CANADA / JUDGMENT

R. v. Alphonse

2020 BCSC 1882

COURT
Supreme Court of British Columbia

DECIDED
27 November 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1882 R. v. Alphonse

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Alphonse,

2020 BCSC 1882

Date: 20201127

Docket: 26346

Registry: Quesnel

Regina

v.

Kelvin E. Alphonse

Before: The Honourable Justice Winteringham

Reasons for Sentence

Counsel for the Crown:

J. Johnston

L. Ruzicka

Counsel for the Accused:

D. Turko, Q.C.

S. Dawson

Place and Date Hearing:

Quesnel, B.C.

October 1-3, 2019

Microsoft Teams

July 8-9, 2020

Place and Date of Judgment:

Quesnel, B.C.

November 27, 2020

Table of Contents

I. OVERVIEW.. 3

II. SENTENCING POSITION OF CROWN AND DEFENCE. 4

III. BACKGROUND. 6

A. Procedural History. 6

B. Circumstances of the Offence. 8

C. Victim Impact Statements. 12

IV. CIRCUMSTANCES OF MR. ALPHONSE. 17

A. Criminal History. 18

B. Gladue Report 18

C. Restorative Justice Peace Circle - December 11, 2019. 23

D. Letters of Support - Family and Community. 25

E. Medical Information. 26

F. Expression of Remorse. 28

V. SENTENCING PRINCIPLES. 28

A. Relevant Principles of Sentencing. 28

B. Section 718.2(e) 31

C. Sentencing Range. 32

D. Aggravating and Mitigation Factors. 36

VI. DECISION REGARDING SENTENCE. 38

A. Ancillary Orders. 41

VII. CONSTITUTIONALITY OF MANDATORY MINIMUM and s. 742.1. 41

A. Revisiting provisions found to be constitutionally compliant 44

B. Sentence is consistent with the mandatory minimum.. 46

C. Constitutional challenge regarding unavailability of CSO provisions. 47

VIII. CONCLUSION. 50

I. OVERVIEW

[1] On January 31, 2016, a small group of friends and family, including Kelvin Alphonse, gathered at a home, having some drinks and sharing time with one another. Things took a turn and Mr. Alphonse was asked to leave the gathering. He complied. He returned a few moments later with a gun. He shot Janet Paul as she was walking down the road, having left the party with her nephew. Ms. Paul suffered lifelong debilitating injuries as a result of the bullet wound.

[2] On July 6, 2018, Mr. Alphonse was convicted of that shooting and various firearms offences connected to it.

[3] Mr. Alphonse is now to be sentenced for those offences.

[4] Mr. Alphonse is 53-year old Tsilhquot'in First Nation man and a residential school survivor. Two of the offences for which he stands convicted carry mandatory minimum sentences of four years. Mr. Alphonse asks the court to consider the constitutionality of the mandatory minimum sentence in the context of his Indigenous status.

[5] It is here where the tension reveals itself. On the one hand, Parliament insists that certain firearms offences must be punished by a prescribed minimum jail sentence. The prescribed minimum sentences at issue here have withstood prior constitutional scrutiny. On the other, Parliament directs sentencing judges to recognize the systemic racism that plagues our criminal justice system and which has caused the disproportionate incarceration of Indigenous peoples. To that end, s. 718.2(e) of the Criminal Code, R.S.C., 1985, c. C-46, "directs sentencing judges to undertake the sentencing of aboriginal offenders individually, but also differently, because the circumstances of aboriginal people are unique."[1]

[6] At the same time, s. 718.2(e), as now constituted, directs sentencing judges to account for harm done to the victim and to the community. In this case, the harm done to Ms. Paul is grave and any sentence must properly reflect that harm. To that end, account is to be taken of Ms. Paul, her pain and suffering and her status as an Indigenous woman.

[7] The tension mentioned earlier is nowhere more evident than in a case such as this. Nothing that is done here today will ameliorate the lifelong adversity, including the impacts of colonialism, endured by Mr. Alphonse.

[8] Nor will this decision alleviate the pain and suffering caused to Ms. Paul.

[9] Perhaps what can best be accomplished is that the proceedings come to a close and some finality brought to those impacted.

[10] As I set out these reasons for sentence, I will provide some context. After setting out the sentencing positions, I will relate the procedural history. I will then turn to the circumstances of the offence and will set out the impact the shooting had on Ms. Paul as described by her, her sister and her daughter. Next, I will address Mr. Alphonse and his circumstances, including his upbringing, his struggles and the steps he has taken to answer the harm caused by these offences. I will then provide the legislative framework, governing legal principles and my decision regarding the appropriate sentence in this case. Last, I will consider the constitutional challenge brought to the various sentencing provisions at issue.

II. SENTENCING POSITION OF CROWN AND DEFENCE

[11] The Crown takes the position that eight years incarceration is the just and fit sentence, broken down as follows (with each sentence to run concurrently):

a) For count 2, pointing a firearm at Lazzar Paul, 1 - 2 years incarceration;

b) For count 3, discharge of a firearm while being reckless as to the life or safety of another person, six years incarceration;

c) For count 4, discharge of a firearm with the intent to wound, maim or disfigure Janet Paul and/or Peter Paul, eight years incarceration; and

d) For count 5, aggravated assault of Janet Paul, 6 - 8 years incarceration.

[12] The Crown submits that the range of sentence for these firearms offences is 5 - 8 years and relies on the following cases for the range and the position it takes: R. v. Ivanic, 2009 BCSC 931 and 2011 BCCA 158; R. v. Oud, 2016 BCCA 332; R. v. Dingwall, 2017 BCSC 1457 and 2018 BCSC 1041; R. v. Abdullahi, 2014 ONSC 272; R. v. Hassan, 2012 BCCA 201; R. v. Barr, 2016 BCSC 193; R. v. Haque, 2019 ONCJ 466; R. v. Larmond, 2011 ONSC 7170; and R. v. Sesay, 2019 BCSC 795.

[13] Citing deterrence and denunciation as the primary sentencing considerations for firearms offences, the Crown contends that Mr. Alphonse should be subject to the upper end of the range for the most serious counts (counts 3 and 4) due to: (1) the seriousness of Ms. Paul's injuries and the ongoing psychological and physical trauma that will last for her entire life; (2) the degree of planning and premeditation; and (3) the seriousness of his criminal record.

[14] The Crown seeks ancillary orders including a DNA order (counts 3, 4 and 5 are primary designated offences); a lifetime firearms ban pursuant to s. 109(2)(a) and (b); and, a forfeiture order of the .303 firearm pursuant to s. 491(1)(a) (subject to the defence establishing grounds for its return to a lawful owner pursuant to s. 491(2)).

[15] Mr. Alphonse does not dispute the ancillary orders sought.

[16] Mr. Alphonse contends that the appropriate disposition is a conditional sentence order of two years less a day followed by a period of probation. Mr. Alphonse submits that the Court must take into account the circumstances of the offence, his circumstances and the principles of sentencing (including the necessary Gladue analysis). The defence position for counts 3 and 4 is impermissible because of the mandatory minimum sentence and other prescribed restrictions found in s. 742.1. To make available his sentencing position, Mr. Alphonse challenges the constitutionality of the mandatory minimum sentences at issue and the unavailability of a conditional sentence.

[17] Setting aside the prescribed mandatory jail sentence, Mr. Alphonse says that the following cases support his position on sentence: R. v. Ball, [1993] O.J. No. 3207; R. v. Owens, [1985] B.C.J. no. 431, affirmed [1986] B.C.J. 401; and R. v. Pettigrew, [1990] B.C.J. No. 996, 56 C.C.C. (3d) 390.

III. BACKGROUND

[18] This proceeding has had a protracted history, impacted by a change of counsel, a constitutional challenge complicated by intersecting sentencing provisions and by a pandemic restricting access to the court. The procedural history is unfortunate because the proceedings have weighed heavily on everyone involved.

A. Procedural History

[19] A summary of the proceedings follows:

a) The offences occurred on January 31, 2016. Mr. Alphonse was arrested that night and was released from custody on April 21, 2016, 81 days later;

b) Following a preliminary inquiry, Mr. Alphonse was committed to stand trial in late 2016. His trial was scheduled for October 2017 but it did not proceed. On May 28, 2018, the trial commenced before me concluding on July 6, 2018;

c) Following conviction, Mr. Alphonse provided notice of a constitutional challenge to the mandatory minimum sentencing provisions and filed a notice to that effect;

d) Before the sentencing hearing commenced, Mr. Alphonse discharged his trial counsel. There were a number of appearances then required to organize new counsel. Eventually, Donna Turko, Q.C. came on record and the sentencing hearing was scheduled;

e) The sentencing hearing took place between October 1 - 3, 2019 and included submissions about the constitutionality of s. 244.2(3)(b). On the third day of the sentencing hearing, the Court enquired about two matters: (1) the sufficiency of the information presented in light of the Gladue requirements and in particular, restorative sentencing options considering the defence position on sentence; and (2) the defence sentencing position in circumstances where s. 742.1 precluded the availability of a conditional sentence. The hearing was then

scheduled to conclude in December to allow Mr. Alphonse an opportunity to tender further evidence and submissions;

f) When the sentencing hearing was scheduled to continue in December, Mr. Alphonse sought to adjourn the hearing for medical related reasons and so that an additional constitutional challenge could be raised;

g) On March 13, 2020, Mr. Alphonse delivered an Amended Notice of Application challenging the constitutionality of the unavailability of a conditional sentence order for the impugned offences;

h) The sentencing hearing was scheduled to continue in April 2020 but was adjourned because of the COVID-19 pandemic and the suspension of the court's general operations;

i) The sentencing hearing was rescheduled to continue on July 8 and 9, 2020 and was conducted, with Mr. Alphonse's agreement, on the Microsoft Teams platform. Mr. Alphonse was present in a room at the Quesnel courthouse during the proceedings; and

j) The sentencing hearing concluded on July 9, 2020. The decision date was arranged in accordance with counsel's availability.

B. Circumstances of the Offence

[20] On July 6, 2018, Mr. Alphonse was convicted of the following six offences:

a) Count 1 - careless use of a firearm contrary to s. 86(1) of the Criminal Code;

b) Count 2 - pointing a firearm, contrary to s. 87(1) of the Criminal Code;

c) Count 3 - unlawfully discharging a firearm into or at a place, knowing that or being reckless as to whether another person was present, contrary to s. 244.2(3)(b) of the Criminal Code;

d) Count 4 - discharging a firearm with intent to wound, maim or disfigure contrary to s. 244(1) of the Criminal Code;

e) Count 5 - aggravated assault contrary to s. 268(2) of the Criminal Code; and

f) Count 6 - using a firearm in the commission of an indictable offence contrary to s. 85(1) of the Criminal Code.

