

CANADA / JUDGMENT

R. v. Charpentier

2022 BCSC 2451

COURT

Supreme Court of British Columbia

DECIDED

29 November 2022

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2022 BCSC 2451 R. v. Charpentier

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Charpentier,

2022 BCSC 2451

Date: 20221129

Docket: 70414

Registry: Chilliwack

Rex

v.

Owen Dale Charpentier

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Before: The Honourable Justice A. Ross

Oral Reasons for Sentence

Counsel for the Crown:

H.B. Waldock

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S.R.A. Buck, K.C.

A. Dorin

Place and Date of Trial/Hearing:

Chilliwack, B.C.

June 13-17, 2022

August 11, 2022

Place and Date of Judgment:

Chilliwack, B.C.

November 29, 2022

- [1] THE COURT: These reasons address the sentencing submissions of counsel following a Gardiner hearing relating to the circumstances of the subject offence. Owen Charpentier pled guilty to manslaughter in the death of Keith Baldwin, who I will refer to as Mr. Baldwin. The offence occurred on or about midnight, as October 21 turned to October 22, 2019.
- [2] Mr. Charpentier's sentencing hearing was bifurcated. In the first part of the hearing, I was tasked with making findings of fact relating to the disputed circumstances of the offence, as well as the aggravating and mitigating facts. Following that first part of the hearing, I provided a memorandum to counsel setting out my findings of fact. The evidence and my findings that comprise that memorandum are reproduced in paras. 6-66 of the written version of these reasons.
- [3] Following receipt of my memorandum, counsel made submissions on the appropriate sentence in light of the facts as I had found them. My consideration of counsel's submissions regarding the appropriate sentence follow in paras. 67-156 of the written version of these reasons.
- [4] At the first sentencing hearing, the parties tendered the following evidence:
- a) an agreed statement of facts,
 - b) security videos from buildings near the crime that had been collated by the RCMP,
 - c) viva voce testimony from Mr. Charpentier and two Crown witnesses familiar with the circumstances.

I also received the victim impact statements.

- [5] Additional evidence was tendered at the second stage of the hearing, including:
- a) a Gladue report,
 - b) a list of convictions,

- c) a list of offences while incarcerated, and
- d) Mr. Charpentier's in-court apology to the victim's mother and family.

Applicable Evidentiary Burden

[6] The following evidentiary burdens and onuses apply:

- a) Pursuant to R. v. Gardiner, [1982] 2 S.C.R. 368:
 - i. the crown has the onus and burden to prove aggravating factors beyond a reasonable doubt;
 - ii. the defence has the onus and burden to establish mitigating factors on a balance of probabilities.
- b) Pursuant to R. v. W.D., [1991] 1 S.C.R. 742, as applied in the sentencing context:
 - i. if Mr. Charpentier is believed, then the aggravating factors are not established and mitigating factors are established;
 - ii. if Mr. Charpentier is not believed, but his testimony leaves a reasonable doubt about the circumstances, then the aggravating factors are not established;
 - iii. if Mr. Charpentier's evidence is not accepted, then the court must look to all of the evidence to see whether the aggravating factors are established beyond a reasonable doubt.

[7] The W.D. analysis in sentencing hearings has one significant difference from the conviction context. Given that the accused has the burden to establish mitigating factors on a balance of probabilities, the W.D. analysis does not apply. Simply put, mitigating factors must be established on a balance of probabilities.

Background Facts

- [8] Admissions of fact were filed at trial. Based on those admissions, and other testimony, I find as a fact that:
- a) The deceased, Keith Baldwin, was 27 when he died. He was 6'1" tall.
 - b) He had a wife, but no children.
 - c) From age 11 he began to abuse alcohol and drugs, but he pursued sobriety. For 8 years, he was sober. In February 2019, he relapsed. He returned to a recovery facility in May, but left it in August and returned to drug use.
 - d) Mr. Baldwin did not have any close relationship with Owen Charpentier.
 - e) Mr. Charpentier is 26 years old (born May 6, 1996). He is 5'5" tall. He is partially disabled, having very limited use of his left arm and no use of his left hand.

- f) Mr. Baldwin possessed an old Camaro. Mr. Charpentier, broke into the Camaro on or about October 20, 2019. He was caught in the act by Mr. Baldwin who stopped him violently and injured him.
- g) Mr. Baldwin believed that Mr. Charpentier had damaged the Camaro. He was angry and he wanted Mr. Charpentier to pay for the damage.
- h) After the incident with the Camaro, on or about October 21, 2019, at some point in the morning, Mr. Baldwin encountered Mr. Charpentier at the Newmark apartment building on Yale Road. Mr. Baldwin confronted Mr. Charpentier about the payment. Mr. Baldwin was struck by bear spray.

The Incident

- i) Mr. Baldwin left his mother's residence on the evening of October 21, 2019 wearing all black, including black pants, shirt and jacket with hood.
- j) Before midnight on October 21, 2019, Mr. Charpentier attended the car-wash at 46260 Yale Rd, Chilliwack. Rhiannon ("Rae") Lilly and a woman with a two-wheeled cart attended there as well. They loitered there, sharing street drugs.
- k) In the seconds before midnight, Mr. Baldwin approached the car-wash from the south.
- l) In the first seconds of the morning of October 22, 2019, Owen Charpentier shot a gun at Mr. Baldwin once. The bullet hit Mr. Baldwin in the head, killing him.
- m) Mr. Charpentier left the car-wash, running north to Yale Road and then east along Yale Road. He ran to a local school, whereupon he buried the gun. He later caught a taxi to his father's residence.
- n) Mr. Baldwin's body remained where it fell. Nobody approached it until 12:30am, when homeless people attended and then summoned help.
- o) Two private security guards quickly attended Mr. Baldwin. He was unconscious and on his back with a 6-7" filleting knife in his right hand or sleeve. No other knives lay near Baldwin's body when they first attended.
- p) When emergency personnel attended, they cut some of Mr. Baldwin's clothing to access his body. They found and removed 4 more knives secreted in the sleeves of his clothing, his pockets, his pant legs and his socks. These knives were a meat cleaver, a fillet knife, a kitchen knife with an 8" blade and two folding knives. No bear spray or pepper spray was located on or near the body.
- q) Despite receiving medical treatment, Mr. Baldwin remained unconscious. He stopped breathing on October 22, 2019 at 3:00pm. He died at 6:40pm, after medical staff removed him from a ventilator.

The Pathologist's Evidence

- [9] There is no dispute regarding the conclusions of the pathology report of Dr. White:
- a) After he died, Mr. Baldwin's blood contained metabolites of cocaine, and small quantities of methamphetamine, fentanyl, ketamine and midazolam. It is not possible to determine how much of these drugs were in Mr. Baldwin when he died. Cocaine and methamphetamine are stimulants; fentanyl, ketamine and midazolam have sedating and pain-killing effects.
 - b) As discussed below, Mr. Charpentier's evidence is that he fired the gun from waist level and that he did not aim the gun. Dr. White testified that the bullet entered Mr. Baldwin's forehead near the hairline above the right side of his right eye. He could not determine the trajectory of the bullet (high-to-low, low-to-high or level) because there was no evidence of the position of Mr. Baldwin's head when he was shot. In other words, if Mr. Baldwin's head was tilted forward, then a bullet travelling upward would have the same trajectory as a level bullet striking a level head.
 - c) Dr. White could not determine whether it was possible for Mr. Baldwin to have taken any steps after being struck by the bullet.

