
CANADA / JUDGMENT

R. v. D.K.D.B.

2013 BCSC 2321

COURT

Supreme Court of British Columbia

DECIDED

13 October 2013

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. D.K.D.B.,

2013 BCSC 2321

Date: 20131013

Docket: X074667

Registry: New Westminster

Regina

v.

D.K.D.B.

Restriction on publication: Pursuant to s. 486.5(1) of the CCC

Before: The Honourable Madam Justice Ballance

Oral Reasons for Sentence

Counsel for the Crown:

B.K. Boland

Counsel for the Accused:

B.V. Bagnall

Place and Date of Hearing:

New Westminster, B.C.

May 4 and October 31, 2012

Vancouver, B.C.

January 24,

April 2 and 3 and August 29, 2013

Place and Date of Judgment:

Vancouver, B.C.

October 11, 2013

- [1] THE COURT: On January 24, 2012, I convicted the accused of eight counts under the Criminal Code, R.S.C. 1985, c. C-46. Five of the offences related to possession and/or use of a prohibited or restricted handgun contrary to ss. 95(1), 86(1), 88(1), 91(1), and 92(1) of the Code. Another offence pertained to mischief to property not exceeding \$5,000, and the two remaining convictions were for the possession of more than three kilograms of marijuana for the purpose of trafficking and the production of marijuana in violation of ss. 5(2) and 7(1), respectively, of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 (the "CDSA").
- [2] At the start of sentencing hearing, the Crown moved for a judicial stay of proceedings on Counts 4 and 5 of the indictment, being possession of a handgun without a licence or registration certificate contrary to s. 91(1), and knowing that he did not hold such a licence or certificate contrary to s. 92(1). Based on the application of the principles established in *R. v. Kienapple*, [1975] 1 S.C.R. 729, I directed conditional stays on those Counts.
- [3] A summary of the history of this protracted sentencing hearing is worthy of mention. The initial hearing was set for one day. It was adjourned at the request of former defence counsel due to his legitimate medical reasons, to enable him to cross-examine the author of the pre-sentence report and because he had recently given notice of the accused's application to challenge the constitutionality of the mandatory minimum sentence compelled in relation to the s. 95(1) offence. The sentencing hearing resumed months later, at which time the author of the pre-sentence report was cross-examined.
- [4] In the meanwhile, the issue of the accused's aboriginal heritage had come to light and continuation of the hearing was further adjourned to enable the preparation of a Gladue report. When the next hearing date arrived, former defence counsel applied for another adjournment on the basis that he had only just received the Gladue report the day before the hearing, and it had only been made available to the accused the morning of the hearing. I granted the adjournment over the opposition of Crown counsel and attached deadlines for the exchange by counsel of further argument in relation to the constitutional challenge.

- [5] The sentencing hearing subsequently continued for two days in early April 2013. Near the end of the second day, the accused discharged his counsel. The accused was, of course, given time to retain new counsel, a process that took several weeks. Eventually, a continuation date slightly more than three months later was set with new defence counsel, Mr. Bagnall.
- [6] After new defence counsel was retained by the accused, the constitutional challenge was abandoned. Regrettably, despite my direction that counsel advise the Court of that eventuality in advance of the continuation of the sentencing, I was not apprised until that day. At the sentencing continuation this past August, Mr. Bagnall advised the Court that the accused had discharged his former counsel because he had lost confidence in him. In the circumstances, defence counsel wished to address sentencing "afresh" rather than attempt to build on submissions that had already been made by former defence counsel in whom the accused had no confidence. Mr. Boland for the Crown was agreeable provided he be entitled to a broad scope of reply, to which defence counsel readily agreed. The sentencing continued on that footing.
- [7] I will turn now to the circumstances surrounding the offences.
- [8] My reasons for judgment on the conviction were delivered orally on January 24, 2012, and contain a detailed summary of the evidence and my findings of fact surrounding the commission of these offences. I do not propose to recite them again at this stage. Instead, what I will do is provide an overview of the factual findings material to the sentencing of the accused.
- [9] In brief, at the time of the commission of the offences, the accused lived next door to Mr. and Ms. D. Mr. D. was a professional truck driver at that time. He and the accused had a "not good" and hostile relationship; they did not socialize and were not on speaking terms.
- [10] On November 11, 2009, Mr. D. parked his dump truck directly across the street from his home and next to a public park which borders the playing field of a local school. The park was a favourite hangout for teens and young adults in the evening and late hours. His truck was readily identifiable as belonging to him having his name, the name of his company and his telephone number inscribed on both the driver's door and the driver's-side of the attached dump box.
- [11] At approximately 1:30 a.m. on November 12, 2009, Ms. D. was awakened by a loud sound that she believed to be the sound of a gunshot. She woke up her husband and reported what she had heard. Mr. D. had been asleep and had not heard the noise. Having in his mind that it was less than two weeks after Halloween, he told his wife that she probably heard fireworks and that she should go back to bed and she did so. Approximately 90 minutes later, Ms. D. was awakened a second time by another loud sound that she also suspected to be a gunshot.

- [12] Mr. S. was a downstairs tenant in the home of Mr. and Ms. D. He also had heard a "boom" or a "pop" sufficiently loud to startle him in the early hours of November 12.
- [13] On the morning of November 12, 2009, Mr. D. was about to get into his truck to begin his day's work when he noticed two holes on the driver's side. One was in the driver's door and the other was located at the rear corner of the cab of the truck near to where it connects to the dump box. Recalling the middle of the night awakening by his wife who claimed to have heard a gunshot, Mr. D. called his father, a commissioned officer of the RCMP. He also called 9-1-1.
- [14] The police determined that the holes in Mr. D.'s truck were bullet holes. They located a bullet from inside of the driver's interior door panel and a bullet fragment from underneath his truck. I concluded that the accused had fired the shots into Mr. D.'s truck on November 12, 2009.
- [15] As the police investigation was unfolding, the accused was seen to come out of his front door in his underclothes, pick up a small item from his front lawn and place it into the waistband at the back of his underwear. He then returned into his residence and a short time later re-emerged dressed in a suit. At that stage, he was arrested by police and taken into custody.
- [16] A search warrant was executed at the accused's residence that evening. Just before the officers entered his home, they located a shell casing on his front lawn in very close proximity to the front door. Upon entry to the home, which was solely occupied by the accused at that time, there was a strong odour of fresh marijuana.
- [17] The rooms on the main living floor were unkempt and in disarray. One of the bedrooms on that floor housed a marijuana grow operation of 90 healthy plants. Also discovered were ventilation and watering tubes, high-intensity lights and other equipment commonly associated with marijuana grow operations. There was no barrier between that bedroom and the remainder of the accused's home.
- [18] The police located a cartridge on the surface of the kitchen stove in plain sight. Directly across from and within arm's reach of the stove was a kitchen island with drawers. Inside the top drawer were five live bullets and six spent shell casings. A handgun was found hidden inside a cavity accessed through the undercarriage of the microwave that was mounted above the stove. The magazine was inside the handle of the gun and was unsecured. One .380 automatic calibre cartridge was found inside the magazine.
- [19] The handgun discovered in the accused's home was a .380 calibre semiautomatic pistol. It is a firearm within the meaning of the Code and a prohibited firearm within the meaning of s. 84(1).
- [20] Several admissions of fact were made in this case including the following:
- the handgun was in operating condition;

- the cartridge found inside the magazine beside the handgun, the cartridge found on the stove in the kitchen, and the cartridges inside the kitchen drawer are all .380 automatic calibre cartridges and ammunition within the meaning of s. 84(1) of the Code;
- the fired shell casings discovered inside the kitchen drawer were all .380 automatic calibre cartridge casings and had all been fired by the handgun;
- the bullet recovered from Mr. D.'s dump truck was fired by the handgun;
- The accused had never possessed an authorization or licence for the handgun or any other firearm and did not possess a registration certificate for the handgun;
- no fingerprints were found on the handgun or any of the cartridges; and
- particles characteristic of gunshot residue were discovered on the stubs used to sample the accused's left hand and the left side of his face, but not on the stubs used to sample his right hand and the right side of his face. These findings indicate that the accused had either fired the handgun or was in close proximity to it being discharged or was in contact with the surface of a firearm or with another source of gunshot residue particles. The latter source would include blank firing devices, certain cartridge-operated industrial tools, certain pyrotechnic devices, and certain automobile brake and airbag components.