[21] The Crown takes the position, and Mr. Alphonse does not disagree, that counts 1 and 6 should be stayed due to the application of the principles in Kienapple v. The Queen, [1975] 1 S.C.R. 729.

[22] In light of the positions taken by Crown and defence and based on the authorities cited (R. v. Ivanic, 2009 BCSC 931, and R. v. Dingwall, 2018 BCSC 1041),[2] I direct a conditional stay of the convictions for counts 1 and 6.

[23] I turn back to January 31, 2016 and provide a very brief description of the events leading up to the shooting. I will not repeat that which was set out in my reasons for conviction of July 6, 2018, indexed at 2018 BCSC 2512. Those reasons should be read in conjunction with these.

[24] Ms. Paul described the circumstances during the day and early evening before she was shot. She was living approximately three blocks from the Lhtako (Red Bluff) reserve with her five children and at times her nephews, Peter Paul and Joseph Paul, resided with her. Though not described as a close relationship, she knew Mr. Alphonse because he was married to her cousin, Wanda Aldred. Ms. Paul also knew Mr. Alphonse's children.

[25] Ms. Paul described having a few drinks with her nephews in the late afternoon at her home. They decided to go to her friend's place, Deanna Boyd, because Ms. Boyd was at home having a few drinks with her daughter.

[26] Ms. Boyd lived next door to Mr. Alphonse.

[27] Ms. Paul and one or both of her nephews walked to Ms. Boyd's house where they met up with Ms. Boyd, her daughter, Kristen Boyd and Kristen's boyfriend, Lazzar Paul.

[28] Lazzar Paul had spent much of the day with Mr. Alphonse. Lazzar Paul retired to his bedroom to play video games after he and Mr. Alphonse arrived at Ms. Boyd's place. The others stayed in the living room. Ms. Paul testified that she was drinking heavily that evening. She recalled the group having fun and laughing. Ms. Paul decided to leave when some of the men, including Mr. Alphonse, started to argue. Her memory of the events shortly before the argument and thereafter was admittedly weak.

[29] Ms. Paul and Peter Paul left Deanna Boyd's residence and started to walk down the dark road. Ms. Paul remembers hearing Peter Paul yelling at her, "auntie, run." The next thing she remembered after she was shot was being on the couch and wanting to use the washroom. When she went to the bathroom, she saw blood, "too much blood." She had a vague recollection of the paramedics working on her. She next remembered waking up in Vancouver.

[30] I will return to Ms. Paul's injuries momentarily.

[31] With respect to the circumstances surrounding the events, I found as follows:

a) Janet, Peter and Joseph Paul and Kristen and Deanna Boyd were drinking at Deanna Boyd's residence;

b) All had been consuming alcohol to varying degrees;

c) Despite some consumption, the observations of Lazzar Paul and Kristen Boyd were not impacted to a significant degree by alcohol;

d) Mr. Alphonse spent the day with Lazzar Paul and Mr. Alphonse had been drinking for much of the day;

e) Early in the evening, Lazzar Paul returned with Mr. Alphonse to Deanna Boyd's residence and then Lazzar Paul retired to play video games in his room (though came out and had a beer with the group at some point);

f) Mr. Alphonse was partying with the group for a period of time and, after a disagreement, was asked to leave Deanna Boyd's residence;

g) Mr. Alphonse was angry when he left Deanna Boyd's;

h) Janet Paul and Peter Paul left Deanna Boyd's shortly after Mr. Alphonse's departure;

i) While walking along Chief Dominic road and just passed Deanna Boyd's residence, Mr. Alphonse returned to Deanna Boyd's property and shot Janet Paul with a rifle as she was walking along the road with Peter Paul;

j) Lazzar Paul observed the shooting from his bedroom window, told Mr. Alphonse to put away the gun and in response to the demand to put away the gun, Mr. Alphonse pointed the firearm at Lazzar Paul; and

k) The police attended shortly after the shooting, provided some assistance to Ms. Paul, spoke with some of the attendees and thereafter arrested Mr. Alphonse at his residence, recovering a firearm.

[32] The injuries suffered by Ms. Paul were devastating and her recovery will be lifelong. The Crown described the injuries in this way:

Janet Paul was taken to GR Barker Memorial Hospital with serious injuries to her stomach. Dr. Matthews performed surgery on Ms. Paul and testified that he could see a path of a projectile that traveled from the entry wound to her pelvis area and exited out her back. The initial surgery involved taking 50 cm from her small intestine, 10 cm from her sigmoid colon and making temporary drains to her bowels in preparation for further surgery in Vancouver General Hospital. Dr. Matthews saw Ms. Paul after her return from VGH and finally closed her stomach to get rid of the colostomy bag some months after the initial injury. He took metal fragments out of Ms. Paul's insides that are consistent with fragments from a bullet. He testified that numerous surgeries were required to heal Ms. Paul.

[33] Ms. Paul described ongoing physical problems as a result of the shooting. She described multiple surgeries and attending at a pain clinic in 2018 to help her manage the ongoing pain and, as she put it, "to control my mind." She described the emotional toll on her, including the loss of some friendships and the loss of the Red Bluff - a place that, as she put it, "we loved" saying that she had never felt welcome anywhere until there.

[34] Clearly, Ms. Paul's physical and psychological injuries are devastating and lifelong. The defence does not say otherwise.

[35] Defence counsel (at the time) presented this case as an identification case submitting that the Crown had failed to prove Mr. Alphonse was the shooter. Mr. Alphonse did not testify at trial.

[36] During the sentencing hearing, material was presented suggesting that Mr. Alphonse was drinking heavily during the day of the shooting and has minimal recollection (if any) about the shooting and the events leading up to it.

[37] I have considered the submissions of the Crown that Mr. Alphonse was convicted of offences requiring a specific intent and he does not dispute that he had the necessary mens rea for those offences. After reviewing the trial evidence about Mr. Alphonse's intoxication, the Crown agreed that Mr. Alphonse was drunk - though not to the extent suggested in the sentencing material. The Crown takes the position that for the purpose of sentencing, the question of whether he has a memory of the shooting is immaterial when, as here, intent is accepted by the defence.

[38] Intoxication was not advanced as a defence at trial. I am satisfied based on the trial evidence, and for the purpose of sentencing, that Mr. Alphonse had consumed a considerable amount of alcohol on January 31, 2016 and that his conduct was, at least in part, fuelled by the amount of alcohol he consumed. At this proceeding, he does not dispute he had the necessary intent to prove the offences charged, particularly he does not dispute that he had the necessary intent required to establish count 4 (discharging a firearm with intent to wound, main or disfigure).

C. Victim Impact Statements

[39] The impact of the offences was profound. Ms. Paul, her daughter, Dayna Paul and sister, Jennifer Ann Clement presented to the Court how each was impacted.

[40] I start with Janet Paul.

[41] I have set out very briefly the medical implications caused by the bullet wound, including the multiple surgeries and the continuing complications. Ms. Paul described eloquently and in considerable detail some of the intricacies of her struggle since the shooting. I have considered what she has so carefully articulated both in her written statement and presentation to the Court. I cannot repeat all of it but note her statement was marked as an exhibit. I highlight the following:

a) Ms. Paul suffered significant injury as a result of the shooting. She was in hospital for several months then placed on a course of rehabilitation that became exhausting. She was required to attend a pain management program to help her cope with her changed physical condition and the psychological toll that has taken. Her lack of mobility required her to use a wheelchair, a walker, a scooter and a cane for periods of time. She says the bullet fragments are forever lodged in her pelvis;

b) The offences were particularly damaging because they impacted a small community. A rift grew in the community where members thought it necessary to pick sides. Sadly, Ms. Paul believed that she lost good friends and relationships;

c) During her recovery, particularly in the early months when she was hospitalized in Vancouver, significant responsibility was placed on Dayna. Ms. Paul put it this way, "My oldest, Dayna had to step up and become not only a mother but a support to her own mother; she was far too young, she already had her own personal demands to deal with . . ." I pause to note that it was at this point in her presentation to the Court when Ms. Paul became emotional - clearly upset by her belief that she had unfairly burdened her daughter;

d) A significant portion of Ms. Paul's statement was devoted to the ongoing impact on her children. She described that before the shooting, she was able to manage as a single parent raising five children and that she was proud of her ability to do so. She believes she is now unable to do all that she had done before to raise her children. She wrote, "it doesn't seem fair to me that a single mother of five children had to fight against all odds just to survive her life. . . I hope you understand how your acts have torn myself, my children, my family, to complete despair filled with fear, pain, anger, hurt, confusion."

[42] Finally, Ms. Paul spoke about the loss of a community she loved stating, "I had to leave the only place I ever loved." She ended her presentation with a message of hope. These are her words of hope:

[I learned from the psychiatrist] that I should not be ashamed of my disabilities and to let go of this hurt I carried for too long. I know I have a long way to go but I now know I have it in me to continue forward - teaching my children that there is a better way to stand even if you stand alone then to do so for what you believe in.

[43] Ms. Paul's sister, Jennifer Ann Clement, witnessed first hand Ms. Paul's long recovery and the physical and emotional pain she endured. Ms. Clement flew to Vancouver on February 1, 2016 with her unconscious sister - her only sister. Ms. Clement told the Court about what she observed during those early days stating that she prayed and "sat by her side holding her limp, lifeless hand for many days before she woke up." Ms. Clement left her own young family to care for her sister. She had made a promise to Ms. Paul's eldest daughter that she would not come home without Ms. Paul. In fulfilling her promise, Ms. Clement was unable to work. Ultimately, the incident impacted her employment and her ability to contribute to the family's income. In addition to observing the physical implications of Ms. Paul's wounds, Ms. Clement suffered from her own loss and feelings of sadness and has required support from her doctor, including medications and counselling.

[44] I turn to Dayna Paul, Ms. Paul's daughter. She spoke of fear and of loss and of sadness.

[45] Dayna travelled to Vancouver and waited as her mom went through the many surgeries. Dayna described her fear this way:

When I finally got to see her, I was so scared. There was tubes and everything hooked on to her, I felt like I couldn't [breathe] - sometimes I still can't breath. I love my mom. I just couldn't accept that someone could ever try and take her from me.

[46] Dayna returned home before her mother was able to leave Vancouver and took over the care of her young siblings. She said it was "hard being the mom and going to school. And it wasn't until about two months later that I got to see my mom again." Since her mother's return home, Dayna has seen her mom cry and described the days that her mom cannot get out of bed.

[47] As she watches her mom trying to cope, she feels a sadness and, as she describes, she "starts crying to the point that I can't breathe."

