated that, in doing so, the ***Downes*** credit cannot be used to make a CSO an "available" sentencing option, but it may determine whether the prison sentence should be served in a provincial or federal correctional facility, if the Court applied the Totality Principle and utilized the low end of his recommended range of sentence.

[10] In addition, the Crown Attorney acknowledges that the Court must consider IRCA factors, and he notes that Mr. Smith is a youthful offender, who had a difficult upbringing, involvement of child protective services, removed from his mother's house and had difficulties in the foster system and his education, but has made significant changes in his lifestyle with the full support of the

Department of Community Services and other resources in the community. Even taking all those factors into account and making reasonable deductions from the recommended low end of the range, the just and appropriate sentence for Mr. Smith ought to be more than two years, which would preclude the imposition of a CSO of imprisonment in the community.

[11] The Crown Attorney also seeks the ancillary orders of the mandatory section 109 of the **Code** lifetime prohibition and a primary designated offence DNA order pursuant to section 487.051(1) of the **Code**.

[12] For his part, Defence Counsel recommends the imposition of a two-year less one day CSO of imprisonment in the community to be followed by two to three years on probation. It is the position of the defence that based on the comments of the Supreme Court of Canada in ***R. v. Proulx***, 2001 SCR 61 at para. 22, a CSO incorporates aspects of incarceration, but the sentence being served in the community also achieves restorative objectives of rehabilitation, reparations to the victim and community as well as a promotion of sense responsibility in the offender. The punitive aspects of the order may achieve the objectives of denunciation and deterrence.

[13] Defence Counsel acknowledges that the Supreme Court of Canada stated that four criteria must be met before deciding to impose a CSO criteria in ***Proulx*, *supra***, at para. 46: (1) the offender must be convicted of an offence that is not punishable by a minimum term of imprisonment; (2) the court must impose a term of imprisonment of less than two years; (3) the safety of the community would not be endangered by the offender serving the sentence in the community; and (4) a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2.

[14] Defence Counsel notes none of the offences for which Mr. Smith has been convicted are subject to a minimum term of imprisonment. In his opinion, the just and appropriate sentence should be a two-year CSO followed by two or three years of probation instead of the range of imprisonment between 38 months to 64 months as submitted by the Crown Attorney. Obviously, if the Court was to agree even with the low end of the range proposed by the Crown Attorney, a CSO would not be an “available” sentencing option for Mr. Smith.

[15] However, Defence Counsel submits that, even though the range of sentence proposed by the Crown Attorney by virtue of the Parity Principle would

exclude the option of a CSO, he notes that the Crown Attorney has acknowledged that Mr. Smith's sentence would likely be at the low end of that range. Defence Counsel submits that, given the fact that Mr. Smith's sentence ought to be at the low-end of the proposed range, when considering that Mr. Smith is a youthful, first-time offender and by taking into account the very significant IRCA factors, the just and appropriate sentence ought to be a CSO of less than two years if the court imposed concurrent terms of imprisonment for all of the offences before the court.

[16] In terms of the other criteria to be considered with respect to the imposition of a CSO, with respect to the "safety of the community," Defence Counsel submits that the Supreme Court of Canada int ***Proulx***, *supra*, at para. 68, stated that this referred to the threat to the community posed by the specific offender. With respect to this criterion for the issuance of a CSO, Defence Counsel points to the information in the IRCA, the Pre-Sentence Report and supplementary character references as evidence of the tremendous work that Mr. Smith has done to rehabilitate himself in a positive direction since the incident in question.

[17] Defence Counsel also points to the fact that Mr. Smith was able to comply with a lengthy period of house arrest without any breach of those release conditions. Given the significant progress towards rehabilitation to date, coupled with appropriate conditions in a CSO, he submits that there is a minimal risk of breach or re-offence if the court was to impose appropriate conditions in a CSO to highlight deterrence and denunciation. Defence Counsel submits that the risk of recidivism is minimal and given the significant progress towards rehabilitation that Mr. Smith has made to date, coupled with the resources which have been made available and have been utilized by him, it is unlikely that there would be any re-offence of a harmful nature.

[18] Mr. Smith has no prior criminal record, is a youthful offender being only 18 years old at the time of the offence and now 21 years old, having complied with very strict release conditions of house arrest for almost three years until those conditions were relaxed to a curfew. The information before the Court highlights the tremendous steps that Mr. Smith has taken to rehabilitate himself and promote a sense of responsibility in him. Defence Counsel submits that it would be counterproductive to his rehabilitation to order a lengthy jail sentence. Mr. Smith is a young African Nova Scotian male and taking into account all of the circumstances of this case together with the comments of the NSCA in ***Anderson*** and ***Wournell*,** the just and appropriate sanction in this case is the

imposition of a CSO followed by probation. Defence Counsel did not take issue with any of the ancillary orders sought by the Crown.

The Circumstances of the Offences:

[19] During the afternoon of August 13, 2020, Mr. Araya Smith, got together with two of his friends, Ethan Tibbo and Cameron Brown. They drove around town and smoked some weed. Later that afternoon, another friend, Traydell Brown joined them and they continued to drive around town, smoking weed and generally having a “good time.” Mr. Tibbo was driving his car and a little later they picked up Antoine Clarke and his girlfriend, Teirah Slawter. Although they had not made a reservation, their plan was to get a room for the night at the Hampton Suites Hotel located in Dartmouth and drink alcohol and “hang out” together.

[20] Prior to going to the hotel, they had stopped to buy some alcohol. In addition, Mr. Cameron Brown stated that they had done some “Molly” as a reference to MDMA as well as some “blow” referring to some of the 2 grams of cocaine that he had bought to bring to the hotel room. The Court found that the group arrived at the hotel between 9:15 PM and 9:30 PM on August 12, 2020. The entry to room 503 at the hotel was delayed somewhat to arrange for payment for the room since no one had made a reservation for the room secured by a credit card.

[21] Once the financial arrangements for the room were confirmed, the hotel clerk provided the group with entry cards for room 503. The video surveillance of the front desk area of the Hampton Suites Hotel and witnesses confirmed that, at about 9:48 PM, Traydell Brown, Antoine Clarke, Ethan Tibbo and Ms. Slawter went up to room 503. A few moments later, at 9:49 PM on August 12, 2020, the video surveillance evidence of the front lobby area established that Cameron Brown, who was carrying a red box and Araya Smith, entered the elevator to go to room 503.

[22] As a result, the Court concluded that the five young men and one woman had entered their hotel room shortly before 10:00 PM and that, around 12:35 AM on August 13, 2020, a 911 call was made to report that Mr. Cameron Brown had been struck in the back by a single bullet.

[23] In terms of the firearm that fired the single bullet which struck Mr. Brown, all of the witnesses who testified provided a description of the handgun. Mr.

Brown provided a detailed description of the handgun with consistent descriptions of the firearm being provided by Mr. Tibbo and Ms. Slawter. From those descriptions and the evidence of Mr. Parkin, the Court found that the witnesses had described a 22-calibre handgun with a pistol grip with a break action to load ammunition. The witnesses described the handgun as looking "old" and had rust on it, appeared to have duct tape on the handle and that the part of the gun where the bullets would go rotates.

[24] Based upon the evidence provided by Mr. Brown, Mr. Tibbo, Mr. Clarke and Ms. Slawter, as well as the evidence of Mr. John Parkin, who is the Chief Firearms Officer of Nova Scotia, with description of the length of the barrel, and the calibre bullets, the Court concluded that the firearm which discharged the bullet that struck Mr. Cameron Brown was either a restricted or prohibited firearm.

[25] Once everyone was in the hotel room, all of the witnesses who testified indicated where people were seated on chairs and who was sitting on the bed in the room. Everyone in the room had been drinking some alcohol and some of the people in the room, according to Mr. Brown, did some cocaine but no one could clearly state how much alcohol was consumed or how much cocaine was consumed by a person prior to Mr. Brown being shot in the back.

[26] Mr. Brown had stated that he had seen the gun when he had visited Araya Smith at his house in East or North Preston a couple of days prior to the incident. A couple of witnesses who were in Mr. Tibbo's car on the way to the hotel mentioned that they had seen the gun in Mr. Smith's possession at that time. In addition, Mr. Brown and Mr. Tibbo had stated that, once they were in the hotel room, Mr. Smith was the person who initially had brought the gun to the hotel and when it was first shown to the others in the hotel room, it was Mr. Smith who was "playing with it," and pointing it at people and pulling the trigger as he was pointing it around the room.

[27] Although the handgun involved in this incident was never located, based upon the direct and circumstantial evidence, the Court concluded that Mr. Smith had possession of the handgun and that he was the person who concealed it and transported it into and out of the hotel room without taking the proper measures for handling and transporting that firearm. In addition, based upon the direct evidence which the Court has accepted as well as circumstantial evidence, the Court concluded that, at all material times, that Araya Smith was the person

who was "playing" with what the Court found to be a restricted or prohibited firearm, and that he was the person who was pointing the firearm at people in the room, pulling the trigger and that he had pulled the trigger which fired the single bullet that struck Cameron Brown in the back.

[28] The Court concluded that the evidence had established that Mr. Araya Smith had failed to properly check to determine whether the firearm was unloaded and safe to handle in the circumstances. In the final analysis, the Court concluded that Mr. Smith's acts and/or omissions showed a wanton and reckless disregard for the life or safety of Cameron Brown and potentially the other people who were present in the hotel room at the same time. The Court also concluded that those acts or omissions of Araya Smith had caused the bodily harm to Cameron Brown and that they were a marked and substantial departure from the standard of care of a reasonably prudent firearms handler who had been trained and licensed to handle restricted firearms in the accused's circumstances, including what they knew or ought to have known and especially in the circumstances of a group of people being in a relatively small interior space of a hotel room.

[29] Given the fact that the Court concluded that the handgun was concealed when it was brought into and out of the hotel room, the Court found that, with respect to the handling of the firearm, there was no evidence that it had been stored separately from its ammunition or that it was transported with a trigger lock for the firearm or that it was brought to the hotel room in a secure and approved type of container. The Court found that all those facts and circumstances were established by the direct evidence of the witnesses that none of those items were seen by anyone when the gun was pulled out and "played with" by Mr. Smith and by the lack of any visible secured container when Mr. Smith entered the hotel with Mr. Brown on the hotel's video surveillance evidence or when he left the hotel after Mr. Brown was shot in the back.

[30] A few moments after Mr. Brown was shot in the back, Mr. Tibbo, Traydell Brown and Araya Smith left the hotel room. Video surveillance evidence from the hotel confirmed that Araya Smith left the hotel room just after 12:39 AM on August 13, 2020, and showed him speaking on a cell phone held in his right hand. The police officer who introduced that video surveillance clip pointed out that he believed there was a "heavy object" in the area of his right hip or right pocket, covered by the T-shirt that Mr. Smith was wearing, but he could not confirm whether that "object" was a firearm. As mentioned previously, the

firearm involved in this incident was never recovered to be analysed by the police.

[31] Fortunately, Ms. Slawter and Antoine Clarke stayed in the hotel room with Mr. Brown until police and emergency medical personnel arrived about 10 minutes after the 911 call. Mr. Brown had been placed on a couch face down and they were applying pressure to the area of the bullet wound to ensure that he did not "bleed out." Once police officers arrived in the room, they took over applying pressure with towels until the paramedics arrived. Mr. Brown was then transported to the hospital and seen immediately by the trauma team in the emergency department.

[32] The factual admissions made during the trial confirmed that Cameron Brown was shot in his left scapula (shoulder blade) with the bullet discharged from the handgun, which had not been located. The bullet entry wound resulted in damage to the cervical spine of Mr. Brown at vertebrae C5, where there was a markedly commuted fracture of the articular process and lamina on the left. An x-ray had shown that bullet fragments spread anteriorly and that there was moderate to severe narrowing at the C5 and C6. At the C6, there was also a comminuted fracture of the articular process and lamina on the left and x-rays revealed what was believed to be metal bullet fragments in that area. It was also noted that there had been displacement of the spinal cord to the right.

[33] The parties had agreed that those injuries and Mr. Brown's residual limitations met the definition of "bodily harm" in the **Criminal Code**.

Victim Impact Statement:

[34] During his trial evidence, Mr. Cameron Brown outlined the serious nature of the injuries suffered as a result of the gunshot. He described the significant impact on his mobility and ability to work for a significant period and, during his trial evidence, he stated that some impacts continue. He stated that the bullet entered the left side of his shoulder blade, then apparently ricocheted into his neck, and almost paralyzed him. Mr. Brown advised the Court that the bullet itself is still in his C5 section and that any surgery to remove it, could result in a high risk of death.

[35] Mr. Brown stated, during his trial testimony, that he had to re-learn how to walk, talk, eat, jog and use the washroom during his period of time in the hospital and at a rehab centre. In total, Mr. Brown stated that he had spent two

months in hospital and an additional 3 to 4 months in a rehab centre to complete his recovery. He also described that, with respect to re-learning how to talk, the bullet had struck him in the neck and put his vocal cords in shock. In terms of relearning how to eat and feed himself, he stated that he initially had difficulty even getting out of bed and using his fingers to feed himself.

Circumstances of the Offender:

[36] In the Pre-Sentence Report (PSR) prepared on April 24, 2023, the Probation Officer noted that Mr. Smith is 21 years old, having been born on November 16, 2001. He is currently single and living in Bridgewater Nova Scotia attending the carpentry program at the Nova Scotia Community College. The Court notes that the charges for which Mr. Araya Smith has been found guilty occurred on or about August 13, 2020, at which time he was 18 years old. The Probation Officer notes that Mr. Smith identifies as an African Nova Scotian (ANS) and I note that an Impact of Race and Culture Assessment Report was requested and prepared for him.

[37] The Probation Officer noted that Araya Smith has never met his biological father or one of his brothers and has only met the other brother on one occasion. He does share a close relationship with his sister, and they speak daily. In terms of his mother, Mr. Smith described their relationship as “awkward” and although he speaks to her on a weekly basis but described it as “small talk.”

[38] Mr. Smith stated that his mother’s substance abuse resulted in him being taken into care by the Department of Community Services (DCS) as a young child. There were several placements and while he was in care, he was the victim of both physical and emotional abuse by foster parents. Since moving to the Bridgewater Nova Scotia area in August/September 2022, he has been living independently. He is not involved in any current relationship and has no children.