[21] In terms of the Counts relating to the marijuana, it was admitted:

- the 90 marijuana plants discovered in the accused's residence is consistent with trafficking but would be considered a smaller size grow operation; and
- none of the equipment utilized for growing marijuana at the residence was analyzed for fingerprints.

[22] During the sentencing hearing, Crown counsel advised that the Crown was relying on the following additional facts:

- At the time the accused committed the firearms offences, he was subject to a court order that prohibited him from having direct or indirect contact with Mr. D.;
- The order had stemmed from an earlier incident where it was alleged that on October 31, 2008, the accused had used a baseball bat or similar object to smash a car window of a vehicle that was parked in the driveway of Mr. and Ms. D.'s home;
- A trial confirmation hearing date had been set for November 12, 2009, being the date of the offences, in respect of the 2008 incident;
- The trial itself had been scheduled for November 27, 2009. When the accused was arrested by police on his front lawn in respect of this matter, he was leaving his residence to attend the courthouse to make an appearance on that other matter.

- [23] On this next point, I am not entirely convinced that Crown has the date correct, although nothing turns on it. It was either January 5, 2011, or later in November 2011, that the accused entered a guilty plea to a charge of mischief in relation to this incident in the driveway of the home of Mr. and Ms. D. and was given a suspended sentence and probation.
- [24] MR. BOLAND: My Lady, I think the confusion in my recollection is that [the accused] entered a guilty plea on a certain date and then was not sentenced until much later, so his criminal record -
- [25] THE COURT: All right. So a guilty plea early in January 2011 and received his sentence November that year?
- [26] MR. BOLAND: That is my understanding.
- [27] THE COURT: Thank you for that clarification.
- [28] I will now summarize the accused's circumstances.
- [29] The conventional pre-sentence report and separate Gladue report were prepared in relation to the accused are intended to be read together.
- [30] At the time he committed the subject offences, the accused was 24 years old. He does not know anything about his biological father other than his name. His mother, Ms. W., explained that the father was "out of the picture" when the accused was still an infant. Ms. W. has Métis status on her father's side. The accused's father is three-quarters aboriginal; however, Ms. W. was uncertain of the details of his heritage beyond that.
- [31] Ms. W. and J.W. have been in a common-law relationship for more than 20 years. Defence counsel advised that when the accused was young, his mother and stepfather would periodically remark in his presence that the biological father had acted with the accused in an inappropriate manner.
- [32] The person with whom the accused had forged the closest relationship while growing up was his maternal great-grandmother. She held to the Catholic faith and he attended Catholic school for grades 1 and 2. Interestingly and sadly, the accused's recollection is that whenever the topic of his aboriginal heritage was discussed at home, his great-grandmother would tell him that he was not Native. He believes that she was trying to protect him in the sense of shielding him from the non-aboriginal world by promoting denial of his background.
- [33] The accused had three siblings. The youngest, a little sister, died in infancy when the accused was 10 or 11 years old. He attributes that tragic event as a trigger in the home for his mother and stepfather to begin to seriously abuse alcohol. He reported that although the household was already dysfunctional, it became markedly worse after his baby sister's sudden death. Ms. W. attributed her admitted alcohol abuse at that time as a means of coping with the loss of her baby and not, in the words of the Gladue author, "due to systemic factors of their aboriginal heritage." I have extreme difficulty accepting that Ms. W. would have used the Gladue language in discussing the source of her alcohol abuse. Clearly, this

expresses the Gladue reporter's interpretation.

- [34] After his sister's death, the accused felt that his great-grandmother was the only stable person holding the family together, but unfortunately, she died less than a year after the little great-granddaughter. After her passing, the dysfunction in the household escalated. According to the accused, the stepfather took care of the family financially, but was physically abusive to all of the children and to Ms. W. The accused reported a vicious circle of abuse. He and his siblings were physically abused by the stepfather; the stepfather also beat the mother "all of the time" and Ms. W. would also attack her husband. The police attended at their home on many occasions.
- [35] When the accused was 14 years old, there was an incident where he fought back against his stepfather resulting in his removal from the home by the Ministry of Family and Child Development. He was placed into government care and lived in a series of foster homes, as many as nine and possibly more, over a period of less than two-and-a-half years. His foster parents did not "force" him to attend school so he did nothing for a period of time. He ended up being expelled from high school in grade 10 or 11. By age 16, the accused was living in a group home which exposed him to a number of other challenged and unhappy youths.
- [36] At that impressionable age and while a resident of the group home, the accused began a relationship with M.C. She was a staff member at the group home and was approximately 10 years his senior.
- [37] In time, the accused became involved in criminal activity such as stealing cars, stealing from cars, and some use of drugs at what he describes a very low level. His admittedly antisocial and misguided activities were reflected in his youth record. It shows that on March 11, 2002, when he was 17, he was convicted of five counts including the dangerous operation of a motor vehicle, possession of property obtained by crime under and over \$5,000, theft under \$5,000, and possession of a scheduled substance. Although I understood his counsel to say that the accused was in custody for roughly three months in relation to the dangerous operation of vehicle offence, the record shows that he received 15 days or less at Burnaby Youth Detention Centre in the open setting and I take the record as accurate. He was also sentenced to one year's probation in relation to the motor vehicle and property crimes, five days' open custody for the theft under \$5,000, and six months' probation in relation to possession of the illicit substance.
- [38] A few months later on July 4, 2002, the accused received eight months' probation for taking a vehicle without the owner's consent and, roughly five months after that, on January 13, 2003, he was convicted of a failure to comply with disposition, which I presume was his probation, for which he received one day in open custody.
- [39] When the accused reached 18, he and M.C. moved in together. Over the course of their relationship, they have had two children. The eldest, a daughter, was born when the accused was 20 years and she is now eight. His son arrived about four years later and is now age four.

- [40] Before the commission of these offences, the accused had two convictions as an adult. The first was for obstructing a peace officer on March 17, 2003, for which he pled guilty and was given a suspended sentence and a 12-month probation. He was 18 at the time. With respect to this offence, Mr. Bagnall stated that his client and M.C. often called the police about the downstairs tenants and those tenants sometimes responded in kind. On this occasion, the police attended the accused's apartment as he and M.C. were readying themselves to go to work and said they had received a report of an argument. The accused was instructed by police not to do certain things and, evidently in a state of confusion, he went to sit on the couch when he was told not to do so. A scuffle ensued giving rise to an initial charge of assaulting a police officer, but within a matter of approximately one month, it was resolved by way of a plea to the obstruction charge.
- [41] The second offence took place in July 2005 when the accused got drunk, his counsel says, to celebrate the birth of his daughter. He ended up having a physical altercation of some kind with another person either in a taxicab or about a taxicab. He was charged with mischief under \$5,000 and assault and received a sentence of one day and 12 months' probation on each charge. During the periods of supervision, the accused complied with requirements to complete community work service hours and wrote a letter of apology.
- [42] After he left high school, the accused worked as a casual labourer. He soon found a position with a residential and commercial development company and he did well there. In his early days and with that employer, he completed a level 3 first aid course and was the designated first aid attendant at the job sites. He was subsequently made the site superintendent in relation to various multimillion dollar townhouse construction projects and moved up the ranks to the positions of assistant superintendent and, ultimately, to structural foreman. Between the ages of 20 and 23, he worked approximately 70 hours per week and eventually earned close to \$100,000.
- [43] When the accused was 20 years old, he purchased the home in which he was living at the time these offences were committed. This was also around the time that he began to foster his younger brother, who was then about 14 and was the natural son of his mother and stepfather. He and his brother subsequently became estranged. The accused describes his younger brother as a "stoner" who does not seem to have any direction in life. The accused has always and continues to enjoy a close and father-like relationship with his younger sister who is a teenager.
- [44] The accused remained in his employer's continuous employment from age 17 to 24. Through his counsel, he says that the money he was earning went to his head. He began to abuse alcohol, was not coming home at night, and was underperforming at work. He also took illicit drugs from time to time. He admitted to the author of the pre-sentence report that he had used ecstasy and marijuana until his early 20s.

