SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Perry*, 2018 NSSC 16

Date: 20180122
Docket: CRH450525
Registry: Halifax

Between:

HER MAJESTY THE QUEEN

v.

LANCE JOSEPH PERRY

Decision

Judge: The Honourable Justice Michael J. Wood

Heard: January 9, 2018, in Halifax, Nova Scotia

Oral Decision: January 19 and 22, 2018, in Halifax, Nova Scotia

Counsel: Melanie Perry, for the Provincial Crown

Alexander MacKillop and Jade Pictou, for Lance Joseph Perry

By the Court:

[1] On June 4, 2014, Lance Perry was arrested by police outside his home on Pleasant Street in Dartmouth. At that time Mr. Perry advised police that they would find certain things in his apartment including a loaded handgun, which he had purchased for protection, some knives, as well as drugs and drug paraphernalia. With this information the police obtained a search warrant for Mr. Perry's apartment and, among other things, found the following items:

1. A 45 calibre Remington handgun, with one round in the chamber and the hammer cocked. The firearm was found in a plastic storage unit in the bedroom;
2. A magazine that contained five rounds of ammunition in the clip;
3. An air pistol, found under a chair cushion in the living room;
4. ¼ inch steel hunting shot;
5. A push dagger seized from the bedroom nightstand;
6. Three throwing knives, seized from the bedroom nightstand; and
7. Approximately 43 grams of marijuana.

[2] At the time of his arrest Mr. Perry did not have a licence or registration to possess any firearm, nor did he have a license to possess the push dagger. In addition, Mr. Perry was subject to an Order dated June 8, 2008, pursuant to s. 109 of the *Criminal Code* prohibiting him from possessing any firearm, prohibited weapon, restricted weapon or ammunition.

[3] Mr. Perry was charged with fourteen offences arising out of the search on June 4, 2014, and on November 8, 2017, plead guilty to the following charges:

> … that he at the same time and place aforesaid, did have in his possession a prohibited weapon, to wit., "a push dagger", without being the holder of a license under which he may possess it, contrary to Section 91(2) of the *Criminal Code*.
>
> … that he at the same time and place aforesaid, did possess a loaded restricted firearm and was not the holder of an authorization or license and registration certificate under which he may possess the said firearm, contrary to Section 95(1) of the *Criminal Code*.
>
> … that he at the same time and place aforesaid, did possess a firearm, to wit., "a handgun" knowing he was not the holder of a license or the holder of a registration certificate for the firearm, under which he may possess it, contrary to Section 92(1) of the *Criminal Code*.

> … that he at the same time and place aforesaid, did have in his possession a prohibited weapon while he was prohibited from doing so, by reason of an Order of Prohibition, pursuant to Section 109(1) of the *Criminal Code* dated at Halifax, Nova Scotia, on the 24th day of June, 2008, contrary to Section 117.01(1) of the *Criminal Code*.
>
> … that he at the same time and place aforesaid, did have in his possession ammunition while he was prohibited from doing so, by reason of an Order of Prohibition, pursuant to Section 109(1) of the *Criminal Code* dated at Halifax, Nova Scotia on the 24th day of June, 2008, contrary to Section 117.01(1) of the *Criminal Code*.

[4] Mr. Perry also plead guilty to possession of the marijuana contrary to s. 4(1) of the *Controlled Drugs and Substances Act*.

[5] Mr. Perry has both Aboriginal and African Nova Scotian heritage.

[6] A sentencing hearing took place on January 9, 2018, following which I reserved decision.

Evidence on Sentencing

[7] The parties agreed on the circumstances of the offence, which I have outlined above. There were six exhibits which were entered by consent and these were:

Exhibit 1	Cultural Impact Assessment dated July 25, 2017, prepared by Lana M. MacLean.
Exhibit 2	Gladue Report prepared by Cheryl Ann Fritz, dated November 18, 2016.
Exhibit 3	Pre-Sentence Report prepared by the Nova Scotia Department of Justice (Anne Marie Romkey-Howlett), dated March 8, 2016.
Exhibits 4 and 5	Photographs taken by police of items seized.
Exhibit 6	Criminal Record of Lance Perry.

[8] In addition, defence counsel called Mr. Sobaz Benjamin as a witness and read an extract from a letter received from Robert Wright, a social worker who has provided counselling to Mr. Perry. Finally, Mr. Perry himself made representations to the Court about the offence and his circumstances.

[9] The Pre-Sentence Report, Gladue Report and Cultural Impact Assessment were all prepared in relation to a charge under s. 270(1)(a) of the *Code* and not the offences for which Mr. Perry is now being sentenced. As a result they contain no specific recommendations with respect the appropriate disposition of the current charges. The Pre-Sentence Report and Gladue Report were both prepared in 2016, and as a result have limited information concerning Mr. Perry's current circumstances. The information in the Cultural Impact Assessment was gathered by Ms. MacLean through interviews in June and July 2017. The best information concerning Mr. Perry's present circumstances came from Mr. Benjamin and Mr. Perry himself.

The Gladue Report

[10] Gladue reports derive their name from the Supreme Court of Canada decision in *R. v. Gladue*, [1999] 1 SCR 688. In that case the Court described the many ways in which Canada had failed Aboriginal peoples, resulting in their over representation in the prison population. The Court concluded that this over representation led parliament to include the specific reference to Aboriginal people in s. 718.2(e) of the *Criminal Code* which reads:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
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> …
>
> (e) 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.

[11] The decision in *Gladue* called upon Canadian judges to undertake a different method of analysis in determining an appropriate sentence for Aboriginal offenders. It said Courts must take judicial notice of matters such as the history of colonialism, displacement, community fragmentation and residential schools. We must acknowledge how this past continues to impact many aspects of the lives of Aboriginal peoples, including the disproportionately high level of incarceration. This information provides the context required in order to understand the particular circumstances of the offender being sentenced.

[12] In the later decision of *R. v. Ipeelee,* [2012] 1 S.C.R. 433, the Supreme Court described the duty imposed on sentencing judges dealing with Aboriginal offenders as follows:

> 59 … When sentencing an Aboriginal offender, a judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection (*Gladue*, at para. 66). Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people generally, but additional case-specific information will have to come from counsel and from the pre-sentence report (*Gladue*, at paras. 83-84).