Security Video Evidence

- [10] To put the relevance of the video evidence into context Mr. Charpentier:
- a) alleges that Mr. Baldwin bear-sprayed him at the car-wash.
 - b) alleges that he shot Mr. Baldwin when Mr. Baldwin stepped towards him.
- [11] Although there is dispute over what happened within the car-wash in the moments before the shooting, there is security video which recorded the incident from the south. There is also video from businesses located to the north of the car-wash. The video is grainy and portions of the scene are in shadow and not visible. I set out my findings of fact from the video evidence below.
- a) The videos from the south show Mr. Baldwin's approach to the car-wash and ultimately, his falling to the ground after being shot. The time stamp on the video from the south is not accurate. It is off by approximately one minute. The video (based on the imbedded, incorrect time stamp) shows:
 - i. Mr. Charpentier entered the east bay of the car-wash with the two other individuals at approximately 11:39 pm. Although they are not always visible on the video, it is clear that the three people remained in the east bay of the car-wash until Mr. Baldwin approached.
 - ii. Mr. Baldwin approached the car-wash walking from the south just after 11:58 pm.
 - iii. The entire exchange between the two men took approximately 15 seconds.

iv. Mr. Baldwin entered the east bay of the car-wash at 23:58:43, took two steps in and then retreating quickly out of the bay at 23:58:46.

v. Mr. Baldwin then appears to stay in a position where he is shielded by the wall between the car-wash's west bay and east bay for a few seconds until 23:58:53.

vi. Mr. Baldwin then appears on the video walking westward. He takes a total of five steps across the south side of the west bay between 23:58:53 and 23:58:57. On his last step he slumps to the ground, having been shot. (As discussed below, Mr. Charpentier says that he shot when Mr. Baldwin appeared to take a step toward him. He says that the shot occurred at approximately 23:58:55 and that Mr. Baldwin took two steps before falling to the ground).

vii. Within 2 seconds, of Mr. Baldwin falling, Mr. Charpentier is seen walking to the north toward Yale Road (at 23:58:59). He is then seen on other security video cameras running from the scene.

viii. The distance of the shot, based on the position of the persons in the video, was at least 30 feet and in the range of 40 feet.

I return to discuss the video evidence below.

Mr. Charpentier's Testimony

[12] Mr. Charpentier says that Mr. Baldwin bear-sprayed him while in the east bay of the car-wash. The crown does not accept that Mr. Charpentier has established that fact on the balance of probabilities. The crown notes that no bear-spray was found on Mr. Baldwin's person. I do not accept the crown's submission on this point of the evidence.

[13] I accept, on the balance of probabilities, that Mr. Baldwin did spray bear-spray into the east bay of the car-wash. I make that finding on the basis of the following evidence:

- a) Police took photographs of scene on the morning after the shooting. Near the place where Mr. Baldwin was found, there is an orange object on the ground.
- b) The best photograph of the orange object indicates that it was a "safety wedge" that is used as the top to a bear-spray canister.
- c) The crown witness, Ms. Lilly, testified that Mr. Baldwin said something about bear-spraying Mr. Charpentier when he entered the east bay.

[14] In combination, I find these pieces of evidence to be corroborative of Mr. Charpentier's evidence that Mr. Baldwin bear-sprayed him. On the balance of probabilities, I find that Mr. Baldwin did discharge bear-spray into the east bay of the car-wash. For the reasons set out below, I am unable to make any finding about the effect of that bear-spray on Mr. Charpentier. In short, Mr. Charpentier's inconsistent testimony about his vision after the bear-spray leads me to conclude (on a balance of probabilities) that his vision was not impaired by the bear-spray.

Mitigating and Aggravating Factors

[15] Mr. Charpentier admits that he intentionally committed an unlawful act by firing the gun which was the act that caused Mr. Baldwin's death. He argues that the aggravating factors, put forward by the crown are not established beyond a reasonable doubt. He also puts forward mitigating factors. Included in his mitigating factors are Mr. Charpentier's versions of events that the crown says are aggravating factors.

[16] I discuss the aggravating factors below. My findings on certain of those events determines whether they are aggravating or mitigating factors.

[17] On the mitigating factors, I make the following findings on the balance of probabilities:

- a) It was evident during the hearing, and specifically during the reading of the Victim Impact Statements, that Mr. Charpentier showed real remorse.
- b) Mr. Coty-Lee Robins-Micall testified that he was a friend to both Mr. Baldwin and Mr. Charpentier. His testimony was that Mr. Baldwin was furious with Mr. Charpentier after the break-in of the Camaro. Mr. Charpentier was scared of Mr. Baldwin and did not take any steps to pursue any confrontation with Mr. Baldwin. To the contrary, Mr. Charpentier attempted to avoid Mr. Baldwin. Mr. Baldwin asked Mr. Robins-Micall "a couple of times" about Charpentier's location. Mr. Robins-Micall was concerned that Mr. Baldwin might harm Mr. Charpentier. Mr. Robins-Micall believed that Mr. Baldwin could be violent, and he told Mr. Charpentier of his belief in that regard.

[18] That is the extent of the mitigating factors.

[19] The crown submits that the following aggravating factors have been established on the evidence beyond a reasonable doubt:

- a) Mr. Charpentier initiated the dispute.
- b) Mr. Charpentier escalated the dispute.
- c) Mr. Charpentier prepared for violence.
- d) Mr. Charpentier used a nasty gun.
- e) Mr. Charpentier shot Mr. Baldwin when Mr. Baldwin was retreating.
- f) Mr. Charpentier aimed the gun at Mr. Baldwin.

[20] I deal with each allegation below.

Mr. Charpentier Initiated the Dispute

[21] The crown says that Mr. Charpentier initiated the dispute by breaking into Mr. Baldwin's vehicle. The fact of that break-in is admitted by Mr. Charpentier. Further it is not disputed that Mr. Baldwin violently dealt with Mr. Charpentier when he found him in the vehicle.

[22] It is clear that the dispute between the two men then spiraled in a tragic direction, ultimately resulting in Mr. Baldwin's death. The entirety of that spiral was not foreseeable at the time of the break in of the vehicle. However, to the extent that Mr. Charpentier's act of breaking into Mr. Baldwin's vehicle constituted the beginning of their dispute, I accept the crown submission on that point.

Mr. Charpentier Escalated or Aggravated the Dispute

- [23] The crown argues that Mr. Charpentier escalated the dispute by pepper-spraying Mr. Baldwin at the Newmark apartments on the morning of October 21, 2019. In short, I am unable to find that this allegation is established beyond a reasonable doubt.
- [24] It is not disputed that Mr. Baldwin approached a group of people at the Newmark apartments on October 21, 2019. Mr. Robins-Micall walked forward to chat with Mr. Baldwin. During the course of that discussion, someone in the group behind Mr. Robins-Micall bear-sprayed Mr. Baldwin.
- [25] Mr. Charpentier denies being the sprayer. Mr. Robins-Micall did not see who sprayed the substance.
- [26] The crown asks me to infer that the sprayer was Mr. Charpentier because there was nobody else who was in a dispute with Mr. Baldwin. Further, Mr. Charpentier was not able to identify the individual who stood up for him at this moment (by spraying Mr. Baldwin).
- [27] Although there is internal logic in the crown's position, there is no evidence to support it. I am unable to find that Mr. Charpentier was the person who sprayed bear-spray on Mr. Baldwin on this occasion.