[39] The Probation Officer also contacted Ms. Jennifer Sewell, who has been Mr. Smith’s long time DCS social worker. She confirmed that Mr. Smith was initially left in the care and custody of his mother for a period of time, but then the Children’s Aid Society became involved with his mother prior to his birth and then became re-involved with her after his birth. In October 2006, the Agency was granted permanent care and custody of Mr. Smith and Ms. Sewell

has been his social worker since 2007. She noted that Mr. Smith was in four long-term foster family placements while in care, typically with his sister.

[40] Ms. Sewell confirmed information provided by Mr. Smith with respect to allegations of abuse in foster placements. She described Mr. Smith as a prosocial young man who has a lifelong connection to the church, attended Sunday school until age 18. She also noted that in grade 9, Mr. Smith received a "Citizenship Award" at his school and was an active volunteer at the North Preston community centre. He played basketball recreationally and was on the high school team.

[41] Ms. Sewell stated that at the beginning of the pandemic, Mr. Smith was residing in a foster home with an elderly caretaker and at that time, he did not fully appreciate the risk of Covid-19 on elderly people with compromised health. As a result, his placement broke down and he found himself without the housing, structure, or stability that he had previously enjoyed. Then, she learned of Mr. Smith's charges, and she was "stunned" by his arrest as the events were "completely out of character."

[42] Ms. Sewell confirmed that Mr. Smith began working with Ms. Clara Coward in September 2020, initially meeting twice weekly to engage in therapy and working to address childhood trauma and how his narrative had impacted his current situation. Ms. Sewell added that, at the time of her interview with the Probation Officer she was not sure if Mr. Smith was still attending counselling sessions with Ms. Coward.

[43] In addition, Ms. Sewell advised the Probation Officer that Mr. Smith is actively engaged as a participant in the LOVE [leave out violence] program and is part of the leadership team. He has a personal understanding of the impacts of gun violence as he knows people have been victims of gun violence and has met on several occasions with Quentrel Provo the founder/CEO of the Stop the Violence [Spread the Love] program. Mr. Smith has also worked with the Nova Scotia Brotherhood Initiative and received support and services from that organization. She also advised that Mr. Smith has been compliant with medication prescribed by his clinical physician, Doctor Milne and has responded well to the medications.

[44] In terms of Mr. Smith's education/training, the Probation Officer noted that he is presently enrolled as a student at the Nova Scotia Community College, Lunenburg campus where he is studying carpentry. Mr. Smith had passing

marks and was about to start a work placement. He was also working on a part-time basis and planned to work over the summer for additional funds but noted that his financial needs were provided by DCS.

[45] In terms of his health and lifestyle, Mr. Smith stated that he was not taking any medication for any physical health concerns, but in terms of his mental health, he had been diagnosed with ADHD, depression, anxiety, and insomnia. He has been prescribed medication for his anxiety, depression and as a sleep aid. He reported seeing a therapist, Ms. Clara Coward and remains connected to the Love Program. The Love Program is designed to provide participants with greater resilience, heighten skills and the confidence to be leaders.

[46] Mr. Smith reported that he first used alcohol when he was about 13 years old and acknowledged that his use of alcohol has been problematic in the past. He stated that his doctor advised him that he was damaging his liver and he was encouraged to reduce his intake or abstain from alcohol to heal his liver. He began using drugs around the start of high school and had experimented with substances including cocaine, Molly, Xanax, psilocybin mushrooms, Percocet, codeine and marijuana. Mr. Smith reported that he is no longer using alcohol or drugs.

[47] The Probation Officer also contacted Mr. Smith's therapist, Ms. Clara Coward who stated that she has worked with him for several months and that, in her opinion, he has done "extremely well" given his narrative and is moving forward and navigating life. She recommended that Mr. Smith continue to engage in therapy, live outside the HRM and attend school would be of great benefit.

[48] The Probation Officer noted that Mr. Smith had only one involvement with the criminal justice system and received a conditional discharge on September 23, 2021, for the offences of causing disturbance by fighting, screaming, shouting, etc. contrary to section 175(1)(A)(1) of the **Criminal Code** and uttering threats to cause death or bodily harm charge contrary to section 264.1(1)(a) of the **Code**. The probation duration was 12 months and the Probation Officer supervised Mr. Smith during that period. She notes that the offences were committed while he was under the influence of alcohol, there were no concerns with respect to his reporting and he was engaged in programming (LOVE Program) as well as private therapy and focused on his educational goals.

[49] The Probation Officer noted that during the probation period, there were some concerns about Mr. Smith's peers and associates, but they were addressed by his move outside the city. The Probation Officer stated that Mr. Smith continues to have the continued support of his DCS social worker (Ms. Sewell), he has relocated outside the HRM, transitioned to independent living and is on track to graduate from post-secondary education. She also noted that neither Mr. Smith nor his social worker reported any concerns regarding use of substances and that while he was awaiting trial and supervised on a release order with strict conditions of house arrest, there were no subsequent charges.

[50] As a result, if community supervision was deemed appropriate, conditions to abstain from alcohol and/or drugs would be appropriate as well as conditions to obtain or maintain an education program and/or employment. The Probation Officer also recommended that Mr. Smith would benefit from continuing to engage in therapy. She also opined that Mr. Smith would be "suitable for further period of community supervision" with strict conditions including electronic monitoring.

Impact of Race and Cultural Assessment (IRCA) Report:

[51] In addition to the information contained in the Pre-Sentence Report prepared by the Probation Officer, Defence Counsel requested that an IRCA report on behalf of Mr. Araya Smith be prepared in this case. The IRCA report, submitted to the court on April 27, 2023, outlines several systemic, cultural and race factors that the Court should consider. The IRCA report also outlines the individual impact of those factors on Mr. Smith, which must be taken into consideration.

[52] The IRCA report states that Mr. Smith's social, cultural and community roots strongly influenced his racial identity development. He grew up in the large African Nova Scotian (ANS) community of North Preston, but at age 5, he was removed from the care of his biological parents and was placed in the care of the Department of Community Services (DCS). During his time in care, he did not have successful and stabilizing placements due to abuse and discord in those placements. Mr. Smith had abusive or negative foster home and school experiences until he was about 15 years old and placed in a new foster placement. He was in that home for approximately five years.

[53] The authors of the IRCA report note that Mr. Smith did not have consistent and meaningful community connections within the ANS context during that time and that impacted his capacity to connect with social supports, cultural literacy, and experience positive racial identity development, Mr. Smith's DCS placements were in low-income housing developments located in central Halifax. That community has had several social economic challenges that have contributed to a cycle of intergenerational trauma and is considered an "at risk or vulnerable" community to criminogenic factors, according to the authors of the IRCA report.

[54] The authors also indicate that it is not unusual for children who were born and raised in such environments to struggle with attachment issues due to their inability to have their needs met. Ms. Jennifer Sewell, who has been Mr. Smith's DCS social worker since age 5, confirmed that Mr. Smith attended therapy to address attachment issues when he was younger.

[55] More recently, Ms. Clara Coward, who is his ANS clinician and has worked with Mr. Smith since the summer of 2021, reported that Mr. Smith presented with an attachment disorder as well as PTSD. She did trauma therapy with him because he became "emotionally dysregulated" after receiving the charges. In addition, it was also Ms. Coward's clinical opinion that, due to the level of trauma that Mr. Smith has endured over his lifetime, he has not been able to transfer what he has learned in therapy into his daily life as he is always in "survival mode." The IRCA authors state that, based upon their research into the impact of race and trauma, it will often destabilize a person and they may relapse or engage in regressive behaviours and not be able to integrate previously prosocial and supportive skills.

[56] The IRCA authors also note that Mr. Smith's struggle with attachment issues has meant that he only engages with others on a "surface level" and how the relationship can meet his needs. Mr. Smith has struggled throughout his life to have appropriate relationships with others including caregivers, peers, family members, partners as well as professionals. Ms. Coward also advised the authors that another symptom of Mr. Smith's attachment disorder is a "reactive attachment disorder" (RAD) which she described as Mr. Smith's pattern of "indiscriminate sociability" and his inappropriately familiar choices in attachment figures within the RAD spectrum.

[57] During his last, relatively long five-year DCS placement, the authors note at pages 9 to 10, that Mr. Smith reported that this was when he began heavy drug use because everyone else was doing it. He also described couch surfing and contacting his biological mother who allowed him to sleep on the floor of her studio apartment from time to time. He also stated: "I started robbing people, stealing, selling drugs and there was a lot of fighting. By this time, I was smoking weed and cigarettes, and ingesting coke, Xanax, Molly and Percocet. I felt it was the only way I could survive. I had no one to tell me what to do. I was not in school, and mom kicked me out. I was then paying for hotels."

[58] Mr. Smith added that this is when he learned that living on the streets "was not easy and you are always living in fear. You need a gun just to feel safe." He advised that having access to drugs allowed him to earn money, but it also provided him with the resources to use and contribute to an increase in his own addictions. He stated that when he was high on the streets, he had a false feeling of "being cool" but when he was not high, he would become stressed of where the next meal would come from and slept in ditches on many nights.

[59] In his interview with the IRCA authors, Mr. Smith reported "being remorseful" for his actions and described himself as being a "generally good person" who does not seek out to intentionally harm others.

[60] Mr. Smith is currently living in the Bridgewater, Nova Scotia area with a foster parent. He was able to complete his GED and is now attending the Nova Scotia Community College in his second semester in the carpentry program. He had been attending bi-weekly therapy sessions with Clara Coward to gain insight into his challenges but paused that counselling as he felt his life was "more stable."

[61] At the same time, Mr. Smith is being followed by Doctor Milne, with the Brotherhood Association and following a medication regime that is treating his anxiety/depression and insomnia. Ms. Sewell confirmed that the medication regime and therapy have allowed Mr. Smith to be able to set goals and to follow through on them. She also confirmed that Mr. Smith is now in the post-care program with DCS and Ms. Sewell added that she will continue to support him through this process. It was also noted in the IRCA report that Mr. Smith reported no alcohol or drug use at this time.

[62] The IRCA report also refers to the "Impacts of Adverse Childhood Experiences" and points out that exposures to toxic stress have been proven to

have a strong correlation to poor outcomes in the lives of children and youth in areas of social emotional development. Mr. Smith reported, at length, about his high conflict relationship with his caregivers that involved poverty, substance use and emotional/physical abuse, all of which having an immense impact on his emotional growth. He reported that his biological mother struggled with substance abuse and that he had been exposed to violence in his home and being exposed to domestic violence within his foster placements.

[63] Mr. Smith also reported being the victim of abuse and violence while he was in the care of child welfare by various foster parents, primarily his "mother figures" which has resulted in feelings of loneliness and worthlessness. Ms. Sewell confirmed that Mr. Smith had three foster home placements terminated because of ongoing harm that he suffered while in the agency's care until being placed in his fourth foster home placement. In those early placements, Mr. Smith had described harsh physical abuse and the IRCA authors highlight the potential causal impact of those adverse childhood experiences on Mr. Smith while in the care of the Department of Community Services.

[64] The IRCA report (at p.13) also covers the Impact of Community Violence and Substance use and racial identity development. They note that recruitment and grooming of young black males into the criminal culture are well known within the at-risk communities in the HRM. Mr. Smith described witnessing this at various developmental stages – trafficking of drugs, robberies, community and interpersonal violence. Mr. Smith reported that, once he became homeless, he started robbing people, jumping people stealing, selling drugs and being involved in a lot of fighting and added: "I felt like it was the only way to survive. No one to tell me to be good or to go to school."

[65] The authors note that Mr. Smith has been exposed to "chronic criminogenic psychosocial subculture" within the ANS community and larger community. He has also been exposed to the vulnerable community features of black male identity development such as: black men abandoning their children, abusing their family, selling drugs, stealing, committing or being murdered and going to jail. Mr. Smith did not always have pro-social formal or informal supports available to him and began questioning his own value as a black man and seeing the crime cycle played out in the ANS community. They note that this "internalized racism" has not only affected his thoughts and perceptions of himself as a black man, but also his self-worth and cultural esteem.

[66] The IRCA report also highlights the prevalence of gun violence in the ANS community. Mr. Smith and Ms. Sewell stated that Mr. Smith has known many of the young black men who have died due to gun violence. As a result, Mr. Smith discussed his fear of being out on the streets on his own and the need to always be on alert, and as he had mentioned before, needing a gun to survive. He also stated that since age 14, he has smoked "weed" to cope with the stressors in his life, and continued to use marijuana as a coping strategy which helped him address his anxiety and to relax, as well as dampening his thoughts of helplessness.

[67] Ms. Sewell, who has been Mr. Smith's DCS social worker since he came into care at age 5, reported that Mr. Smith's last placement in North Preston in 2015 was the best for him as he felt accepted in the home, was going to school, playing basketball and working at the rec centre until Covid hit. It was then that the placement broke down as the foster mother was afraid that she would catch Covid because she did not believe Mr. Smith was respecting the restrictions. At the same time, he contacted his biological mother, started using drugs more aggressively and became involved in street life. Ms. Sewell stated that, once Mr. Smith lost his home, that is when his life spiraled out of control.

[68] However, Ms. Sewell added that, since these charges, Mr. Smith has done very well "stabilizing himself" and was able to complete grade 12 while on house arrest and then graduate. Since then, he has moved to Bridgewater, Nova Scotia and has stated that he wants to remain in that area once he completes the carpentry program. Ms. Sewell stated that Mr. Smith has "gained a lot of insight" and that she will continue to support him as much as she can.

[69] In the final analysis, the authors of the IRCA report state that, should the Court consider Mr. Smith eligible for a non-custodial sentence, they would recommend:

1. That Mr. Smith reestablish mental health support with Clara Coward who has insight into the unique cultural and criminogenic factors that have contributed to Mr. Smith's life today.

2. That Mr. Smith attend treatment for his substance use; and

3. That Mr. Smith continue to attend his academic programming with the continued support of DCS.

Supplementary Character References/Letters of Support

[70] The Court received a character reference for Mr. Smith, dated July 17, 2023, from Mr. Finley Tolliver, who is the Senior Program Supervisor of Love Nova Scotia. He first met with Mr. Smith four years ago through his social worker, Ms. Sewell. She referred Mr. Smith to Mr. Tolliver and Mr. Smith was placed in a Media Arts Program (MAP) to help youth learn to communicate creatively and constructively. During Covid, the program moved online instead of being offered at King's College and that assisted Mr. Smith as he was, at that time, on house arrest.

[71] Mr. Tolliver stated that, over the course of an eight-month period, Mr. Smith participated in every session and became a leader in group discussions, being open and honest about sharing his lived experiences. Mr. Tolliver, Ms. Sewell and the MAP staff believed that Mr. Smith represented an "ideal participant and success we strive for in our programming" as he attended programming while he was on conditions of house arrest. As part of the programming in partnership with Hope Blooms, Mr. Smith increased his self-confidence which further helped him explore his positive path forward.