[13] The Court in *Ipeelee* identified two ways in which *Gladue* information may impact the sentencing outcome. These were described as follows:

> 73 First, systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness. …
>
> 74 The second set of circumstances - the types of sanctions which may be appropriate - bears not on the degree of culpability of the offender, but on the effectiveness of the sentence itself. As Cory and Iacobucci JJ. point out, at para. 73 of *Gladue*: "What is important to recognize is that, for many if not most aboriginal offenders, the current concepts of sentencing are inappropriate because they have frequently not responded to the needs, experiences, and perspectives of aboriginal people or aboriginal communities." As the RCAP indicates, at p. 309, the "crushing failure" of the Canadian criminal justice system *vis-à-vis* Aboriginal peoples is due to "the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice". The *Gladue* principles direct sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community.

[14] As the Supreme Court has said, the sentencing of Aboriginal offenders requires a different analysis and approach. This does not necessarily mean that a different outcome will be reached. Ultimately, sentencing must continue to be based upon the particular circumstances of the offender and the offence. The Court in *Ipeelee* described it as follows:

> 75 Section 718.2(*e*) does not create a race-based discount on sentencing. The provision does not ask courts to remedy the overrepresentation of Aboriginal people in prisons by artificially reducing incarceration rates. Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case. This has been, and continues to be, the fundamental duty of a sentencing judge. *Gladue* is entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them. *Gladue* affirms this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process. Section 718.2(*e*) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples. Neglecting this duty would not be faithful to the core requirement of the sentencing process.

[15] The Gladue Report prepared by Ms. Fritz indicates that Mr. Perry's maternal grandmother is a Cree from Big Stone Cree Nation in Alberta. As a child she attended Indian residential schools. By seventeen she was living on her own and working in Alberta. She and a friend went to Winnipeg where she met a Nova Scotian man who was working for the railroad. They got married and moved to Truro. It was not a happy relationship. Her husband drank and was abusive. There were a number of separations. As a young girl, Mr. Perry's mother, Debra, was sent to live in the United States for a period of time.

[16] Debra had a disruptive childhood and did not always reside with her mother. She spent time at the Truro School for Girls. As an adult, she became a drug addict and was unable to care for her children for periods of time.

[17] Mr. Perry and his mother lived in Halifax and Cape Breton. He did poorly in school and did not get past grade seven. In his mid-teens he was sent to a youth custodial facility. He was often on his own although he did spend time at the homes of his older sister and grandmother in Halifax.

[18] Mr. Perry was incarcerated in a Federal institution (including 11 months of segregation), has been assaulted and had friends who were murdered.

[19] The Gladue Report indicates that Mr. Perry has three children and has upgraded his education by obtaining his GED. His mother has turned her life around, is productively employed, and they have a positive, protective and supportive relationship. The report also says that it is critical that Mr. Perry develop a strong relationship with his youngest child, particularly because of the broken parent-child bonds which have existed in his family for three generations.

With supportive family relationships, the report indicates that Mr. Perry is able to focus on working on self-improvement and continue to provide outreach to young people in his community.

[20] Ms. Fritz indicates that Mr. Perry has been using his experiences to try and influence other young persons to follow a different path and has been working with Sobaz Benjamin to that end. Her report recommends that any period of incarceration be served in the community by way of house arrest.

Cultural Impact Assessment

[21] This report indicates that its purpose is to provide information to assist the Court "in developing a more informed and comprehensive insight as to how Mr. Lance Perry's cultural location may have contributed to his behaviour, lifestyle choices and contact with the criminal justice system." In particular, it provides history and contemporary context with respect to the African Nova Scotian community of which Mr. Perry is a member. Similar reports have been relied upon in other sentencing cases (see for example *R. v. Gabriel*, 2017 NSSC 90).

[22] An African Nova Scotian Cultural Impact Assessment is not the same as a Gladue Report because there is no statutory duty imposed on a sentencing judge to consider the unique circumstances of African Canadian offenders, as there is in s. 718.2(e) of the *Criminal Code* in relation to Aboriginal offenders. Despite this, there are circumstances where such a report will be of assistance to the Court as part of the sentencing process. A useful comparison of the sentencing approaches for offenders from these two marginalized communities is found in the Ontario Court of Appeal decision in *R. v. Borde*, [2003] O.J. 354:

> 30 Some of the same things could be said of the over-representation of African Canadians in our jails and penitentiaries. I think that in an appropriate case a sentencing judge might find assistance from the approach described by the court in Gladue and Wells, even though that approach is grounded in the special reference to aboriginal offenders in s. 718.2. However, this is a matter that should be addressed at trial where the evidence can be tested and its relevance to the particular offender explored.
>
> 31 As well, I note that the affirmative duty placed upon the judge by s. 718.2(e), to take judicial notice of the unique systemic and background factors that have contributed to the difficulties faced by aboriginal people in the criminal justice system and throughout society at large and to inquire into the unique circumstances of aboriginal offenders, by its terms, only applies to aboriginal offenders. See Gladue at paras. 82-85 and Wells at paras. 53-55.

> 32 Further, an important part of the Gladue analysis hinged on the fact that the traditional sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by aboriginal offenders and their community. At para. 70 the Gladue court noted, "most traditional aboriginal conceptions of sentencing place a primary emphasis upon the ideals of restorative justice. This tradition is extremely important to the analysis under s. 718.2(e)." This link for the African Canadian community is missing from the fresh evidence. The importance that the Supreme Court attached to the sentencing conceptions of aboriginal communities results from the specific reference to aboriginal offenders in s. 718.2(e). In this regard, aboriginal communities are unique. However, the principles that are generally applicable to all offenders, including African Canadians, are sufficiently broad and flexible to enable a sentencing court in appropriate cases to consider both the systemic and background factors that may have played a role in the commission of the offence and the values of the community from which the offender comes.

[23] In this case, Ms. MacLean provides a helpful history of the African Nova Scotia community, including past and current traumatic events which have been experienced, and in particular, by young black men. It also included more current information about Mr. Perry than the Pre-Sentence and Gladue reports. Ms. MacLean describes Mr. Perry's paternal family history, which could be traced back to some of the original founders of Africville. It describes the value of both family and community relationships, including their extended nature and interdependence. For example, as a young child living in Mulgrave Park and Uniacke Square, there was always someone looking out for Mr. Perry, even if his mother wasn't there for him. The significance of this broad based support in the face of community displacement, discrimination and trauma, is evident throughout the report.