Mr. Charpentier Prepared for Violence

- [28] The crown submits that, by arming himself, Mr. Charpentier prepared for violence in his dispute with Mr. Baldwin.
- [29] Mr. Charpentier's evidence is that a friend provided him with the gun and that he did not go out looking for it.
- [30] Mr. Charpentier's evidence was, to some extent, in conflict with the testimony of Mr. Robins-Micall, who testified that Mr. Charpentier indicated that he would be obtaining a gun because of his dispute with Mr. Baldwin.
- [31] In the end, I find Mr. Charpentier's evidence establishes a reasonable doubt in my mind regarding the amount of forethought he had before obtaining the gun. It is beyond doubt that he went to a friends' apartment and obtained the gun. The amount of planning that went into that decision is in considerable doubt. However, my reasonable doubt in that respect does not remove the fact that Mr. Charpentier did obtain the gun. At the very least, he did not turn the gun down when offered.

Mr. Charpentier Used a Nasty Gun

- [32] The crown submits that the gun Mr. Charpentier used was "nasty". It was small enough to make it easy to hide. The gun has not been located and it was not in evidence. According to Mr. Charpentier's testimony, the barrel was sawed-off. The crown submits that the shortened barrel made it useful only for killing people.
- [33] The crown submits that the total length of the gun was less than 660 mm, thus bringing it within the definition of a prohibited firearm under s. 84 of the Criminal Code.
- [34] The basis of the crown's position is a diagram drawn by Mr. Charpentier. The length of the gun in his drawing is significantly shorter than 660 mm. The crown submits that even if the gun was 50% longer than the drawing, it would still be shorter than the required 660 mm.
- [35] In short, I do not accept this submission regarding the length of the gun. I have no evidence of the actual length of the gun in relation to the lengths set out in the Criminal Code. I have no confidence in Mr. Charpentier's diagram a providing evidence of the actual length of the firearm.
- [36] On the other hand, I accept the evidence that the barrel of the gun had been sawed off.
- [37] In respect of the nastiness of the gun, I infer from his testimony that Mr. Charpentier was not in a position to seek out or negotiate for the most appropriate firearm. He took what he could get from his friend. It is beyond doubt that he carried that firearm with him to the scene.

Was Mr. Baldwin retreating when he was shot at the car-wash?

- [38] The crown submits that this is the major aggravating factor. In contrast, Mr. Charpentier submits that the moment of the shooting is a mitigating factor.
- [39] The crown theory is that Mr. Baldwin approached Mr. Charpentier in the car-wash, but backed away when he saw Mr. Charpentier draw a gun. Thereafter, Mr. Baldwin sought to hide himself behind a wall. He then walked westbound across the front (south) of the west bay while looking in Mr. Charpentier's direction. He walked until he was shot at the west edge of the west bay and he fell immediately upon being shot. The crown's position is that Mr. Charpentier shot Mr. Baldwin at a time when Mr. Baldwin was clearly walking away from him.
- [40] If Mr. Baldwin fell immediately when he was shot, then he was walking away from Mr. Charpentier at that moment.

- [41] The defence position is that Mr. Baldwin approached the east bay and bear-sprayed into the bay. He then backed away so as to avoid being affected by the spray. He did not see Mr. Charpentier's gun. Mr. Baldwin then circled into the west bay. Mr. Charpentier's evidence is that Mr. Baldwin started to walk northbound toward Mr. Charpentier. At that point Mr. Charpentier shot Mr. Baldwin, who then took a couple of steps westbound and fell to the ground.
- [42] On the crown theory of the shooting, the timing and nature of the shooting was an aggravating factor because Mr. Baldwin was walking away from Mr. Charpentier. On the defence version, it was a mitigating factor, because Mr. Baldwin had turned and was pursuing Mr. Charpentier. For that reason, I set out below my assessment of all of the evidence regarding the timing of the shooting below.
- [43] The defence position is based upon the testimony of Mr. Charpentier. There is no evidence to corroborate his version of events. There is, of course, the video which shows Mr. Baldwin's progress. That video does not appear to show Mr. Baldwin moving toward Mr. Charpentier. However, I accept the defence submission that the video is grainy and cannot be used, on its own, to make a finding that Mr. Charpentier's version of events is incorrect. Put another way, there is a possibility that a subtle or nuanced movement of Mr. Baldwin's would not be picked up on the grainy video.
- [44] I note however, that Mr. Charpentier's evidence regarding the shooting is internally inconsistent. There are several aspects that cause me concern:
- a) Mr. Charpentier testified that Mr. Baldwin hit him with bear-spray while in the east bay of the car-wash. He says the bear-spray got in his eyes. Despite that circumstance, he testified that he was able to notice a knife in Mr. Baldwin's hand. He also says that he was able to discern the subtlety of Mr. Baldwin's step in his direction while walking in the west bay.
 - b) Mr. Charpentier further testified that, because of the bear-spray, he could not really see where he was aiming when he pulled the trigger. Hence, he seeks to minimize his culpability based on the existence of bear-spray in his eyes, after describing subtle details that he noticed after being hit by the bear-spray.
 - c) Mr. Charpentier's testimony about the moment of the shooting, and the seconds following, were internally inconsistent. First, as noted, he testified that his vision was impaired by the bear-spray. However, he claims that he was able to see Mr. Baldwin turn toward him, which was the move that caused him to pull the trigger. He further says that Mr. Baldwin took steps before falling.
 - d) Mr. Charpentier then testified that he turned and left the scene without knowing whether Mr. Baldwin had been shot. For that to be the case:
 - i. Mr. Charpentier would have had to have been looking at Mr. Baldwin in order to discern that Mr. Baldwin was stepping toward him,.

- ii. Upon seeing Mr. Baldwin's change of direction, he immediately pulled the trigger.
- iii. Despite those two actions, he says he did not see the bullet strike Mr. Baldwin because he turned to run away.
- iv. He also says that Mr. Baldwin took some steps before falling, despite claiming that he left the scene without knowing that the bullet had struck Mr. Baldwin.

[45] Mr. Charpentier also says that he was moving backward when he pulled the trigger and he did not intend to hit Mr. Baldwin. At another point, he testified that he did not know why he pulled the trigger, but he noted that he was scared and he wanted to scare Mr. Baldwin. He says that he shot Mr. Baldwin at a certain point in the west bay. I analyze that statement in relation to all of the available evidence below. However, for the reasons set out above, I do not accept Mr. Charpentier's testimony about the shooting to be credible.