[72] Mr. Tolliver stated that Mr. Smith has been placed on his continuing care list and they have continued to share stories about their families and situations that they faced as young black males and how they associated themselves to come through those barriers. Mr. Tolliver noted that Mr. Smith has made efforts to build community around him to support his life goals, with the support of Love NS. Mr. Tolliver concluded that Mr. Smith is on a "positive path forward" and he hopes that his journey is supported to continue.

[73] Defence Counsel also filed a mental health and addictions assessment form prepared by Dr. Jacob Cookey in January 2021 which was forwarded to Mr. Smith's physician (Dr. Milne). Mr. Smith had been referred for the psychiatric assessment through the Nova Scotia Brotherhood Initiative (NSBI). Doctor Cookey noted that Mr. Smith, was 19 years old at that time, and had a history of abuse while being in foster care and experienced psychiatric symptoms including depression and anxiety for some time. He added that Mr. Smith had experienced a lot of trauma-related symptoms later in his childhood and early teenage years due to being taken from his parents as a toddler at age 3. However, Dr. Cookey noted that Mr. Smith has been connected with a therapist

for trauma since 2015 and his trauma related symptoms have reduced significantly.

[74] With respect to Mr. Smith's use of substances, the report notes that he had reported smoking 3 to 4 grams per day of cannabis and occasionally hash but quit completely since August 2020. In terms of alcohol consumption, Mr. Smith stated that he used to drink two or three times per week of up to 1.5 quarts of hard liquor but quit completely since August 2020. The report notes that Mr. Smith experienced significant withdrawal symptoms for some time. Mr. Smith also reported taking Xanax, up to three pills per day for several months but quit completely in the July/August 2020 timeframe. In addition, Mr. Smith reported taking about 2 grams of MDMA on weekends for a few weeks during the summer of 2020, but none since then.

[75] With respect to the consumption of alcohol and other substances, I find that, based upon this information, Mr. Smith completely ceased consuming alcohol and other substances following the incident on August 13, 2020, which resulted in the charges before the Court.

[76] In the final analysis, Dr. Cookey concluded that there were diagnoses for a major depressive disorder, with anxious distress, in remission, an alcohol use disorder in early remission and a possible previous PTSD which was also currently in remission. He recommended continuing the current medication prescribed by Dr. Milne and noted that Mr. Smith is "quite a positive young man, with very good supports in place and has remained abstinent from all substances of abuse since August 2020." Dr. Cookey concluded that Mr. Smith is currently expressing motivation to make positive changes in his life and if he remains in therapy, connected with his current supports and motivated, "he would have quite a positive long-term prognosis."

[77] Defence Counsel also submitted a report from Clara Coward, who provided clinical therapeutic services to Mr. Smith between August 2020 and December 2022. After meeting with Mr. Smith, she noted that he presented with symptoms of post-traumatic stress disorder and attachment disorder. During their sessions, she provided psycho-educational trauma for Mr. Smith but indicated that he still had some "unhealed trauma" that can present itself as Mr. Smith being in "survival mode."

[78] During their sessions, Ms. Coward noted many resiliency traits within Mr. Smith's personality and presentation. As an example, she noted that he finished

his first year at NSCC and was determined to continue with his goals. In order to reach the goals that they had identified, which included reducing the risk of reoffending and the risk of violence among other pro-social goals, she recommended that Mr. Smith continue with therapeutic counselling.

[79] A further letter of support was received from Dr. Ron Milne, dated July 20, 2023, who has been seeing Mr. Smith as a patient since 2020 through the Nova Scotia Brotherhood, a black man's health initiative which provides medical, social, and psychological supports to black men. Dr. Milne noted that Mr. Smith comes from a most dysfunctional and social deprived background, but to his credit, he has turned his life around, changed the people who he associated with and has abstained from drug use. In addition, he is upgraded is education and is currently studying to obtain a trade certificate.

[80] Dr. Milne confirmed that Mr. Smith has suffered from a depressive mood disorder as well as insomnia but has been treated with antidepressant medications. He also referred to the psychiatric assessment which was done and found "no antisocial disorders or serious mental elements." He has been compliant with the treatment and his mood and sleep have stabilized. Dr. Milne concluded that Mr. Smith "has reformed himself and taken steps to become a productive member of society" and that he will continue to treat and support Mr. Smith on that journey.

[81] In addition, Ms. Jennifer Sewell of DCS provided a letter of support dated July 24, 2023. In her letter, she related the history of her involvement with Mr. Smith which has been detailed in the Pre-Sentence Report as well as the IRCA report. She states that, prior to Covid 19, Mr. Smith was on track to graduate from Auburn Drive High School but did not fully appreciate the impact of Covid on older individuals with compromised health situations and he left his foster home. As a result, Mr. Smith struggled with housing, structure and stability for the first time in his life. In her opinion, this resulted in him making poor choices and the criminal charges.

[82] After Mr. Smith was charged with current offences, DCS offered him a "Place of Safety" which was a staffed situation where Mr. Smith was placed and was able to follow all the court-ordered conditions. Mr. Smith followed the rules and expectations of the court and staff and while he was on house arrest at the "Place of Safety," he reflected on his current situation and thought about the future. He also developed new coping skills and ways to manage stress and

support good mental and physical health. At the same time, Mr. Smith engaged in counselling and therapy with Ms. Clara Coward on ways to mitigate any future risk to himself and others.

[83] Once Mr. Smith turned 19 years old, he was no longer a child in care and therefore not eligible to remain with the continued support at the "Place of Safety." DCS arranged for another placement which went very well, and Mr. Smith fully complied with his release conditions. In September 2021, Mr. Smith moved out of that placement and into a basement apartment at his former "Place of Safety" where he continued his studies at NSCC.

[84] Ms. Sewell also noted that Mr. Smith met regularly with the Nova Scotia Brother Initiative to receive supports and met regularly with their physician, Dr. Milne to support his mental health and well-being. During this time on house arrest, Mr. Smith completed his remaining high school credits both online and in person by December 2020. Following that, he was accepted into an academic and career connections program for September 2021 at NSCC and completed the upgrading needed for the program by the spring of 2022. In the Fall of 2022, Mr. Smith was accepted into the carpentry course at NSCC Lunenburg campus and he then moved to the Bridgewater area for that program.

[85] Ms. Sewell concluded by noting that Mr. Smith has met frequently with members of the LOVE program [leave out violence] and noted that he has been personally impacted by gun violence due to his relationship with several victims. He is well aware of the impact gun violence hands-on individuals, families and his community.

[86] In conclusion, Ms. Sewell noted that Mr. Smith was very appreciative of the opportunity to be in the community on house arrest as it gave him a second chance to get his life together. He focused on future goals, completed grade 12, the academic career and connections courses at NSCC and was then one credit short of completing the carpentry certificate at the college. She reiterated that DCS remains committed to supporting Mr. Smith while he completes the course and while he successfully transitions from the care of the department. Ms. Sewell concludes that, since August 2020, Mr. Smith has consistently demonstrated a genuine desire and commitment to change as he embraces all the support that he has been offered.

[87] All of the above-noted letters of support or character references were filed as Exhibit 1 during sentencing submissions of counsel on August 23, 2023.

Purposes and Principles of Sentencing:

[88] He determination of a just and appropriate sentence is a highly contextual and individualized process which depends upon the circumstances of the offence and the offender: see ***R. v. Lacasse***, 2015 SCC 64, at para.1. The trial judge is required to carefully balance the societal goals of sentencing against the moral blameworthiness of the offender and the gravity of the offence, while at the same time, considering the victim or victims and the needs of and current conditions in the community: ***R. v M. (C.A.)***, [1996] 1 SCR 500 at paras. 91-92.

[89] The fundamental purposes and principles of sentencing are set out in sections 718 to 718.2 of the **Criminal Code**. Those fundamental objectives of sentencing are to protect the public and to contribute to respect for the law and the maintenance of a safe society, by having one or more of the following goals: denunciation, general and specific deterrence, separation from society where necessary, rehabilitation of the offender, promotion of respons,ibility in offenders and acknowledgement of the harm done to victims and to the community.

[90] Section 718.1 of the **Criminal Code** sets out the fundamental principle of proportionality and sentencing. A sentence must be proportionate to the gravity or seriousness of the offence and the degree of responsibility or moral blameworthiness of the offender. In other words, the severity of the sanction for a crime should reflect or be proportionate to the seriousness of the criminal conduct.

[91] Pursuant to section 718.2 of the **Criminal Code**, the Court that imposes a sentence is also required to consider several other sentencing principles in determining the Just and Appropriate sanction. 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.

[92] 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 offences which were committed in similar circumstances. On this point, I note that it is often difficult to find those similar cases, as the sentencing considerations in any case are highly individualized and based upon the circumstances of the offence and on the circumstances of the offender.

[93] In addition, in sections 718.2 (d) and (e) of the **Code,** Parliament has reminded sentencing judges that the offender should not be deprived of liberty if a less restrictive sanction may be appropriate in all the circumstances. Furthermore, the sentencing judge is required to consider all available sanctions, other than imprisonment that are reasonable in the circumstances, with particular attention to the circumstances of aboriginal offenders.

Aggravating and Mitigating Circumstances:

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

- Multiple instances of "playing" and pointing the firearm at people in a confined space, with a risk of discharge, while under the influence of alcohol and other substances,
- There were very significant and long-lasting injuries to Mr. Brown – s.718.2(a)(iii.1) of the **Code**,
- Flight from the scene, taking the handgun away from the scene and leaving it in an unidentified location, representing a continued public risk – see ***Wournell*** (NSCA) at para. 89 with respect to a sawed-off .22 calibre rifle which was ultimately recovered by the police.

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

- The youthfulness of the accused, being an **18-year-old** African Nova Scotia male at the time of the incident before the Court.
- The lack of any pre-existing youth or adult criminal convictions,
- Significant efforts at rehabilitation since being charged, which have included education, counselling, job skills and lifestyle changes,
- No further involvement in the criminal justice system while on restrictive interim release conditions for a significant period of time,
- An expression of remorse by Mr. Smith as noted by the authors of the Impact of Race and Cultural Assessment (IRCA),

- When offered an opportunity to speak at the sentencing hearing, Mr. Smith accepted full responsibility for his actions and expressed sincere regret and remorse for the injury to one of his best friends,

- Since the incident, Mr. Smith also confirmed his efforts to change his life in a positive direction, through therapy, connecting with all available supports, completing his high school education and attending NSCC's carpentry course to become a red-seal carpenter.

Guidance of NSCA Cases *Anderson* and *Wournell* on Sentencing Decisions

[96] The Nova Scotia Court of Appeal in its ***Anderson*** decision in 2021 and more recently in ***R. v. Wournell***, 2023 NSCA 53 [issued on July 27, 2023] had provided "guidance" for sentencing decisions which involved an African Nova Scotian offender. In ***Anderson***, *supra*, which was a Crown appeal to the order of a conditional sentence for firearms offences related to his possession of a loaded .22 calibre revolver, at paragraphs 112 to 124, Derrick JA highlighted how IRCA's should inform the sentencing of African Nova Scotian Offenders.

[97] In particular, in ***Anderson***, *supra*, Derrick JA stated, at para. 114, that taking account of IRCA evidence insures relevant systemic and background factors are integrated in the crafting of a fit sentence, one that is proportionate to the gravity of the offence and the moral culpability of the offender.

[98] The ***Wournell*** decision related to a defence appeal with respect to a jail sentence imposed for possession of a prohibited firearm, being a .22 calibre sawed-off rifle together with readily accessible ammunition contrary to section 95(1) of the **Code**, unlawful possession of an airsoft gun for a purpose dangerous to the public peace or for the purpose of committing an offence contrary to section 88(1) of the **Code** and being an occupant of a motor vehicle in which he knew there was a firearm, the 22 calibre rifle, contrary to section 94(1) **Code**. In ***Wournell***, Justice Derrick noted, *supra*, at para. 62, that the "guidance" provided by the Court of Appeal with respect to the "application" of an African Nova Scotian offender's specific information and circumstances where a conditional sentence is an "option in play" is found in the ***Anderson*** decision at paras. 126-163.

[99] Furthermore, Derrick JA stated, in ***Anderson***, *supra*, at para. 118 that the "method" employed for sentencing African Nova Scotian offender should carefully consider the systemic and background factors detailed in an IRCA. It

may amount to an error of law for a sentencing judge to ignore or fail to inquire into these factors. A judge does not have to be satisfied that a causal link has been established "between the systemic and background factors and the commission of the offence." These principles parallel the requirements in law established by the Supreme Court of Canada in relation to ***Gladue*** factors in the sentencing of indigenous offenders.

[100] The Court of Appeal noted, in ***Anderson***, *supra*, at para. 121, and reiterated in ***Wournell***, *supra*, at para. 63, the need for the sentencing judge to employ that social context information supplied by an IRCA to assist in:

- contextualizing the gravity of the offence and the degree of responsibility of the offender.
- Revealing the existence of mitigating factors or explaining their absence.
- Addressing aggravating factors and offering a deeper explanation for them.
- Informing the principles of sentencing in the weight to be accorded to denunciation and deterrence.
- Identifying rehabilitative and restorative options for the offender and appropriate opportunities for reparations by the offender to the victim and the community.
- Strengthening the offender's engagement with their community.
- Informing the application of the parity principle. "Courts must ensure that a formulistic approach to parity in sentencing does not undermine
- the remedial purpose of section 718.2 (e)."

[101] In ***Anderson***, *supra*, at para. 123, the Court of Appeal added that in explaining their sentences, judges should make more than passing reference to the background of an African Nova Scotian offender. It may not be enough to simply describe the offender's history in great detail. It should be possible on appeal for a court to determine, based on the record or the judge's reasons, that proper attention was given to the circumstances of the offender. Where this cannot be discerned, appellate intervention may be warranted.

[102] In ***Wournell***, *supra* at para. 105 since the imposition of a CSO was an "available" option, after examining the risk of re-offence and the gravity of damage should reoffending occur in accordance with the criteria set out in the SCC's ***Proulx*** decision, the Court of Appeal determined that the appellant's risk of reoffending can be managed in the community under a conditional sentence order. Derrick JA added that the Court was also satisfied that, as is statutorily required, a conditional sentence order in this case will serve the fundamental principle of proportionality set out in section 718.1 of the **Criminal Code**.