[24] Ms. MacLean outlines the information which she obtained from discussions with Ms. Kate MacDonald, Mr. Sobaz Benjamin, and Mr. Robert Wright. Ms. MacDonald and Mr. Benjamin work with a community organization known as iMove. Both have acted as sureties for Mr. Perry in relation to his release on bail. They describe him as having a positive impact on the community by acting as a mentor for young black men, particularly those who have been incarcerated. Both indicate that Mr. Perry has made positive personal changes and is in a position to offer benefits to the community with the supports that he is now receiving. Ms. MacLean reports that Mr. Benjamin describes Mr. Perry's character as follows:

> Concerned for others, emphatic and forgiving, Lance's relationship with his mother is a testament to those characteristics. He has a willingness to work through that difficult parent-child relationship of the past. He is in counselling and working on his own healing journey. I don't think it's been easy but he has

> openness and willingness to have a better life for him despite all the past life challenges. Relationships and community are important to Lance.
>
> Lance like a lot of the guys coming out of prison are private – some say hard – but all they have been exposed to is that 'forest mentality' in and out of prison. Lance has a team of people around him now that he can trust and he is making the changes he needs to make to be accountable, functioning and contributing member of society. He is working hard at making re-integration back into community and family. He is making the connections that are positive. I think the young men who are seeking him out are looking for those skills …someone who is making it happen for them and making the right connections. For a lot of these guys they have to think and repurpose the skills that got them into jail to keeping them out. Lance going back into prison places all that good at risk. Lance has the capacity to do more good on the outside then on the inside. Lance will survive if he is sentenced to go back in – he has proven that – but he has more to offer to the community now that he is in a good place with the supports he presently needs.

[25] Mr. Robert Wright is a social worker and therapist who has provided counselling to Mr. Perry starting in the spring of 2017. He reports that Mr. Perry is motivated to reintegrate and is learning new skills which enable him to maintain healthy relationships with family and members of the community.

[26] Ms. MacLean's summary and assessment of the information provided in her report is as follows:

> Community displacement, ACEs, 'cultural' codes of conduct and mental health considerations largely stem from the impacts of historical systemic racism which have impacted Mr. Perry's life to date. Mr. Perry also acknowledges his own accountability in making the choices he has made and their impacts on his life and others. Collateral reports [sic] Mr. Perry has become a contributing member to society and community and continues to progress as an engaged citizen. Mr. Perry has participated in culturally competent counselling and is making meaningful and reasonable progress.
>
> Mr. Perry has had a difficult and challenging start in his life. The legacy of racism, racialized, institutionalized and intrapersonal trauma and his own lifestyle choices have contributed to the factors that have led him before the Court. What is also significant and reasonable for the Court to consider is the unique cultural and racial location and identity of Mr. Perry – he is of Indigenous and African Nova Scotian descent. Both these racialized communities are over represented in the criminal justice system, which is another sentencing factor for the Court to consider although not richly explored in this CIA.
>
> Over the past year collateral report [sic] Mr. Perry is making reasonable attempts to work through his own emotional, cultural and psychological harms. Mr. Perry is also volunteering in his community to support other young Black and Aboriginal youth to be successful with community reintegration providing

> guidance and support. Mr. Perry also reports he is developing greater insight into his mental health issues with a culturally competent therapist.
>
> Since his recent release, Mr. Perry has been able to establish a community of care to support his reintegration back into the community. Mr. Perry has taken accountability for his behaviour that places him before the Court and he has participated in culturally competent and responsive counselling.

Other Evidence

[27] The other evidence presented at the sentencing hearing is found primarily in Mr. Benjamin's testimony, the Pre-Sentence Report, the criminal records and Mr. Perry's submissions.

[28] Mr. Benjamin's testimony supplemented the information from him which was included in the report prepared by Ms. MacLean. He resides in Halifax with his wife and two children and describes himself as a film maker. In 2007 he started an organization called iMove, an acronym for 'In My Own Voice'. This organization has been involved in a number of projects, including some in partnership with the Nova Scotia Department of Justice. They have presented programs at correctional institutions, universities, and in the community. Mr. Benjamin has done extensive work with young people and former inmates. With the latter group, Mr. Benjamin attempts to help them recover their identity which had been lost through institutionalization.

[29] Mr. Benjamin's relationship with Mr. Perry started about three years ago. He described that relationship as being "real". Although he considers Mr. Perry a friend, the relationship is more complex than that. It is healthy and open. Mr. Benjamin has acted as a surety for Mr. Perry.

[30] During the time that he has known Mr. Perry, Mr. Benjamin has seen him develop an understanding of the impact of his incarceration on him and reconnect with his family and community. He said that Mr. Perry suffered a psychological break a few month ago which resulted in a period of hospitalization. This incident led Mr. Perry to recognize that he was not well from a mental health point of view and helped him understand the forces and stresses that he was under.

[31] Mr. Benjamin expressed the view that Mr. Perry had a lot to offer other people because of his experience in the criminal justice system. He has credibility and power and the ability to offer others a path forward in their lives.

[32] Mr. Perry has been able to open up about himself, his family and his experiences in public settings.

[33] According to Mr. Benjamin, iMove is developing projects with the government which include entrepreneurial programming, which Mr. Perry will take if he is permitted to do so. Mr. Benjamin said that Mr. Perry is an example of how damage can be used to heal. In his view, the public safety and public good will benefit more from Mr. Perry being in the community than in jail.

[34] The Pre-Sentence Report dated March 14, 2016, is almost two years old and was not prepared in relation to the current offences. It provides information concerning Mr. Perry's background and his circumstances in 2016. The author suggests the Mr. Perry may benefit from attending a mental health assessment, as well as an assessment by addiction services.

[35] Mr. Perry's criminal record starts with a conviction for possession of a prohibited weapon when he was sixteen years old. In addition to probation he was subject to a ten year weapons prohibition. The weapon which gave rise to those charges was a knife.

[36] Mr. Perry was also convicted for break and enter in relation to an incident when he was seventeen. He was sentenced to two years probation and community service.

[37] By far the most significant aspect of Mr. Perry's criminal record results from an incident which took place in May 2007. He was involved in an argument on a street in downtown Halifax, at which time he produced a loaded handgun and pointed it at another person. As a result of this incident he pled guilty to six offences – uttering threats to cause death or bodily harm (s. 264.1), assault (s. 266), pointing a firearm (s. 87(1)), possessing a firearm while prohibited (s. 117.01(1)), possession of a weapon obtained by commission of an offence (s. 96), and failure to comply with a condition (s. 145(3)). As a result of these convictions Mr. Perry was sentenced in June 2008 to two years in custody on each offence, with all sentences to run concurrently. He was also subject to a ten year prohibition under s. 109 of the *Code* and a DNA Order under s. 487.051.

[38] Mr. Perry's only other conviction prior to the incident in June 2014 was another breach of s. 145(3), for which he was sentenced to one day in custody.

[39] In his comments at the sentencing, Mr. Perry apologized to the Court and said that he was not well at the time of these events. He briefly described his mental breakdown. He said he meant no harm, but acknowledged that he knew he should not have had a gun. He did not realize that the other items were prohibited under the Order which was in place.