- [45] The accused lost his job sometime in 2009. He described it through his counsel as being laid off, not fired, and attributed it to a combination of the recession and his poor performance at work due to alcohol abuse. M.C. reported that he lost his job due to drugs, and through his counsel, the accused admitted to using illicit substances in or around that time. The accused's relationship with M.C. also failed and she moved out of the home with the two children in tow. After he lost his job, the accused received employment insurance benefits for a while.
- [46] According to the accused, approximately five months before these offences took place, he was approached by an acquaintance who offered to pay him a flat fee of \$1,500 per month to use a room in his home to grow marijuana. Mr. B. I acknowledge that this morning when you addressed the Court, you said the fee was \$1,600 a month; I had made a note of \$1,500 based on your counsel's submissions and I assure you nothing will turn on the discrepancy.
- [47] The accused says it was a purely financial arrangement and that he had no role in the growing of the marijuana and that his monthly stipend was not tied to the yield of the crop. This male acquaintance, whom the accused was reluctant to name for fear of repercussions, came and went and tended the plants. He evidently drove a grey Lexus automobile that was referred to in the evidence at trial as being spotted outside the residence of the accused. There was no theft of electricity in respect of the grow operation. It was a single-stage enterprise with no clones or baby plants, no evidence of a harvest, and no baggies or other paraphernalia ordinarily associated with drug trafficking. As noted, Crown counsel agrees that although the operation was a commercial one, it qualified as a small-scale endeavour.
- [48] After the commission of the current offences, the accused applied for and obtained a grant to attend a 10-month construction drafting and construction management college program. He successfully completed that diploma program in 2010. He was also able to secure employment where he held the position of superintendent doing commercial and residential painting. His annual salary there was approximately \$60,000. The accused had met the owner of his new employer, Mr. S., in about 2005 while he was employed by his previous employer. He has developed a close relationship with Mr. S.'s family, three of whom have written positive letters of reference on his behalf for the purposes of this hearing. The letters speak to the accused's strong work ethic, superior talent and knowledge in relation to construction projects, and his devotion to his children. They describe him as a valuable asset to their company and assure there will always be a job for him. The accused's personal future goal is to continue in the construction industry and, ideally, become a property developer.
- [49] At some stage after his separation from M.C. the accused sold his home and, from the minimal net proceeds, he contributed financially to his children, for example, by paying for some of their sports costs. It looks as though he lived with his mother for a short time afterward, but that arrangement did not work out and he eventually took up residence at a property that belonged to one or more members of Mr. S.'s family.

- [50] The accused and M.C. shared joint guardianship of the children and, at first, the accused visited often. There was an incident between them that involved the police in January 2011. I have no cogent details about that matter other than it resulted in the accused entering into a recognizance under s. 810 of the Code several months later.
- [51] In the early months of 2012, the Ministry of Child and Family Development ("MCFD") conducted an investigation, presumably in relation to the accused, although it is never explicitly stated. The stated areas of concern included an altercation with the accused's brother, the finding of drug paraphernalia, the accused's slapping his daughter's hand, and an inappropriate home in that it lacked heat and water due to construction; again, I assume this is a reference to the accused's home. It is not clear whether the investigation has been concluded and, if so, what it determined, if anything. Either as part of that investigation or as a standalone measure, the MCFD conducted a test sample of the accused's hair. The results indicated positive for ecstasy, cocaine, and other illicit drugs and the author of the pre-sentence report was told that those findings suggested long term daily use of cocaine ingested at the same time as alcohol.
- [52] The accused described himself to the pre-sentence reporter as a social drinker, but he also admitted that after the incident with M.C., he began to drink in a very heavy manner, consuming a 26-ounce bottle of either vodka or rye over the course of a day. By April 2012, he reported a reduced consumption of three drinks two or maybe three times a week or six or so beers if he was watching a hockey game with friends.
- [53] There remains an outstanding family law dispute between M.C. and the accused in respect of which court orders have been made and amended over time. There had been a time when the accused was denied access to his children. His counsel advises that the accused is now permitted to resume contact with M.C. for the purpose of arranging contact with his kids. The accused owes a \$40,000 debt to ICBC for an accident which occurred when he was 19 years old. The ownership of his only other assets, consisting of an 18-foot speed boat and a 2004 Dodge Durango vehicle and about which I have no information as to value, is in dispute in the matrimonial proceedings with M.C.
- [54] The accused breached the s. 810 recognizance on March 13, 2012, and was arrested the next day. Following his arrest on March 14, 2012, he elected to remain in custody at North Fraser pretrial. On July 25 of that year, he received a 30-day jail sentence in respect of the breach. Within that institution, the accused has spent significant time in an enhanced supervision unit known as "Charlie Pod" where he receives two fewer hours of free time per day than do inmates in the other unit. Crown counsel conceded that the jail conditions at North Fraser pretrial are probably worse than those at a non-remand institution.
- [55] Even so, the accused has made constructive use of his time there. He has regularly participated in a weekly Catholic studies program facilitated through the chaplain's office. In fact, the Chaplain has written a letter of reference describing the accused as consistently respectful and courteous in his interactions with the Chaplains and the volunteers at the

meetings. He has completed his studies for his GED, although he is not able to write the test while he is in remand. In May 2012, the accused completed a multi-component Essential Skills to Success Program. It included modules that pertained to employment, housing, healthy living skills, and education around substance abuse. In October, he participated in various components of cognitive behavioural therapy offered as part of addiction services that addresses violent, criminal, and addictive thinking as well as socialization issues. He has attended both Narcotics Anonymous and Alcoholics Anonymous while in custody.

- [56] Through his counsel and this morning through the accused himself, it has been explained to the Court that the most profound effect custody has had on the accused is its impact with his children. He assures that he is committed to their well-being. However, he has not wanted them to visit him in jail, opting instead to speak to them over the telephone on average once a week. He senses that his relationship with his daughter is a bit distant and believes she feels he has abandoned her. They had a close relationship until he went into custody. The circumstances have not affected his younger son in the same way and the accused has been able to maintain a positive ongoing relationship with him over the telephone.
- [57] As mentioned, the accused is a non-status Métis. The Métis Nation to which he and his mother have blood lineage is located in Newfoundland. At the time the Gladue report was prepared, the accused had no ties to his community of origin in Newfoundland or to the Métis Nation as an entity. The author of the Gladue report concluded that he appeared to have little knowledge about the Métis people and ancestry. That said, he expressed to that probation officer a general desire to learn more about his aboriginal culture and to get back to his roots. He reported that he had spoken with an elder at North Fraser who would be providing him with contact information of Friendship Centres and aboriginal treatment centres in the community.
- [58] Additionally, the accused recalled involvement in some aboriginal-related activities as a child. As a boy, he actively participated in a school program geared toward the promotion of aboriginal culture such as drum-making. According to the accused, he suffered verbal abuse in the form of racial slurs and was made fun of by his non-aboriginal peers. He does not look particularly aboriginal and so he withdrew from further attempts to connect with his history of lineage. He was embarrassed by his heritage. Ms. W. claims that her son's involvement, at least in the drum-making activity, ended due to his lack of interest. The accused told the author of the Gladue report that he disagreed with things that his mother had reported and described her as not overly truthful. Both he and his mother have confirmed that they have a distant relationship at present.