[103] Justice Derrick added in ***Wournell***, *supra*, at para. 105, that the gravity of the appellant's offence and his moral culpability for it must be assessed in the context of historic factors and systemic racism. Therefore, the Court of Appeal's determination in re-sentencing the appellant required taking "into account the impact of that social and economic deprivation, historical disadvantage, diminished and nonexistent opportunities, and restricted options that may have had on the offender's moral responsibility." In the footnote to this paragraph, Justice Derrick notes that the same comments were made in ***Anderson***, *supra*, at para. 146.

[104] Furthermore, Derrick JA added in ***Wournell*** at para. 106, comments which were also made in ***Anderson*** at para. 154 that sentencing principles of deterrence and denunciation can also be served by the imposition of a "properly crafted conditional sentence with appropriate conditions." Then, referring to para. 41 from the ***Proulx*** decision, Justice Derrick added that a CSO may even be as onerous or more onerous than a jail term particularly in circumstances where the offender is forced to take responsibility for his or her actions and make reparations to both the victim and the community while living in the community under tight controls.

[105] In ***Anderson***, *supra*, at para. 155, Derrick JA stated that should the offender fail to abide by the Court imposed conditions or reoffend, the consequences of breaching a conditional sentence are potent - the "real threat of incarceration."

[106] In ***Anderson*****,** *supra***,** at para. 160, the NSCA added that denunciation and deterrence – general deterrence in Mr. Anderson's case – must be assessed contextually in sentencing African Nova Scotian offenders. They "cannot be regarded as static principles to be applied rigidly in what is a highly individualized process."

[107] In ***Wournell***, *supra*, at para. 112, Derrick JA stated that a conditional sentence for the appellant ensures that we do not lose sight of other sentencing principles of rehabilitation and restraint, particularly in this case of a first-time offender. Justice Derrick acknowledges that ***Proulx's*** observation that Parliament mandated the "expanded use… of restorative principles in sentencing as a result of the general failure of incarceration to rehabilitate offenders and reintegrate them into society." A conditional sentence for the appellant represents a restrained, restorative sanction, one that is responsive to the disproportionate incarceration of African Nova Scotians.

The Principle of Proportionality and the Parity Principle:

[108] As I have previously mentioned, the fundamental principle in sentencing is proportionality which is codified in section 718.1 of the **Code**. Recently, in ***R. v. Parranto***, 2021 SCC 46 at para. 44, the Supreme Court of Canada stated that:

> "Sentencing judges are required to individualize the sentence in a way that accounts for both aspects of proportionality – the gravity of the offence and the offender's individual circumstances and moral culpability. At the stage of individualizing the sentence, the sentencing judge must therefore consider "all of the relevant factors and circumstances, including the status and life experiences, of the person before them" (*Ipeelee*, at para. 75). Those factors and circumstances may well justify a significant downward or upward adjustment in the sentence imposed."

[109] The Supreme Court of Canada in ***R. v Lacasse***, *supra*, further explained the considerations involving the principles of proportionality and parity on specific sentencing decisions at paras. 53 – 54:

> [53] This inquiry must be focused on the fundamental principle of proportionality stated in section 718.1 of the **Criminal Code,** which provides that a sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender." A sentence will therefore be demonstrably unfit if it constitutes an unreasonable departure from this principle. 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: s.718.2(a) and (b) of the **Criminal Code**.
>
> [54] The determination of whether a sentence is fit also requires that the sentencing objectives set out in section 718 of the **Criminal Code** and the other sentencing principles set out in section 718.2 be taken into account. Once again,

> however, it is up to the trial judge to properly weigh these various principles and objectives, whose relative importance will necessarily vary with the nature of the crime and the circumstances in which it was committed. The principle of parity of sentences, on which the Court of Appeal relied, is secondary to the fundamental principle of proportionality. This court explained this as follows in ***M. (C.A)*****:**
>
> > "It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime…. Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. [para. 92]"

[110] As I indicated previously, the parity principle 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 sentences, as a guideline for the trial judge. It does not, however, create any hard and fast rules, nor does the consideration of an appropriate range preclude a greater sentence where the emphasis is upon denunciation, deterrence and the gravity of the offence or a lesser sentence based upon special or significant mitigating circumstances.

[111] The Nova Scotia Court of Appeal in ***R. v. Rakeem Anderson*****,** 2021 NSCA 62, which was determined about six months before the Supreme Court of Canada's decision in ***Parranto*****,** incorporated those same comments from the ***Ipeelee*** decision in their decision to once again, highlight, the fact that sentencing is an "inherently individualized process." In ***Anderson***, *supra*, at paras. 115 and 116, Derrick J.A. stated:

> "[115] Sentencing is an inherently individualized process. It is a fundamental duty of a sentencing judge to pay close attention to the circumstances of all offenders in order to craft a sentence that is genuinely fit and proper. What is required in the sentencing of Indigenous offenders applies to offenders of African descent who are also entitled to 'an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences…'
>
> [116] Sentencing judges play a significant role in how offenders are punished and rehabilitated through the criminal justice system. As in the case of Indigenous offenders, they decide whether an offender of African descent is incarcerated or receives a sentence that can play 'a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.' Notwithstanding that the sentencing judges are far downstream from the forces that have contributed to bringing offenders before them, they are influential at a

> critical juncture: they determine if incarceration and separation from society is the course to be followed or if a remedial option can serve the objectives of sentencing and achieve a just outcome."

[112] Most recently, in ***R. v. Hills***, 2023 SCC 2 at paras. 61 and 62, the SCC has, once again, stated that a "proportionate sentence" incorporates both the gravity of the offence and the moral blameworthiness of the offender. Sentencing is a "highly individualized and discretionary endeavour" and that each sentence is to be "custom tailored" to match the particular offences, as well as the offender. The SCC reiterated that there is no "one-size-fits-all" penalty, and that sentencing is "an entirely individualized" and "profoundly subjective process."

[113] In ***R. v. Hills***, 2023 SCC 2 has reiterated, at para. 56, that "proportionality is the "central tenet" of Canada's sentencing regime. Indeed, "whatever weight a judge may wish to accord to the objectives [for sentencing prescribed in section 718 to 718.2 of the **Criminal Code**], the resulting sentence ***must*** respect the fundamental principle of proportionality" (***Nasogaluak***, at para. 40, (emphasis in the original)).

[114] The SCC has clearly stated, in ***Hills***, *supra*, at para. 57, that the purpose of proportionality is founded in "fairness and justice" to prevent unjust punishment for the "sake of the common good." It serves as a limiting function to ensure that there is "justice for the offender." As the "*sine qua non* of a just sanction" as mentioned in ***Ipeelee***, *supra*, (at para. 37), the concept expresses that the amount of punishment an offender receives must be proportionate to the gravity of the offence and the offender's moral blameworthiness.

[115] In ***Hills***, *supra*, at para. 58, the SCC provided additional guidance on the key issues to address in determining the relative gravity of the offence and the offender's moral culpability in stating:

> [58] The "***gravity of the offence"*** refers to the seriousness of the offence in a general sense and is reflected in the potential penalty imposed by Parliament and in any specific features of the commission of the crime. The gravity of the offence should be measured by taking into account the consequences of the offender's actions on the victims and public safety, and the physical and psychological harms that flowed from the offence. In some cases, where there is bias, prejudice or hatred, the motivation of the offender may also be relevant (see s.718.2(a)(i) **Criminal Code**). The offender's ***moral culpability or degree of responsibility*** should be measured by gauging the essential substantive elements of the offence including the offence's *mens rea*, the offender's conduct in the commission of the offence, the offender's motive for committing the offence and aspects of the

> offender's background that increase or decrease the offender's individual responsibility for the crime, including the offender's personal circumstances and mental capacity. [*SCC's Citations are omitted* and emphasis is mine].

[116] The seriousness or gravity of the offence of criminal negligence involving firearms was highlighted by the Supreme Court of Canada in ***R v. Morrissey*,** 2000 SCC 39, which involved a section 12 **Charter** appeal that the four-year minimum sentence imposed for criminal negligence causing death which also involved the charge of unlawfully pointing a firearm, constituted cruel and unusual punishment. The accused and his friend had been drinking heavily in a small cabin, and the accused had a sawed-off rifle, jumped up with the rifle that he knew was loaded, then fell and the rifle discharged, killing his friend.

[117] The accused had pled guilty to those charges and the trial judge found that the mandatory minimum constituted cruel and unusual punishment pursuant to section 12 of the **Charter** and ordered a two-year sentence. The Court of Appeal allowed the Crown appeal and reinstated the four-year mandatory minimum sentence. The Supreme Court of Canada dismissed the appeal and upheld the mandatory minimum sentence.

[118] In discussing the seriousness or gravity of the criminal negligence causing death with the use of a firearm, which in my view would be equally applicable to a charge of criminal negligence in the use of a firearm causing bodily harm, the SCC stated in **Morrissey**, *supra*, at para. 53:

> [53] In both of these hypotheticals, it is my view that a four-year imprisonment would not be cruel and unusual punishment for such offenders. *Perhaps the most egregious hypotheticals reviewed are the individuals playing with guns. Firearms are not toys. There is no room for error when a trigger is pulled. If a gun is loaded, there is a sufficient probability that any person in the line of fire could be killed. The need for general deterrence is as great (if not greater) for the hypothetical offenders playing with guns as it is for people such as the appellant.* Considering the gravity of the offence, the denunciation and retribution of justice principles satisfied by the minimum sentence are equally applicable in this hypothetical. In such circumstances, there can be no question that the four-year minimum is as appropriate as it is for the appellant. (*Emphasis is mine*)

[119] It is important to note that the offence of criminal negligence causing bodily harm contrary to section 221 of the **Criminal Code** has not been subject to a mandatory minimum punishment. The offence of possession of a prohibited or restricted firearm with ammunition, without a authorization or registration

certificate for the firearm [s. 95(1) of the **Code**], had been subject to a minimum punishment for that offence, but it was struck down in ***R. v. Nur***, *supra*.

[120] In terms of the seriousness or gravity of the offences as determined by Parliament, both the section 221 of the **Code** and the section 95(1) of the **Code** offences may be prosecuted by indictment, as they were in this case, and in both cases, an offender may be liable to a term of imprisonment for not more than 10 years. Those two offences reflect the most serious offences before the court as determined by Parliament, as the other offences for which Mr. Smith is to be sentenced are liable to a maximum of five years or two years of imprisonment when prosecuted by indictment.

[121] Moreover, in considering the consequences of the offender's actions on victims and public safety as mentioned in ***Hills***, *supra*, there can be no doubt that the victim suffered significant bodily harm which required surgery, and several months of combined hospital and follow-up at a rehab centre. The fact that the firearm has never been recovered and could still be in the community has a potential impact on public safety.

[122] In terms of the gravity or seriousness of the offences before the court, I agree with the Crown Attorney and find that the gravity or seriousness of the offences committed by Mr. Smith which involved the possession, handling, use and ultimately the criminally negligent discharge of a restricted or prohibited firearm, were very high.

[123] In terms of Mr. Smith's degree of responsibility or moral blameworthiness for the offences before the court, I find that it is somewhat attenuated by the fact that the most serious offence involved criminal negligence in the use of the firearm without any motive or specific intent (*mens rea*) to injure the victim who was, in fact, one of his best friends and as Mr. Smith stated during his remarks to the Court, "like a brother to him." However, the fact that Mr. Smith brought a loaded, restricted or prohibited firearm into a small interior space of a hotel room and then pointed it at people and pulled the trigger as "horseplay," while under the influence of alcohol and likely drugs, demonstrated a complete disregard for the safety of others and a high degree of responsibility for the commission of the offences.

[124] However, I also find that the information in the IRCA report of Mr. Smith's personal circumstances in relation to historic factors, foster placements, childhood trauma, mental health issues of anxiety and depression, systemic

racism and his struggles with racial identity and locating a place in the ANS community play a role in attenuating his moral blameworthiness for the offences before the court.

[125] In addition, with respect to Mr. Smith's moral blameworthiness, although I have found that it is high, there is no doubt that he has expressed sincere regret and remorse for his actions. As mentioned previously, there is substantial information before the Court which has clearly demonstrated that Mr. Smith has taken significant steps to move forward from the circumstances in which he found himself at the time of the offences, through accessing rehabilitative counselling and other resources to rehabilitate himself and promote a sense of responsibility in the community.

Sentencing Precedents to Establish a Range of Sentence

[126] As I indicated previously, the parity principle 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.

[127] During his submissions, the Crown Attorney referred to several sentencing precedents to establish an appropriate range of sentence. However, it is important to note, from comments of the Supreme Court of Canada, that the proposed range only serves as a "guideline" for the trial judge. This range does not create any hard and fast rules, nor does it preclude a greater sentence where the emphasis is upon denunciation, deterrence and the gravity of the offence or a lesser sentence based upon special or significant mitigating circumstances.

Criminal Negligence Causing Bodily harm:

[128] In ***R. v. Cantre***, 2021 SKQB 39, the accused who was a 42-year-old indigenous offender was convicted of criminal negligence in the shooting of a firearm and causing bodily harm to the complainant. The victim had been hunting for deer and had just shot a deer. He was heading back to his vehicle which was parked in a field to transport the animal when he saw another vehicle parked on a nearby road. The victim started waving and yelling "don't shoot" as he kept walking towards his vehicle. Then, he heard a muffled sound and fell to the ground, unable to get up, having been shot in the left hip. Mr. Cantre moved

toward the victim, but did not assist him, returned to his truck and drove off leaving the victim severely injured in the mid-November cold.

[129] The accused had stated that he believed he was firing at a moose, but the judge found him guilty of the offence in concluding that this was not an accidental discharge of his weapon. The Court found that it was an intended and hurried shot in lowlight which involved a substantial and marked departure from the care required and a wanton and reckless disregard for the lives and safety of others. The bodily harm to the victim was substantial and he was in the hospital for almost one month, required treatment and surgery and experienced pain for several years.

[130] In terms of the ***Gladue*** factors considered by the Court, it was noted that Mr. Cantre was a status member of the First Nation where the incident occurred and the Court took judicial notice of the systemic elements of his heritage, including the history of colonization and the negative impact of residential schools. The PSR had stated that his father was abusive, his parents separated when he was five years old, and he was placed in foster care. In foster care, Mr. Cantre and his siblings experienced emotional, physical and sexual abuse. At age 8, his mother regained custody and moved into a town where he attended school and completed Grade 9, but during that time, he experienced racial discrimination, poverty and scarcity of food. In Grade 10, he was placed in a residential school and struggled with mental health issues. After graduation, he returned to his First Nation community and decided to focus on his cultural identity as part of his healing process.