[48] The overall tenor of these presentations reveal an ongoing sadness and sense of something lost. Though each of the speakers reflect some hope that things will improve, the ongoing impact of the wounds caused by the shooting undoubtedly effect Ms. Paul every day - and the impact on those closest to her remain.

[49] In a moment, I will turn to Mr. Alphonse and will describe the circumstances relevant to the Court's consideration of a just sentence. In so doing, I pay particular attention to Mr. Alphonse's Indigenous status, as I am obliged to do.

[50] At this point, I again acknowledge that Ms. Paul is also Indigenous. Though raised in the context of his analysis of s. 718.04 of the Criminal Code[3], Justice Marchand, in R. v. West, 2020 BCSC 352, described the importance of recognizing the reality of Indigenous women as victims of violence. He put it this way:

[34] In its powerful final report, the National Inquiry into Missing and Murdered Indigenous Women and Girls documented a crisis of violence, including sexual violence, against Indigenous women, girls, and 2SLGBTQQIA people. The Inquiry identified four "pathways" that have resulted in disproportionate rates of oppression and violence towards Indigenous women, girls, and gender-diverse people. The four pathways identified by the Inquiry are:

· Historical multigenerational and intergenerational trauma;

· Social and economic marginalization;

· Maintaining the status quo and institutional lack of will; and

· Ignoring the agency and expertise of Indigenous women and girls and 2SLGBTQQIA people.

[35] The Inquiry concluded that:

. . . the more these . . . pathways intersect in an Indigenous person's life, the more likely they are to experience violence . . .

[36] One of my takeaways from the Inquiry's work is that Canada's colonial history and destructive assimilationist policies, as well as racism and sexism, have embedded and normalized violence into the everyday lives of Indigenous women, girls, and gender-diverse people.

[51] The West decision is an apt reminder that the sentencing process include a consideration of impact.

[52] Most recently, the Quebec Court of Appeal addressed the court's requirement to consider the harm done to victims and to the community to ensure there is a proper balance between the rights of the offender and those who have been victimized by the offender's behavior: R. v. L.P., 2020 QCCA 1239. In so doing, the majority of the Court considered s. 718.04 of the Criminal Code. However, the Quebec Court of Appeal noted that this provision is not anything new. For the majority, Justice Ruel wrote:

[80] The protection of vulnerable female Indigenous victims as a sentencing consideration is not a novelty, and was judicially considered prior to the enactment of sections 718.04 and 718.201 of the Criminal Code.

[81] In R v. Whitehead, the Saskatchewan Court of Appeal wrote that it was "vital that the application of s. 718.2(e) not be seen as discounting the lives of or harms done to aboriginal victims of crime, their families and their communities." In R v. Williams, the British Columbia Court of Appeal wrote that there was "much to be said for the sentencing judge's concern for the protection of Aboriginal victims [. . .] and for the role of deterrence in the Aboriginal community."

. . .

[91] Therefore, even before the enactment of sections 718.04 and 718.021 of the Criminal Code, the protection of vulnerable Indigenous women who were victims of abuse, whether or not in the domestic context, and the recognition of the suffering endured by these victims, were key considerations in sentencing offenders.

[53] In short, the Criminal Code requires sentencing judges to take into account Mr. Alphonse's circumstances as an Indigenous person. At the same time, s. 718.2(e) commands that the sentencing judge not ignore or discount the harm done to Ms. Paul and the community.

IV. CIRCUMSTANCES OF MR. ALPHONSE

[54] Mr. Alphonse provided the Court with substantial information about his background and about his current circumstances, medically and otherwise. I have reviewed and considered the following:

a) Detailed Gladue Report written by Stuart Cadwallader dated November 3, 2018;

b) Pre-sentence report dated December 6, 2019;

c) Letters of support from:

i. Violet Stump - member, Elder and former Chief of the Alexandria Band (Esdilagh);

ii. Norma Stump - council member of Esdilagh First Nation;

iii. Thomas Billyboy - Esdilagh First Nations Elder;

iv. Agatha Billy - long-time family friend;

v. Kori-lee Alphonse - daughter;

vi. Stefan Schwarzmann - friend;

vii. Tanisha Alphonse - daughter;

viii. Eleanor Cooper - Tl'etinqox Councillor; and

ix. Cindy Aldred - sister-in-law;

d) Letters from VisionQuest Recovery Society dated September 7, 2016, September 8, 2016, December 17, 2018, January 2, 2019, September 29, 2019 and July 6, 2020;

e) Letter from Crossroads Prison Ministries (Canada) dated March 26, 2018; and

f) Various medical letters including:

i. Dr. Mitch Verde, Tl'etinqox Community Psychologist dated October 1, 2019;

ii. Dr. Rohan Ghatak, Tl'etinqox Government Social Services dated October 2, 2019;

iii. Dr. Mullins (consultant gastroenterologist) dated November 18, 2019 and June 24, 2020;

iv. Dr. Yoshida (gastroenterology) dated January 20, 2020;

v. Dr. Huckell (UBC - cardiology) dated March 13, 2020;

vi. Dr. Brunner (cardiology), Vancouver General Hospital Results Review Report dated March 30, 2020; and

vii. Dr. VanWyk McDonald (general practitioner) dated June 3, 2020 and July 7, 2020.

[55] I have also considered additional and updated material that was presented at the continuation of the sentencing hearing including a report about a restorative peace circle. I will address that material shortly.

A. Criminal History

[56] Mr. Alphonse's criminal record was tendered by the Crown. The criminal record is indicative of a person experiencing alcoholism. His early record contains convictions for property related offences and impaired driving. He has two old convictions for assaulting a peace officer and a 1994 conviction for assault with a weapon where his sentence included seven months of jail time. Thereafter, he has an almost ten-year gap in his record.

Commencing in 2004, he accumulated four convictions for impaired driving related offences. His last conviction was May 14, 2012. For the purpose of this sentencing hearing, I have not placed great weight on his criminal record except to note he has one. I would also note that any convictions for violence were recorded over 25 years ago.

B. Gladue Report

[57] I turn to Mr. Cadwallader's report entitled "Gladue Report."

[58] Mr. Alphonse is, today, 53 years old and is a Tsilhqot'in First Nation man registered with the Lhtako (Red Bluff) Dene band. He was born in Williams Lake, BC. His mother is a member of the Esdilagh (Alexandria) First Nation and his father a member of the Tl'etinqox (Anaham) First Nation. He has one brother and three maternal half-siblings. Mr. Alphonse was close with his mother but has had irregular contact with his siblings and other extended family members, many of whom struggle with substance use and other symptoms of unaddressed trauma.

[59] In his report, Mr. Cadwallader quotes Mr. Alphonse as he described his early years. Mr. Alphonse described those early years in this way:

My mother came from Esdilagh reserve and was a childhood survivor of the St. Josephs' [Indian Residential School] but Terry [Billyboy - Mr. Alphonse's step father] and my father were from Anaham and went to the Indian Day School there. Terry is a decent man and was always very kind to my mother and us while we were growing up. He and my mom are still together 45 years later.

My dad didn't live very far from my mom and Terry's place but there was far too much drinking and violence going on at his house so Elroy and I were mostly raised by my paternal grandparents. . . When I was around nine or ten, my grandfather Eugene was drinking and froze to death while trying to find his way home . . . that kind of thing wasn't unusual . . .

. . . one of my earliest childhood memories, from when I was only around five years old, was of my uncle, Curtis, being killed in front of me and my little brother. Curtis was only 30 years old and they were all sitting around the living room getting drunk on red wine - he gave me some . . . they thought it was funny to get us kids drunk too. I remember him being stabbed in the heart by his girlfriend. . . There was blood everywhere - it was a horrifying and confusing situation. I was pulled out of there by my step-dad Terry . . .

[60] In this case, it is significant that Mr. Alphonse experienced residential schools both first hand and generationally. He and his brother were left by their father at the St. Joseph's Indian Residential School in Williams Lake. He described it as follows:

I felt lost and abandoned. They put me in a dorm room and I was scared . . . the same nun that used to beat and abuse my mom was still there and she identified us and began picking on Elroy and me right away.

[61] Mr. Alphonse described experiencing acts of every kind of abuse while at the residential school. His mother and step-father eventually removed the boys from the school. Mr. Alphonse describes his brother as "irreparably traumatized."

[62] Mr. Cadwallader noted that Mr. Alphonse's experience at the St. Joseph's Indian Residential School was "formally documented." Mr. Cadwallader described the horrendous history of the school in the Gladue report stating the following:

On July 5, 1861, the Oblate Order of Roman Catholics established the St. Joseph's Indian Residential School in Williams Lake. This school remained open until 1981 and was first supervised, as principal (1961-1967) and then later maintained, as Bishop of Prince George (1986-1991), by Hubert O'Connor, a man who later confessed to a multitude of sexual offences against the children left in his charge. Counted amongst the survivors of the St. Joseph's Indian Residential School were [Mr. Alphonse], his brother, and parents, as well as innumerable members of the community.

[63] Mr. Alphonse's teenage years were similarly difficult. He reported that the family rented a place from a local rancher near McLeese Lake. When his parents could not afford to pay the rent, the family would live in tents. While recounting her experience at the residential school, Mr. Alphonse's mother said "it imparted a legacy of suffering with the resulting trauma being handed down to her children."

[64] Mr. Alphonse quit school when he was about 15 years old and moved to Williams Lake where he lived with an aunt who was dealing with her own symptoms of trauma. To pay for rent and to support himself, Mr. Alphonse engaged in property crime. It was here that his involvement in the criminal justice system began, including time spent incarcerated.

[65] In his early twenties, he relocated to Red Deer, Alberta to work on the pipelines. He began a relationship and had his first child, a son. Mr. Alphonse stated that "his use of alcohol and transient lifestyle precluded him from taking an active parental role in his son's life but they currently communicate by phone and social media."

[66] Though he met his current wife when they were 14 years old, they became a couple when he was about 22 years old. They have been together since then. They have three daughters, Kori-Lee, Tanisha and Karissa - now all young adults. There was some suggestion that Mr. Alphonse has experienced periods of separation from his spouse in recent years and in part because of his bail restrictions. It appeared during the sentencing proceedings that Mr. Alphonse has continued to enjoy the support of his spouse.

[67] I pause for a moment to address Mr. Alphonse's comments about the role violence has played in his life. He says that he learned violence as a part of "the struggle to survive. If the priests or older kids saw you as vulnerable or weak in any way, you became a victim. They taught us to be violent and unfortunately, it kind of took over and became who you were, and how others saw you as an adult." Mr. Alphonse says that the [index offence] opened his eyes. He says he has made a commitment to change:

I stopped drinking and want to be the man and father that my wife and children deserve. I want to be a role model for positive change in my community and show them that we can do things differently, without all of the alcohol and violence that continues to plague us.