- [59] The accused claims that after and because of the birth of his daughter, his interest in his aboriginal heritage was renewed; his mother confirmed that. She informed the probation officer that her son showed interest in his heritage when his daughter was born and had sought her assistance to enlist her for Métis status. The accused explained to the Gladue reporter that he had been hesitant in acquiring Métis status for his children out of fear of discrimination.
- [60] The Gladue reporter did not consider it appropriate to explore restorative justice sanctions on the basis they would not be internally relevant for the accused at this time. She did provide information, however, about aboriginal-based programs for inmates available in both provincial and federal institutions and within the accused's community.
- [61] The accused was not particularly pleased with the probation officer that prepared the Gladue report in that he believes she was dismissive of what he told her about his aboriginal background. His lawyer advises that the accused received a phone call from his mother reporting that the probation officer had called her and asked that she confirm the accused had no aboriginal background and that Ms. W. informed the probation officer that her son, in fact, did have aboriginal background. The accused's sense is that the probation officer had already decided she did not believe him and was hoping to enlist his mother as a collateral source to that end.
- [62] I have some misgivings about the objectivity of the Gladue report on its face. I have already referred to the implausibility of Ms. W. using the Gladue concept of "systemic factors" when describing her perceived rationale for her alcohol abuse. The author also expressed her opinion on a central prong of inquiry stating that there appeared to be no systemic or background factors that contributed to the accused coming before the Court. For reasons I will expound upon later, that view could only be formed by discounting most of what the accused reported to her and what he reported to the author of the conventional pre-sentence report which the Gladue author clearly had in hand. That central issue is for me to determine. In my view, there was also a glaring inaccuracy suggestive of a lack of balance in the reporter stating that many of the accused's previous offences involved violence. The accumulation of deficiencies has influenced the weight that I have assigned to the report as is my entitlement affirmed recently by our Court of Appeal in *R. v. Lawson*, 2012 BCCA 508.
- [63] Turning now to the victim impact, Mr. D. and his family moved out of their house next door sometime after the offences because his wife was afraid to leave her home on her own in case she encountered the accused. Mr. D. does not wish to receive a letter of apology. He believes that a no-contact order and prohibition from attendance at his residence ought to be put in place. He would also like to receive restitution for the \$500 deductible he paid for the repair of his truck and in respect of the few days of net income loss he sustained as a result which he calculated to be \$300 a day.
- [64] I will briefly summarize the statutory sentence parameters set out in the Code applicable to the offences the accused has committed, excluding Counts 4 and 5.

Count 1:

- s. 95(1) Criminal Code - Prohibited/restricted possession of unloaded firearm with accessible ammunition

3-year minimum,

10 year maximum.

Count 2:

- s. 86(1) Criminal Code - Careless use of firearm

No minimum sentence, 2-year maximum for first offence.

Count 3:

- s. 88(1) Criminal Code - Carry/possession of weapon and ammunition for a purpose dangerous to the public peace

No minimum sentence, 10-year maximum.

Count 6:

- s. 430(4) Criminal Code - Mischief under \$5,000

No minimum sentence, 2-year maximum.

Count 7:

- s. 7(1) CDSA - Production of Marijuana

No minimum sentence, 7-year maximum.

Count 8:

- s. 5(2) CDSA - Possession of Marijuana in an amount greater than 3 kg. for the purpose of trafficking

No minimum sentence, life sentence maximum.

[65] I will now give an overview of the Crown and defence positions.

[66] The offences predate the enactment of the Truth in Sentencing Act that amended the Code to reduce the amount of credit ordinarily to be given for pre-sentencing custody. The Crown and defence agree that the pre-amendment approach of double credit for time spent in pre-sentencing custody applies in this case. The exception, and it is a proper one, advocated by the Crown is that the accused should not be credited for the 30 days he spent in custody in consequence of his conviction for violating the peace bond.

[67] The Crown seeks a sentence of six-years imprisonment, less credit for the accused's pre-sentencing custody, other than in respect of those 30 days. Crown counsel provided a detailed breakdown of the sentences sought. They are as follows:

Count 1:

4 years imprisonment

Count 2:

1 year imprisonment consecutive to Count 1

Count 3:

1 year imprisonment consecutive to Count 1 but concurrent to Count 2

Count 6:

1 year imprisonment consecutive to Count 1 but concurrent to Counts 2 and 3.

Count 7:

1 year imprisonment consecutive to all other charges.

Count 8:

1 year imprisonment concurrent to Count 7 but consecutive to all other charges

Total Sentence:

6 years imprisonment

[68] The Crown also seeks as ancillary sentencing orders: a secondary designated DNA order pursuant to s. 487.051(3) of the Code, and a mandatory 10-year firearm prohibition pursuant to s. 109(2)(b) of the Code. The Crown is satisfied with restitution in the amount of \$500.

[69] It is the Crown's contention there are at least five aggravating factors at play in this case:

- The accused shot at the vehicle of a person with whom he was to have no contact pursuant to an active court order and who was scheduled to be a witness against him in a trial in just 15 days;
- Mr. D.'s dump truck was parked in a residential area in front of a public park where members of the public, particularly teens, are known to congregate even late at night. As a long-term resident of that street, the Crown asserts it can be reasonably inferred that the accused would have known the circumstances of his own neighbourhood and, hence, the possibility of persons being present in the park beyond the dump truck he shot at;
- Although there is no evidence of how long the accused possessed the handgun or why he came to possess it, it was clearly not a fleeting possession lasting only a few moments;
- The cartridges for the handgun were carelessly stored in a kitchen drawer and on top of a stove; and

- The accused has a criminal record that includes convictions both for assault and mischief.

[70] I have already described his youth record and the two offences he committed as an adult prior to these offences. The only other offence in the accused's adult history was the mischief charge involving the incident at the property of Mr. and Ms. D. on Halloween 2008 which I described earlier and to which he pled guilty in January 2011 and received 12 months' probation and ordered to pay \$300 in restitution.

[71] Crown counsel submits, and defence counsel essentially concedes, that weapons are often discovered in marijuana grow operations and their purpose is to defend the enterprise against others in the criminal underworld from ripping off the plants. The Crown contends that the accused's possession of the handgun was in concert with the commercial marijuana growing operation in his home. Such an operation increases the risk of harm in a community both from the internal risks entailed with the maintenance of the clandestine operation, as well as the real risk to the public in the surrounding area of unknowingly being caught in the crossfire of a violent rip-off undertaking. Building on this, Crown counsel submits that the weapons-related sentences and the sentences imposed for the drug offences ought either to be served consecutively with the total sentence being adjusted, if required, to reflect the totality principle, or the pairing of two or more convictions ought to aggravate the other charges so that, if the sentences are to be served concurrently, the cumulative sentence is higher than what it would have been without the presence of the other charges. Failing to do so, asserts the Crown, would result in no discernible consequence to the accused for having committed multiple offences as opposed to only one. Crown counsel contends this is particularly the case here where the accused's criminal activities placed his surrounding community at risk for the sole purpose of his profit from an illicit activity.

[72] Crown counsel further emphasizes that, in this case, the risk posed by the presence of a handgun went further than a mere theoretical risk because the accused actually discharged it. The Crown submits that, accordingly, the actions which led to the accused's conviction for the unlawful use of the handgun and mischief for causing damage to the vehicle are especially severe and troubling. In order to properly reflect his moral blameworthiness for the act of using the handgun in the particular circumstances, the Crown submits a custodial sentence for that offence is merited which ought to run consecutive to the sentences for the simple possession of the handgun. As there is no connection between the drug charges and the shooting, the Crown submits, as well, that the sentences for the drug charges should run consecutive to the shooting.