[46] The crown position on the timing of the shot (and the position of Mr. Baldwin) is based upon a combination of two security videos, one from the south, and one from the north. A business called "Go Audio" is located across Yale Road (to the north) from the car-wash. It has a security camera mounted facing toward the south. That camera also records sound. Crown points to the following evidence:

- a) On the "Go Audio" video, a large bang is heard. Soon after, a vehicle is seen driving along Yale Road. Eight seconds after the bang, the vehicle is seen crossing the intersection of Fletcher Street and Yale Road.
- b) The same vehicle can be seen on the video taken from south of the car-wash (facing north). That, north-facing video shows Mr. Baldwin falling to the ground. The vehicle enters the Fletcher Street intersection eight seconds after Mr. Baldwin falls to the ground.

[47] On the basis of that evidence, the crown submits that it has established, beyond a reasonable doubt, that Mr. Baldwin fell immediately upon being struck by the bullet. The crown submits that the timing of the bang and the vehicle arriving at the intersection establishes his positioning when he was shot. He fell at the westernmost edge of the west bay of the car-wash and 8 seconds later the car crosses the intersection. Hence, the crown submits, Mr. Baldwin was walking away from Mr. Charpentier when he was shot.

[48] The comparison of the two videos is compelling. However, keeping in mind the crown's burden of proving this fact beyond a reasonable doubt, I am unable to find that the video satisfies that burden. My reasonable doubt derives from the following:

- a) The difference between the crown and the defence versions of events consists of approximately three seconds. Mr. Charpentier's position is that the shot was fired the shot approximately 3 seconds before the crown's version of events.
- b) There is no expert opinion evidence regarding the "Go Audio" video.

c) There is no evidence of the distance of the "Go Audio" camera (or recording device) to the point of the shot. It is possible that there could have been some delay in the transmission of the sound, versus the light, to that recording device. However, a significant delay is improbable.

d) I was not presented with evidence regarding whether the audio portion of the video was, or was not, synchronized with the video portion.

[49] My main concern is that if there was an issue with the technology, and if the audio portion was not synchronized with the video portion, then it is possible (although unlikely) that the audio recording of the gunshot that is heard on the video, might have occurred a second or two earlier. If the audio portion is off by as little as two seconds, not only would the crown position be disproved, but the defence position might be established.

[50] It follows from my analysis of the testimony and the video evidence that:

a) The crown has not established beyond a reasonable doubt that Mr. Charpentier shot Mr. Baldwin at the spot where his body was found.

b) Hence, the crown has not proved, beyond a reasonable doubt, that Mr. Baldwin was shot as he was walking away from Mr. Charpentier.

c) Hence, this is not an aggravating factor.

d) However, the video evidence does provide evidence on a balance of probabilities. I find that it is more probable than not that Mr. Baldwin fell in the place where he was struck by the bullet.

e) Hence, the video evidence is inconsistent with Mr. Charpentier's version of events. I find on the balance of probabilities that Mr. Charpentier's version of events is not accurate.

f) Hence, Mr. Charpentier has failed to establish the mitigating factor that he shot Mr. Baldwin as Mr. Baldwin stepped toward him. I reject Mr. Charpentier's evidence on the timing of his pulling of the trigger.

[51] On a related issue, defence counsel submits that in the circumstances of Mr. Baldwin having come upon Mr. Charpentier and posing a threat, including the use of bear-spray and the possession of knives, there was no requirement that Mr. Charpentier "weigh the niceties" of possible responses. Defence counsel submits that Mr. Charpentier was entitled to use the force that he did and that this is a mitigating factor.

[52] It follows from my finding on the timing of the shooting above, that, on the balance of probabilities, Mr. Baldwin was shot while he was walking away from Mr. Charpentier. In my opinion, that finding moves this shooting outside of circumstances where Mr. Charpentier was required to act in self-preservation in the heat of the moment. He had substantial distance between himself and Mr. Baldwin. He was armed, and he was, at the very least, able to communicate that fact to Mr. Baldwin. On the balance of probabilities, I find that he

faced no immediate threat at the moment he pulled the trigger.

Did Charpentier aim the gun at Mr. Baldwin?

- [53] The crown submits that it is an aggravating factor that Mr. Charpentier aimed the gun at Mr. Baldwin.
- [54] The evidence of both Mr. Charpentier and Ms. Lilly was that Mr. Charpentier was holding the gun in his right hand, near his waist, with his elbow bent to aim the gun forward. There is no evidence that he raised it to shoulder height and took aim through the sights of the gun. Again, he has very limited use of his left arm.
- [55] Mr. Charpentier's evidence was that he only shot the gun to scare Mr. Baldwin and that he did not mean to hit him. He says that his eyesight was affected by the bear-spray that Mr. Baldwin had sprayed into the east bay of the car-wash.
- [56] It is not disputed that Mr. Baldwin was struck on the right side of his forehead from a distance of 30-40 feet. Further, Mr. Charpentier accepts that he did not fire the gun into the air, a warning shot. However, as noted, he says that he did not see Mr. Baldwin fall.
- [57] Mr. Charpentier's actions after the shooting are also relevant to this issue. As noted above, he walked a few steps then started running away from the scene. He stopped at a local school and buried the gun.
- [58] Mr. Charpentier testified that he took these steps because he did not know whether Mr. Baldwin was chasing him.
- [59] The crown submits, and I accept, that Mr. Charpentier's actions after the shooting are more consistent with him having seen Mr. Baldwin fall. The crown submits that, if he did see Mr. Baldwin fall, then it is clear that he was both looking at Mr. Baldwin and aiming the gun in his direction when he pulled the trigger.
- [60] First, I find that the act of burying the gun is most consistent with Mr. Charpentier knowing that he had shot Mr. Baldwin. If Mr. Charpentier believed that Mr. Baldwin was still a threat, if he thought that Mr. Baldwin was still pursuing him, then it would make no sense to bury the gun. His dispute with Mr. Baldwin would still be alive. He may need the gun to protect himself, or ward off Mr. Baldwin, in the future.
- [61] The most reasonable explanation for Mr. Charpentier's actions after the shooting is that he knew that he had shot Mr. Baldwin and realized the seriousness of his actions. Hence, there is strong evidence that Mr. Charpentier saw Mr. Baldwin fall. It follows that he was looking at Mr. Baldwin when he pulled the trigger.
- [62] As noted above, on a balance of probabilities, I have found that Mr. Baldwin fell immediately upon being shot. However, on this point, it does not matter where Mr. Baldwin was when he was shot. The point is that the bullet hit him in the head.

- [63] In my opinion, the fact that the bullet struck Mr. Baldwin in the head is the best evidence that Mr. Charpentier was, in fact, aiming at him. Mr. Baldwin was moving at the moment he was shot. Based upon the nature of the entry wound, he must have been looking in Mr. Charpentier's direction. If Mr. Charpentier truly wanted to scare Mr. Baldwin by discharging the weapon, he had any number of directions to aim. Instead, he chose the fire in Mr. Baldwin's direction.
- [64] On the basis of the analysis above, I find beyond a reasonable doubt that Mr. Charpentier was aiming the gun in the direction of Mr. Baldwin when he pulled the trigger. It follows that I do not accept Mr. Charpentier's evidence that he meant the shot only as a warning to Mr. Baldwin. I do not accept that he intended to miss Mr. Baldwin.
- [65] As noted above, Mr. Charpentier admits that he intentionally committed an unlawful act by firing the gun which was the act that caused Mr. Baldwin's death. On the basis of the evidence, I find that he aimed the gun in Mr. Baldwin's direction and pulled the trigger being reckless as to whether Mr. Baldwin would be injured or killed.
- [66] As noted above, in respect of the bigger picture, I have found that Mr. Charpentier took no steps to pursue Mr. Baldwin. In fact, Mr. Charpentier sought to avoid Mr. Baldwin. I accept, beyond a reasonable doubt, that, in a general sense, Mr. Baldwin was the aggressor. However, in the moment of the shooting, I find:
- a) On the balance of probabilities that Mr. Baldwin was not stepping toward Mr. Charpentier. He was walking away from Mr. Charpentier.
 - b) Beyond a reasonable doubt that Mr. Charpentier was aiming the gun in Mr. Baldwin's direction and was reckless as to whether Mr. Baldwin would be injured or killed.