[131] The PSR noted that since high school, Mr. Cantre received had several certificates from mental health and addictions services and succeeded at various trades including heavy equipment operation. He was able to maintain full-time employment for his entire adult life and a had a positive 20-year relationship with his wife, raising their children to understand their culture. He was active in his First Nations community by hunting and providing food for his elders as well as being an instructor in hunter safety and traditional hunting practices.

[132] In ***Cantre***, the trial judge also referred to the comments of the SCC in ***Morrissey***, *supra*, case at paras. 53 and 54 with respect to the need for the denunciation and deterrence, where people handle firearms in a way that may cause harm to people if they do not take care in handling their weapon. In the final analysis, the Court stated that there was a need to emphasize deterrence

and denunciation in the case, considered ***Gladue*** and aggravating factors and the principle of proportionality, in imposing a sentence of 30 months.

[133] In his brief, the Crown Attorney acknowledges that there are a couple of clear distinctions between Mr. Smith's situation and that of Mr. Cantre. In ***Cantre***, the court concluded that the accused had intentionally shot at and injured the victim in a criminally negligent manner and did not accept that it was at an accidental shot at an animal. On the other hand, unlike Mr. Smith, Mr. Cantre was using a lawfully acquired hunting rifle and not an unlicensed, restricted or prohibited firearm.

Unregistered Possession of a Prohibited or Restricted Firearm [s. 95 of the **Code**]:

[134] In ***R. v. MacLean***, 2020 ONSC 622, the 23-year-old accused who had no prior record was found in possession of a loaded handgun in his bedroom while he was sleeping when a warrant was executed. The accused, who was on bail at the time of his arrest and prohibited from possessing weapons, was charged with several firearms related offences. The accused pled guilty to possession of a loaded prohibited firearm without having a license and breaching his bail conditions. He accepted full responsibility for his conduct. Information before the court confirmed that the accused had had a difficult life but was determined to make positive changes.

[135] The Court stated that there was no evidence that the accused had discharged the firearm, threatened anyone with it or that he had it in connection with any other criminal offence and as such, there were no additional aggravating facts. However, the Court stated that the mere possession of a loaded prohibited firearm was serious without evidence that it was used. Given the danger posed by loaded firearms, the Court held that the sentence should emphasize denunciation and deterrence.

[136] The Court noted that the mandatory minimum three-year sentence for possessing a loaded restricted or prohibited firearm had been struck down as being unconstitutional in ***R. v. Nur***, 2015 SCC 15, but the SCC had added at para. 52, that a three-year sentence would often be appropriate for those who carry a loaded prohibited or restricted firearm in public as a tool of his or her criminal trade. The SCC also stated that for those whose conduct is less serious and poses less of a risk to the public, a three-year sentence may well be too high.

[137] In ***MacLean***, *supra*, at para. 12, the trial judge determined that the sentencing range for possessing a loaded restricted or prohibited firearm where the gun was not displayed in public and was not used in connection with other criminal activity was 18 months in exceptional circumstances to three years: ***R. v. Burke***, 2018 ONSC 5183 at para. 52 and ***R. v. Adan***, 2016 ONSC 6753 at para. 23. A sentence of two years or approaching two years had been imposed on a first offender found in possession of a loaded prohibited firearm, unless the gun was found in a public place: ***R. v. Ishmael***, 2014 ONCJ 136 at para. 16.

[138] The Court considered the significant mitigating factors in the case, Mr. McLean being 23-year-old, youthful first-time adult offender with no prior criminal record. The Court noted that, in ***R. v. Priest***, [1996] 30 OR (3rd) 538 at para. 30, stood for the proposition that a court must impose the shortest term of imprisonment that is proportionate to the crime and the responsibility of the offender. In addition, Mr. McLean had pled guilty, he had a difficult life, having been raised by a single mother, only seeing his father on occasion, and now wanted to make changes in his life. He had completed some programs while in custody where opportunities were limited and planned to reconnect with his father, upgrade his education and start his own business.

[139] In the final analysis, considering the seriousness of the offence and the mitigating factors present in the case, the Court ordered a 20-month sentence for the possession of a loaded prohibited or restricted firearm. For the breach of the bail condition that he not possess any weapon, the Court imposed a sentence of 4 months less one day for that offence to be served on a consecutive basis for a total of two years less one day in jail. At that point, the Court credited Mr. McLean with a substantial amount of pre-sentence custody which then only required him to serve a further 17 days in custody. Following the custodial sentence, the court placed Mr. McLean on probation for a period of two years.

[140] The Crown Attorney notes that the ***MacLean*** case may well establish a low end of the range for the section 95 of the **Code** offence, where a person possesses a loaded handgun, but relates to a case where the firearm was not discharged. He submits that the facts of that case are far less serious than the instant case. The key distinctions between the ***MacLean*** case and the instant case are that in ***MacLean*** no one was shot; the accused did not flee, and the firearm was recovered.

[141] In ***R. v. Anderson***, 2021 NSCA 62, Mr. Anderson had been stopped by police at a random motor vehicle checkpoint. A pat-down search located a loaded .22 calibre revolver in his waistband. The Court dismissed a *voir dire* with respect to the constitutionality of Mr. Anderson's investigative detention and subsequent search. The trial court admitted the handgun into evidence and Mr. Anderson was convicted of five related offences – transporting restricted weapon in a careless manner [s. 86(1) of the **Code**], carrying a concealed weapon without being authorized under the Firearms Act [s. 90(1) of the **Code],** possession of a restricted weapon without a registration certificate [s. 91(1) of the **Code],** possession of a loaded restricted weapon with ammunition [s. 95(2)(a) of the **Code**] and being the occupant of a motor vehicle in which he knew there was a restricted weapon [s. 94 (1) of the **Code**]. Two other counts on the Information were stayed based upon the ***Kienapple*** principle. The trial judge had sentenced Mr. Anderson to a CSO of two years less a day to be served in the community followed by two years probation. Ultimately, the Court of Appeal dismissed the Crown appeal of that sentence.

[142] The Crown had initially recommended a sentence in the range of two to three years in a federal penitentiary while Defence Counsel had recommended a non-custodial sentence. Both parties agreed that a conditional sentence was an available option as the SCC in ***R. v. Nur*** had struck down the mandatory minimum sentence for this offence. The Court received information from an IRCA report and from witnesses with respect to Mr. Anderson and more generally, systemic issues experienced by African Nova Scotians. The trial judge saw Mr. Anderson's experiences as a racialized person, detailed in the IRCA, as the factors that contributed to his "pathway to criminality."

[143] Mr. Anderson was a young African Nova Scotian with a dated record of convictions as a youth including two assaults with a weapons charge of possession of a weapon when he was 15 years old. He had one conviction as an adult for break enter and theft which had occurred six years earlier for which he received a two-year federal sentence of incarceration.

[144] The trial judge noted that the loaded firearm was found as a result of a routine traffic stop and that Mr. Anderson was not otherwise engaged in any criminal activity at the time. There was a discussion of whether this was a "true crime", but the Court of Appeal confirmed in ***Anderson***, *supra*, at paras. 59-61 that the evidence established that this was a "true crime" as he had a loaded handgun in his possession, albeit not for the purpose of pursuing a criminal

offence, but rather out of fear that he might be targeted for violence. This was certainly not a regulatory offence.

[145] The trial judge noted that Mr. Anderson had grown up in an area with extremely low income and impoverished people, substandard housing and lacking in both services and resources. His parents had separated when he was very young, and he had experienced housing instability and the regular involvement of Child Protection Services. He found school difficult and was only able to obtain grade 6, which crippled his ability to pursue career opportunities. He had several mental health issues which were identified including ADHD, Oppositional Defiant Disorder and Obsessive-Compulsive Disorder. The IRCA report also noted that he had been subject to racial profiling in his area of the city and had experienced trauma and loss when his father died when he was only eight years old due to a chronic illness and an alcohol addiction.

[146] The trial judge had also noted that Mr. Anderson's gun possession was not connected to other criminal activities such as drug trafficking, he did not have other guns in his possession, he was not impaired and his interaction with the police was polite, respectful, and cooperative. The Court of Appeal stated in ***Anderson***, *supra*, at paras. 145-146, that even where the offence is very serious, consideration must be given to the impact of systemic racism and its effect on the offender. The objective gravity of a crime is not the sole driver of the sentencing determination which must reflect a careful weighing of all sentencing objectives. The moral culpability of an African Nova Scotian offender has to be assessed in the context of historic factors and systemic racism, as it was done in this case.

[147] Although the Crown had originally appealed the sentence, the Court of Appeal noted that the Crown position had "evolved substantially" and utilized the opportunity to provide "guidance" for courts tasked with applying the principles of sentencing to offenders like Mr. Anderson who are of African descent. The Court of Appeal stated that it is now a widely accepted fact that certain groups in society are disproportionately incarcerated, notably indigenous offenders and black offenders and that Parliament had introduced the conditional sentencing regime to remedy the problem of over-incarceration [***Anderson***, *supra*, at paras. 2-3].

[148] With respect to the ***Anderson*** decision, the Crown Attorney submitted that there are a couple of key distinguishing features between that case and the instant case. In ***Anderson***, the firearm was in his possession and discovered during a traffic stop, but it had not been fired at or pointed in the direction of anyone, there was no victim who had suffered bodily harm, and the firearm was recovered by the police during the traffic stop. In addition, while both cases involved unlawful possession, transportation and concealing the firearm, a key distinguishing feature in this case is that Mr. Smith's possession of the firearm also included several acts where he "played with" the firearm in a criminally negligent fashion, pointed it at people and pulled the trigger which discharged a bullet that caused serious bodily harm to the victim who required surgery and a long period of convalescence.

[149] In ***R. v. Travis***, 2019 ONSC 4862, the accused was found guilty of five weapons related charges, including unauthorized possession of a loaded prohibited firearm contrary to s.95 (1)**,** unlicensed possession of a prohibited firearm contrary to s. 91(1), unauthorized possession of prohibited ammunition contrary to section 86 (2), possession of a weapon dangerous to the public peace contrary to section 88 (1) and unauthorized carrying of a concealed weapon contrary to section 90 (1).

[150] The trial arose out of unusual events as the police had been investigating a domestic assault and met with that person but were advised that they did not have grounds to arrest and released him. Later, they were told that they now had grounds to arrest that person. At a restaurant, police officers saw a man of the same general size and stature, wearing a similar hoodie to the assault suspect. As the police approached that person, he ran off with the police pursuing him on foot. The accused was taken to the ground and following a short struggle was handcuffed. During that process, the police located a fully loaded Smith & Wesson .38 calibre revolver on the accused. They also realized, at the same time, that he was not the individual who they had been looking for in relation to the domestic assault.

[151] Following a *voir dire* with respect to whether there was a breach of Mr. Travis's s. 8 and 9 **Charter** rights, the Court ruled that there was no breach of his **Charter** rights and dismissed his application to exclude the revolver and other evidence seized by the police. Following that decision, Mr. Travis pled guilty to the five charges before the Court.

[152] Mr. Travis was 26 years old, had no prior criminal record, was working part-time as a general labourer and there was a positive Pre-Sentence Report. He was in a stable marital relationship for over four years and was the father of their 18-month-old daughter. Mr. Travis had the full support of his partner and his extended family, having grown up in a home without any issues of domestic violence, mental health come or any alcohol or substance abuse. He had a Grade 12 graduation diploma and was described as a hard worker with a favourable employment history.

[153] The Pre-Sentence Report indicated that he expressed his remorse for his actions and appeared to accept responsibility for his actions. He had apologized for his actions in court and stated that he had no intention of ever using the gun, but it was being carried as a way of protecting himself, having been previously assaulted and injured on a couple of previous occasions prior to the birth of his daughter.

[154] In ***Travis***, *supra*, at para. 57, the trial judge stated that the appropriate sentence must focus on the objectives of denunciation, general deterrence, and the overriding goal of protection of the public as it is important to remember that courts have taken notice of "the lethal problem posed by illegal handguns." The Court sentenced Mr. Travis to a term of imprisonment of 29 months for the unauthorized possession of a loaded prohibited firearm [s. 95(1) of the **Code**] and a concurrent sentence of 18 months for the unauthorized carrying of a concealed weapon [s.90 (1) of the **Code**]. The remaining charges were stayed.

[155] In ***R. v. Mohiadin***, 2021 ONCA 122, the accused was convicted of six counts arising from his possession of a loaded handgun in the car and sentenced to 38 months in custody, less credit for presentence custody. The appeal only related to the sentence imposed by the court.

[156] At the time of the offence, the accused was 19 years old and seated in a parked car outside an apartment building. The police were at that building to investigate an unrelated matter and saw marijuana smoke coming from the open car window. The incident occurred just before marijuana was legalized and the police approached the car and saw the accused with a thick marijuana "blunt" in his hand and a satchel around his neck. They saw the handle of a handgun inside the satchel and immediately arrested the accused and seized the handgun.

[157] At the Court of Appeal, the Crown Attorney pointed out that the trial judge had misapprehended the Crown's proposed sentence and had imposed a

sentence greater than the range of sentence of 32 to 36 months as proposed by the Crown for this offence, less ***Downes*** credit of five months for being on restrictive house arrest conditions. As a result, the range of sentence proposed by the Crown was not 32 to 36 months but rather 27 to 31 months for this offence and the 38-month sentence exceeded the Crown's position by seven months.

[158] In sentencing afresh in the Court of Appeal, the Court noted that the Crown had recommended a three-year sentence before credit for pre-sentence custody and ***Downes*** credit. The Crown also acknowledged that longer and shorter sentences had been imposed for similar serious gun possession offences by youthful first-time offenders. Here, the accused was a youthful first offender, there was no evidence that he was involved in any gang activity or evidence of any direct threat to the accused. The accused had witnessed gun violence as his older brother had died in gun violence and he lived up in a part of Toronto where gun violence was commonplace. The accused had good prospects for rehabilitation and although he had not pled guilty, he had saved several days of court time by effectively inviting the guilty verdict after losing the **Charter** challenge.

[159] The Ontario Court of Appeal granted the sentence appeal and reduced the sentence to the Crown's original proposal, which was 36 months, less 54 days credit for pre-sentence custody and 5 months as ***Downes*** credit for restrictive house arrest conditions, which effectively made the sentence about 29.5 months.

[160] In ***R. v. Lugela***, 2021 ABPC 310, a 29-year-old black Sudanese immigrant was convicted and sentenced to 36 months in prison for seven firearms related offences. The accused and two other individuals were walking in an area of Calgary when they were approached by police who had been watching them. The accused had a small handbag in which he had a loaded, illegal firearm. The men ran off and the police let off a flash bang distraction device which caused the accused to fall to the ground. As he fell, the bag fell off his arm and landed nearby. The police seized the bag and found a loaded Smith & Wesson 40 semiautomatic handgun with the serial number removed. The accused was not engaged in any other criminal activity at the time of the possession of the firearm. However, he was subject to a five-year section 109 of the **Code** firearm prohibition order as a result of a prior firearm conviction.