[73] I understood the accused's counsel to submit initially that three years' imprisonment, less credit for time served at the pre-amendment rate of double credit, followed by three years of strict probation, and restitution in the amount of \$500 would be a fit sentence in this case. Mr. Bagnall advised that the accused wishes an opportunity to reintegrate into the community and contribute to it and is prepared to be subjected to strict terms of probation for a prolonged period. He submits that in addition to consideration of the general

sentencing principles articulated in many of the authorities he provided to the Court, the Gladue factors, the accused's young age, the gap in time between the date of the commission of his last offence prior to these charges, other than the breach of the peace bond, the accused's demonstrated steps to rehabilitate himself since the commission of these offences, and the restrictive circumstances of his custody in remand, all support the fitness of the sentence that defence counsel proposes. Later in his submissions, Mr. Bagnall submitted that while the appropriate range in respect of the offence committed under s. 95(1) could fall between three to four years' imprisonment, a term of four years at most would adequately address any concerns the Court may have with respect to the aggravating factors at play. He urged that all sentences imposed run concurrently.

[74] I will summarize now some well-known general principles of sentencing.

[75] Determination of a fit sentence is informed by the general sentencing principles found in s. 718 of the Code as well as the common law. The fundamental purpose is to contribute to the respect for the law and for the maintenance of a just, peaceful, and safe society. That purpose underlies the primary sentencing objectives of denunciation of unlawful conduct, deterrence of the offender and others from criminal conduct, separation of the offender from society where that is necessary, to assist in the rehabilitation of offenders, to provide reparations to victims or the community, and to foster the offender's acknowledgment of responsibility and of the harm done to the victims and the community. Because sentencing is an individualized process, the relative emphasis to be given to the various objectives vary according to the particular offence and the unique circumstances of the offender.

[76] The Code stipulates additional essential principles of sentencing to assist in achieving the overall objectives. They include the principle that the sentence must be proportionate to the gravity of the offence and the degree of the responsibility of the offender. Also engaged is the key principle of proportionality which mandates that the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. Additionally, the sentence is to be increased or reduced to account for the relevant aggravating or mitigating factors, and an offender should not be deprived of liberty if less restrictive sanctions may be appropriately available in all of the circumstances.

[77] Section 10(1) of the CDSA sets out the following principles of sentencing applicable to offences under its provisions:

Without restricting the generality of the Criminal Code, the fundamental purpose of any sentence for an offence under this Part is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community.

- [78] Mandatory minimum sentences in respect of drug-related offences under the CDSA were brought into force effective November 2012. They are not retrospective and do not apply to the accused.
- [79] Section 718.2(e) of the Code embodies another vital sentencing principle engaged in this case. It imposes a statutory duty on the sentencing judge to take into account consideration of all available sanctions, other than imprisonment, that are reasonable in the circumstances for all offenders, with particular attention to the circumstances of aboriginal offenders.
- [80] The landmark decision pertaining to the sentencing of Canada's aboriginal people is *R. v. Gladue*, [1999] 1 S.C.R. 688. In *Gladue*, the Supreme Court of Canada directed judges to use an altered framework of analysis in determining a fit sentence for aboriginal offenders and explained that the implication of s. 718.2(e) of the Code is that the circumstances of aboriginal offenders are significantly different from those of non-aboriginal offenders. At paragraph 66, *Gladue* instructed sentencing judges to pay attention to the distinct background characteristics of aboriginal peoples, which encompass a wide range of unique circumstances and, at the very least, to take particular account of:
1. the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
 2. 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.
- [81] Both sets of circumstances bear on the ultimate question of what is a fit and proper sentence.
- [82] In *R. v. Wells*, 2000 SCC 10, the Supreme Court of Canada expounded upon the *Gladue* requirements on sentencing at paragraphs 39 through 42:
- [39] In the search for a fit sentence, therefore, the role of the sentencing judge is to conduct the sentencing process and impose sanctions taking into account the perspective of the aboriginal offender's community. As was noted in *Gladue*, it is often the case that imposing a custodial sentence on an aboriginal offender does not advance the remedial purpose of s. 718.2(e), neither for the offender nor for his community. This is particularly true for less serious or non-violent offences, where the goal of restorative justice will no doubt be given greater weight than principles of denunciation or deterrence.
- [40] However, the scope of s. 718.2(e), as it applies to all offenders, restricts the adoption of alternatives to incarceration to those sanctions that are "reasonable in the circumstances". Again, as was expressly stated in *Gladue*, the Court in no way intended to suggest that as a general rule, the greatest weight is to be given to principles of restorative justice, and less weight accorded to goals such as denunciation and deterrence. Indeed, such a general rule would contradict the individual or case-by-case nature of the sentencing process, which

proceeds on the basis of inquiring whether, given the particular facts of the offence, the offender, the victim and the community, the sentence is fit in the circumstances.

- [41] I should take this opportunity to stress that the guidelines as set out in Gladue, and reiterated in the present appeal, are not intended to provide a single test for a sentencing judge to apply in determining a reasonable sentence in the circumstances. Section 718.2(e) imposes an affirmative duty on the sentencing judge to take into account the surrounding circumstances of the offender, including the nature of the offence, the victims and the community.
- [42] Notwithstanding what may well be different approaches to sentencing as between aboriginal and non-aboriginal conceptions of sentencing, it is reasonable to assume that for some aboriginal offenders, and depending upon the nature of the offence, the goals of denunciation and deterrence are fundamentally relevant to the offender's community. As held in Gladue, at para. 79, to the extent that generalizations may be made, the more violent and serious the offence, the more likely as a practical matter that the appropriate sentence will not differ as between aboriginal and non-aboriginal offenders, given that in these circumstances, the goals of denunciation and deterrence are accorded increasing significance.
- [83] In the clarifying decision of *R. v. Ipeelee*, [2012] S.C.J. No. 13, the Supreme Court of Canada examined the judicial errors that have arisen in the implementation of s. 718.2(e) of the Code, and the misinterpretations of the teachings of Gladue. The Court also provided additional guidance in the sentencing of aboriginal offenders.
- [84] First of all and importantly, Ipeelee affirmed that s. 718.2(e) is remedial in nature, designed to ameliorate the problem of overrepresentation of aboriginal people in prison and encourage a restorative approach to sentencing. It reminded that adherence to the Gladue approach is mandatory in every case involving aboriginal offenders whether or not the offence could be characterized as a serious offence. The Court cautioned that the failure to consider the unique circumstances of an aboriginal offender would, in every case, yield a sentence that is not fit and not consistent with the fundamental principle of proportionality.
- [85] Ipeelee directed that judicial notice must be taken of the historical background of Canada's aboriginal peoples such as colonialism, displacement, and residential schools, and how it continues to translate into all manner of societal impoverishment such as on the educational front, income and employment disadvantages, and higher rates of substance abuse, suicide, and higher levels of incarceration. Ipeelee reaffirmed that s. 718.2(e) is properly seen as a direction to sentencing judges to inquire into the causes and remedy the problem, but only "to the extent that a remedy is possible through the sentencing process" (para. 68).