[40] Mr. Perry has found the last four years very difficult but he believes he has a strong support circle which has assisted him over this time. He said he has followed the terms of his release conditions and wants the opportunity to reintegrate into his community.

[41] Mr. MacKillop on behalf of Mr. Perry read an extract from a letter received from Robert Wright, which confirmed that Mr. Perry continued to receive counselling. Mr. Wright is no longer personally involved in the counselling. That responsibility is now with James Dube .

Positions of the Parties

Crown Position

[42] The Crown says that Mr. Perry should receive a custodial sentence for each of the offences on the following terms:

- Section 91(2) – six months
- Section 95(1) – sixty months consecutive
- Section 92(1) – six month concurrent
- Section 117.01 – twelve months consecutive
- Section 117.01 – twelve months concurrent
- CDSA Section 4(1) – fifteen days consecutive

[43] Counsel says that Mr. Perry is entitled to twelve months credit for remand time which should only be applied to the first of the s. 117.01 offences. This would result in a sentence on a go forward basis of sixty-six and one half months. In recognition of the *Gladue* factors she proposes that the total sentence be reduced to sixty months incarceration from the date of sentencing. The Crown also seeks the mandatory lifetime ban on weapons and ammunition imposed by s. 109(3), a Forfeiture Order under s. 491, and a discretionary DNA Order under s. 487.051(3).

[44] The Crown's position is motivated by concerns about the serious and fatal nature of the ever increasing gun violence in our community. Mr. Perry's criminal record involving weapons offences is said to be extremely aggravating. Ms. Perry in her submissions said that a handgun only has one purpose and that is to shoot another person.

[45] The Crown referred to a number of cases in which there were significant jail sentences for weapons offences. For example, in *R. v. Racette*, 2016 BCCA 275, the Aboriginal accused pled guilty to trafficking in methamphetamine, possession of a loaded prohibited firearm, possession for the purposes of trafficking and possession of a firearm while prohibited. The weapon was a loaded sawed off shot gun, which was in a backpack in a public place. Mr. Racette had a prior record involving a sentence of seven and one half years imprisonment for robbery with a firearm and various other offences. The Court concluded that a five year sentence for possession of the firearm with a consecutive six months for violation of the s. 109 Order was appropriate.

[46] In *R. v. Phinn*, 2015 NSCA 27, the offender had been convicted of two firearms offences (under s. 94(1) and s. 90(1)) following trial. The Court of Appeal dismissed the appeal from a sentence of seventy-two months incarceration for the s. 94(1) conviction. Mr. Phinn had two prior convictions for firearm offences, the most recent of which lead to a prison term of three and one half years.

[47] In *R. v. Holland*, 2017 NSSC 148, the Court accepted a joint recommendation following a guilty plea to possession of cocaine for the purpose of trafficking and possession of a prohibited or restricted firearm with ammunition, contrary to s. 95(1) of the *Code*. The sentence was five years custody for the s. 95(1) charge and a concurrent three and one half years for the drug charge. Mr. Holland had prior drug convictions and two earlier firearm possession convictions under s. 91(1) and s. 95(1) of the *Code*. Mr. Holland had served approximately three years in jail for the prior offences, which were five years before the offences for which he was being sentenced.

[48] Ms. Perry says that the emphasis in this case should be on both general and specific deterrence, and that any mitigating factors which exist (such as the guilty plea) do not justify a departure from the requirement to impose a significant period of incarceration.

Defence Position

[49] The defence acknowledges that the lifetime weapons Prohibition and Forfeiture Order should be granted. With respect to the discretionary DNA Order, they point out that such an Order was already granted in relation to Mr. Perry's earlier convictions and therefore it is unnecessary in this case. With respect to incarceration, the defence recommends the following:

- Section 91(2) – three months consecutive

- Section 95(1) – suspended sentence (two years)
- Section 92(1) – three month concurrent
- Section 117.01 – two months consecutive
- Section 117.01 – two months consecutive
- CDSA Section 4(1) – a fine of $200

[50] The defence says that all of the periods of incarceration would be served by remand credit, and so the only ongoing punishment would be the suspended sentence for the s. 95(1) conviction.

[51] The defence points out the wide range of sentences which have been imposed for weapons offences. For example, in *R. v. Redden*, 2017 NSSC 172, the 66 year old offender pled guilty to ten weapons related offences involving over seven thousand rounds of ammunition and nineteen firearms. He had a prior record for serious weapons offences and was subject to a s. 109 Prohibition Order. The Pre-Sentence Report indicated he was a suitable candidate for community supervision and was deemed to be a low risk. He described himself as a gun collector. Both Mr. Redden and his wife had health issues.

[52] After concluding that Mr. Redden did not present a threat to society, had demonstrated remorse, and had been compliant with his release conditions, the Court imposed a conditional sentence of two years, with house arrest for the first twelve months. The conditional sentence was to be followed by twenty-four months of probation.

[53] The defence distinguishes some of the cases relied upon by the Crown on the basis that the offender's criminal records was more serious than Mr. Perry's and that the loaded firearms were being carried in a public place. They note that Mr. Redden's arsenal was far more extensive than the single gun and six bullets found in Mr. Perry's bedroom.

[54] The defence highlights the information found in the reports with respect to Mr. Perry's Aboriginal and African Nova Scotia background. They say the duty to consider *Gladue* factors supports their position that an alternative to incarceration should be found for Mr. Perry. Counsel also points out that Mr. Perry has made significant advancements since the earlier convictions in 2008 and has established important community resources that will enable his rehabilitation to occur.

[55] Mr. Perry is receiving what counsel have described as culturally appropriate counselling, which may not be available to him in jail. The resources which he now has were not available in 2008, which may have contributed to the events leading to these proceedings.

[56] The defence says that in the exceptional circumstances of this case, more jail time for Mr. Perry is unnecessary and inappropriate.

Applicable Principles

[57] The general purpose of sentencing is found in s. 718 of the *Code*, which states:

> Purpose and Principles of Sentencing
>
> Purpose
>
> 718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[58] The sentencing exercise involves a balancing of the objectives set out in this section.

[59] Section 718.1 of the *Code* requires that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender. Section 718.2 identifies specific sentencing principles which must be considered, including the following:

1. The sentence should be increased or reduced to account for any relevant, aggravating or mitigating circumstances relating to the offence or the offender.

2. The sentence should be similar to sentences imposed on similar offenders for similar offences, committed in similar circumstances.