[68] Based on the material I have reviewed, I accept that Mr. Alphonse is sincere in his commitment to this aspirational statement.

[69] I return to his employment. In 2000, Mr. Alphonse went to the Nicola Valley Institute of Technology and completed a four-year forestry program graduating in 2003. He then started a career as a forestry technician for the next decade and he stated, "he enjoyed a measure of success but that this came crashing down in 2013" when there were cuts in the industry. He then secured a position as a referral officer for the Lhtako Dene band office but lost this position unexpectedly in 2015 following a change in the local band leadership.

[70] After he lost his employment, Mr. Alphonse says he became depressed and began drinking heavily.

[71] Mr. Alphonse says ultimately his alcohol dependency, at this point in his life, resulted in his involvement in the events of January 31, 2016.

[72] After his arrest, Mr. Alphonse spent 81 days in pre-trial detention. He was released on April 21, 2016 on conditions that required him to live at VisionQuest's recovery facility in Chilliwack, BC. He was not permitted to leave VisionQuest except for medical emergencies and then only in the company of a staff member. His bail conditions were varied on October 14, 2016 to grant him temporary absences from VisionQuest if in the presence of a staff member or with the written permission of Rick Edwards, a VisionQuest staff member. His bail conditions were varied further on December 15, 2016 permitting him to reside at 103 Esdilagh Road, Quesnel, BC. Pursuant to his bail conditions, Mr. Alphonse was prohibited from possessing or consuming alcohol or attending at any drinking establishments. It appears that there were two more iterations of the recognizance of bail. However, the gist of the restrictions remained throughout.

[73] I characterize the bail conditions to be onerous and constituted restrictions on Mr. Alphonse's liberty.

[74] In the pre-sentence report, Patricia Reinsdorf described Mr. Alphonse's living arrangements. Mr. Alphonse's bail conditions meant that he was prohibited from living with his family who stayed in the family home on the Lhtako Dene reserve. He has instead lived with his mother and step-father on the Esdilagh Reserve.

[75] Based on the material before me and as summarized in Mr. Cadwallader's report, I accept that there were a number of adverse factors in Mr. Alphonse's life including:

a) Multigenerational familial instability, violence, breakdown and fragmentation reflected in Mr. Alphonse's formative environment as defined by poverty, neglect, chronic alcoholism, instability, violence and fear (including, notably, witnessing the killing of his uncle and subsequent abuse experienced at the residential school);

b) Early introduction to and subsequent chronic personal history of substance use, including an introduction to alcohol at approximately five years old; and

c) Intergenerational effects flowing from his residential school experience, including: alcoholism, violence, family fragmentation, dislocation from his Indigenous community and consequent alienation and loneliness, loss of language, culture and traditional community.

[76] Mr. Cadwallader included in his report (as did Ms. Reinsdorf in the pre-sentence report) a range of community and custodial based programs available for Indigenous men facing criminal sanctions.

C. Restorative Justice Peace Circle - December 11, 2019

[77] On December 11, 2019, Mr. Alphonse participated in a restorative justice peace circle. Annette Frank authored a report about the process and described what occurred. Those in attendance included members from Mr. Alphonse's family but did not include representatives from Ms. Paul's family. In the report, Ms. Frank referred to the "victim's family - elder male from Red Bluff." However, Ms. Paul stated that she did not know who this man was nor did she authorize anyone to speak on her behalf at the peace circle.

[78] I am satisfied that the peace circle did not include any representation from Ms. Paul's family. Due to the lack of representation, Ms. Paul and her family were not able to share their story with the other participants. Indeed, sharing by the victim is stated to be one of the significant features of the peace circle. Without Ms. Paul or members from her community, the peace circle was missing a crucial component.

[79] As I will explain, I am satisfied that the peace circle can be considered as a step in the healing process.

[80] Relying on Ms. Frank's report, I make some observations about the peace circle.

[81] Ms. Frank believed in the sincerity of Mr. Alphonse's apology and participation. She provided a thoughtful description of what could be accomplished through this restorative process. She wrote:

Peacemaking Circles [are] a process that brings people together who wish to participate in conflict resolution, support, decision making or provide a space to acknowledge responsibility for one's behavior. Peacemaking circles bring people together in a way that creates an atmosphere of trust.

[82] I took from Ms. Frank's observations that she was hopeful that the peace circle could be a starting point for healing. I also accept what I have been told about the importance of victim participation in the peace circle. And, as I have said, that did not occur here. However, I have accepted that this restorative process was perhaps a beginning - or a step -- in a more hopeful direction.

[83] The various reports tendered at the sentencing hearing, including the Gladue report and the peace circle report, bring to light the limits of sentencing (within our criminal justice system) as a solitary answer to ameliorate the impact of systemic discrimination in Canada and, in particular in this context, the overrepresentation of Indigenous peoples in our jails. I am reminded of Justice LeBel's recognition of that limitation in R. v. Ipeelee, 2012 SCC 13 when he wrote:

[68] Section 718.2(e) is therefore properly seen as a "direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process" (Gladue, at para. 64 (emphasis added)). Applying the provision does not amount to "hijacking the sentencing process in the pursuit of other goals" (Stenning and Roberts, at p. 160). The purpose of sentencing is to promote a just, peaceful and safe society through the imposition of just sanctions that, among other things, deter criminality and rehabilitate offenders, all in accordance with the fundamental principle of proportionality. Just sanctions are those that do not operate in a discriminatory manner. Parliament, in enacting s. 718.2(e), evidently concluded that nothing short of a specific direction to pay particular attention to the circumstances of Aboriginal offenders would suffice to ensure that judges undertook their duties properly.

[69] Certainly sentencing will not be the sole -- or even the primary -- means of addressing Aboriginal overrepresentation in penal institutions. But that does not detract from a judge's fundamental duty to fashion a sentence that is fit and proper in the circumstances of the offence, the offender, and the victim. Nor does it turn s. 718.2(e) into an empty promise. The sentencing judge has an admittedly limited, yet important role to play. As the Aboriginal Justice Inquiry of Manitoba put it, at pp. 110-11:

To change this situation will require a real commitment to ending social inequality in Canadian society, something to which no government in Canada has committed itself to date. This will be a far-reaching endeavour and involve much more than the justice system as it is understood currently... .

Despite the magnitude of the problems, there is much the justice system can do to assist in reducing the degree to which Aboriginal people come into conflict with the law. It can reduce the ways in which it discriminates against Aboriginal people and the ways in which it adds to Aboriginal alienation.

Cory and Iacobucci JJ. were equally cognizant of the limits of the sentencing judge's power to effect change. Paragraph 65 of Gladue bears repeating here:

It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system... . What can and must be addressed, though, is the limited role that sentencing judges will play in remedying injustice against aboriginal peoples in Canada. Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.

[Emphasis in original.]

[84] Based on the materials as presented and the submissions received from both parties, I recognize the peace circle as constituting an important first gesture in the restorative justice process. Only time will tell whether anything more can be achieved in the healing process between the families and their communities.

D. Letters of Support - Family and Community

[85] Letters were presented from family and friends, and they spoke admirably about Mr. Alphonse's recent efforts to address his addiction and the underlying reasons for it.

[86] For example, Violet Stump, an elder from Esdilagh wrote that she has known Mr. Alphonse his whole life. She says "he is one of the very few people in their community who still practices the aboriginal cultural ways and fluently speaks the Chilcotin language." She recognizes that he has been "actively seeking help through treatment centres, counseling, spending time with community elders, utilizing support services that are offered in the community. He demonstrates a strong sense of responsibility to his wife, his children, his elderly mother, step-father and siblings."

[87] Norma Stump, also an elder from the Esdilagh First Nation, made similar comments and noted that Mr. Alphonse would have the support of the community so long as he maintained his sobriety.

[88] Two of Mr. Alphonse's daughters wrote about their father and the importance of his sobriety since January 2016. His oldest daughter, Kori-lee gave the following description about this change in her father:

For the past 3 years, my dad has improved and learned a lot of things. He is definitely a changed man. He is 3 years and 9 months sober and is still going strong. He's also been working on the Anaham reserve as an alcohol and drug counselor, helping clients straighten up their lives and go to treatment. He also holds his own AA meetings as well as a men and women wellness night - giving back to the community and helping people who need it is what he does.

[89] Tanisha expressed a similar sentiment about her father and his commitment to sobriety. She wrote about the important role he plays for the family and the support that he provides to each of them. She says he is needed for the family (and the community) because of what he brings to the community. She asks that his background be taken into account, including the fact that he is "a residential school survivor and being a victim to all different kinds of abuse. Understanding what it's like to try to overcome all of that."

[90] His sister-in-law, Ms. Aldred, delivered a candid view of Mr. Alphonse. She wrote, "I'd like to say that my brother had quite the mean streak while under the influence of alcohol but when he is sober, he is the most kind and helpful, responsible person I know." Ms. Aldred was clearly moved by Mr. Alphonse's commitment to sobriety and the lifestyle changes he has made. She says that she knows he has done a lot of healing work and self-discovery.

E. Medical Information

[91] Several letters were provided demonstrating Mr. Alphonse's success at VisionQuest and his ongoing commitment to recovery and maintaining sobriety. In addition to the residential program[4], it is clear he has embraced community-based treatment. In fact, VisionQuest's manager, Roy McLaughlin stated that "Mr. Alphonse was highly committed to long-term abstinence and positive lifestyle change and became a role model for other residents."

[92] The material presented establishes that Mr. Alphonse has done just about everything he can to address his alcohol addiction. In my view, this demonstrated commitment to recovery answers, in part, the purpose and principles of sentencing including specific deterrence and rehabilitation.

[93] Mr. Alphonse also provided medical records describing his current physical health. The records indicate that Mr. Alphonse is suffering from cirrhosis of the liver and pulmonary hypertension. It appears that he has been in and out of hospital and consulted several doctors to determine a course of treatment. He underwent a liver transplant assessment earlier this year to determine whether he was a viable candidate for a transplant. His general practitioner, Dr. VanWyk McDonald noted on June 3, 2020 that

[A]t this point in time, he has been denied liver transplant because of the significantly elevated risk of death after the procedure. He does not qualify because of elevated PVR in his lungs. He will be managed for these complications and I do not know if the condition is adequately managed if he will be a candidate [in the future].

[94] On July 7, 2020, Dr. VanWyk McDonald wrote

[Mr. Alphonse] does not appear gravely ill and my last consult with him was on March 19, 2020. Even though he has multiple medical conditions I do not foresee any acute deterioration in his physical condition. I consulted with Dr. Brunner who felt that [Mr. Alphonse's] pulmonary hypertension is very mild and he will have a potential 90% survival over five years with regards to his lungs only. We are unable to comment on the liver failure.