[161] The Crown had sought a global sentence of 4 years for the section 95(1) offence of possession of a loaded restricted firearm without a license and concurrent sentences for all the remaining charges. Defence Counsel submitted that the appropriate global sentence would be two years less one day, with 18 months concurrent being for all the other firearms offences and also 3 months consecutive for each of the other two charges of failing to comply with the release order and failing to comply with the section 109 order. Defence Counsel relied upon the NSCA decision in ***R. v. Anderson***, in seeking a culturally sensitive analysis based upon overrepresentation of people of African descent in Canadian prisons and the factors used in ***Anderson*** to mitigate moral culpability and to reduce the seriousness of the offence.

[162] In ***Lugela*****,** the trial judge noted, *supra*, at para. 42 that in ***Anderson***, *supra*, at para. 14, the NSCA had stated that "these reasons are intended as guidance for Judges sentencing African Nova Scotian offenders." It was also noted that the ***Anderson*** decision was focused "exclusively" on the unique history and context of African Nova Scotians.

[163] In addition, the trial judge referred to ***R. v. Morris***, 2021 ONCA 680 (CanLII) in ***Lugela***, *supra*, at para. 44:

> [44] The Ontario Court of Appeal in ***Morris*** took a different approach to sentencing a black offender than the court in ***Anderson***. The court in ***Morris*** had agreed with the court in **Anderson** that anti-black racism is a real phenomenon in Canadian society and can be acknowledged through judicial notice. However, the court in ***Morris*** found that not all individuals of African descent would experience systemic racism in the same manner and evidence would need to be called about the circumstance of a particular individual's experience with racism. The court found that, in some cases, the existence of anti-black racism and the disadvantages that flow from this reality could reduce the moral culpability of an offender. The Court was clear, however, that the same factors could not reduce the seriousness of the offence. As such, in ***Morris***, the existence of racism becomes one of the individualized factors provided to trial judges to consider at a sentencing when determining an offender's moral blameworthiness in the context of a fit and proportionate sentence.

[164] In terms of the gravity of the offence, the Court noted in ***Lugela***, *supra*, at para. 62 that he had possessed a loaded firearm in a public space, the firearm had been concealed in a small bag and could be used at any moment with deadly effect. This was not a regulatory offence and was characterized as a "true crime" offence. The Court also found that Mr. Lugela was not engaged in

any form of criminal activity while in possession of the firearm, so the offence was not the most serious of its kind.

[165] The Court took judicial notice of the societal conditions of anti-black racism and applied the principles from ***Morris*** to reduce his moral blameworthiness. However, the Court was of the view that the same evidence could not be used to reduce the gravity of the offence.

[166] In terms of the aggravating circumstances, Mr. Lugela had a prior criminal record which began in 2007 when he was a young person and continued to the present day with few breaks. The Court stated, that apart from two sets of convictions in 2012 and 2017 for firearms offences, his record consisted primarily of breaches of court orders. However, this was his third conviction for having possessed a firearm unlawfully and the second violation of a firearms prohibition. The offence was further aggravated by the fact that Mr. Lugela ran from the police which created a dangerous situation for all involved and increased the likelihood of armed conflict.

[167] In the final analysis, the Court sentenced Mr. Lugela to a total of 36 months in prison, with 34 months for possession of a loaded restricted firearm without license [s. 95(1)] and two months consecutive for possession of a firearm while prohibited by reason of a section 109 order [s.117.01(1)]. For the remaining five charges, he was sentenced to concurrent time of 12 months for careless storage of a firearm [s.86(1)], carrying a concealed weapon [s.90(1)], possession of a restricted firearm without license [s.91(2)], and possession of a firearm with an altered serial number [s.108(1)(b). He also received six months concurrent for failing to comply with the release order by possessing a firearm [s.145(5)(a)].

[168] For his submissions with respect to Parity principle, Defence Counsel primarily referred to the NSCA decisions in ***Anderson*** and also the Court of Appeal's recent decision in ***Wournell***.

[169] In ***R. v. Wournell***, 2023 NSCA 53, released on July 27, 2023, the NSCA set aside the trial judge's sentence of two years less one day to be served in the provincial correctional centre followed by probation in relation to firearms charges for which he had pled guilty. The appellant, an African Nova Scotian, had the benefit of a PSR and an IRCA to inform about his circumstances. The Court of Appeal held that the trial judge had failed to apply the Court's decision in ***Anderson*** and utilize the relevant information which was available to

determine an individualized and contextualized sentence for this racialized offender.

[170] The facts to the case were that on December 27, 2019, the appellant had pulled over at the side of the road after a chance encounter with another vehicle. The occupants of the other vehicle thought that Mr. Wournell had cut them off. They parked their car behind Mr. Wournell and a passenger got out of that vehicle and approached Mr. Wournell's vehicle on the passenger side. As he did so, the person saw Mr. Wournell place what appeared to be a black handgun on his dashboard. The person promptly turned back to the other car and called 911.

[171] Mr. Wournell drove off with the complainant following him and they saw him drive behind a gas station where he was ultimately located by the police. A search of Mr. Wournell's vehicle turned up a loaded magazine with ammunition for a 22-calibre firearm. No firearms were found in the car but subsequently, with the assistance of a K-9 unit, police seized a sawed-off 22 calibre rifle and a black Airsoft BB gun that had been deposited nearby. It was that Airsoft BB gun that the appellant had displayed earlier by the side of the road. Later, police obtained CCTV footage which showed Mr. Wournell going behind the service station and disposing of the guns.

[172] Mr. Wournell was charged with the number of firearms offences and uttering threats. The Crown proceeded by indictment. Mr. Wournell entered not guilty pleas and obtained a trial date, but on the day of trial, he entered guilty pleas to three charges - unlawful possession of an air soft gun for a purpose dangerous to the public peace or for the purpose of committing an offence [s.88 (1)]; possession of a prohibited firearm, being a 22 calibre sawed-off rifle together with readily accessible ammunition without being the holder of an authorization or license for that firearm [s.95 (1)] and being the occupant of a motor vehicle in which he knew there was a firearm, the 22 calibre rifle [s.94(1)].

[173] At the sentencing hearing, the Crown had sought a sentence in the range of 2 to 2.5 years in custody whereas Defence Counsel had indicated that the appropriate sentence would be 12 to 18 months of imprisonment served in the community under a CSO. Defence Counsel noted that Mr. Wournell had maladaptive coping mechanisms and that it was the complainant who had been confrontational. At the sentencing hearing Mr. Wournell took responsibility for

his actions and was remorseful, hoping that he would not be separated from his family.

[174] In terms of the circumstances of the offender which were made known to the trial judge, Mr. Wournell is an African Nova Scotian, identified as being "biracial and bisexual," was 26 years old, had acquired traumatic brain injury from a motor vehicle accident when he was an adolescent, had experienced "significant residential instability" growing up and was only able to complete grade 8. He was unemployed but was able to finance a home and vehicle, was in a polyamorous relationship and had a pregnant partner. He had prior substance abuse issues and although sober for the last year, he was experiencing some slippage due to his current situation. Mr. Wournell had no prior criminal record.

[175] The NSCA determined that the trial judge had not paid "proper attention" to Mr. Wournell's circumstances in crafting a proportionate sentence and that there was no "engagement" by the judge of any of the principles discussed in ***Anderson***. Those key principles which could have assisted in the sentencing decision are listed in ***Wournell***, *supra*, at para. 63 and are listed earlier in this decision under the heading "Guidance of NSCA ***Anderson*** and ***Wournell*** decisions."

[176] The Court of Appeal determined that it was an error in principle to have not considered those principles and the impact that they could have had on Mr. Wournell's sentence. The Court of Appeal also determined that the trial judge had failed to address the issue of whether the CSO would be an "appropriate" sentence which would have then required the judge to determine if the service of the sentence in the community would not endanger the community, the risk of re-offence and the gravity of the damage should any reoffending occur.

[177] At the Court of Appeal, fresh evidence was tendered by both the appellant and the respondent, and that evidence was admitted as neither side objected to its admission. Given the finding of the trial judge's "errors in principle" and the fresh evidence, the NSCA determined that the trial judge's sentence would not be affirmed, and Mr. Wournell would be re-sentenced "afresh" in the Court of Appeal.

[178] Relying on the facts of the case as found by the trial judge as well as the aggravating and mitigating factors as found by the trial judge, the Court of Appeal than applied the information with respect to the individual sentencing of

Mr. Wournell by use of his background systemic factors and the updated IRCA report. The Court of Appeal confirmed that a CSO was an "available" sentence as the range of offences for which Mr. Wournell had pled guilty includes a sentence of two years less a day, which would permit the imposition of a CSO, subject to an assessment of the community endangerment issue. Since that had not been addressed by the trial judge, after considering all of the information, the Court of Appeal determined that his risk of reoffending could be managed in the community under a CSO.

[179] The Court of Appeal also determined that the sentencing principles of denunciation and deterrence could be served by the imposition of a CSO and that there was information that Mr. Wournell's earlier experience of incarceration was "wholly negative." Moreover, he had shown that he could abide by strict conditions in the community and that given his previous struggles with racial identity in the community, a CSO could support the development of that connection and assist in his rehabilitation. A CSO would also support a restrained and restorative sanction, particularly in the case of a first-time offender and would be a sanction that is responsive to the "disproportionate incarceration of African Nova Scotians" [see ***Wournell***, *supra*, at para. 112].

[180] In the final analysis, the Court of Appeal stated, at *supra*, at para. 122-123, that Mr. Wournell's sentence in the first instance should have been a CSO of two years less a day. However, since he had already spent 298 days pre-sentence custody in jail [about 10 months] and then was on strict release conditions, including house arrest, that justified a further credit of 10 months. When Derrick JA took those credits into account, based upon what the length of the CSO "should have been," Mr. Wournell was ordered to serve a CSO of four months to be followed by 12 months probation.

[181] Defence Counsel also referred to the case of ***R. v. Taylor***, 2023 NSSC 143 in his sentencing submissions. Although the ***Taylor*** decision did not involve any firearms offences, she was found guilty of three very serious offences, which involved one count of being an accessory after the fact to murder, contrary to section 240 of the **Code,** which is an indictable offence and liable to imprisonment for life. She was also found guilty of two counts of the section 423.1 of the **Code** offence for intimidation of justice system participants, which is an indictable offence and liable to imprisonment of not more than 14 years.

[182] The parties had widely different positions on the appropriate sentence with the Crown seeking five years imprisonment for the s. 240 offence and concurrent two-year terms for the s. 423.1 offences. Defence Counsel had recommended three sentencing options - a CSO of two years less a day for the s. 240 offence and a judicial stay pursuant to the ***Kienapple*** principle for the other two offences. In the alternative, a CSO for the section 240 offence and a suspended sentence for the other two offences and finally a 90-day sentence to be served intermittently for the section 240 offence and 90-day concurrent sentences for the other offences.

[183] Justice Bodurtha considered a range of sentence, compared some similar offenders who had committed similar offences in somewhat similar, serious circumstances and determined that the just and appropriate sentence for Ms. Taylor would be two years less one day in custody followed by a probation period of one year for the section 240 of the **Code** offence. As for the section 423.1 of the **Code** offences, the Court noted that they are unique factually, but the range should be within 12 to 15 months incarceration and the Court considered that the sentence should be 14 months imprisonment for those offences.

[184] Thereafter, after considering the aggravating and mitigating factors, the Court examined whether the imposition of a CSO under the guidance of the ***Proulx*** decision would be consistent with the fundamental purpose and principles of sentencing. The Court noted that, even in those cases where denunciation and deterrence are to be emphasized, the rehabilitation of offenders continues to be one of the main objectives of Canadian criminal Law and helps courts impose just and appropriate sentences [***R. v. Lacasse***, *supra*, at para. 4].

[185] The Court noted that specific deterrence had already been met, given Ms. Taylor's expression of remorse and her positive progress, as addressed in her pre-Sentence Report. It was also noted that Ms. Taylor had pursued a path towards rehabilitation while on restrictive bail conditions which included her being employed, furthering her educational pursuits and having full family support. She had not actively assisted Mr. Cox in concealing evidence at the time of the murder, like many of the cases relied upon by the Crown. In addition, she was a first-time offender and had been on strict release conditions for almost 3 years without a breach. For those reasons, the Court concluded that the sentence could be served in the community.

[186] The Court also noted that section 718.2 of the **Code** required the trial judge to consider principles of restraint and totality and to impose the least intrusive form of punishment appropriate to the circumstances and consistent with the harm done to victims or the community. The totality principle comes into play where there is a sentence for multiple offences to ensure that the total sentence to be given is fit and proper. The Court also concluded that the ***Kienapple*** principle did not apply to the three offences for which Ms. Taylor was found guilty as they had additional and distinguishing essential elements.

[187] In the final analysis, the Court determined that the just and appropriate sentence for the section 240 of the **Code** offence was a custodial sentence of two years less a day to be served in the community followed by probation for a term of one year. The appropriate sentence for the section 423.1 of the **Code** offences would be 14 months in custody to be served **concurrently** in the community under the terms and conditions of a CSO followed a period of 12 months under the terms of a probation order.

[188] In terms of establishing range of sentence for the section 95 of the **Code** offence of possession of a loaded restricted firearm without being licensed, based upon the case authorities, and in particular, the ***Anderson*** and ***Wournell*** decisions of our Court of Appeal which involved young African Nova Scotian males as well as the ***MacLean*** decision, I find that those cases would establish, with significant mitigating factors, a low-end range of between 20 to 24 months in jail. In similar cases for this offence where there may be several aggravating factors, I find that the upper end of the range would be 36 to 40 months in jail.

[189] In addition, I find that it is also apparent from those s. 95 of the **Code** decisions where the court ordered a sentence at the low-end of the range, the case did not involve any evidence that the loaded prohibited or restricted firearm was used to threaten anyone or was used in connection with any other criminal offence or was fired which impacted the safety of other members of the public or the police.

[190] With respect to the other most serious charge before the Court, namely, the criminal negligence causing bodily harm contrary to section 221(a) of the **Code**, it is apparent that those cases are certainly fact driven. Cases where there was a negligent and intentional discharge attracted higher sentences like the ***Cantre*** case, which involved an indigenous hunter, being sentenced to 30 months in jail. In this case, I have found that Mr. Smith did not intentionally

shoot Mr. Brown, but his actions amounted to criminal negligence which caused bodily harm and were much more serious than simply involving the careless use, storage and handling of a firearm.