3. An offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances.

4. All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders with particular attention to the circumstances of Aboriginal offenders.

[60] Where an offender is being sentenced for multiple offences the court must consider whether any terms of imprisonment are to be served consecutively. In some circumstances the *Code* makes consecutive sentences mandatory (see for example s. 85(4)). In the absence of such a direction in the *Code*, the question will be resolved by a determination of whether there is a sufficiently close connection among the offences to make concurrent sentences appropriate. If the offences arise out of a single event or transaction, concurrent as opposed to consecutive offences would typically be imposed. For example in *Phinn*, *supra*, the accused was convicted of two firearms offences arising out of a loaded revolver being found in a car. The sentences were to be served concurrently. In *Holland*, *supra*, the accused was convicted of possession of cocaine for the purpose of trafficking and possession of a prohibited or restricted firearm with ammunition as a result of a search of his apartment. The sentences were concurrent.

[61] As previously discussed, Mr. Perry identifies as Aboriginal and as a result I have a duty to undertake the analysis described by the Supreme Court of Canada in *Gladue* and *Ipeelee*. I need to pay particular attention to his circumstances as an Aboriginal offender, as well as take judicial notice of the Aboriginal history of colonialism, discrimination, dislocation, and poor social and economic development. These have led to negative economic and social impacts on Aboriginal people and communities.

[62] In the sentencing process, the *Gladue* factors may assist the Court in coming to an appropriate sentence for the particular offender. According to the Supreme Court of Canada there are two potential ways in which these factors may play a role. First, they may provide insight into the moral culpability of the offender, which might adjust the balance between the sentencing objectives of punishment and rehabilitation. Secondly, the *Gladue* factors may clarify the types of sentencing procedures and sanctions that might be effective for this particular individual. The underlying message of the Supreme Court is that s. 718.2(e) requires that non-custodial sanctions should be given particular consideration for Aboriginal

offenders as one part of the effort to understand and remedy the over representation of Aboriginal people in Canadian prisons.

Application of Principles to Mr. Perry

[63] Any sentencing hearing requires a careful consideration of the unique circumstances of each offender and the offence. It requires the balancing of sentencing objectives and, for Aboriginal offenders, the application of an analysis based upon the *Gladue* factors. In Mr. Perry's case there are many, sometimes competing, complexities in play. I will attempt to outline the considerations which have led to my ultimate disposition on sentence.

Circumstances of the Offender

[64] Mr. Perry is a thirty-five year old African Nova Scotia and Aboriginal man. He grew up in Halifax and Cape Breton, and as a child lived with his mother and, when she was unable to care for him, his sister or grandmother. His maternal grandmother was a Cree from Alberta who attended residential school and was living on her own as a teenager. She moved to Nova Scotia as a young woman shortly after getting married.

[65] Primarily because of his mother's drug addiction, Mr. Perry's home life was not stable. However, like many young African Nova Scotians, he received care and guidance from the broader community.

[66] The highest grade in school achieved by Mr. Perry was seven, although he subsequently obtained a GED. He became involved with the youth criminal justice system as a teenager, which included time spend in a youth facility.

[67] As a twenty-four year old, Mr. Perry was involved in a very serious situation which took place on a public street in Halifax resulting in multiple convictions, including for uttering threats, pointing a firearm and possession of a firearm while prohibited from doing so. He received a sentence of two years custody for uttering threats, as well as two year sentences on all of the other convictions, which were to be served concurrently. While in custody Mr. Perry was assaulted and stabbed.

[68] Mr. Perry says he has been diagnosed with ADHD, PTSD and has experienced difficulties with anxiety. He has had struggles with his mental health, including a psychological breakdown requiring hospitalization in 2017.

[69] Over the last three years Mr. Perry has become involved in community based programming, including providing mentorship and support to others who

have been incarcerated. Most of these activities have developed from his relationship with Mr. Sobaz Benjamin, who is executive director of iMove. Although not a health professional, Mr. Benjamin observed in his testimony significant improvement in Mr. Perry's personal outlook and development over the time they have known each other. The exception is the psychological breakdown in 2017, which he believed helped Mr. Perry come to terms with the stresses and other factors adversely affecting him.

[70] Since the spring of 2017, Mr. Perry has received counselling to assist in his struggles of reintegration. This counselling is particularly designed to assist him as a racialized man dealing with his life experiences.

[71] Following his arrest in 2014, Mr. Perry was remanded into custody for a significant amount of time. The parties have agreed that his total time in remand is four hundred and fifteen days. This consists of three hundred and fifty-six days in relation to these charges and fifty-nine days on a charge of breaching his release conditions of which he was acquitted. For the rest of the pre-sentencing period Mr. Perry was in the community subject to a recognizance, the terms of which were very restrictive and included house arrest. Since February 2017 Mr. Benjamin has been one of his sureties with a pledge of personal property in the amount of $4,000. Since July 2017 Ms. Kate MacDonald and Ms. Emma Paulson have also acted as sureties, pledging personal property of $1,000 each. Since that time Mr. Perry's house arrest has required him to live with Ms. MacDonald and Ms. Paulson. Ms. MacDonald is youth facilitator with iMove.

[72] In the Cultural Impact Assessment, Ms. MacDonald is reported to say that she has engaged with Mr. Perry on a daily basis since 2016. She says that he has worked hard to maintain the conditions of his release while giving back to the community and that he is striving to make healthy lifestyle choices.

[73] For his part Mr. Perry acknowledges his struggles with mental health. He advised the Court that he meant no harm, although he knew possession of the gun was prohibited. He described the last four years as being very hard, but noted that he followed every Order of the Court during that time period. He asked for a chance to continue his reintegration into the community.

[74] Over the last two or three years, Mr. Perry has taken steps to move forward in a positive fashion. He has provided peer mentoring to other young people who are in conflict with the law or at risk of this occurring. He has established an important support system, including Mr. Benjamin and Ms. MacDonald, who have acted as sureties and in Ms. MacDonald's case, permitted him to live with her. Mr.

Perry's mother continues to provide support. Mr. Perry has also begun counselling, which is specific to his status as a racialized individual.

[75] As an Aboriginal person whose grandmother spent time in residential schools, it is not surprising that his childhood was fragmented and included periods when his mother was unable to parent him. The extent to which these factors contributed to his involvement in the youth criminal justice system may not be known with precision, but it seems likely that there is a connection.