- [86] Ipeelee identified two ways in which the inquiry formulated in Gladue informs the sentencing process. First, systemic and background factors may bear on the culpability of the offender to the extent they shed light on his or her level of moral blameworthiness. Second, the inquiry may assist in assessing the effectiveness of the sentence itself (para. 74).
- [87] One of the fundamental misconceptions identified by the Court in Ipeelee was the notion that an aboriginal offender must establish a causal connection between the systemic and/or background factors and the commission of the current offence. In renouncing that misreading of Gladue, the Ipeelee Court noted that neither Gladue nor the Code place such a burden on an aboriginal offender. The remarks of LeBel J. in Ipeelee are instructive of this point:
- [83] As the Ontario Court of Appeal goes on to note in [R. v. Collins, 2011 ONCA 182], it would be extremely difficult for an Aboriginal offender to ever establish a direct causal link between his circumstances and his offending. The interconnections are simply too complex. The Aboriginal Justice Inquiry of Manitoba describes the issue, at p. 86:
- 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.
- Furthermore, the operation of s. 718.2(e) does not logically require such a connection. Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.
- [88] Importantly, Ipeelee confronted the misconception that s. 718.2(e) creates a heritage-based discount on sentencing:
- [75] ... The provision does not ask courts to remedy the overrepresentation of Aboriginal people in prisons by artificially reducing incarceration rates. Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case.
- [89] The Court reasoned that to the extent that the application of the Gladue factors warrant different sanctions for aboriginal offenders, those sanctions are justified based on the unique circumstances of those offenders, circumstances that are rationally related to the sentencing process.
- [90] I will now summarize the law relative to mandatory minimum sentences.

- [91] The conviction for the possession of the handgun carries with it a mandatory minimum sentence of three years' imprisonment. That offence initially imposed a mandatory one-year term for the first offence; the three-year minimum came into force on May 1, 2008. The principles of denunciation and deterrence are embedded as the paramount, but not exclusive, sentencing considerations in the minimum mandatory sentence.
- [92] In *R. v. Guha*, 2012 BCCA 423, Smith J.A. remarked on the rationale that underlies the enactment of s. 95:
- [26] Section 95 was added to the Criminal Code on December 1, 1998 in response to what has been described as "a serious and growing societal danger" over the potential for serious injury and death from gun violence
- [93] Trial and appellate courts alike have acknowledged the risk of lawlessness and of the infliction of serious harm inherent in firearm-related offences. There is a judicial consensus that such offences call for sentences that reflect society's "absolute rejection" and condemnation and the importance of deterring like-minded person from committing them: *Guha*, at 30. See also: *R. v. Bacon*, 2010 BCPC 325 at 19; *R. v. Desmond*, 2011 BCSC 698 at 31; *R. v. Radjenovic*, 2011 BCSC 1225 at 101; *R. v. Sanghera*, 2012 BCSC 901 at 28-30; *R. v. Ross*, 2010 BCCA 314 at 16; *R. v. Nguyen*, 2005 BCCA 115 at 5; and *R. v. Jarsch*, 2007 BCCA 189 at 17.
- [94] At issue in *R. v. Morrissey*, 2000 SCC 39, was a challenge to the four-year mandatory minimum for the offence of criminal negligence causing death with a firearm. At para. 75, Arbour J., for the concurring minority, characterized the mandatory minimum sentence as a type of "inflationary floor" that set a "new minimum punishment applicable to the so-called 'best' offender whose conduct is caught by those provisions", and elaborated:
- [75] The mandatory minimum must not become the standard sentence imposed on all but the very worst offender who has committed the offence in the very worst circumstances. The latter approach would not only defeat the intention of Parliament in enacting this particular legislation, but also offend against the general principles of sentencing designed to promote a just and fair sentencing regime and thereby advance the purposes of imposing criminal sanctions.
- [95] In *R. v. B.C.M.*, 2008 BCCA 365, Neilson J. for the Court acknowledged that although Madam Justice Arbour's reasoning in *Morrissey* was not authoritative as precedent, the sentencing judge is nonetheless entitled to adopt it as "a logical and appropriate statement of the interaction between minimum sentences and traditional sentencing principles" (at para. 31). At paragraph 32, her Ladyship echoed Arbour J.'s analysis. After referring to the decision in *Morrissey* and *B.C.M.*, the Court of Appeal in the recent decision of *Guha* concluded:
- [35] Therefore, when considering the range of possible sentences in the context of mandatory minimums and the principle of proportionality, Justice Arbour's comments in *Morrissey* at para. 76 provide some guidance:

The search for the appropriate punishment is not an abstract exercise. It is very much guided by the types of sentences that have been imposed in the past on similarly situated offenders, and because of that, it changes over time, and may come to reflect the inflationary consequences of the proper application of mandatory minimum sentences for particular types of offences.

- [96] The Ontario Court of Appeal recently discussed the harmonious interplay between a mandatory minimum sentence and consideration of the Gladue factors in *R. v. Johnson*, 2013 ONCA 177. There, the offender, Johnson, who was aboriginal, had been convicted of six weapons-related charges and was subject to an escalated mandatory minimum sentence of at least five years. He was sentenced to seven-and-a-half years for the firearms offences and various other sentences for the remaining offences.
- [97] One of the arguments advanced by defence counsel on the sentence appeal was that, in light of Mr. Johnson aboriginal status, the sentencing floor should be considered differently, arguing that to do otherwise would unjustifiably water down, if not entirely eliminate, the impact of his aboriginal status. Epstein J.A., for the Court, stated that the difficulty with the defence submission was that the five-year mandatory minimum applies to all cases including cases where s. 718.2(e) is engaged. After referring to Ipeelee, her Ladyship observed:

As the trial judge correctly recognized, his sentencing options were restricted by the fact that Johnson faced a five-year minimum prison sentence. And it was against the background of this restriction that the trial judge was obliged to consider the circumstances of the offence and the offender, including his Aboriginal status. These circumstances included the fact that the crimes for which Johnson was being sentenced were serious as was his criminal record.

- [98] I will spend a few moments explaining the difference between concurrent and consecutive sentences, to the accused. Sir, as Crown counsel's submissions reflect, because you have been convicted of multiple offences, an issue arises about whether the sentences imposed for the individual offences ought to be served concurrently, i.e. at the same time, or consecutively, i.e. after one another.
- [99] As a general rule, separate and distinct offences invite consecutive sentences. In contrast, where the offences embody a linked series of acts within a single endeavour or arise from a single criminal adventure or enterprise, they typically attract concurrent sentences: *R. v. G.P.W.* (1998), 106 BCAC 239 at 35; *R. v. Li*, 2009 BCCA 85 at 42.
- [100] In *Li*, Smith J.A. explained that whether the sentences for multiple offences are concurrent or consecutive, the sentencing judge must fix an appropriate global sentence that reflects the specific circumstances of the offences and of the offender's particular circumstances in accordance with the principle of proportionality (at 26). Where consecutive (one-after-the-other) sentences are imposed, the principle of proportionality expresses itself in the form of the totality principle. An aggregate sentence, a global sentence, may offend the totality principle if it substantially exceeds the normal range of sentence of the most serious of the offences involved or is otherwise unduly harsh or is crushing or exceeds the overall

culpability of the offender: Li at para. 27, quoting *R. v. C.A.M.* (1996), 105 C.C.C. (3d) 327 (S.C.C.).

[101] The methodology to be employed by the sentencing judge was summarized by Smith J.A. in Li and was recently endorsed by the Court of Appeal in *R. v. Nagy*, 2013 BCCA 419. At para. 28 Smith J. A. explained:

Thus, there is a two-stage approach to sentencing an offender convicted of multiple offences. The first stage is to determine the appropriate sentence for each offence, and decide whether the individual sentences should be made consecutive or concurrent. If consecutive sentences are imposed, then the second stage is to determine whether the sentences, in the aggregate, offend the totality principle. If the sentence, as a whole, is unduly harsh or disproportionate, then the length of the individual sentences should be adjusted in order to arrive at an appropriate global sentence ...

[102] Mr. Boland for the Crown provided case law decided when the mandatory minimum sentence for offences under s. 95(1) was one year, as well as authorities that came after the 2008 amendment where the minimum sentence was increased to three years. The sentences imposed in those cases, particularly in those decided after the 2008 amendment, range from four to seven years. The aggravating factors were more severe and the other pertinent surrounding circumstances I found not sufficiently comparable to the case at hand in the cases where the sentences fell at the higher end of the range.