[95] Mr. Alphonse asks the Court to take into account his fragile medical condition and the hardship that will be caused by time spent in jail.

F. Expression of Remorse

[96] During the sentencing hearing, Mr. Alphonse delivered an apology to Ms. Paul and to those in the courtroom. This will be for Ms. Paul to determine how to receive and/or accept his apology - if at all.

[97] I have taken his apology into account as I analyze the totality of the factors I am required to consider. In my view, Mr. Alphonse's words were not delivered as a ploy for a more lenient sentence or to garner favour from the Court. Rather, his words were thoughtful and his delivery, sadly emotional. He has spent many years now reflecting about what he did and the devastating impact his conduct had on Ms. Paul.

[98] I find his expression of remorse to be sincere.

V. SENTENCING PRINCIPLES

[99] In accordance with the jurisprudence dealing with constitutional challenges to mandatory jail sentences, I will, as a first step, determine the proportionate sentence for the offence having regard to the principles and objectives of sentencing: R. v. Lloyd, 2016 SCC 13 at para. 23 and R. v. Nur, 2015 SCC 15 at paras. 40-46. I will then move to the second step and determine whether the imposition of the mandatory minimum sentence is grossly disproportionate to the fit and proportionate sentence: Lloyd at para. 23 and Nur at para 46.

A. Relevant Principles of Sentencing

[100] Much has been written about the principles of sentencing. I summarize here what I consider to be particularly pertinent in a case such as this.

[101] Sections 718 - 718.2 of the Criminal Code set out the purpose and principles of sentencing. These sections provide, in part, as follows:

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:

(1) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;

(2) to deter the offender and other persons from committing offences;

(3) to separate offenders from society, where necessary;

(4) to assist in rehabilitating offenders;

(5) to provide reparations for harm done to victims or to the community; and

(6) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender . . .

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

. . .

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(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.

[102] As s. 718.1 makes clear, a fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Chief Justice McLachlin explained in Nur, at para. 43 ". . . that imposing a proportionate sentence is a highly individualized exercise, tailored to the gravity of the offence, the blameworthiness of the offender and the harm caused by the crime". That said, no one sentencing objective trumps the others. Rather, it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case: R. v. Nasogaluak, 2010 SCC 6 at para. 43.

[103] Justice LeBel recognized the constitutional aspect of proportionality when he stated, at paras. 41-43 of Nasogaluak:

[41] It is clear from these provisions that the principle of proportionality is central to the sentencing process (R. v. Solowan, 2008 SCC 62, [2008] 3 S.C.R. 309, at para. 12). This emphasis was not borne of the 1996 amendments to the Code but, rather, reflects its long history as a guiding principle in sentencing (e.g. R. v. Wilmott (1966), 58 D.L.R. (2d) 33 (Ont. C.A.)). It has a constitutional dimension, in that s. 12 of the Charter forbids the imposition of a grossly disproportionate sentence that would outrage society's standards of decency. But what does proportionality mean in the context of sentencing?

[42] For one, it requires that a sentence not exceed what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence. In this sense, the principle serves a limiting or restraining function. However, the rights-based, protective angle of proportionality is counter-balanced by its alignment with the "just deserts" philosophy of

sentencing, which seeks to ensure that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused (R. v. M. (C.A.), [1996] 1 S.C.R. 500, at para. 81; Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, at pp. 533-34, per Wilson J., concurring). Understood in this latter sense, sentencing is a form of judicial and social censure (J. v. Roberts and D. P. Cole, "Introduction to Sentencing and Parole", in Roberts and Cole, eds., Making Sense of Sentencing (1999), 3, at p. 10). Whatever the rationale for proportionality, however, the degree of censure required to express society's condemnation of the offence is always limited by the principle that an offender's sentence must be equivalent to his or her moral culpability, and not greater than it. The two perspectives on proportionality thus converge in a sentence that both speaks out against the offence and punishes the offender no more than is necessary.

[43] The language in ss. 718 to 718.2 of the Code is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender. The determination of a "fit" sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case (R. v. Lyons, [1987] 2 S.C.R. 309; M. (C.A.); R. v. Hamilton (2004), 72 O.R. (3d) 1 (C.A.)). No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case. The relative importance of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge's discretion to decide on the particular blend of sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines and principles in the Code and in the case law.

B. Section 718.2(e)

[104] By virtue of s. 718.2(e), a sentencing judge must consider the unique circumstances of an Indigenous offender. Justice Marchand, in R. v. Harry, 2018 BCSC 2069, provided this insightful summary of the analysis compelled by s. 718.2(e):

[21] Section 718.2(e) was introduced in 1996. Cases such as R. v. Gladue, [1999] 1 S.C.R. 688 and R. v. Ipeelee, 2012 SCC 13, make clear that it is a remedial provision that was and is intended to deal with the crisis of over-representation of indigenous offenders in the Canadian criminal justice system. Sadly, the statistics are worse today than they were in 1996.

[22] The crisis described by the Supreme Court of Canada has been driven by the alienation, poverty, substance abuse, lower educational attainment, lower rates of employment, and bias experienced by indigenous Canadians as a result of Canada's colonial history and destructive assimilationist policies such as the operation of Indian Residential Schools.

[23] While these are broader societal issues, the Court, in Gladue and Ipeelee, has recognized that sentencing indigenous offenders has a role to play in addressing their over-representation in the criminal justice system. Indigenous offenders are different from other offenders because, in the words of the Supreme Court of Canada, they "are victims of systemic and direct discrimination". To help address the crisis, Gladue and Ipeelee changed the way indigenous offenders are sentenced, though not necessarily the result. In sentencing an indigenous offender, a sentencing judge must consider two factors:

1. The unique systemic or background factors which may have played a part in bringing the particular offender before the courts; and
2. The types of sentencing procedures and sanctions which may be appropriate in the circumstances.

[24] Other important principles from Gladue and Ipeelee include the following:

- The court must take a holistic approach to imposing a fit sentence. A fit sentence is one that is proportional and appropriately balances the seriousness of the offence with the moral blameworthiness of the offender;
- The unique systemic or background factors that may have played a part in bringing the particular offender before the court speaks to the moral blameworthiness of the offender;
- A causal connection between the systemic and background factors need not be established but a link may be important or helpful in finding a fit sentence; and
- Restorative sentences may be more appropriate for indigenous offenders, but taking a restorative approach will not necessarily lead to a reduced sentence. Colloquially, s. 718.2(e) is not a "get out of jail free" card.

[105] There is no doubt the Gladue factors in this case are striking.

C. Sentencing Range

[106] The Crown advances a range of 5 - 8 years for the offences captured in counts 3 and 4 and relies on the authorities as set out earlier. I address those authorities now.

[107] The Crown first relies on R. v. Ivanic, 2011 BCCA 158, in which the Court of Appeal upheld an eight-year sentence including a six-year sentence for discharging a firearm with intent (then s. 244(a)) and aggravated assault. In my view, Ivanic provides some guidance but I have determined that the circumstances in Ivanic to be more egregious than those presented here, particularly with respect to the retaliatory aspect of Mr. Ivanic's conduct. The sentencing judge, in R. v. Ivanic, 2009 BCSC 0931, described the offences this way:

[36] . . . the accused's convictions for the offences of discharging a firearm with intent and aggravated assault are based on the accused's shooting of Renshaw. Here, the accused armed himself prior to attending at the residential apartment complex to engage in a drug transaction which turned into a set-up for a robbery. The accused knew that Renshaw was unarmed. He was backed into a corner. The accused shot Renshaw twice from Close range. He did so with the intent of maiming him in retaliation for Renshaw having set him up. . . .

[108] Ivanic involved very different circumstances than the case before me. Mr. Ivanic was a young man armed with a firearm in the course of drug-trafficking related activities. I do not agree that Mr. Alphonse's case is as serious as Ivanic.

[109] I do not agree that the conduct in Ivanic is comparable to the overall circumstances presented here.

[110] The second case relied on by the Crown is R. v. Dingwall, 2018 BCSC 1041. Ms. Dingwall, a young Indigenous woman, was sentenced to five years imprisonment for discharging a firearm with intent (the mandatory minimum) and four years, six months concurrent for recklessly discharging a firearm. In this case, Ms. Dingwall participated in a drive-by shooting in a residential neighbourhood by waiting in a nearby get-away car to facilitate the shooter's escape. She did not have a criminal record. Justice Abrioux accepted that denunciation and deterrence were the overriding considerations when sentencing persons convicted of firearms offences. In fashioning a just and fit sentence in the case before him, Abrioux J. stated:

[b]earing in mind the highly individualized approach to be followed for the purposes of sentencing, two of the most salient characteristics are the absence of a criminal record and the fact that Ms. Dingwall identifies as a member of the Saddle Lake Cree Nation.

[111] For its suggested range, the Crown relies on the authorities referenced by Abrioux J. in Dingwall.[5] In addition, the Crown relies on R. v. Hassan, 2012 BCCA 201, where the Court of Appeal upheld a nine-and-a-half-year sentence in circumstances where the accused was denied entry into a nightclub and then shot the bouncer with a handgun, causing severe injuries. Finally, the Crown relies on R. v. Barr, 2016 BCSC 193, where Justice Tindale imposed a seven-year jail sentence in circumstances where the accused shot the victim after a dispute. The victim sustained serious and life-threatening injuries.

[112] I turn to Mr. Alphonse's sentencing authorities.

[113] Mr. Alphonse relies on authorities that he says support his sentencing position of a conditional sentence order followed by three years of probation. Of course, such a sentence is prohibited by the Criminal Code provisions at issue because mandatory minimum sentences apply. Assuming the constitutional challenge is resolved in his favour, Mr. Alphonse invites the Court to consider sentencing decisions that predate the implementation of mandatory minimum sentences for firearms offences. He submits that sentencing ranges for firearms offences are higher today than they were 20 years ago,

before Parliament invoked mandatory minimum sentences for many of the firearms offences.

[114] In written submissions, defence counsel put Mr. Alphonse's position as follows:

The relevant section, Criminal Code 224.2(3)(b), underwent considerable change over the last decade with regards to the imposition of a mandatory minimum and increases to the sentence range. Precedents prior to the imposition of the Minimum Mandatory sentences must be canvassed. If the courts must start at four years, there is no doubt there would be an increase in quantums when courts impose sentences to reflect varying degrees of aggravated facts. How judges dealt with crimes involving guns and shootings prior to the imposition of minimum mandatory sentences is the only way to assess the "pure" potential ranges of how judges would sentence today absent the arbitrary mandatory minimum legislation. Justice Hill in R. v. C.S. [2018] O.J. No.909 ,at para. 113, acknowledged the inflationary impact by Minimum Mandatory legislation on the sentence ranges.