[76] In my view, Mr. Perry is an offender for whom the possibility of rehabilitation is real and should be given serious weight in the sentencing exercise. This is particularly so given his status as an Aboriginal offender and the direction found in s. 718.2(e) of the *Code* as interpreted by the Supreme Court of Canada in *Gladue*. In addition, his status as an African Nova Scotia offender raises similar issues. Even though there is no specific *Code* reference, Courts have acknowledged an over representation of African Canadians in the prison system. Dealing with the problem of over representation of that population is an appropriate consideration for a sentencing judge, keeping in mind that the ultimate sentence must be appropriate for the specific offender and offence.

Circumstances of the Offence

[77] The circumstances of the offence, which took place on June 4, 2014, have already been described. The prohibited items and marijuana were found in Mr. Perry's apartment after he told police where they could be located. The gun was loaded and cocked, and found in the bedroom. Mr. Perry told police that he had purchased it for protection.

[78] Mr. Perry has pled guilty to six offences. One is simple possession of marijuana under the *Controlled Drugs and Substances Act*. There were five *Criminal Code* convictions.

[79] The charge under s. 91(2) of the *Code* and one of the charges under s. 117.01(1) relate to what is referred to as a "push dagger", which was found in the search. This is a small knife in a leather sheath, which has a blade of approximately nine centimeters or three and one half inches. The other charge under s. 117.01(1) relates to six rounds of ammunition which were found.

[80] The remaining two charges, under s. 95(1) and s. 92(1), relate to the handgun found in the bedroom drawer. These charges are by far the more serious ones. The circumstances under which someone might possess a firearm can vary

widely. The severity of the situation is often viewed through the lens of the risk to public safety. Driving a car or being in a public place with a concealed, loaded handgun is not the same as having an unlicensed firearm, under lock and key at home. This distinction along with the criminal record of the accused will usually account for the range in sentences which can be found for these offences. That is certainly the case with the authorities submitted by counsel in this matter.

[81] When one looks at the circumstances of the offences to which Mr. Perry has pled guilty, they are less serious than the situation which led to his multiple convictions in June 2008. That event took place on a public street, involved threatening death and pointing a loaded firearm at a person. In some ways it is also less serious than the situation in *Redden* given the extent of the arsenal, which gave rise to those charges.

Mitigating and Aggravating Circumstances

[82] Mr. Perry's guilty plea was somewhat late in the process, however it is still a mitigating factor, as is his initial cooperation with the police in informing them about the weapons and drugs in his apartment.

[83] There are two aggravating factors. The first is Mr. Perry's criminal record, and in particular the incident which took place in May 2007, involving pointing a firearm and uttering threats to individuals in a public place. The other is Mr. Perry's decision to have a loaded gun in his apartment when he knew he was under a Court Order prohibiting him from doing so.

Deterrence, Denunciation, Rehabilitation and Proportionality

[84] These important principles are at the heart of the sentencing process. Denunciation and deterrence emphasize society's interest in protecting the public by imposing appropriate punishment for criminal conduct. It tends to focus on the nature of the offence and less on the individual offender. The exception is the principle of specific deterrence, which has the goal of ensuring that the particular offender before the Court is discouraged from repeating their criminal behaviour.

[85] Rehabilitation requires the Court to consider the individual offender and what options may be available to maximize the likelihood that they can be rehabilitated. It is generally accepted that imprisonment is not an effective tool for rehabilitation.

[86] In some sentencing hearings the objectives of deterrence, denunciation and rehabilitation are at odds with each other. It requires the Court to strike a thoughtful balance between the need to demonstrate that criminal behaviour is sanctioned, with the goal of helping the offender become a productive member of the community. I would put Mr. Perry's situation in this category.

[87] Proportionality requires the Court to consider the seriousness of the offence and the degree of responsibility of the offender. In other words, the sentence must first and foremost fit the specific crime and the specific offender.

[88] The *Gladue* factors which must be considered in sentencing an Aboriginal offender permeate all aspects of sentencing. It brings a different approach and analysis than might be used for non-Aboriginal offenders. In my view it shifts the focus to the individual and requires greater consideration of rehabilitation. In Mr. Perry's case the evidence shows that his involvement with iMove has been positive for himself and others. He is participating in culturally appropriate counselling and has focussed his attention on dealing with his personal health and in particular, his mental health. If those steps continue the possibility of his rehabilitation grows and the likelihood of further offences decreases.

[89] In my view any sentence imposed must encourage and facilitate, rather than frustrate, Mr. Perry's rehabilitation. It must not, however, ignore the important objectives of denunciation, deterrence and proportionality.

Determination of Sentence for Each Offence

[90] The Court must impose an appropriate sentence for each of the offences, including a determination as to whether any periods of incarceration should be concurrent or consecutive. There must also be an overall assessment as to whether the totality of the sentences are proportionate to the offence.

[91] For an Aboriginal offender I am required to consider alternatives to incarceration. In Mr. Perry's case I believe that also includes recognizing that his work with iMove is with members of his peer group, young racialized men. If his mentorship is successful in reducing the risk of others committing offences requiring imprisonment, it is important that he be allowed to continue that work. I believe this is within the direction from the Supreme Court of Canada that sentencing judges be creative in dealing with Aboriginal offenders and developing strategies directed to reducing the overall level of incarceration of members of that community.

[92] On the issue of whether the custodial sentences should be consecutive or concurrent I note that they all arise out of a single search. There is no *Code* provision requiring consecutive sentences for these charges. Section 718.3(4) sets out circumstances when consecutive sentences must be considered but none of these apply. Given that all of these charges arise from a single event I believe any sentences should be served concurrently.

[93] For any sentence of incarceration consideration must be given to what credit should be given for time spent in pre-trial custody. In appropriate circumstances this credit can be up to one and one half days for each day of remand (s. 719(3.1)). In this case Mr. Perry spent four hundred and fifteen days in custody although fifty-nine arose from his arrest on allegations that he breached his bail terms that he was ultimately acquitted of. The Crown says Mr. Perry should not get any credit for the fifty-nine days because that custody was not “as a result of the offence” as that term is used in s. 719(3) of the *Code*. The Ontario Court of Appeal in the recent decision of *R. v. Barnett*, 2017 ONCA 897, noted that this phrase should be given broad interpretation and could apply to time spent on remand for other charges. The court described its rationale as follows:

> 28 It would be artificial to restrict a sentencing judge's ability to apply pre-sentence custody to only those charges that are the immediate trigger of the detention. Judges are regularly called upon to sentence offenders who are facing different sets of charges and who obtained bail on the initial set of charges, but were remanded in custody on the later charges. In such cases, legitimate questions will arise as to whether the pre-sentence custody can be said to be "as a result of" each of the various charges the offender is facing. In many cases, common sense will dictate that the offender did not apply for, or was denied, bail on the second set of charges at least in part because of the totality of the charges outstanding, or because he had been on bail on the prior charges. In those circumstances, it does not stretch the language of s. 719(3) to describe the pre-sentence custody as being "a result of" both sets of charges.