[103] For example, in *Sanghera*, supra, two of three accused were in possession of three loaded guns with many rounds of ammunition, including a round in the chamber, which were concealed in a motor vehicle and transported through public streets. Two of those guns had the serial numbers completely or partly obliterated. As well, one of the accused had a recent similar conviction for possessing a prohibited firearm and had been subject to a 10-year firearms prohibition order.

[104] In *R. v. Brown*, 2011 BCSC 1544, the accused pled guilty to possession for the purpose of trafficking methamphetamine and possession of a unloaded firearm with ammunition contrary to s. 95(1). A joint submission for the imposition of a sentence of 6.5 years was accepted. It is important to note, however, that counsel agreed that when Mr. Brown's plea was taken, it was to be assumed that the Crown had proceeded summarily on the weapons offence. In the result, Mr. Brown was not subjected to a mandatory minimum sentence and so he was given 5.5 years on the drug offence, and only one year on the firearms offence to be served consecutively, less the credit he had earned for time served.

[105] For the most part, the sentencing authorities provided by the accused's counsel iterated statements of general sentencing principles that he contends are applicable in this case and do not speak to the range of fit sentence in respect of the accused's offences. That said, defence counsel did direct me to the recent decision of our Court of Appeal in *R. v. Borecky*, 2013 BCCA 163.

- [106] Mr. Borecky was convicted of three counts of possession of heroin, cocaine, and methamphetamine, respectively, for the purpose of trafficking, and 13 counts related to the possession of firearms, ammunition, and a restricted device. One of the offences for which he was convicted was possession of a firearm with readily accessible ammunition contrary to s. 95(1). The sentencing judge treated the firearms and prohibited devices offences in connection with the drugs as an aggravating factor to the drug offences. He reasoned that the drugs and firearm offences (other than one of the counts) were part of a linked series of acts within a single endeavour that warranted concurrent sentences. Mr. Borecky was sentenced to three years on each of the three drug charges to run concurrently, effective sentences of four years on some of the weapons counts, and effective sentences of two years on several other of the weapons offences, all of which were to run concurrent with each other and with the drug offence sentences.
- [107] The Crown appealed arguing that certain of the sentences ought to have been imposed consecutively. The Court of Appeal pointed out that Parliament did not intend the imposition of mandatory consecutive sentences for all offences involving the possession of firearms and possession of drugs for the purpose of trafficking and that the case law did not mandate consecutive sentences where an offender is convicted of both types of charges. Endorsing decisions of the Ontario Court of Appeal, the Court in *Borecky* also noted that the simple fact that offences are connected in time does not sufficiently ground concurrent sentences if the offences constitute "an invasion of different legally protected interests" (at 21).
- [108] The Court was not persuaded that the imposition of concurrent sentences for Mr. Borecky's drugs and weapon charges amounted to reversible error and did not disturb the sentence imposed for the weapons offences. However, the sentence for the drug offences was found to fall outside the range for an individual with Mr. Borecky's record and the circumstances of the offences. The Court determined that the appropriate sentence for the drug offences, absent their combination with the weapons and ammunition, was at least five years. It concluded that the sentencing judge had failed to treat the weapons and ammunition offences as aggravating factors, as he said he would, and increased the effective sentence for each of the three drug offences to seven years to be served concurrent to the others.
- [109] It is notable, as well, that in *Borecky*, the Court concluded that there was no proper evidentiary basis to realistically anticipate that Mr. Borecky was likely to change his criminal lifestyle and become rehabilitated, and that the sentencing judge's conclusion that there was potential for his rehabilitation was unfounded and amounted to an error of law.
- [110] Also placed before me by defence counsel is the case of *R. v. Loring*, 2009 BCCA 166. *Loring* is instructive of the fitness of sentences in relation to the careless use of a firearm and possession of a weapon for a purpose dangerous to the public peace. Mr. Loring, an aboriginal offender, in a time of anger and intoxication, used a six-foot-long muffler pipe to break down a door of a home in a search to find another man. There, he got involved with yet a different individual. He left and went to the home of his mother where he picked up a

rifle and walked back to that home intending to confront the individual he was looking for with it. As he approached the house, he fired the rifle into the air toward a non-residential hill. The RCMP found Mr. Loring hiding in some bush behind a neighbouring house with one spent cartridge and an unspent bullet in his pocket; the rifle contained four bullets in the magazine.

- [111] The Court of Appeal concluded that the positive steps taken by Mr. Loring after the commission of those offences indicated that his rehabilitation ought to play an equal role with the objective of denunciation. It considered the global sentence of two years less a day, which had been imposed by the sentencing judge, to be unfit and imposed a sentence of nine months concurrent in respect of the two weapons offences and on the separate charge of breaking and entering and assault, coupled with an extended period of probation of two years.
- [112] Neither counsel provided case law relative to the appropriate range of sentence of the other offences.
- [113] In my view, the Gladue factors are not neutral in the accused's case, as was urged by the Crown. He suffered a miserable upbringing punctuated by chronic parental alcohol abuse and physical violence aimed at himself, his little siblings, and his mother perpetrated by a father figure. He also witnessed his own mother attack his stepfather from time to time. The circle of violence saw police attending with some regularity. In his formative years, the accused was teased by his peers about his aboriginal heritage and grew to be ashamed of his ancestry. His own great-grandmother encouraged him to deny his heritage. The abusive and unstable household resulted in his removal from the home and placement into a series of foster homes where those in charge could not care less whether he attended school. He ended up in a group home and was exposed to other disenfranchised teens. The confluence of all of these disturbing factors contributed to his own troubled teen years and brushes with the law as a youth. He was expelled from school and, not surprisingly, starting in his late teens began to misuse alcohol and take drugs.
- [114] The accused strikes me as an intelligent man. Given his aptitude for hard work and talent in the construction industry, he was able to secure and maintain a well-paying job and move up the ranks of employment to attain a managerial position. He had established a spousal relationship and has children, although at a very young age. Despite those successes, he has not been able to control or overcome his alcohol misuse and consumption of illicit drugs or occasional minor criminal conduct, all of which were part of a self-destructive pattern that had taken form early in his life and remained very much part of his life at the time he committed these offences.
- [115] It is true that the accused's upbringing was not marked by the appalling degree of chronic abuse, squalor, and disadvantage that tragically still permeates too many persons of aboriginal heritage in this country. That said, the fact remains that the instability of his home life, the abuse and disadvantages he did face are typical of the systemic and

background factors that have plagued generations of aboriginal people. I find those factors contributed to the accused coming before this Court in respect of these charges and shed light on his moral blameworthiness and serve to reduce somewhat his overall culpability. I must acknowledge, however, that the accused does not qualify as the least culpable offender and, therefore, is not entitled to a sentence that reflects the three-year minimum.

- [116] I accept as accurate Crown counsel's articulation of the aggravating factors that I referred to earlier.
- [117] There are also mitigating circumstances.
- [118] The accused is still a relatively young man. He has made substantial admissions in the trial. He spent a portion of his pre-sentencing custody in a restrictive remand unit. These are the first weapons-related offences for the accused and the first drug production conviction. His criminal history does not indicate that he is committed to a life of crime. He has taken several substantive steps in a genuine effort to improve himself, to turn things around, on several fronts and he is young enough and capable enough to do that. The prospect for his rehabilitation looms large in this case.
- [119] The objective of denunciation and deterrence are key with regard to the weapons offences, particularly, but they must not be overly emphasized in a way that would undermine the accused's demonstrated progression toward rehabilitation.
- [120] Balancing the sentencing principles, including those captured in 718.2(e) as explained in Gladue and its judicial lineage, I conclude that a sentence of incarceration in respect of the accused's offence under s. 95(1) at the lower end of the range followed by a period of probation would be a fit and proper sentence and give appropriate weight to the essential objectives of denunciation and deterrence, without undermining the objective of his rehabilitation.
- [121] There was no explanation given for the accused's possession of the handgun. The proven facts support the inference that his decision to have it in his home was a considered one and not a fleeting possession and was connected to the operation of a small-time grow-op. The possession of the handgun and the drug offences, in my view, are linked within a single criminal endeavour and they attract concurrent sentences. The careless use of that handgun and its possession for a dangerous purpose as well as the mischief are together acts within a single criminal endeavour. They are factually distinct, however, from the other charges. I agree with Crown counsel's characterization of the accused's discharge of the handgun in the circumstances to be very grave and of deep concern.
- [122] It is my view that the sentences for the careless use of the handgun and possession of it for a purpose dangerous to the public and the mischief charge ought to be consecutive to the sentences imposed in respect of the offence under s. 95(1) and the drug offences under the CDSA, but concurrent to each other. Accordingly, some of the sentences I am about to impose will be served consecutively to others. In imposing them and the other sentences, I

have considered the totality principle and I have concluded that in each case, in all of the circumstances, the combined sentence is justified.