[115] To that end, Mr. Alphonse invited the Court to consider the following cases in determining a just and fit sentence:

a) R. v. Ball, [1993] O.J. No. 3207 (C.J.), where the Court imposed a suspended sentence of two years with probation, including 200 hours of community service for manslaughter that resulted from careless handling of a loaded firearm;

b) R. v. Owens, [1985] B.C.J. No. 431 (S.C.) aff'd [1986] B.C.J. No. 401 (C.A), where the Court imposed a three-year suspended sentence with terms of probation that included 1,000 hours of community service where the sentencing judge found the death resulted from the negligent handling of a firearm; and

c) R. v. Pettigrew, (1990) 56 C.C.C. (3d) 39 (BCCA), where the offender, who was an alcoholic with no criminal record, had while drunk, shot and killed the man with whom she was living with. She had been abused during her childhood and had a history of alcohol abuse. The Court concluded that the conduct involved three unlawful acts: criminal negligence, pointing a firearm at another person, and careless handling of a firearm. The trial judge imposed a sentence of 12 months, which on appeal was reduced to six months with probation.

[116] In essence, I am asked to find that the mandatory minimum sentences for these firearms offences has introduced an inflationary floor. Should the constitutional challenge succeed, Mr. Alphonse contends that I should take into account this inflationary floor and revert back to the sentencing range from an earlier time.

[117] I do not agree that I can safely rely on Ball, Owens and Pettigrew in the manner suggested.

[118] As noted by Justice Saunders in R. v. Oud, 2016 BCCA 332 at para. 62, the older sentencing decisions "are dated and should be read understanding that courts and Parliament, have taken a newer, firmer response to gun offences."

[119] In R. v. Farrell, 2015 BCCA 477, Justice Fenlon commented similarly stating "the sentencing landscape post Nur has changed" (para. 31) and reiterated that Nur "underscored the primacy of the principles of denunciation and deterrence for offences of this kind" (para. 35).

[120] In R. v. Kachuol, 2017 BCCA 292, Justice Dickson also addressed the realignment of the sentencing range for firearms possession offences post-Nur, stating at para. 25:

In recent years, Canadian courts have become increasingly concerned by the proliferation of handguns, gun violence and the dire consequences for our society. Guns are inherently, often lethally, dangerous, all the more so when they are possessed for an illicit purpose. As a result, their possession and use is highly regulated and, if unlawful, criminalized to ensure public safety, express society's condemnation and punish offenders. To the extent possible, courts strive to achieve these goals when imposing sentences for firearms-related offences by prioritizing deterrence and denunciation, following customary sentencing ranges in all but exceptional cases and fully accounting for aggravating factors where they exist.

[121] In my view, Saunders J.A.'s statement in Oud at para. 63 must guide my assessment of the range today for the firearms offences at issue when she held:

. . . any starting range for an offence under s. 244.2, even without the mandatory minimum sentence, should be much closer to the four-year mandatory minimum sentence required by s. 244.2(3)(b) . . .

[122] Accordingly, a sentencing judge's assessment of a just sentence will have regard to statutory provisions (such as maximum and minimum punishments set by Parliament) and appellate courts' guidance about the appropriate range for a particular crime. That said, judges are permitted to order sentences outside of the range under appropriate circumstances. In Nasogaluak, LeBel J. stated at para. 44:

[44] . . . A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.

D. Aggravating and Mitigation Factors

[123] In this case, there are a number of aggravating factors including:

a) The extensive injuries to Ms. Paul that can be expected to have long-term consequences to her and from which she will not fully recover;

b) The loss to Ms. Paul's family as she spent significant time away from her children during the initial recovery, her later attendance at the pain management program in Vancouver and overall, convalescing at her home when she was not able to care for her family as she had before the shooting;

c) A criminal record, although less aggravating because of the lengthy gap in it and the significant passage of time since he recorded any convictions for assault; and

d) The use of a firearm in circumstances where, in addition to shooting Ms. Paul, he placed his community at risk.

[124] I have not accepted the Crown's submission that Mr. Alphonse acted with "some, albeit limited, pre-meditation" when he retrieved a firearm from his residence. Rather, I have concluded that Mr. Alphonse's criminal conduct on January 31, 2016 occurred over a relatively brief period of time, where he was reacting to a perceived slight and which was coloured by alcohol.

[125] In terms of mitigating factors, to his credit, Mr. Alphonse made a commitment to stop drinking. It is in that sense that I have found he has taken some responsibility for the behavior underlying, at least to a certain extent, his actions.

[126] Further, I accept that Mr. Alphonse is remorseful and that he acknowledges the magnitude of the pain and suffering his actions caused Ms. Paul. He recognized the destructive role alcohol was playing in his life and the impact it had on others, most significantly, Ms. Paul. I accept that his lengthy attendance at VisionQuest and ongoing involvement in alcohol treatment demonstrates his commitment to ongoing recovery. He has been abstinent for over four years. I acknowledge his effort to maintain sobriety.

[127] As stated earlier in these reasons, I have taken his expression of remorse as sincere.

[128] I have also taken into account that Mr. Alphonse, as an Indigenous person, has suffered directly and indirectly the impact of colonialism at every turn of his life. Perhaps most strikingly, he was a young child when he first felt that impact personally, but also generationally as he carried his mother's suffering with him to the residential school that employed his mother's abuser. He was then exposed to the same abuse and trauma as his mother by the same perpetrator. It is without a doubt that he has born witness to abuse, trauma and tragedy first hand.

[129] No one should have had to endure what he did.

[130] I pause here only to make this comment.

[131] Sometimes it can be extremely difficult to hear sympathetic comments about a person that has caused you incredible harm. I note only that this part of the process is necessary. That is because I am being asked to send someone to jail for a very long time. It is thus critically important that I consider all of the factors about him that the law demands of me. The criminal justice system, even with its imperfections, demands no less.

VI. DECISION REGARDING SENTENCE

[132] The Crown's submission is that the range of sentence for the offences at issue, in this province, is 5 - 8 years. Taking into account Saunder J.'s comments in Oud, and reflecting the range accordingly, I have found that the sentencing range in this case is four to eight years.

[133] The authorities are clear that denunciation and deterrence are the primary sentencing principles that I am to take into account. A fit sentence must send a clear message that firearms offences in the circumstances presented are not to be tolerated.

[134] At the same time, Mr. Alphonse's personal circumstances and s. 718.2(e) of the Criminal Code demand that restoration and rehabilitation play a substantial role in his sentence. Mr. Alphonse has experienced first hand the tragedies of Canada's colonial history, including abuse during his time at a residential school where his mother was also abused years earlier. Mr. Alphonse has experienced multiple other traumatic events as a child and adolescent.

[135] It is a great testament to Mr. Alphonse that he has taken his recovery from alcohol addiction into his own hands. I accept that the risk to public safety has been greatly reduced as a result of his hard-work and demonstrated commitment to sobriety, as documented by the evidentiary record.

[136] I also take into account Mr. Alphonse's age and his multiple medical conditions that will make a lengthy period of incarceration harder for him than for an otherwise healthy younger person.

[137] Further, I have taken into account Mr. Alphonse's moral blameworthiness. This is a serious offence that has caused lifelong debilitating injuries to Ms. Paul, an Indigenous woman working hard to raise, on her own, five children and working hard to give back to her community. Her path is forever altered by Mr. Alphonse's conduct. That said, I agree that Mr. Alphonse's moral blameworthiness is diminished. I make that finding not because of any requirement that Mr. Alphonse prove causation between his conduct and his particular life experiences as an Indigenous person: Ipeelee.[6] It is clear that a constellation of systemic factors and striking personal experiences played a profound role in bringing him before the court.

[138] Considering the totality of the circumstances presented, I am required to impose a sentence that is proportionate and appropriately balances the seriousness of the offence with Mr. Alphonse's moral blameworthiness, taking into account the aggravating and mitigating factors. I recognize that these unique systemic and background factors have played a part in bringing him before the court and those factors speak to his moral blameworthiness.

[139] I have concluded that the sentencing range is 4 - 8 years. However, I have attempted to reconcile this sentencing range with LeBel J.'s guidance in Ipeelee regarding the applicability of the Gladue principles to serious or violent offences. Justice LeBel found it was an error for sentencing judges to conclude Gladue principles were inapplicable to serious or violent offences and that Indigenous offenders and other offenders would likely receive similar jail sentences for such offences. The Gladue framework is obligatory in every case and I have a duty to apply s. 718.2(e). In determining a fit sentence for Mr. Alphonse, I am guided by LeBel J.'s words at para 86. where he stated:

. . . Trying to carve out an exception from Gladue for serious offences would inevitably lead to inconsistency in the jurisprudence due to "the relative ease with which a sentencing judge could deem any number of offences to be 'serious'" (Pelletier, at p. 479). It would also deprive s. 718.2(e) of much of its remedial power, given its focus on reducing overreliance on incarceration. A second question arises: Who are courts sentencing if not the offender standing in front of them? If the offender is Aboriginal, then courts must consider all of the circumstances of that offender, including the unique circumstances described in Gladue. There is no sense comparing the sentence that a particular Aboriginal offender would receive to the sentence that some hypothetical non-Aboriginal offender would receive, because there is only one offender standing before the court.

[140] In all of the circumstances, I have determined that an appropriate sentence in this case is four years incarceration. Four years is at the lower end of the range. It is lower than the eight years sought by the Crown and significantly higher than the sentence sought by Mr. Alphonse.

[141] The sentence is an attempt to reflect what was intended by the guidance provided by the Supreme Court of Canada in Gladue and Ipeelee. Though not a community-based sentence, the length of the sentence reflects the seriousness of the offence and an acknowledgment of the harm to Ms. Paul. It also reflects Mr. Alphonse's personal circumstances which are tragic. In addition, the length of the sentence is an attempt to reflect "the link between colonialism and racism and discrimination against Indigenous people and their circumstances of poverty, lack of education and overrepresentation within the criminal justice system, as well as discrimination in the prison system and in sentencing": R. v. Sharma, 2020 ONCA 478 at para. 97.

[142] In determining the length of the jail sentence, I have considered his substantial time on release conditions, particularly during the time immediately following his release from pre-trial custody. I take into account credit for Mr. Alphonse's time in pre-trial custody. To adequately reflect that time, I have reduced the sentence accordingly pursuant to s. 719(3.1) and R. v. Wust, 2000 SCC 18.

[143] In summary, I have determined that a just and fit sentence for Mr. Alphonse is four years. That sentence is to be reduced to account for 81 days in pre-trial detention. Pursuant to s. 719(3.1) of the Criminal Code, I have given a credit of 1.5 for an overall credit of 120 days. The remaining time to be served is thus 44 months. I will in a moment address the breakdown of the sentence with respect to each count.