[191] In those circumstances, I find that Mr. Smith's criminal negligence causing bodily harm, together with the significant mitigating circumstances present in this case and a few aggravating circumstances would militate towards a lower end sentencing range. In contrast to ***Cantre*,** which likely represents the upper end of the range for this offence, where there several significant mitigating circumstances and no other criminality or threats to anyone when the firearm was discharged in a criminally negligent fashion, I agree with the Crown Attorney that the appropriate range of sentence for the offence of criminal negligence causing bodily harm, would likely be between 18 months and 24 months in jail.

[192] In addition to those offences, a just and appropriate sentence must be determined for the other offences which Parliament objectively determined as being less serious, in terms of their maximum terms of imprisonment compared to the more serious criminal negligence causing bodily harm and the possession of a loaded, restricted or prohibited firearm offences.

[193] With respect to the range of sentence for the offences of carrying a weapon concealed which was accomplished by transporting the firearm into and out of the hotel contrary to s. 90(1) of the **Code**, the unlawful pointing of the firearm contrary to s. 87(1) of the **Code** and the improper storage handling and transportation contrary to s. 86(2) of the **Code**, I find that the range of sentence for those offences, at the lower end with significant mitigating circumstances would likely be 6 months in jail and at the upper end of that range, in this case, based upon the authorities provided by the Crown Attorney, 12 months in jail.

[194] It is clear from the ***Anderson*** and ***Wournell*** decisions that where the most serious offence before the court was the section 95 of the **Code** offence for possession of a loaded, restricted or prohibited firearm, the Court of Appeal determined that the two-year less a day sentence for that offence to be served in the community under the conditions of a CSO was the just and appropriate sanction. However, in those cases, there is a key distinction with the instant case, as in those cases the firearm was not discharged and there was no victim who was struck by a bullet.

[195] Although the Crown Attorney had submitted that the range of sentence for this offence might be as low as 20-24 months based upon the ***McLean*** decision, there are the two recent NSCA cases of ***Anderson*** and ***Wournell*** which also involved s. 95 of the **Code** offences which were committed by similarly situated African Nova Scotian accused persons to Mr. Smith. In those cases, the Court of Appeal upheld the trial judge's decision of a two-year CSO for Mr. Anderson and overturned the trial judge's decision of a two-year prison sentence for Mr. Wournell and indicated that, at a detailed analysis been conducted, that a two-year CSO would have been the just and appropriate disposition.

[196] After having considered the Parity Principle and the range of sentences for similar offenders who had committed similar offences in similar situations, and the fact that the range only serves as a "guideline" and is not a hard and fast rule, I find that the just and appropriate sentence for the s. 95 **Code** offence for possession of a loaded restricted or prohibited firearm with ammunition should be 24 months imprisonment.

[197] With respect to the offence of criminal negligence causing bodily harm contrary to section 221(a) of the **Code**, again, for the purposes of the Parity Principle, I find that, given the gravity of the offence and Mr. Smith's degree of responsibility, but taking into account a significant number of mitigating circumstances in this case, that the just and appropriate sentence for that offence should be at the low end of the 18 to 24 month range. I find that a just and appropriate sentence for the criminal negligence causing bodily harm would be 18 months imprisonment.

[198] With respect to the remaining charges of the unlawful pointing of a firearm, contrary to s. 87(1) of the **Code**, carrying a concealed weapon contrary to s. 90(1) of the **Code** and the charge contrary to s. 86(2) of the **Code** for the contravention of the regulations of the **Firearms Act** in relation to the storage, handling and transportation of firearms and restricted weapons, I find that the just and appropriate sentence would be 6 months imprisonment for each of those offences.

Sentencing of an Accused Convicted of Multiple Offences

[199] The Nova Scotia Court of Appeal has directed that when sentencing for multiple offences, a sentencing judge should first determine and fix the appropriate sentence for each individual convictions and then go on to decide

whether the sentence should be consecutive or concurrent before ultimately taking a "final look" at the total sentence and reducing it if required to reflect totality (***R. v. Adams***, 2010 NSCA 42 (Canlii) at para,23 and, ***R. v. Laing***, 2022 NSCA 23.

Determination of Consecutive or Concurrent Sentences

[200] One of the key areas in dispute between the parties is whether all of the offences before the court should be sentenced on a concurrent basis or the two most serious charges on a consecutive basis with the remaining charges to be sentenced that all five charges before the court should be sentenced on a concurrent basis.

[201] Defence Counsel has submitted that all charges before the court should be sentenced on a concurrent basis to a total of two years less one day in order to make a CSO in the community and "available" sentencing option.

[202] On the other hand, the Crown Attorney submits that the two most serious charges before the court, namely the criminal negligence causing bodily harm [s. 221 of the **Code**] and the possession of the loaded, restricted or prohibited firearm [s. 95 of the **Code**] should be sentenced on a consecutive basis to each other, with the balance of the charges being made concurrent to those two charges. He submits that the just and appropriate sentence should be more than two years of imprisonment and, therefore, a CSO in the community would not be an "available" sentencing option.

[203] The starting point for the determination of whether a consecutive sentence which involves cumulative punishment should be imposed in this case is found in section 718.3(4)(b)(i) of the **Criminal Code**, which states:

> 718.3(4) **Cumulative punishments** – The Court that sentences an accused shall consider directing:
>
>> (b) that the terms of imprisonment that it imposes at the same time for more than one offence be served consecutively, including when
>>
>> (i) the offences do not arise out of the same event or series of events.

[204] Essentially, the dispute between the parties is whether the two most serious offences for which the court must impose sentence on Mr. Smith "arise out of the same event or the same series of events."

[205] While there has been much debate as to whether an offence "arises out of the same event or series of events," the Supreme Court of Canada in ***R. v. Friesen***, 2020 SCC 9, at para. 155 provided their opinion on how to address the issue of whether a sentence for different offences should be served on a consecutive or concurrent basis. There, the Supreme Court of Canada stated as follows:

> [155] The decision whether to impose a sentence concurrent with another sentence or consecutive to it is guided by principles. While the issue warrants further discussion in another case, the general rule is that offences that are so closely linked to each other as to constitute a single criminal adventure may, but are not required to, receive concurrent sentences, while all other offences are to receive consecutive sentences (see, e.g., ***R. v. Arbuthnot*,** 2009 MBCA 106, 245 Man.R. (2d) 244, at paras. 18-21; ***R. v. Hutchings***, 2012 NLCA 2, 316 Nfld. & P.E.I.R. 211, at para. 84; ***R. v. Desjardins***, 2015 QCCA 1774, at para. 29 (CanLII)).

[206] In my opinion, Mr. Smith's possession of the loaded restricted or prohibited firearm would certainly constitute a series of events in a single criminal adventure covering his carrying of a concealed weapon and contravention of the storage, handling and transportation of the firearms and restricted weapons. As such, I find that those offences should be sentenced on a concurrent basis with the possession charge contrary to s.95 of the **Code** as they arise out of a single criminal transaction to possess the firearm. In addition, I find that the essence of those charges involved offences which seek to address a distinct risks and harm to society in general.

[207] On the other hand, I find that the decision to handle the firearm in a criminally negligent fashion, ultimately discharging a bullet which struck and caused significant bodily harm to a victim, constitutes a separate and distinct transaction. The gravamen of the criminal negligence causing bodily harm charge certainly goes well beyond the actions of simply possessing the loaded, restricted firearm. In those circumstances, I find that the s. 221(a) of the **Code** offence, should be sentenced on a consecutive basis to the s. 95 of the **Code** offence. With respect to the s. 87(1) of the **Code** offence of pointing a firearm at another person, I find that the pointing of the firearm was certainly part of the series of events which culminated with the criminal negligence causing bodily harm offence. It should be sentenced on a concurrent basis with the criminal negligence causing bodily harm offence contrary to s. 221(a) of the **Code.**

[208] Therefore, prior to consideration of the Principles of Totality and Restraint, I conclude the following sentences would be just and appropriate for:

1. The unlawful possession of a restricted or prohibited firearm with ammunition [s. 95(1)] - 24 months – Consecutive.

2. The carrying of a concealed weapon [s. 90(1)] - 6 months – Concurrent.

3. The s. 86(2) offence relating to the storage, handling and transportation of firearms and restricted weapons - 6 months – Concurrent.

4. The criminal negligence causing bodily harm offence [s. 221(a)] - 18 months – Consecutive.

5. The offence of pointing a firearm at another person [s. 87(1)] - 6 months - Concurrent.

Principles of Totality and Restraint

[209] Once the Court has fixed a sentence for each offence and determined which sentences should be consecutive and which, if any, should be concurrent, the final step in the process for determining the actual sentence to be served, requires the Court to take a "final look" at the aggregate sentence. As a result of that "final look," the Court may reduce the overall sentence if, but only if, the Court concludes that the total exceeds what is "just and appropriate" in the circumstances: ***R. v. Adams*** *supra*, at para. 23.

[210] The Totality Principle is closely connected to the Principle of Proportionality and ensures that the sentence imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender. The "final look" is reviewed within the context of consecutive sentences and the principle is well-established in sentencing jurisprudence. It has also been codified in section 718.2(c) of the **Criminal Code** which provides:

> "Where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh."

[211] In addition, the Principle of Restraint is also reflected in s. 718.2(d) of the **Code** where Parliament has established that an offender should not be deprived of liberty if a less restrictive sanction may be appropriate in the circumstances. In addition, s. 718.2(e) of the **Code** states that all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[212] As a result, the Supreme Court of Canada has stated in ***R. v. Proulx***, 2000 SCC 64 para. 19, that those Principles of Restraint require the sentencing judge to consider the possibility that a less restrictive sanction would attain the same sentencing objectives that a more restrictive sanction seeks to attain.

[213] When I consider the totality principle in all the circumstances of this case, I note that this case involves a very youthful African Nova Scotian, who was only 18 years old at the time of the offences. I also note that there are ae significant number of mitigating factors present in this case and that, since the charges, Mr. Smith has made significant efforts at rehabilitation, which have been described as "amazing." Those changes in a positive direction have included upgrading his education and moving to complete a program at the Nova Scotia Community College. He has been involved in counselling and programming, treatment and therapy, acquired job skills and made lifetime changes, including abstinence from alcohol and controlled substances. In the interim, there have been no violations of any of his very restrictive release conditions over an extended period of time. When I consider all of those facts and circumstances and the work that Mr Smith has taken in the interim to turn his life around and move in a positive direction, I find that the potential imposition of a sentence of 42 months would undoubtedly amount to a total, combined sentence that would be unduly long and harsh for Mr. Smith.

[214] Moreover, when I consider the guidance provided by our Court of Appeal in the ***Anderson*** and ***Wournell*** decisions, I find that the social context evidence in the PSR and especially in the IRCA report contextualizes the gravity of the offence and the degree of responsibility of the offender. The information in those reports also serves to contextualize some of the aggravating factors and those aggravating factors have been attenuated by what both counsel have described as Mr. Smith's "amazing" steps toward his rehabilitation, upgrading his education and a personal sense of responsibility by working with resources in the community to strengthen his engagement with the community as a productive member of society.

[215] Once again when I consider all of those positive steps and the continued support through various programs and counselling that are culturally appropriate and would strengthen the Mr. Smith's engagement with his community, I find that a 42-month sentence to be served in a federal penitentiary would undoubtedly be an unduly long or harsh sentence for Mr. Smith who is very youthful offender who has no prior convictions. I should also

mention that, even if I was to consider deducting 6 months custody by virtue of the ***Downes*** credit as proposed by the Crown Attorney, I find that an overall sentence of 36 months would still result in Mr. Smith being subject to an unduly long and harsh sentence.

[216] While offences involving gun violence in the community require an emphasis on the sentencing objectives of general and specific deterrence and denunciation of the unlawful conduct, I am reminded by the guidance of our Court of Appeal that in applying the parity principle, courts must ensure that a formulistic approach to parity in sentencing does not undermine the remedial purpose of section 718.2(e) of the **Code**.

[217] In addition, in taking this "final look" at the aggregate sentence to determine if it exceeds what is just and appropriate in all of the circumstances, I am also mindful of and should consider the First Offender Principle which was stated by Justice Rosenberg in ***R. v. Priest***, 1996 Canlii 1381 (ONCA). In that case, the Court of Appeal held that, in the case of a first offender and especially where there was a youthful first offender, the court should explore all other dispositions before imposing a custodial sentence. Trial judges should consider community-based dispositions first and impose more serious forms of punishment only when necessary.

[218] For all of the foregoing reasons, in taking that "final look" at the aggregate sentence that, in all the circumstances of this case, a 42 month sentence of imprisonment in a federal penitentiary would not only be unduly long and harsh, but at the same time, I find that it would be counterproductive to all of the progress that has been made by a youthful, first-time offender who is presently only 21 years old since the incident which brought him before the court.

[219] As a result, I find that, in taking that "final look" at the aggregate sentence, that the just and appropriate sentence which is proportionate to both the gravity of the offence and the moral blameworthiness of the offender, which would be either 36 or 42 months in a federal penitentiary, is unduly long and harsh and would amount to a crushing sentence for this youthful first-time African Nova Scotian offender. Therefore, in determining the just and appropriate sentence for Mr. Smith in what I have previously noted as being a "highly individualized" decision, I am prepared to reduce the proposed 42-month

aggregate sentence to be served by Mr. Smith by just over 18 months to be a custodial sentence of two years less one day.

The Just and Appropriate Sentence

[220] As a result of the "final look" in the totality analysis, I have concluded that a sentence based solely upon the parity principle and the principles around consecutive sentencing, would result in a sentence that is unduly long and harsh. As a result of taking that "final look," the Court has concluded that the just and appropriate sentence should be a sentence of two years less one day. In those circumstances, the key question to determine is whether that sentence is to be served in a provincial correctional centre or may be served in the community under the terms and conditions of a CSO.

[221] The first question to determine is whether a CSO is in "available sanction" and that brings into play the criteria that the court must consider before deciding whether to impose a conditional sentence. Pursuant to section 742.1 of the **Criminal Code,** there are four criteria which must be satisfied before a CSO may be ordered for the purpose of supervising the offender's behaviour in the community:

a) the Court must impose a sentence of imprisonment of less than two years,

b) the offender must be convicted of an offence that is not punishable by a minimum term of imprisonment,

c) the Court must be satisfied that the service of the sentence in the community would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2 **Code**, and

d) the Court must be satisfied that the service of the sentence in the community would not endanger the safety of the community.