Sentencing Submissions of Counsel

- [67] As noted, the second part of the Gardiner hearing consisted of submissions of counsel relating to the appropriate sentence based on the facts found above. To place the discussion in context, the Crown submits that the appropriate sentence would be in the range of eight to nine years of incarceration plus other ancillary orders. The defence submits that the appropriate sentence is six years of incarceration. The defence agrees with the proposed ancillary orders proposed by the Crown. There is no dispute relating to the credit for time served, which I discuss below.

Consideration of the Evidence and Submissions

- [68] I discuss my consideration of the evidence and submissions below and address them in the following order:
- a) the circumstances of the offender;
 - b) Mr. Charpentier's prior criminal record;

- c) his performance in custody and prospects of rehabilitation;
- d) mitigating factors;
- e) aggravating factors;
- f) victim impact statements and offender's statement;
- g) principles of sentencing;
- h) analogous caselaw and imposition of sentence; and
- i) calculation of time served.

Circumstances of the Offender

[69] I start with the circumstances of the offender.

[70] Mr. Charpentier is 26 years old. He was 23 at the time of this offence. He does not dispute that he has been addicted to street drugs since his mid-teens. The circumstances of Mr. Charpentier's upbringing are relevant. In short, his upbringing was difficult. A Gladue report was prepared for the sentencing hearing. There is a dispute regarding the evidentiary basis through which Mr. Charpentier claims Indigenous ethnicity. I discuss that issue below. However, the Gladue report assisted me in understanding Mr. Charpentier's upbringing.

[71] Mr. Charpentier was raised in Surrey. His parents separated when he was 18. His father was and is chronically addicted to street drugs and has been homeless for an extended period of years.

[72] I note that the report writer was not able to contact Mr. Charpentier's father, who is believed to be living in a makeshift encampment outside of Chilliwack.

[73] Mr. Charpentier has three brothers and one sister. Two of his brothers have been affected by problems with addiction. His sister and youngest brother live prosocial lifestyles.

[74] It is common ground that Mr. Charpentier was raised in less than ideal circumstances. During his childhood, there was violence in the home. He stopped attending school in Grade 8. He started using drugs by age 14. By age 18, he was using cocaine and crystal methamphetamine. It was during this period that his father left the family and immersed himself in his own addictions.

[75] Mr. Charpentier was the victim of a stabbing that occurred in late 2017. The stabbing inflicted nerve damage on his left shoulder, arm, and hand. He was prescribed morphine for the pain resulting from that injury. After he was discharged from hospital, Mr. Charpentier turned to fentanyl as his drug of choice. The stabbing left him with extremely limited movement of his left arm and no functional use of his left hand. His counsel submits that Mr. Charpentier went downhill after this injury and his subsequent reliance on fentanyl.

- [76] Following the stabbing in late 2017, Mr. Charpentier continued to live on the streets of Chilliwack. He supported himself by committing petty crimes and spent his time obtaining and using drugs. I understand that he was alienated from his family in the period leading up to his arrest in respect of the shooting in late 2019.
- [77] There are two aspects of Mr. Charpentier's circumstances that are disputed: the first is the existence of fetal alcohol spectrum disorder (FASD), and the second relates to his Indigenous family history, if any.
- [78] The defence submits that the evidence establishes that Mr. Charpentier suffers from FASD or fetal alcohol spectrum disorder. The defence further submits that that condition reduces his moral culpability because he has diminished mental capacity. The defence argues that his decision making in the moments leading up to the shooting were negatively affected by this disorder. The Crown disputes the evidentiary basis for any such finding.
- [79] The evidence that Mr. Charpentier may suffer from FASD derives primarily from the Gladue report. When asked in his direct testimony whether he has been diagnosed with FASD, Mr. Charpentier answered, "Not entirely, but yeah." When interviewed for the Gladue report, Mr. Charpentier stated that at age 12, he was assessed and diagnosed with FASD. That statement provided to the Gladue report writer was not reflected in his sworn testimony at the Gardiner hearing before me.
- [80] Mr. Charpentier's mother was interviewed for the Gladue report. She indicated that she consumed alcohol and marihuana during the first three months of her pregnancy. However, she has no recollection of her son being tested for or diagnosed with FASD.
- [81] The defence relies on the reasoning in *R. v. Badhesa*, 2019 BCCA 70, for the proposition that mental illness can reduce the moral culpability of an offence because general and specific deterrence are less weighty considerations. Further, the overlay of intoxication on mental illness can be a compounding consideration depending on the factual matrix.
- [82] The defence submits that Mr. Charpentier was less mentally competent and his condition was further affected by his intake of methamphetamine in the minutes before the offence. Again, the Crown's position is that no mental illness is established on the evidence. I agree with the Crown's position for the following reasons.
- [83] First, I find that the Gladue report writer, Mr. Cadwallader, is not qualified to diagnose FASD. After the sentencing hearing, counsel jointly referred me to the decision of the Court of Appeal in *R. v. Ellis*, 2022 BCCA 278. That case stands for several propositions, but most importantly for my purposes, the importance of experts keeping within the limits of their qualifications. In disregarding Mr. Cadwallader's opinion regarding FASD, I am accepting only the opinions he is qualified to provide.

- [84] Second, the Gladue report notes that there are no known cognitive functional reports or assessments indicating a mental disability or illness. The report states that Mr. Charpentier's issues as a child and adult "are consistent with" FASD. There is, of course, a substantial evidentiary difference between the import of the phrases "consistent with" and "caused by". Mr. Cadwallader recommends a psychiatric assessment specific to FASD. No psychological or medical report was tendered. Hence, there is no admissible expert evidence on the issue.
- [85] The defence argues that the Crown had the opportunity to cross-examine Mr. Charpentier on the issue but chose not to. In response, the Crown submits that the evidence falls far short of establishing the existence of FASD as a mitigating factor. In my opinion, the existence of FASD falls under the defence' burden of proof.
- [86] I find that there is insufficient evidence to satisfy me, on a balance of probabilities, that Mr. Charpentier has a diagnosis of FASD. I have set out my assessment and rejection of Mr. Cadwallader's evidence above. More to the point, beyond the diagnosis, there is insufficient evidence of any functional or cognitive impairment that may be associated with that condition. I have no evidence that Mr. Charpentier's cognitive abilities are affected by any condition such that it would affect his decision-making abilities or reduce his moral culpability. In other words, a diagnosis of the disorder does not indicate the severity of the disorder.
- [87] I reject the defence argument regarding decreased moral culpability due to decreased mental capacity.
- [88] I now turn to the defence argument regarding Indigenous family history.
- [89] Section 718.2(e) of the Criminal Code provides:
- 718.2 A court that imposes a sentence shall also take into consideration the following principles:
- (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.
- [90] As noted, there is a dispute over Mr. Charpentier's connection to any Indigenous family history. The defence submits that the court is required to assume that the connection exists based on the evidence. The Crown submits that no connection is established.
- [91] The issue derives, in part, from the absence of evidence from Mr. Charpentier's father. All historical information in the report was derived from Mr. Charpentier's mother. Mr. Charpentier's mother is aware that her mother-in-law and father-in-law are both of European descent. However, she understands that the family lore is that her in-laws wed while her mother-in-law was pregnant with the biological child of another man. The suggestion is that the biological father of Mr. Charpentier's father was Indigenous.