[94] I am satisfied that Mr. Perry’s remand time as a result of the alleged breach of conditions is sufficiently connected to the original charges that he should get credit for the entire four hundred and fifteen days spent in custody. I need to consider whether to give enhanced credit of one and one half days per day of remand. This is often done to reflect the fact that such time is not part of the parole calculation and that remand time is often more difficult and does not include much in terms of programing and other services.

[95] The Crown argues that Mr. Perry’s guilty plea for assaulting a correctional officer while on remand should deprive him of any consideration for enhanced

credit. I disagree. The only information I have about the circumstances is found in the three reports filed on this sentencing. According to those Mr. Perry was trying to go to the aid of a relative who was involved in an altercation and, in doing so, pushed past the correctional officer. He has apologized and this was accepted by the officer. There is no other indication that Mr. Perry was a problem while on remand.

[96] According to the reports Mr. Perry did not do well while in custody. Mr. Benjamin spoke about Mr. Perry's condition upon his release on bail. He was struggling to recover from the experience and it has taken many months to do so. Given his mental health and personal history I accept that incarceration was very difficult for him. I am satisfied that enhanced credit is warranted to ensure that this dead time is properly acknowledged. The credit available is six hundred and twenty-two days.

[97] I will now deal with the sentences for each of the six offences.

Section 4(1) *Controlled Drugs and Substances Act*

[98] This is a conviction for simple possession of marijuana. I see no justification for jail time for such an offence and will order a fine of $200 as suggested by the defence.

Section 91(2) *Criminal Code*

[99] This offence relates to possession of the push dagger, which is a prohibited weapon. Mr. Perry said that he was not aware that it was illegal to have this. He has a criminal record involving possession of a knife (as a youth) as well as the charges arising out of the May 2007 incident. In light of his criminal record and the circumstances of the offence I believe a period of sixty days imprisonment is appropriate. This will be served by application of a portion of the remand credit.

Section 117.01(1) *Criminal Code*

[100] There are two charges under this section, one for the push dagger and the other for six rounds of ammunition. In my view there was a difference between these two charges and the one involving ammunition is more serious. Mr. Perry knew he was under a Prohibition Order and this material would be in violation. I would impose terms of imprisonment of sixty days for the charge involving the push dagger and twelve months for the one related to ammunition. These will also be considered served by remand credit.

Section 92(1) *Criminal Code*

[101] This charge relates to possession of a firearm knowing he was not the holder of a license or registration certificate. It carries a maximum penalty of ten years imprisonment. This is the less serious of the gun charges and I would impose a term of imprisonment of twelve months primarily because of Mr. Perry's record and his admission that he knew he should not have this gun. This has been served by Mr. Perry's remand credit.

[102] As may be apparent from these comments I believe the remand credit should be applied to the overall length of the concurrent sentences and not allocated to each offense individually. To do the latter would potentially result in all of the credit being used leaving additional time to serve which makes no sense in the context of concurrent terms.

Section 95(1) *Criminal Code*

[103] This is the most serious of the charges. It carries a maximum penalty of ten years imprisonment and the Crown is seeking a custodial sentence of sixty months. The defence seeks a suspended sentence or conditional sentence.

[104] In light of the circumstances of the offence and Mr. Perry's prior record I do not think that a suspended sentence adequately reflects the need for denunciation and deterrence and I am not prepared to consider that as an option.

[105] The authority to impose a conditional sentence is found in s. 742.1 of the *Code*. It involves a period of incarceration which can be served in the community instead of prison. There are limitations on the circumstances in which such a penalty can be imposed and these are set out in s. 742.1. These include the following:

1. The sentence of imprisonment must be for less than two years.
2. There is no minimum term of imprisonment specified in the *Code* for the offence.
3. The maximum term of imprisonment for the offence must be less than fourteen years.
4. The offence cannot have a maximum term of imprisonment of ten years and involve the use of a weapon.

[106] Section 95(1) does specify a minimum term of imprisonment, however this was struck down as unconstitutional by the Supreme Court of Canada in *R. v. Nur*,

2015 SCC 15. The offence has a maximum term of imprisonment of ten years, however it involved the possession but not the use of a weapon. I am satisfied that none of the limitations in s. 742.1 apply and a conditional sentence is potentially available for a conviction under s. 95(1).

[107] The first step in the analysis is to determine the appropriate range of sentence and, in particular, whether a non-custodial disposition or incarceration for two years or greater should be imposed. I have already indicated why a suspended sentence would not be appropriate and that same reasoning applies to any other non-custodial disposition.

[108] The objectives of denunciation and deterrence require a custodial sentence, and the issue is whether the circumstances of this case and this offender require that it be for two years or greater. The circumstances of the offence do not dictate that such an outcome should be automatic. Having a handgun with a small number of bullets in a bedroom drawer for protection is much different than travelling with a loaded gun in public or possessing multiple weapons and a significant supply of ammunition.

[109] When I look at the circumstances of Mr. Perry, I see an individual who comes from a disjointed and disrupted family life, who did not succeed at school and encountered the criminal justice system at a young age. Despite this, the May 2007 events are the only substantial criminal behaviour in the fifteen years before his arrest in June 2014. Since his arrest Mr. Perry has been in jail for about fourteen months and for the rest of his time was released on strict conditions, including house arrest with very limited exceptions. When a person is subject to stringent release conditions for a significant period of time, this may be taken into account as a mitigating factor on sentence (see *Lever v. R.*, 2014 SKCA 58). I am satisfied that in Mr. Perry's circumstances the burdensome pre-sentence release conditions should be considered as a factor reducing the length of any jail time imposed.

[110] Mr. Perry also has unused remand credit of two hundred and fifty-seven days after all of the other sentences are taken into account (six hundred and twenty-two days less twelve months). This is something that should be considered in deciding on the length of sentence that will be given on the s. 95(1) charge. The Ontario Court of Appeal in *Barnett* noted that pre-sentence incarceration may be taken into account as "relevant information" under s.726.1 for purposes of determining a fit sentence (see paragraph 42). In Mr. Perry's case this unallocated "dead" time is a factor which tends to mitigate the amount of additional jail time to be served.

[111] It is also relevant that Mr. Perry has taken steps to address the negative impacts of his past behaviour, including counselling and becoming involved in mentoring and leadership through iMove.

[112] I must also view all of the circumstances (both of the offence and Mr. Perry) through the lens of the *Gladue* factors which direct the Court to consider sentencing options that are appropriate but also responsive to the problem of over representation of Aboriginal offenders in jail.