[123] D.K.D.B., I would ask you to stand.

[124] Sir, on Count 1, you are sentenced to three years and six months imprisonment, plus probation for a period of 18 months.

[125] On Count 2, you are sentenced to seven months imprisonment consecutive to Count 1.

[126] On Count 3, I sentence you to seven months imprisonment consecutive to Count 1, but concurrent to Count 2.

[127] On Count 6, you are sentenced to seven months imprisonment consecutive to Count 1, but concurrent to Counts 2 and 3.

[128] On Count 7, I sentence you to six months imprisonment concurrent to all of the other charges, and on Count 8, I sentence you to six months imprisonment concurrent to all of the other charges.

[129] D.K.D.B., you have been in custody for 591 days including today. Of that, you served 30 days in respect of your breach of the peace bond and I have already noted you will not be credited for that time in relation to these offences. So deducting those 30 days from the total of 591 leaves 561 days for which you will receive double credit. That calculation results in a credit of three years and one month. In the result, you are sentenced to serve an additional one year.

[130] The conditions of your probation are as follows:

- Keep the peace and be of good behaviour;
- Report to the Court when you are required to do so;
- Report to a probation officer within 48 hours of your release from custody and, thereafter, as and when required by the officer and in the manner directed by the officer;
- Take all reasonable steps to seek and maintain employment and/or pursue more schooling to the satisfaction of and under the direction of the probation officer;
- You will provide the officer with your residential address promptly and notify the officer in advance of any change of your name or your address and promptly notify the probation officer of any change of employment or occupation;
- You will have no contact directly or indirectly with Mr. or Ms. D. or Mr. S., and you will not attend any residence or place of the employment known by you to be occupied by any of them; and
- You will attend for and successfully complete any counselling as directed by the probation officer, or recovery program, including substance abuse counselling or programs.

[131] I am satisfied that paying the sum of \$500 in restitution is a legitimate aspect of your rehabilitation. I therefore order you pay that restitution within the duration of your probation order. You will have that length of time to do so. I have considered the applicable criteria in the Code with respect to a discretionary DNA order and conclude that such an order should be made by requiring the accused to provide a sample of bodily substance as is reasonably suitable for DNA analysis.

[132] Finally, I also order the mandatory 10-year firearm prohibition pursuant to s. 109(2)(b).

[133] You may be seated, sir.

[134] Is there anything else that needs to be addressed?

[DISCUSSION RE PROBATION ORDER]

[135] THE COURT: The intention of the sentence is that with regard to Count 1, I am ordering five months additional custody, having taken the credit of time served of three years and one month into account. To this sentence, I am attaching a probation of 18 months.

[136] MR. BAGNALL: Thank you.

[137] THE COURT: Does that clarify it better?

[138] MR. BAGNALL: I think it does and I do not think there will be any difficulty unless -

[139] MR. BOLAND: I do not have any difficulty with that at all, My Lady. There is just one point of clarification -

[140] THE COURT: Yes.

[141] MR. BOLAND: - I did not quite catch. I am sorry. With regards to the \$500 restitution order, is that part of the probation or is that a standalone?

[142] THE COURT: I thought it should be part of the probation and my thinking there was I am giving the accused time to get a job, reintegrate, get that money together. He certainly does not have any - there is no evidence of any money that he can access and I would rather him have that time.

[143] MR. BOLAND: Yes, My Lady, I do not take any issue with any of that. It is just if it is going to be part of the probation order, and perhaps you said this and I just missed it, but I would respectfully suggest, then, that there ought to be, perhaps by the 16 months or something like that, an end date when the restitution is to be paid, otherwise it becomes the type of thing where if nothing is paid, it becomes difficult for the Crown because the probation runs out.

[144] MR. BAGNALL: It is unenforceable. I think that is where my friend is going.

[FURTHER DISCUSSION ABOUT DEADLINE FOR PAYMENT]

[145] THE COURT: I will impose a date, a deadline of the day before the expiration of the 18 months of probation.

[146] MR. BAGNALL: Thank you.

[147] MR. BOLAND: Thank you, My Lady.

[148] MR. BAGNALL: The only other issue that I - I think I may have missed this, was to whom is it payable? It is payable to Mr. D. or should it be payable to the probation officer or to the court?

[149] THE COURT: I think to Mr. D.

[150] MR. BAGNALL: Okay. My friend and I have some comment about facilitating the payment because they are not to have contact, so.

[151] MR. BOLAND: My Lady, sorry, I do not mean to keep everyone here on the nuts and bolts of things, but with regards to the restitution order, it is paid to the court, then it is - Mr. D. has the - I can contact him, provide him with the case number -

[152] THE COURT: Oh, and he has the ability to access it then?

[153] MR. BOLAND: Yes, exactly, and that way it takes out any - it does not involve anyone else as a potential middleman, so to speak, between the accused and Mr. D.

[154] THE COURT: Well, that is cleaner.

[155] MR. BOLAND: Yes, and it is -

[156] THE COURT: So how will Mr. D. know?

[157] MR. BOLAND: Basically, he can call up and ask if any restitution has been paid. do not want to oversimplify it, but an oversimplified way of saying it, it is almost like a trust account where he can call up and say, "Is there anything in there yet," and if there is, then it is payable to him and if there is not, then he could just call later.

[158] THE COURT: How will he be aware that I have made this order today?

[159] MR. BOLAND: I have the witness' contact order. I will also be informing them of the existence of the no-contact order and the result of the sentence, so.

[160] THE COURT: Yes.

[161] MR. BOLAND: Also, it is my understanding it is standing operating procedure for victim services of the RCMP, is that they also contact the victims to let them know the results in case there are instances where the Crown have forgot to do so.

[162] THE COURT: Okay.

[163] MR. BOLAND: So we do have a two-step check for that.

- [164] THE COURT: Well, that is illuminating, thank you. So payable to the Court, then, and Mr. D. can access it. My intention is that it go to him.
- [165] MR. BAGNALL: Yes. Yes.
- [166] MR. BOLAND: Thank you, My Lady.
- [167] THE COURT: Anything further?
- [168] MR. BAGNALL: No, thank you, My Lady.
- [169] THE CLERK: My Lady?
- [170] THE COURT: Yes.
- [171] THE CLERK: May I just ask two things? The victim fine surcharge is that to be -
- [172] THE COURT: Waived.
- [173] THE CLERK: All right.
- [174] MR. BAGNALL: I would encourage it, but I think Your Ladyship is already there, to waive the victim fine surcharge, I mean.
- [175] THE COURT: Yes. Yes.
- [176] MR. BOLAND: I have no submissions.
- [177] THE COURT: Yes, I am waiving that surcharge.
- [178] MR. BAGNALL: Thank you.
- [179] THE COURT: You said you had two questions.
- [180] THE CLERK: The second question is about the DNA order, is it primary or secondary?
- [181] THE COURT: Secondary.

__ "Ballance J." ____

Ballance J.

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