- [92] The Crown submits that this evidence is extremely thin. The Crown further submits that to the extent Mr. Charpentier's grandmother may have been impregnated by an Indigenous man, there is no evidence or possibility that Mr. Charpentier's upbringing would be affected by the effects of colonialism or negative systemic factors.
- [93] The Crown relies on the reasoning of *R. v. Hamer*, 2021 BCCA 297, and in particular para. 114, where they wrote:
- [114] Similarly, the difficulty in this case is that there is nothing in the fresh evidence to show that systemic or background factors as described in Gladue and Ipeelee operated in any way in Mr. Hamer's life or affected his moral culpability for this crime. Assuming Mr. Hamer has Indigenous roots, there is nothing that spells out the circumstances that would have affected his criminality.
- [94] As noted, the defence position is that the court is required to accept that there is a connection. With that position in mind, the defence relies on my decision in *R. v. Kehoe*, 2021 BCSC 2474. At para. 38, I wrote:
- [38] As noted, the Gladue report indicated many of the same unfortunate experiences from Mr. Kehoe's youth as the presentence report and the psychological report. I have taken those factors into account, both as general background factors and factors to be considered under s. 718.2(e). I consider the nexus between Mr. Kehoe's Aboriginal status and this offence to be limited.
- [95] I note that in *Kehoe*, the offender's Indigenous family history was established on the evidence, despite the fact that he was unaware of it until after the offence. In Mr. Charpentier's case, the biological element is, to my understanding, based on a rumour, and the cultural element is entirely lacking. Like the circumstances in *Hamer*, there is no evidence that Indigenous ancestry played any part in his upbringing.
- [96] I find that the reasoning in *Hamer* is more applicable to these facts. Whatever Mr. Charpentier's family lineage is, no part of his family's history establishes or even suggests that systemic or background factors operated in his life or upbringing.
- [97] It follows that I am not factoring the provisions of s. 718.2(e) of the Criminal Code, as it relates to Indigenous offenders, into my decision on sentencing.
- [98] Having said that, none of my discussion above detracts from my consideration of Mr. Charpentier's difficult upbringing.

Mr. Charpentier's Prior Criminal Record

- [99] As noted, the record was tendered in evidence. At the time of this offence, he had 15 prior convictions. In addition, he had committed a robbery on October 16, 2019. He was arrested for that robbery the next day and released. That arrest was five days before the shooting of Mr. Baldwin.

- [100] Most of the 15 convictions involved petty property crime and breaches of conditions. However, the Crown submits that through all of those interactions, Mr. Charpentier did not take steps to rehabilitate himself. The Crown further submits that the robbery on October 16 indicates an escalation of Mr. Charpentier's level of violence. In response to that submission, counsel for Mr. Charpentier notes that there is no evidence of the circumstances of that robbery.
- [101] In my opinion, there is insufficient evidence to infer that Mr. Charpentier was trending toward more violent crimes. The dispute with Mr. Baldwin began with a petty theft from Mr. Baldwin's vehicle. As noted in my findings of fact, the dispute spiralled from there. Mr. Charpentier did not arm himself to carry out crimes; he armed himself to defend himself against Mr. Baldwin.
- [102] As a result, I accept the Crown's submission insofar as it relates to Mr. Charpentier's propensity to commit crime and the failure of Mr. Charpentier to reform himself through his interactions with the correctional system. I do, however, return to the conviction for robbery because it has an impact on the calculation of time served.

Performance in Custody and Prospects of Rehabilitation

- [103] The Crown tendered evidence of Mr. Charpentier's record while in pretrial detention. The Crown submits that the record is neither exemplary nor indicative of significant problems. The defence accepts that description.
- [104] The Crown submits that Mr. Charpentier has not addressed his addiction issues through counselling. Mr. Charpentier continues on a maintenance or replacement prescription of suboxone. Hence, the Crown submits, he continues to feel the tug of addiction. On this point, I accept the responsive submission of Mr. Charpentier's counsel. There is no evidence that Mr. Charpentier has taken any illicit substances since his incarceration. He is maintained on a medically-prescribed dosage of suboxone. He hopes to address his addiction issues when he is entered into the federal prison system. In my opinion, this evidence holds out hope for his rehabilitation.

Mitigating Factors

- [105] I noted above my findings in respect of the defence position on FASD and Indigenous family history. I do not find those factors to have been established.
- [106] The Crown submits that the following mitigating factors exist:
- 1) first, youth - Mr. Charpentier is 26 years old and, hence, more capable of rehabilitation;
 - 2) second, provocation in the moment - as noted above, Mr. Baldwin's behaviour inspired Mr. Charpentier's crime, although Mr. Charpentier had prepared for that eventuality by arming himself;

- 3) third, remorse - the Crown acknowledges the genuine remorse exhibited by Mr. Charpentier during the hearing and in exchanges with the victim's family and especially the victim's mother;
 - 4) fourth, the guilty plea and responsible litigation - the Crown notes that Mr. Charpentier pled guilty after the preliminary inquiry; further, the Crown notes that the defence conducted the preliminary inquiry in a manner that caused minimal anxiety to the victim's family.
- [107] The defence submissions in respect of mitigating factors focus on the issues discussed above, FASD, and the Gladue factors. As noted above, I have rejected the last two factors on the basis that there is an insufficient evidentiary basis. Mr. Charpentier's counsel also points to his youth and the obvious remorse that he demonstrated through the sentencing hearing.

Aggravating Factors

- [108] First, I will deal with the placement of this crime along the spectrum of culpability. It is not disputed that the offence of manslaughter can involve a wide variety of criminal acts from near murder to near accident. The placement of the offence along the spectrum is not specifically an aggravating or a mitigating factor, but it does assist in assessing the proper sentence.
- [109] The Crown submits that the act of pointing a gun at Mr. Baldwin, pulling the trigger, and being reckless as to the result puts this offence at the near-murder end of the spectrum. The Crown submits that these acts are a measure of the gravity of the offence. However, the Crown concedes that when placed on the spectrum of overall gravity, this shooting does not lie at the most serious end of the range, neither does it sit at the lowest end.
- [110] The defence places Mr. Charpentier's culpability in the mid-range of the spectrum. Counsel argues that the bullet hitting Mr. Baldwin was a possible but not a likely result, given the circumstances.
- [111] I accept the mid-range description of defence counsel. In my opinion, the circumstances of the dispute between the two men cannot be ignored. Mr. Baldwin was pursuing Mr. Charpentier. Mr. Charpentier sought to avoid Mr. Baldwin. Mr. Baldwin was a much larger man. Mr. Charpentier suffered from the significant disability related to his left arm. Although the defence of self-defence was not established, it is clear that the shooting would not have occurred if Mr. Baldwin had not pursued Mr. Charpentier.
- [112] However, Mr. Charpentier aimed the gun and fired at Mr. Baldwin, being reckless as to the result. On that basis, I find that the offence falls in the mid-range on the spectrum of near accident to near murder.
- [113] The Crown submits that the following factors are aggravating in this case:
- 1) Mr. Charpentier had an entrenched illegal drug addiction.