[113] I conclude that Mr. Perry should be subject to a term of imprisonment for a period less than two years, which means that a conditional sentence should be considered.

[114] The two basic factors which must be weighed in deciding whether such a sentence should be imposed are found in s. 742.1(a) which reads:

> 742.1 If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if
>
> > (a) the court is 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 sections 718 to 718.2;

[115] As I've already discussed denunciation and deterrence are important objectives in this case. A conditional sentence order is a serious sanction which can accomplish this purpose. The Supreme Court of Canada in *R. v. Proulx*, 2000 SCC 5, said the following:

> 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 aspect that distinguishes the conditional sentence from probation, and it is to this issue that I now turn.

[116] In order to serve this objective the Supreme Court notes that such sentences should generally include punitive conditions to restrict the offender's liberty. This is highlighted in the following passage from the decision:

> 35 In light of the foregoing, it is clear that Parliament intended a conditional sentence to be more punitive than a suspended sentence with probation, notwithstanding the similarities between the two sanctions in respect of their rehabilitative purposes. I agree wholeheartedly with Vancise J.A., who, dissenting in R. v. McDonald (1997), 113 C.C.C. (3d) 418 (Sask. C.A.), stated, at p. 443, that conditional sentences were designed to "permit the accused to avoid imprisonment but not to avoid punishment".
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> 36 Accordingly, conditional sentences should generally include punitive conditions that are restrictive of the offender's liberty. Conditions such as house arrest or strict curfews should be the norm, not the exception. As the Minister of Justice said during the second reading of Bill C-41 (House of Commons Debates, supra, at p. 5873), "[t]his sanction is obviously aimed at offenders who would otherwise be in jail but who could be in the community under tight controls" (emphasis added).
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> 37 There must be a reason for failing to impose punitive conditions when a conditional sentence order is made. Sentencing judges should always be mindful of the fact that conditional sentences are only to be imposed on offenders who would otherwise have been sent to jail. If the judge is of the opinion that punitive conditions are unnecessary, then probation, rather than a conditional sentence, is most likely the appropriate disposition.

[117] I believe that the sentencing objectives in this case can be met by having Mr. Perry serve a custodial sentence in the community, followed by twelve months of probation. I have concluded that the safety of the community can be addressed by continuing, but diminishing, restrictions on Mr. Perry's liberty through house arrest, curfew and ultimately, probation. To date Mr. Perry has demonstrated his ability to comply with such conditions which were imposed as part of his release terms.

[118] I would note that the potential for public harm raised by the gun in Mr. Perry's bedroom drawer is significantly less than the circumstances which existed on the Halifax street in May 2007, or the cases relied on by the Crown in support of a lengthy jail term.

[119] In my initial oral decision I indicated that I would impose a conditional sentence of two years less a day with probation. I was subsequently advised by counsel that Mr. Perry had been sentenced to a four month conditional sentence on January 11, 2018, for the s. 270(1)(a) conviction. They expressed concern that this might fall within the prohibition against consecutive conditional sentences totalling

more than twenty-four months (see for example *R. v. Frechette*, 2001 MBCA 66, and *Middleton v. R.*, 2009 SCC 21, at para. 44). In the circumstances, and at the suggestion of both counsel, I agreed that the total length of Mr. Perry's conditional sentence would be twenty months less a day and that it be consecutive to the existing order.

[120] Mr. Perry will be under strict house arrest for the first nine months of the conditional sentence and a curfew from 10:00 p.m. to 6:00 a.m. for the next nine months of the sentence. He will be required to perform one hundred and twenty hours of community service during the first twelve months. In addition to the statutory conditions found in s. 742.3(1) Mr. Perry shall do the following:

- Attend for assessment counselling or a program as directed by his supervisor.
- Participate in and cooperate with any assessment counselling or program directed by the supervisor.
- Make reasonable efforts to locate and maintain employment or an education program as directed by the supervisor.
- Abstain from owning, possessing or carrying a weapon, ammunition or explosive substance.
- Abstain from consumption of any controlled substances or alcohol and be subject to urinalysis for verification.
- Be subject to electronic monitoring during the period of house arrest.

[121] In addition, Mr. Perry's house arrest and curfew will be subject to the following exceptions:

- When at regularly scheduled employment or education, which his supervisor knows about, and travelling to and from that employment or education by a direct route.
- When dealing with a medical emergency or medical appointments involving him or a member of his household, and travelling to and from it by a direct route.
- When attending a scheduled appointment with his lawyer, supervisor or probation officer, and travelling to and from the appointment by a direct route.

- When attending Court at a scheduled appearance or under subpoena, and travelling to and from Court by a direct route.
- When attending a counselling appointment, treatment program or a meeting at the direction of or with the permission of his supervisor, and travelling to and from that appointment, program or meeting by a direct route.
- When performing community service approved by his supervisor and travelling to or from that location by a direct route.
- For not more than six hours per week, approved in advance by his supervisor, for the purpose of attending to personal needs.
- When attending a regularly scheduled religious service with the permission of his supervisor, and travelling to and from that service by a direct route.
- To participate in the iMove program or other similar program approved by his supervisor, while in the immediate company of Sobaz Benjamin or other person approved by his supervisor.

[122] The terms of the twelve month Probation Order shall be the same as those found in the Conditional Sentence Order, with the exception of the house arrest, curfew, the alcohol prohibition and urinalysis.

Ancillary Orders and Victim Fine Surcharge

[123] Counsel agree that there is to be a mandatory lifetime Prohibition Order under s. 109(3) for the s.95(1) and 92(1) conviction as well as a Forfeiture Order under s. 491 with respect to property used in the offences. I will grant these Orders.

[124] The Crown also seeks a DNA Order under s. 487.051. These offences are classified as secondary under that section which makes this discretionary. Mr. Perry is already subject to such an Order by virtue of his 2008 convictions. I have no information to suggest that this has not been acted upon. In these circumstances I am not prepared to grant another Order to take a sample of Mr. Perry's bodily substances.

[125] Section 737 imposes a victim surcharge of $200 for each of the *Criminal Code* convictions and fifteen percent of the fine under the CDSA conviction. The total would be $1,030. I have discretion under s. 737(5) to exempt Mr. Perry from some or all of that amount if it would impose undue hardship. Mr. Perry is

unemployed and has a family he would like to try and support. He should be focussing his efforts on rehabilitation. Any additional pressure, financial or otherwise, will likely have adverse consequences. In these circumstance I will exempt him from the victim fine surcharge.

Wood, J.