A. Ancillary Orders

[144] As defence makes no objection, I grant the following ancillary orders sought by the Crown:

a) A DNA order pursuant to s. 487.051(1) of the Criminal Code;

b) A lifetime firearms ban pursuant to ss. 109 of the Criminal Code; and

c) An order that the .303 rifle seized from Mr. Alphonse on January 31, 2016 is forfeited to the Crown pursuant to s. 491(1) of the Criminal Code.

VII. CONSTITUTIONALITY OF MANDATORY MINIMUM and s. 742.1

[145] Mr. Alphonse filed five applications raising constitutional challenges to certain provisions of the Criminal Code. Those applications are summarized as follows:

a) By Notice of Application filed November 19, 2018, Mr. Alphonse challenged the mandatory minimum sentence required by s. 85(3) of the Criminal Code;

b) By Amended Notice of Application filed December 8, 2018, Mr. Alphonse added to his constitutional challenge the mandatory minimum sentence required by ss. 244(2) and 244.2(3) of the Criminal Code;

c) On October 1, 2019, Mr. Alphonse filed his Amended Notice of Application #2 setting out that his challenge relates to the mandatory minimum sentence required by ss. 244(2) and 244.2(3) of the Criminal Code and abandoning the challenge to s. 85(3) of the Criminal Code;

d) On October 2, 2019, Mr. Alphonse filed an Amended Notice of Application #3 setting out that his constitutional challenge relates to the mandatory minimum sentence required by ss. 244(1), 244(2) and 244.2(3)(b) of the Criminal Code; and

e) On March 13, 2020, Mr. Alphonse filed a further Amended Notice of Application raising a constitutional challenge to the "unavailability of a conditional sentence required by s. 742.1(c) of the Criminal Code."

[146] Mr. Alphonse alleges that the impugned provisions violate s. 12 of the Charter. In his constitutional challenge to s. 742.1(c) of the Criminal Code, Mr. Alphonse also alleged breaches of ss. 7 and 15 of the Charter.

[147] I have determined that a just and fit sentence is four years, consistent with the minimum sentence mandated by ss. 244(2)(b) and 244.2(3)(b). In the circumstances of this case, I have decided that it would be inappropriate for me to engage in the constitutional issues, for two reasons. The first reason relates to my authority to revisit provisions that have withstood constitutional scrutiny. The second, and more important, reason relates to my decision that a just and fit sentence in this case is the same as the four-year minimum.

[148] Before I turn to those issues, I briefly set out the analytical framework of a s. 12 Charter challenge.

[149] Section 12 of the Charter provides: Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

[150] The applicant bears the onus of establishing, on a balance of probabilities, that there has been a violation of s. 12 of the Charter. The test for whether a particular sentence constitutes "cruel and unusual" punishment is whether the sentence is "grossly disproportionate." In R. v. Ferguson, 2008 SCC 6 at para. 14, the Supreme Court of Canada made clear that the sentence must be "so excessive as to outrage standards of decency" and disproportionate to the extent that Canadians "would find the punishment abhorrent or intolerable."

[151] As summarized in the Crown's written submission, there are two stages to the s. 12 analysis and each stage involves two steps.[7]

[152] The first stage requires a particularized inquiry. This focuses on the individual circumstances of the offender. Where a sentence is grossly disproportionate for an individual offender, then a prima facie violation of s. 12 is established and the court should go on to consider whether the infringement can be justified under s. 1 of the Charter.

[153] The second stage of the s. 12 analysis arises where a sentence is not grossly disproportionate for the individual offender. In those circumstances, the court can nevertheless go on to consider whether a breach of s. 12 arises from "reasonably foreseeable" circumstances advanced by the offender.

A. Revisiting provisions found to be constitutionally compliant

[154] Sections 244(2)(b) and 244.2(3)(b) of the Criminal Code both prescribe four-year mandatory minimum sentences for the offences of discharging a firearm with intent and recklessly discharging a firearm, respectively.

[155] In his written submission, Mr. Alphonse focused his challenge to the mandatory minimum sentence in s. 244.2(3)(b). In oral argument, counsel submitted that the challenge was intended to also include s. 244(2)(b). However, counsel said very little about this latter provision in their written submissions and/or their oral submissions. I have focused these reasons on s. 244.2(3)(b) but would note that arguably the more serious conduct is captured in s. 244(2)(b).

[156] In Oud, the B.C. Court of Appeal held that the four-year mandatory minimum sentence in s. 244.2(3)(b) of the Criminal Code does not violate s. 12 of the Charter. Justice Saunders, writing for the Court, stated:

[50] . . . Remembering the modern approach to gun offences, I cannot conceive of an offence under s. 244.2 for which the mandatory minimum penalty would be said to be cruel and unusual punishment.

[51] I conclude, for these reasons, that s. 244.2(3)(b) is a mandatory minimum sentence that is within Parliament's competence. The offence is narrowly cast and the gravity of the offence puts this mandatory minimum sentence within the range of proportionate sentences for every reasonable foreseeable hypothetical. In my view, it is not grossly disproportionate; it is not cruel and unusual punishment.

[157] The Crown referred to a number of other cases across the country where the provision withstood constitutional challenges: R. v. Roberts (1998), 125 C.C.C. (3d) 471 (N.B.C.A.) (also indexed as R. v. M.D.R.); R. v. Sheppard (2011), 310 Nfld. & P.E.I.R. 277 (Prov. Ct.); R. v. Crockwell (2013), 333 Nfld. & P.E.I.R. 55; R. v. Abdullahi, 2014 ONSC 272 (followed in R. v. Mohammad 2017 ONCJ 297); R. v. McMillan, 2016 MBCA 12; and R. v. Reis, 2017 ONSC 1961).

[158] Defence referred to a number of decisions from the Nunavut and Northwest Territories courts where the provision was found to violate s. 12: R. v. Nungusuituq, 2019 NUCJ 6; R. v. Ookowt, 2017 NUCJ 22; R. v. Itturiligaq, 2018 NUCJ 31; and R. v. Cardinal, 2018 NWTSC 31.

[159] The Crown also fairly notes other decisions finding s. 12 infringements for s. 244.2 offences. Those include: R. c. Vézina, 2017 QCCQ 7785; R. c. Gunner, 2017 QCCQ 12563; R. v. Kakfwi, 2018 NWTSC 13; and R. v. Cardinal, 2018 NWTSC 12.

[160] In addition to Oud, I have considered recent appellate decisions overturning lower courts' findings that s. 244.2 infringed s. 12: R. v. Hills, 2020 ABCA 263[8]; R. v. Itturiligaq, 2020 NUCA 6[9]; R. v. Ookowt, 2020 NUCA 5. In each of these cases, the appellate court overturned findings of invalidity.

[161] I accept that one could raise a subsequent challenge to a provision that had previously be found to be constitutionally compliant, though the test may be more stringent than a first consideration. That was made clear by McLachlin C.J.C. in Nur when, writing for the majority, she addressed this point (though she expressly stated that there is a "significant threshold" justifying such a revisiting). She wrote:

[71] This brings us to the second ancillary question -- the effect of a ruling that a particular mandatory minimum provision does not violate s. 12. Two questions arise. First, can a particular offender argue in a future case that the provision violates s. 12 because it imposes cruel and unusual punishment on him or her? The answer, all agree, must be yes. If the offender can establish new circumstances or evidence, including mitigating factors specific to the offender, it is open to a court to reconsider the constitutionality of the law. Second, can the offender in a future case argue that the provision as applied to others violates s. 12? The answer to this question is that it depends. Once a law is held not to violate s. 12, stare decisis prevents an offender in a later case from simply rearguing what constitutes a reasonably foreseeable range of the law. But stare decisis does not prevent a court from looking at different circumstances and new evidence that was not considered in the preceding case. A court's conclusion based on its review of the provision's reasonably foreseeable applications does not foreclose consideration in future of different reasonable applications: Morrisey, at para. 89, per Arbour J. That said, the threshold for revisiting the constitutionality of a mandatory minimum is high and requires a significant change in the reasonably foreseeable applications of the law. In a nutshell, the normal rules of stare decisis answer the concern raised by the Attorney General of Ontario that "each subsequent trial court [will be asked] to duplicate the analysis": A.F. (Nur), at para. 39.

[162] In the circumstances presented here, I am not satisfied that this is an appropriate case to revisit the impugned sentencing provisions. There may very well be a case where such a challenge should be brought. This is not that case. In other words, I am not satisfied that this is an appropriate case for revisiting the constitutionality of the mandatory minimum at issue.

B. Sentence is consistent with the mandatory minimum

[163] More importantly to this challenge, I have found that a fit sentence, absent the mandatory minimum sentence, is four years.

[164] As set out earlier, I have determined that absent the mandatory minimum sentence, the range generally for the s. 244 and s. 244.2 offences has been described as four to eight years imprisonment depending on the circumstances of the offence and the individual: see R. v. Stevens, 2010 NSSC 133 at para. 17. Additionally, in B.C., courts have imposed sentences in excess of four years for s. 244.2 offences: Dingwall and Oud. Notably, in Oud the Court found that any starting range for an offence under s. 244.2, even without the mandatory minimum sentence, should be close to the four-year minimum required by s. 244.2(3)(b).

[165] It is a well-established principle of constitutional law that courts should not decide issues of law, particularly constitutional issues, that are not necessary to the resolution of the matter before the court. Lloyd makes this clear at para. 18 where McLachlin C.J.C. wrote:

[18] To be sure, it does not follow that a provincial court judge is obligated to consider the constitutionality of a mandatory minimum provision where it can have no impact on the sentence in the case at issue. Judicial economy dictates that judges should not squander time

and resources on matters they need not decide. But a formalistic approach should be avoided. Thus, once the judge in this case determined that the mandatory minimum did not materially exceed the bottom of the sentencing range applicable to Mr. Lloyd, he could have declined to consider its constitutionality. To put it in legal terms, the doctrine of mootness should be flexibly applied. If an issue arises as to the validity of the law, the provincial court judge has the power to determine it as part of the decision-making process in the case. To compel provincial court judges to conduct an analysis of whether the law could have any impact on an offender's sentence, as a condition precedent to considering the law's constitutional validity, would place artificial constraints on the trial and decision-making process.

[166] This approach was followed in R. v. Boesel, 2017 BCSC 970 at paras. 13-14 and 153 where the sentencing judge concluded it was not necessary to engage in the constitutional challenge.

[167] Regarding the principle of judicial economy, Bennett J.A. addressed circumstances where the sentencing judge may wish to engage in the analysis regardless of the effect on the individual before the court, particularly where the superior court of inherent jurisdiction has an opportunity to prevent "leaving unconstitutional provisions on the books": see R v. E.O., 2019 YKCA 9. In my view, her concerns do not arise in the circumstances presented here.