- 2) He used a firearm for which he had no licence.
- 3) He fled the scene.
- 4) He committed the crime while on community supervision, being on release from his arrest for robbery, and he was bound by a prior probation order.
- 5) He has a significant criminal record.

[114] The defence acknowledges that the following facts are slightly aggravating:

- 1) Mr. Charpentier left the scene, knowing that Mr. Baldwin was gravely injured.
- 2) His existing criminal record.
- 3) The fact that the dispute between the men originated with the breaking into of Mr. Baldwin's vehicle by Mr. Charpentier.

[115] I accept the Crown's submission with respect to aggravating factors. However, I find that they are all tempered by the fact that Mr. Charpentier would not have obtained the firearm and committed this offence if Mr. Baldwin had not pursued him.

Victim Impact Statements and Offender's Statement

[116] I now turn to the victim impact statements and offender remorse.

[117] The Crown filed a collection of victim impact statements that were marked as Exhibit 10 on the sentencing hearing. The booklet contained the statements from Mr. Baldwin's mother, grandmother, aunt, uncle, sister, brother-in-law, cousins, and other close friends and relatives. Members of Mr. Baldwin's family were present in court throughout this sentencing hearing. Their victim impact statements speak to the profound loss and overwhelming grief suffered by the family. The statements are heart-wrenching and deeply emotional. They describe Mr. Baldwin's difficulties, but also his redemption through working with others towards sobriety.

[118] I would be remiss if I did not mention the extraordinary grace displayed by Mr. Baldwin's family, and in particular his mother, Ms. Julie MacDonald, towards the offender. Despite her profound loss, she has formed a bond with Mr. Charpentier. Her forgiveness has, in turn, led to his expression of true remorse for his actions. As noted above, the Crown concedes that Mr. Charpentier has displayed genuine remorse for his actions and their tragic result.

[119] As discussed below, I consider his remorse to be a significant mitigating factor.

Principles of Sentencing

- [120] There is no real disagreement on the principles of sentencing. The parties' submissions focused on different elements that support their positions. Each side made submissions on the purposes of denunciation, deterrence, separation from society, rehabilitation, and promotion of responsibility for the offender. Further, they address the objectives of proportionality, parity, totality, and restraint.
- [121] Defence counsel points to the statements of the Supreme Court of Canada in *R. v. Bissonnette*, 2022 SCC 23, and submits that the objective of denunciation cannot form the justification for longer prison sentences. Further, he submits that the objective of general deterrence is questionable, especially in this case. Conversely, the objective of rehabilitation is baked into the objective of sentencing.
- [122] The court must presuppose that the offender is capable of rehabilitation. These factors play into the restraint that is to be used when arriving at a fit sentence.
- [123] The parties agree that, given the circumstances of this case, the most important element of my consideration should be parity. Each side submitted cases that they say represent a case that is analogous on the facts. In turn, they submit that those cases suggest a sentence in the realm which is reasonable.

Analogous Caselaw and Imposition of Sentence

- [124] Each side tendered a number of cases that were submitted as analogous. As has been noted in prior decisions, the available range for manslaughter sentencing begins with a low of a conditional sentence and extends to a high of life imprisonment. The cases tendered by counsel represented a range of sentences from three and a half years to 14 years. As noted at the outset of these reasons, counsel for the parties set the appropriate range of sentence between six and nine years.
- [125] For the purpose of the discussion below, with the exception of the decision in *R. v. Nur*, [2015] 1 S.C.R. 773, which I discuss briefly, I have excluded all the cases that fall outside of the range submitted by counsel, that being six to nine years. I have done so because, as stated by Mr. Waldock on behalf of the Crown, the cases imposing 12 to 14-year sentences are not actually analogous. Hence, in my consideration of the principle of parity, I have focused on the cases that are argued to be analogous.
- [126] I do, however, start with the Supreme Court of Canada's decision in *Nur*, where the Court upheld a sentence of 40 months or three and a half years on a charge of possession of a prohibited weapon. That case involved a young man without any prior convictions. I accept the Crown's submission that the decision in *Nur*, which did not involve a shooting or a death, provides some context to the offence in this case wherein the discharge of a firearm resulted in Mr. Baldwin's death.

- [127] The Crown bases its range of sentence on the following cases: *R. v. Cooper*, 2002 BCCA 259; *R. v. Dhanda*, 2005 BCCA 533; and *R. v. Chad*, 2015 BCPC 422.
- [128] The Crown also seeks to distinguish the primary cases submitted by the defence, namely: *R. v. Fabas*, 2017 BCSC 1693; and *R. v. Gilpin*, 2022 BCSC 658.
- [129] There are, of course, myriad factors to consider. No two cases are identical.
- [130] I have noted above the mitigating factors in this case include remorse, the guilty plea, and the nature of the provocation. The Crown submits that the decision of the Court of Appeal in *Cooper* supports a sentence of eight years, which was the sentence imposed in that case. The *Cooper* case involved an incident where youths were goading the offender, who was attempting to avoid them. When some of the youths attended at his apartment, he armed himself with a knife and stabbed the most vocal of the crowd. Mr. *Cooper* was charged with murder.
- [131] After a murder trial, the court convicted Mr. *Cooper* of manslaughter in the stabbing death. He was 19 years old at the time of the stabbing, but he had accumulated a substantial record for violence. He was on community supervision at the time of the offence. Many of his prior offences arose due to anger issues. While in custody pending trial, he took steps to deal with his anger issues. Mr. *Cooper* clearly intended to harm his victim, but did not intend death.
- [132] The Crown submits that there is little difference in the moral gravity between these two intentions. Further, the Crown submits that Mr. *Cooper* used a knife and not a gun.
- [133] The defence submits that *Cooper* is distinguishable on the basis that the accused had an extensive criminal record for offences involving violence. Further, in contrast to Mr. *Charpentier*, there was no evidence of remorse.
- [134] The Crown also points to the decision in *Dhanda* wherein two groups of young men were involved in prior violence. In response to that violence, Mr. *Dhanda* purchased a shotgun. The victim was among a group that came to Mr. *Dhanda*'s home to vandalize it. At 2:00 a.m., the victim smashed the windows of Mr. *Dhanda*'s house with a baseball bat and called Mr. *Dhanda* out. Mr. *Dhanda* opened the front door and fired the shotgun into the victim's face twice, killing him.
- [135] Following a trial on the charge of second-degree murder, a jury convicted Mr. *Dhanda* of manslaughter. The Court of Appeal upheld the sentence of eight years. Mr. *Dhanda* was in his mid-twenties and had one significant conviction for cross-border arms trafficking. The Crown submits that the tit-for-tat escalation that occurred in *Dhanda* is analogous to the case at bar. Further, the victim was an immediate threat to Mr. *Dhanda*, having smashed his windows.