[222] With respect to those criteria, it is important to note that these are the current criteria as designated by Parliament with respect to the imposition of a CSO of imprisonment in the community. At the time of this incident, which occurred on or about August 13, 2020, there was a provision, section 742.1(e)(i) which would have prohibited the imposition of a CSO for an offence, prosecuted by way of indictment for which the maximum term of imprisonment is 10 years that resulted in bodily harm. As mentioned previously, the Crown proceeded by

indictment on the section 221(a) **Code** offence of criminal negligence causing bodily harm and the maximum term is 10 years of imprisonment for that offence.

[223] However, it is important to note that s. 718.2(e) **Criminal Code** was repealed in 2022. Therefore, pursuant to section 11(i) of the **Canadian Charter of Rights and Freedoms**, if a person is found guilty of an offence and if the punishment for the offence has been varied between the time of the commission and the time of sentencing, to the benefit of the lesser punishment. As a result of that amendment, the former section 718.2(e) has been repealed and is no longer an impediment to the issuance of a CSO. In addition, by virtue of those recent amendments and s. 718.2(e) of the **Criminal Code,** there are no minimum terms of imprisonment for any of the offences before the court.

[224] I have already determined that the just and appropriate sentence for Mr. Smith in all the circumstances of this case is two years less a day.

[225] In addition, as previously noted in the decision, the mandatory minimum sentence for the section 95(1) of the **Code** offence was struck down as being unconstitutional by the Supreme Court of Canada in ***R. v. Nur***, *supra*. and in Bill C-5, which was proclaimed on November 17, 2022, Parliament expressly removed the mandatory minimum for that offence.

[226] Moreover, in terms of the criterion that the court must be satisfied that the service in the community would be consistent with the fundamental purpose and principles of sentencing set out in section 718 to section 718.2 of the **Code**. Since the decision of ***R. v. Proulx***, [2000] 2 SCR 61, it has been made clear that a CSO of imprisonment in the community under terms and conditions is certainly capable of accomplishing the objectives of denunciation and deterrence when they are the key purposes of a sentence. In that regard, the SCC stated in ***Proulx***, *supra*, at para. 22:

> [22] The conditional sentence incorporates some elements of non-custodial measures and some others of incarceration. Because it is served in the community, it will generally be more effective than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and community, and the promotion of a sense of responsibility in the offender. However, it is also a punitive sanction capable of achieving the objectives of denunciation and deterrence. It is this punitive aspects that distinguishes the conditional sentence from probation…”

[227] In addition, the SCC added in ***Proulx*** that, depending on how a CSO was crafted, there are circumstances where a CSO could actually be more onerous than a period of actual custody. The Court stated, in ***Proulx***, at para. 41:

> [41] ……that is not to say that the conditional sentence is a lenient punishment or that it does not provide significant denunciation and deterrence, or that a conditional sentence can never be as harsh as incarceration. As this Court stated in ***Gladue***, *supra*, at para. 72:
>
> > ….. In our view a sentence focused on restorative justice is not necessarily a "lighter" punishment. Some proponents of restorative justice argue that when it is combined with probationary conditions, it may, in some circumstances, impose a greater burden on the offender than a custodial sentence.

[228] A conditional sentence may be as onerous as, or perhaps even more onerous than, a jail term, particularly in circumstances where the offender's forced to take responsibility for his or her actions and make reparations to both the victim and the community, all the while living in the community under tight controls.

[229] In ***Wournell***, *supra*, at para. 55, the NSCA stated there can be no doubt that gun offences are serious, and that gun related crime poses a grave danger to Canadians. In my opinion, for those reasons, it is evident that sentences for gun related crimes would certainly have specific and general deterrence as well as denunciation of the unlawful conduct as one or more of its objectives. However, as ***Proulx*** noted, *supra* at paragraphs 102 and 107, a properly crafted conditional sentence provides a significant amount of denunciation and significant deterrence, particularly if sufficiently punitive conditions are imposed and the public is made aware of the severity of those sentences.

[230] In a case such as this, however, given the fact that the sentence to be imposed involves a very youthful African Nova Scotian male offender with no prior record and Parliament's objective in instituting conditional sentencing to address "the problem of over incarceration in Canada" [as noted in ***Proulx***]. I find that, even where there were gun related offences, in this case there are also equally valid sentencing objectives of assisting in the rehabilitation of the youthful African Nova Scotian offender, providing reparations for harm done to victims or to the community and promoting a sense responsibility in the offender.

[231] The principle of restraint in the use of prison as a sanction has been included in the **Criminal Code** through the enactment of s.718.2(d) of the **Code** which requires the court to consider that an offender should not be deprived of liberty if a less restrictive sanction may be appropriate in the circumstances.

[232] A second principle of restraint for a sentencing judge to consider is found in s.718.2(e) of the **Code** which states that, all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims and the community should be considered for all offenders, with particular attention to the circumstances of indigenous offenders. Recent cases such as ***Anderson*** and ***Wournell*** have also highlighted the fact that section 718.2(e) of the **Code** should also be considered with respect to the circumstances of African Nova Scotian offenders.

[233] For all of the foregoing reasons, I find that a conditional sentence order would certainly be consistent with the fundamental purposes and principles of sentencing set out in section 718 to 718.2 of the **Code**.

[234] The final criterion to address with respect to the possible imposition of a conditional sentence order of imprisonment in the community is whether the court is satisfied that the service of the sentence in the community would not endanger the safety of the community. As Justice Derrick pointed out in ***Wournell***, *supra*, at para.58, the "endangerment of the community" factor consists of two components: (1) the risk of re-offence; and (2) the gravity of the damage should any reoffending occur.

[235] First, with respect to the risk of re-offence, as ***Proulx*** pointed out, the risk can be mitigated by "the imposition of appropriate conditions" that support rehabilitation and institute a level of supervision to ensure compliance. The offences before the court arise from Mr. Smith acquiring an "old looking, rusty" firearm in some manner which, according to the IRCA report, was for his protection. There was no evidence that the firearm was used on any other occasion except the one time when it was "toyed with," pointed at people and the trigger pulled in a criminally negligent fashion which ultimately fired a bullet which struck Mr. Brown. In terms of mitigating the risk of re-offence, the Court has considered the fact that, since the incident, Mr. Smith has been subject to very restrictive bail conditions for almost three years, which included a condition not to possess any firearms and there have been no breaches of any of those restrictive bail conditions.

[236] Moreover, when I consider the contextualized detail in the IRCA report, and the PSR which highlights the very significant ongoing efforts that he has made towards his rehabilitation and connecting with culturally appropriate resources and counselling, I find that there has been a complete change in Mr. Smith lifestyle. While Mr. Smith was released on those restrictive bail conditions, he also actively participated in counselling, treatment, programming, and education to make significant changes in his life to move forward in a very positive direction.

[237] Looking at all of that progress globally over the last three years, I find that all of those significant efforts towards Mr. Smith's rehabilitation indicate that he has taken many significant steps to move forward in a positive direction as a productive member of society and point to the fact that there is a very minimal risk of reoffending.

[238] Secondly, with respect to the degree of harm or gravity of the damage if there was reoffending, it is important to note, at the outset, that there will be close supervision of a CSO with appropriate conditions by the Sentence Supervisor and Mr. Smith will be asked to attend court for an update and progress report at 6-month intervals. The close supervision during the CSO and regular progress reports and updates with the court would also, in my opinion, attenuate the risk of a breach and any potential damage if there was a breach of the CSO's conditions.

[239] In addition, Mr. Smith's abstention from alcohol and drugs since the incident, his connection and continuing to work with culturally relevant supports in the community for an African Nova Scotian offender, reflects a significant change in his lifestyle and mental state since the incident, which indicates that Mr. Smith is making tremendous progress in his rehabilitation and promoting a sense of responsibility to be a productive member of the community. All of those factors, in my opinion, militate in favour of a very small risk, if any, of reoffending.

[240] Moreover, I find that, given all the progress that Mr. Smith has made to date towards his rehabilitation, I find that it is highly unlikely that there would be any incidents of reoffending. However, if there were to be an incident of reoffending, in my opinion, it would certainly not be as serious as the matter which brought him before the court in the first place.

[241] Having considered the four criteria or conditions precedent to the imposition of a conditional sentence order of imprisonment in the community, and found that, in the circumstances of this case, all four of those conditions precedent have been met, I find that Mr. Smith's just and appropriate sentence of two years less one day of imprisonment should be served in the community under the strict terms and conditions of a CSO. Following the conditional sentence order of imprisonment in the community, Mr. Smith shall be subject to a period of probation for 12 months.

[242] The CSO of imprisonment in the community for a period of two years less one day CSO sentence of imprisonment in the community shall be served concurrently for all of the offences before the court, under the following conditions:

- For the Conditional Sentence Order:

  - Keep the peace and be of good behaviour;
  - Appear before the Court when required to do so by that Court;
  - Report to the Sentence Supervisor at the Correctional Services community office at Suite 112-277 Pleasant St., Dartmouth, today and thereafter as directed by the sentence supervisor;
  - Notify the Court, Probation Officer or supervisor, in advance of any change of name, address, employment or occupation;
  - Remain within the province of Nova Scotia unless written permission to go outside the province from your supervisor;
  - You are required to reside at the specified address in Bridgewater, NS, and not to move out of that residence without the written consent of the sentence supervisor or an order of the Court;
  - You are not to possess, take or consume alcohol or any other intoxicating substances;
  - You are not to possess, take or consume a controlled substance as defined in the **Controlled Drugs and Substances Act**, except in accordance with the physician's prescription for you or some other legal authorization;

- You are not to have in your possession a firearm, crossbow, prohibited weapon, restricted weapon, prohibited vice, ammunition or explosive substance;
- You are not to have any direct or indirect contact or communication with Cameron Brown;
- You are not to be on or within 75 m of Cameron Brown's place of residence, employment or education or any other place that he is known to be;
- You are to attend for mental health assessment and counselling as directed by the Sentence Supervisor;
- You are to attend for such assessment, counselling or treatment as directed by your Sentence Supervisor;
- You are to participate in and cooperate with any assessment, counselling or program that may be directed by the Sentence Supervisor or Probation Officer.

House arrest and Curfew Conditions:

[243] For the first 18 months of the Conditional Sentence Order (CSO), you shall remain in a residence or within the four corners of the grounds of the residence, 24 hours per day seven days a week, beginning on October 20, 2023, except where specifically permitted otherwise by the terms of the Conditional Sentence Order.

[244] For the next three (3) months of the CSO, you shall keep a curfew and remain in your residence or on its grounds between the hours of 10 PM and 6 AM, the following day, seven days a week, except where specifically permitted otherwise by the terms of the order.

[245] During the first 18 months of the CSO while on conditions of house arrest, you may only be absent from the residence for the following reasons:

a) When at regularly scheduled employment, which the supervisor knows about and travelling to and from that employment by direct route;

b) When attending a regularly scheduled education program which your supervisor knows about or at a school educational activity supervised by a principal or teacher, etc. and travelling to and from the education program or activity by a direct route;

c) When dealing with a medical emergency or attending a medical, dental or health-related appointment involving you or a member of your household, with advance notice to your supervisor and travelling to and from it by a direct route;

d) When attending a scheduled appointment with your lawyer, your supervisor or Probation Officer and travelling to and from those appointments by a direct route;

e) When attending court at a scheduled appearance or under subpoena and travelling to and from the court by a direct route;

f) When attending at an assessment or at an appropriate culturally and trauma informed counselling, treatment program or meeting in relation to addictions and substance abuse, mental health and culturally specific education and employment support at the direction of or with the permission of your supervisor and travelling to and from that appointment, program or meeting by a direct route;

g) When attending a regularly scheduled religious service with the permission of your supervisor travelling to and from the service by a direct route;

h) When making applications for employment or attending job interviews, Monday to Friday between the hours of 9:00 AM and 5:00 PM, with the permission of your supervisor, when travelling to and from those locations by a direct route;

i) While on the house arrest condition, you are allowed to be out of your residence for not more than four (4) hours per week, approved in advance by your Sentence Supervisor for the purpose of attending to your personal needs; and

j) Such other exceptions as approved, in advance, by your Sentence Supervisor.

[246] During the following three-month period of the CSO, you will still be subject to the terms of our curfew to remain in your residence between the hours of 10:00 PM and 6:00 AM the following day. You may only be out of your residence for the same reasons listed under the exceptions to the house arrest condition.

[247] During the final three months of this CSO, you will still be subject to all of the other general terms and conditions of the CSO, but not subject to the restrictions of either the house arrest or curfew conditions.

[248] **Compliance –** You are required to prove compliance with the house arrest/curfew conditions by presenting yourself at the entrance to your residence should your supervisor and/or a peace officer attend their to check compliance.

[249] Following the completion of the CSO, you will be subject to 12 months probation with the following conditions:

- Keep the peace and be of good behaviour;
- Report to and be under the supervision of the Probation Officer at 277 Pleasant St., Dartmouth, NS, within two (2) days of the completion of your CSO;
- You are not have any contact or communication directly or indirectly with Cameron Brown and there are no exceptions;
- You are not to be on or within 75 metres of Cameron Brown's place of residence, employment or education or any other place that he is known to be;
- You are not to have in your possession any weapons, firearms, ammunition or any explosive substances;
- You are to make reasonable efforts to locate and maintain employment or an educational program as directed by the Probation Officer;
- You are to attend for culturally appropriate and specific mental health counselling, addictions and substance abuse counselling as well as specific education and employment support, as approved by your Probation Officer;

- You shall attend for any assessment, counselling or treatment program that may be recommended or directed by your probation Officer; and

- You are to participate in and cooperate with any assessment, counselling or program that may be directed by your Probation Officer.

[250] Given Mr. Smith's current status, I find that it would be an undue hardship to impose any financial penalty based upon the Victim Fine Surcharge.

Ancillary Orders

[251] In addition, I hereby make the following ancillary orders which were sought by the Crown Attorney:

1) A section 109(3) **Criminal Code** weapons prohibition, which prohibits the offender from possessing any prohibited firearm, crossbow, restricted weapon, ammunition or explosive substance for life and also prohibits the offender from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life.

2) A section 487.051 **Criminal Code** order for the taking of the bodily substances for forensic DNA analysis in relation to the primary designated offences contrary to section 95(1) of the **Code** relating to the unlicensed possession of a loaded restricted or prohibited firearm and the section 221 Judgement accordingly **Code** offence in relation to criminal negligence causing bodily harm.

Theodore Tax, JPC