C. Constitutional challenge regarding unavailability of CSO provisions

[168] I turn to deal with the constitutional challenge to the unavailability of a Conditional Sentence Order (CSO) for this offence. Section 742.1 of the Criminal Code permits the court to order a CSO where the sentence imposed is less than two years, subject to a list of requirements. In this case, s. 742.1 prohibits the imposition of a CSO on three separate bases:

a) Section 742.1(b) because the offence is punishable by a minimum term of imprisonment;

b) Section 742.1(c) because the offence is prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life; and

c) Section 742.1(e)(i) because the offence was prosecuted by indictment for which the maximum term of imprisonment is ten years or more and resulted in bodily harm.

[169] Mr. Alphonse rests his constitutional challenge on the unavailability of a CSO pursuant to s. 742.1(c) on the basis that it violates ss. 7, 12 and 15 of the Charter. Mr. Alphonse has not advanced a challenge to ss. 742.1(b) or 742.1(e)(i).

[170] The Crown takes the position that it may not be necessary for this Court to engage in the constitutional analysis of the restrictions on the availability of a CSO and, in any event, the challenge should be dismissed as Mr. Alphonse has not established a breach of ss. 7, 12 or 15 on a balance of probabilities.

[171] I provide a brief history of the CSO provisions and then turn to the issue raised in this case.

[172] In 1996, Parliament enacted CSOs in the Act to Amend the Criminal Code (Sentencing) and to Make Consequential Amendments to other Acts, S.C. 1995, c. 22, s. 6. In 2007, Parliament amended the CSO sentencing scheme by prohibiting the imposition of CSOs for serious personal injury offences: An Act to amend the Criminal Code (conditional sentence of imprisonment), S.C. 2007, c.12 [in force December 1, 2007]. Section 742.1 was further amended by the Safe Streets and Communities Act, S.C. 2012, c. 1 [in force November 20, 2012].

[173] As stated in more detail above, in the circumstances presented here, I have declined to decide this constitutional issue because it is unnecessary to the resolution of the Court's determination of the appropriate sentence here. Accordingly, I have dismissed the challenge to the mandatory minimum sentences in ss. 244 and 244.2. Additionally, a CSO is only available for sentences under two years, and I have concluded that a fit sentence is in excess of two years. I would also find that the significant injuries caused to Ms. Paul take this offence out of consideration for a CSO by virtue of s. 742(1)(e)(i).

[174] In R. v. McMath, 2015 BCSC 440, Justice Ross exercised her discretion and declined to engage in the constitutional challenge to s. 742.1(c) stating:

[108] The applicable provisions dealing with conditional sentences included a provision excluding offences punishable by a minimum term. No constitutional challenge has been brought with respect to that provision. In addition, then s. 742.1 provided that conditional sentences were available where, among other conditions, the court imposed a sentence of less than two years. Thus, both by virtue of the minimum and its length, a conditional sentence would not be available whether or not the challenge to the exclusion of serious personal injury offences succeeded.

[109] Based on the principle that courts should not decide issues that are unnecessary for the resolution of the matter before the court (see R. v. Lloyd, 2014 BCCA 224), the Court will therefore not address the constitutional challenge relating to the provisions of then ss. 742.1 and 752 of the Criminal Code concerning the exclusion of serious personal injury offences from conditional sentences.

[175] Justice Ross' words are apt here. By virtue of the minimum sentence and its length, a CSO would not be available whether or not Mr. Alphonse's challenge to s. 742.1(c) succeeded.

[176] I end this portion of the reasons with reference to a decision recently released by the Ontario Court of Appeal where the constitutional issues are similar to those raised by Mr. Alphonse. In Sharma, the Ontario Court of Appeal delivered a lengthy judgment reconciling a mandatory minimum sentence for drug importation, s. 742.1 and Gladue principles.

[177] The sentencing judge found the mandatory minimum constituted cruel and unusual punishment under s. 12 and struck the provision accordingly. The sentencing judge dismissed the claims relating to ss. 7 and 15 of the Charter.

[178] The Crown did not appeal the s. 12 finding of invalidity. However, the Ontario Court of Appeal allowed the appeal to the extent of the sentencing judge's ruling regarding ss. 7 and 15 of the Charter.

[179] The majority set out the legislative context of conditional sentences and s. 718.2(e). Justice Feldman described the context:

[29] Conditional sentences came into force in 1996 in s. 742.1 of the Criminal Code as a part of major sentencing reforms intended to encourage the application of principles of restorative justice in sentence and to reduce over-incarceration and the use of prison sentences, where appropriate.

. . .

[31] As part of the same reform initiative, Parliament also enacted s. 718.2(e). That provision instructs sentencing judges to consider all available sanctions other than imprisonment for all offenders with particular attention to the circumstances of aboriginal offenders.

[180] The majority found a breach of ss. 7 and 15 of the Charter. Regarding the s. 7 breach, the majority found that the impugned provisions are contrary to s. 7 of the Charter because they resulted in the deprivation of Ms. Sharma's liberty in a manner that was not in accordance with the principle of fundamental justice of overbreadth.

[181] As for s. 15 of the Charter, the majority concluded that "the reality is that [s. 742.1, as amended by the Safe Streets and Communities Act] will result in more Indigenous offenders serving their sentences in jail rather than in their communities." Thus, at para. 132, the majority in Sharma concluded:

. . . ss. 742.1(c) and 742.1(e)(ii) deny the benefit of a conditional sentence in a manner that has the effect of reinforcing, perpetuating or exacerbating the disadvantage of Aboriginal offenders, and is therefor contrary to s. 15 of the Charter.

[182] As demonstrated in Sharma, Mr. Alphonse has raised an important constitutional issue. However, in my view, and based on my earlier findings, a proper analysis of these Charter provisions is best left for another day.

VIII. CONCLUSION

[183] In summary, Mr. Alphonse is sentenced to 44 months incarceration, after taking into account pre-trial custody, broken down as follows and with all sentences to run concurrently:

a) Count 2 (s. 87(1): pointing a firearm) - two years;

b) Count 3 (s. 244.2(3)(b): recklessly discharging a firearm) - 44 months;

c) Count 4 (s. 244(1): discharging firearm with intent) - 44 months; and

d) Count 5 (s. 268(2): aggravated assault) - three years.

[184] The Notices of Application seeking a finding that s. 12 of the Charter is infringed by the mandatory minimum sentence found in ss. 244(2)(b) and 244.2(3)(b) of the Criminal Code are dismissed.

[185] The Notice of Application seeking a finding that the unavailability of a conditional sentence order by s. 742.1(c) of the Criminal Code violates ss. 7, 12, and 15 of the Charter is dismissed.

[186] The following ancillary orders are granted:

a) A DNA order pursuant to s. 487.051(1) of the Criminal Code;

b) A lifetime firearms ban pursuant to ss. 109(2)(a) and (b) of the Criminal Code; and

c) An order that the .303 rifle seized from Mr. Alphonse on January 31, 2016 is forfeited to the Crown pursuant to s. 491(1) of the Criminal Code.

"Winteringham J."

[1] R v. Gladue, [1999] 1 S.C.R. 688 at para. 93. The balance of this excerpt states: In sentencing an aboriginal offender, the 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.

[2] R. v. Ivanic, 2009 BCSC 931, addresses the application of the Kienapple principle with respect to the offences of discharging a firearm with intent to endanger life and aggravated assault. R. v. Dingwall, 2018 BCSC 1041, addresses the application of the Kienapple principle with respect to the offences of discharging a firearm with intent and reckless discharge of a firearm.

[3] Section 718.04 provides: when a court imposes a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances -- including because the person is Aboriginal and female -- the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

[4] Mr. Alphonse completed eight months in a residential treatment program, plus a three month follow-up workshop. He also completed a number of courses at VisionQuest including: life skills, anger management, and is a volunteer in a grief counseling group and AA/NA which he regularly attends.

[5] R. v. Seymour, 2011 BCSC 1682: six-year sentence for s. 244(1) conviction; R. v. Lyta, 2013 NUCA 10: the Nunavut Court of Appeal substituted a five-year sentence for a conviction under s. 244.2(1)(a); R. v. Utye, 2013 NUCJ 14: effective seven-year sentence for s. 244.2(1)(a) conviction; R. v. Abdullahi, 2014 ONSC 272: five-year sentence for a s. 244.2(1)(a) conviction; R. v. Sutherland, 2015 NSSC: five-year sentence for 244.2(a) conviction.

[6] As set out at para 83 of Ipeelee, LeBel J. made clear that requiring a causal link is a legal error because it is well recognized that Indigenous peoples have suffered from systemic discrimination in Canada, the effects of which are interconnected and complex. LeBel J. referred to the Aboriginal Justice Inquiry of Manitoba's conclusion that:

Cultural oppression, social inequality, the loss of self-government and systemic discrimination, which are the legacy of the Canadian government's treatment of Aboriginal people, are intertwined and interdependent factors, and in very few cases is it possible to draw a simple and direct correlation between any one of them and the events which lead an individual Aboriginal person to commit a crime or to become incarcerated."

[7] Each stage of the s. 12 analysis involves two steps, as summarized at para. 23 of Lloyd:

The court must first determine what constitutes a proportionate sentence for the offence, in the absence of the impugned [mandatory minimum sentence], have regard to the objectives and principles of sentencing in the Criminal Code. The court need not fix the sentence or sentencing range at a specific point, particularly for a reasonable hypothetical case framed at a high level of generality. However, the court should consider the rough scale of the appropriate sentence.

The court must ask whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the offence and its circumstances. The court must ask: in view of the fit and proportionate sentence, is the mandatory minimum sentence grossly disproportionate to the offence and its circumstances? If the answer is yes, the mandatory minimum provision is inconsistent with s. 12 and will fall unless justified under s. 1 of the Charter.

[8] Appeal by the Crown from declaration that mandatory minimum penalty of four years imprisonment in section 244.2(3)(b) of the Criminal Code was unconstitutional in circumstances where the accused had fired a shot into a parked vehicle and fired three shots into an occupied residence; declaration of invalidity was set aside.

[9] Appeal by the Crown from declaration that mandatory minimum penalty of four years imprisonment in section 244.2(3)(b) was unconstitutional in circumstances where the accused intentionally fired his hunting rifle at the roofline of a house he knew to be occupied causing no injuries but where he knew his girlfriend was present; declaration of invalidity was set aside.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://www.bccourts.ca/jdb-txt/sc/20/18/2020BCSC1882.htm

CASE PAGE https://chat.esheria.ai/case-law/canada/r-v-alphonse-2020

Prepared on 30 October 2026 · Esheria