- [136] The defence distinguishes the decision in Dhanda on the basis that the accused participated in prior acts of violence towards the victim. Mr. Charpentier, as noted, attempted to avoid Mr. Baldwin. Further, in Dhanda, there was no evidence of any remorse.
- [137] In support of a sentence of nine years, the Crown relies on the decision in Chad, where the court imposed that nine-year sentence plus four years for a subsequent firearms offence. To be frank, I do not find the facts in Chad to be analogous. Mr. Chad barged into a flophouse where drug users were congregated, in order to confront the victim in respect of a dispute about drug trafficking. He pointed a rifle at the deceased. In the course of a melee, the gun discharged, killing the victim. Police later arrested Mr. Chad in possession of a loaded handgun, leading to the further conviction and the additional four-year sentence.
- [138] Although Mr. Chad did not intend to fire the gun, he did bring the firearm to the victim's residence in that case. The Crown noted that there was genuine remorse of the offender in Chad.
- [139] The defence submits that in Chad, there was evidence of the accused being violent towards the victim prior to the offence. In addition, Mr. Chad had a lengthy and recent criminal record, including numerous violent offences.
- [140] In my opinion, the facts involved in the Chad decision bear less resemblance than the other four cases submitted by counsel. I distinguish Chad on the basis that the offender sought out the victim on at least three occasions. On the night of the offence, he brought a firearm to the home of the victim. In my opinion, those facts put the case on a different footing than Mr. Charpentier's. Put simply, I find the moral gravity of Mr. Chad's offence is significantly greater than Mr. Charpentier's. The case assists me in setting out nine years as being excessive for Mr. Charpentier's offence.
- [141] As noted, the defence relies on two decisions: Fabas and Gilpin.
- [142] In Fabas, the victim attended at the basement suite of a drug dealer, wielding a baton as a weapon. Mr. Fabas was in the home, but not involved in that dispute. The victim used the baton to break windows and was poised to gain entry to the suite. Mr. Fabas obtained a rifle that was in the suite. He made two shots that missed and failed to deter the victim. Mr. Fabas' third shot struck the victim in the head, killing him. Mr. Fabas had reason to fear the victim because of a prior dispute in which the victim had slashed Mr. Fabas' face with a machete.
- [143] The court imposed a sentence of six years for manslaughter, plus one year for possession of the firearm while prohibited. The defence submits that this case is analogous.
- [144] The Crown acknowledges that there are many similarities between Fabas and this case, in respect of the incidents, including the prior attack by the victim on Mr. Fabas. The assault in that case involved a machete inflicting serious injuries on Mr. Fabas. In the present case, Mr. Baldwin had assaulted Mr. Charpentier when the latter was found stealing from his car.

- [145] However, the Crown submits that: first, Mr. Fabas' criminal record was not as extensive as Mr. Charpentier's; second, Mr. Fabas did not bring the firearm to the apartment, but reached for it when the trouble arose; and third, Mr. Fabas' victim continued to be an immediate threat to enter the residence. The Crown says that these factors indicate that the sentence imposed on Mr. Fabas falls below the appropriate sentence for Mr. Charpentier.
- [146] In Gilpin, the court imposed a sentence of six and a half years. Mr. Gilpin, very drunk, fired a rifle three times into the bedroom where his stepfather was sleeping. His stepfather died from the bullet wounds. The offender did not form the intention to kill his stepfather because he was too drunk. There was no ongoing dispute between them, but there was some evidence of disputes in the past. The defence submits that this case is analogous to Mr. Charpentier's.
- [147] The Crown submits that there are factors that are both less and more serious than the Gilpin case. The more serious elements include Mr. Gilpin shot at a man who posed no immediate threat, Mr. Gilpin later dragged the body from the house and concealed it, Mr. Gilpin pleaded not guilty to murder and underwent a trial. However, the Crown also points to other factors, including Mr. Gilpin had no prior criminal history, Mr. Gilpin had Indigenous family history, and Mr. Gilpin had made real headway on rehabilitation while in custody.
- [148] In my opinion, the Gilpin facts are somewhat different, given the state of intoxication and the lack of any element of self-defence, although there are in some ways more serious, other aspects are less serious.
- [149] In my opinion, the finding in Cooper was that the offence was a lot closer to almost murder than almost an accident. I have found that Mr. Charpentier's actions fall in the middle of that range; hence, Mr. Charpentier's moral culpability is somewhat lower than Mr. Cooper's. However, the use of a firearm increases Mr. Charpentier's culpability.
- [150] Second, unlike the offenders in Dhanda and Chad, Mr. Charpentier sought to avoid conflict with Mr. Baldwin. In this respect, the facts of this case are closer to the Fabas decision.
- [151] I also note that Mr. Charpentier has shown real remorse.
- [152] However, although similar in many ways, I find that Mr. Charpentier's actions were more serious than those of Mr. Fabas, because Mr. Baldwin was not an immediate threat and Mr. Charpentier had armed himself to prepare for the eventuality of danger from Mr. Baldwin.
- [153] I have taken Mr. Charpentier's genuine remorse into account. It is my hope that through counselling and programs, Mr. Charpentier will be able to rehabilitate himself and become a positive contributor to society.

[154] THE COURT: Mr. Charpentier, would you stand up, please. I am going to impose the sentence upon you now. Having considered the facts as I have found them in this case and the analogous cases presented by counsel, I find that a sentence of six and a half years is appropriate in the circumstances.

Calculation of Time Served

[155] I am informed that Mr. Charpentier is entitled to credit for time served. Taking into account his robbery in the days before this offence, he has served 634 days prior to today's sentencing, which is credited at the amount of 954 days. I will leave it to counsel to make the subsequent calculations.

[156] In addition, I impose the following ancillary orders: a DNA sample pursuant to s. 487.051(1) of the Criminal Code, and the lifetime firearms prohibition pursuant to s. 109(3) of the Criminal Code.

[157] That ends my sentence. Any issues arising?

(DISCUSSION WITH COUNSEL)

(PROCEEDINGS ADJOURNED AND RECONVENED)

[158] THE CLERK: Court is in session.

[159] THE COURT: Thank you.

[160] CNSL H. WALDOCK: Justice, we've got the numbers just fine. Three years, ten months, and 18 days is what we calculate as the remnant, what remains in the way of sentence and Madam Clerk, I think, can enter that onto the warrant of committal. But we've just noticed that -- thank you, Madam Clerk, for indicating we have forgotten to deal with the victim fine surcharge.

[161] THE COURT: Yes.

[162] CNSL S. BUCK: I am asking that it be waived. You have discretion, and he should focus on rehabilitation rather than paying a surcharge.

[163] CNSL H. WALDOCK: And I've already taken the position -- no position with respect to waiver.

[164] THE COURT: Let me just say, I see Ms. MacDonald nodding in the background, and that, to me, is an incredibly important affirmation. No victim surcharge in the circumstances. Thank you.

[165] CNSL S. BUCK: Thank you.

[166] CNSL H. WALDOCK: Thank you.

"A. Ross J."

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