

CANADA / JUDGMENT

R. v. Dingwall

2018 BCSC 1041

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2018 BCSC 1041 R. v. Dingwall

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Dingwall,

2018 BCSC 1041

Date: 20180608

Docket: 44239

Registry: Prince George

Between:

Regina

v.

Meranda Leigh Dingwall,

Kelly Michael Richet and Christopher Ryan Russell

Before: The Honourable Mr. Justice Abrioux

Oral Reasons for Judgment Re: Kienapple, Minimum Sentence and Sentence of Meranda Leigh Dingwall

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Place and Date of Hearing:

Prince George, B.C.

March 6 - 7, 2018

Place and Date of Judgment:

Prince George, B.C.

June 8, 2018

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I: INTRODUCTION

- [1] I intend to issue these reasons in writing in due course. In delivering these oral reasons I will not cite or summarize all the paragraphs in the various authorities to which I refer, but will do so in the written reasons.
- [2] Meranda Dingwall, Kelly Richet and Christopher Russell were charged on a 19 count Indictment with certain offences pursuant to the Criminal Code, R.S.C. 1985, c. C-46 [Criminal Code], which related to a drive-by shooting that occurred in Mackenzie, British Columbia in the early hours of July 7, 2016.
- [3] The offences included:
- (a) Counts 1 and 2: attempted murder of Michael Matson ("Matson") and Lyle Suter ("Suter");
 - (b) Counts 3 and 4: discharging a firearm at Matson and Suter with intent to wound, maim or disfigure;
 - (c) Count 5: intentionally discharging a firearm while being reckless as to the life or safety of another person;
 - (d) Count 6: committing the aggravated assault of Suter;
 - (e) Counts 7 and 8: possessing a loaded prohibited or restricted firearm without being the holder of an authorization or a licence and possessing a prohibited firearm, restricted firearm or non-restricted firearm knowing they were not the holder of a license or a registration certificate;
 - (f) Counts 9 and 10: causing mischief to private property, being a motor vehicle, the property of Debra Eagle ("Eagle"), and intentionally or recklessly causing damage by fire to that motor vehicle;
 - (g) Count 11: carrying or having in their possession a weapon for a purpose dangerous to the public peace or for the purpose of committing an offence;
 - (h) Count 12: storing a firearm contrary to a regulation under the Firearms Act, S.C. 1995, c. 39;
 - (i) Counts 14, 16 and 18: possessing a firearm while prohibited from doing so; and
 - (j) Counts 15, 17 and 19: possessing ammunition while prohibited from doing so.
- [4] The trial took place over a period of 10 days in June and July 2017.

- [5] At the commencement of the trial, the Crown stayed Counts 1 and 2, which relate to the offence of attempted murder in relation to all three of the accused. At the conclusion of the Crown's case, it also stayed the counts relating to the offences of possession of ammunition in relation to all three of the accused, being Counts 15, 17 and 19.
- [6] In reasons for judgement which are indexed at 2017 BCSC 1457 (the "Trial Reasons"), I found the accused guilty either as principals and/or aiders and abettors of:
- (a) Counts 3 and 4 (s. 244(1) - discharging a firearm with intent to wound, maim or disfigure);
 - (b) Count 5 (s. 244.2(1)(b) - recklessly discharging a firearm);
 - (c) Count 6 (s. 268 - aggravated assault);
 - (d) Count 7 (s. 95 - unlawful possession of a loaded, restricted or prohibited firearm);
 - (e) Count 8 (s. 92(1) - unlawful possession of a restricted or prohibited firearm);
 - (f) Count 9 (s. 430(1)(a) - mischief);
 - (g) Count 10 (s. 434 - arson);
 - (h) Count 11 (s. 88 - possession of a weapon for a dangerous purpose);
 - (i) Count 12 (s. 86(2) - storage contrary to regulation); and
 - (j) Count 16 (s. 117.01(1) - possession of firearm contrary to order).
- [7] Count 13 of the Indictment also charged that contrary to s. 145(3) of the Criminal Code, Ms. Dingwall, having been released on an undertaking pursuant to s. 515 did fail to comply with that undertaking or recognizance in that she had contact with Mr. Richet. Prior to the conclusion of the Crown's case, Ms. Dingwall entered a plea of guilty to this count.
- [8] These reasons for judgement relate to three issues:
- (a) the application of the principles in *R. v. Kienapple*, [1975] 1 S.C.R. 729;
 - (b) Ms. Dingwall's constitutional challenge to the mandatory minimum sentences in ss. 244(2)(a)(i) and 244.2(3)(a)(i) of the Criminal Code; and
 - (c) Ms. Dingwall's sentence.

II: APPLICATION OF KIENAPPLE

- [9] The principles underlying the rule in *Kienapple* were summarized by Madam Justice Bennett in *R. v. Heaney*, 2013 BCCA 177 at paras. 18-26:

- [18] In *Prince*, Dickson C.J.C. articulated the rationale behind the rule, which had been animating the decisions of courts even before *Kienapple*. In his view, the law seeks to ensure that "multiple convictions are not without good reason heaped on an accused in respect of a single criminal delict" (at 42). He made it clear that *Kienapple* was not referring to the same "offence", which would require precise correspondence, but whether the "same 'cause', 'matter' or 'delict' was the foundation for both charges" (at 42).
- [19] He determined that there had to be both a factual and a legal nexus between the charges in order for the *Kienapple* principle to apply (at 46).

Factual nexus

- [20] The question of whether the same act is the basis for each of the charges is usually a straightforward question: for example, in *Kienapple*, the accused was charged with rape and having sexual intercourse with a female under the age of 14 years, relating to the identical act.
- [21] However, there are, as Dickson C.J.C. noted, "peculiar problems" with "continuing offences". The Chief Justice subsequently set out certain factors to consider where there is more than one act, as there is in the case at bar. At 44, he said the following:

Such difficulties will have to be resolved on an individual basis as cases arise, having regard to factors such as the remoteness or proximity of the events in time and place, the presence or absence of relevant intervening events

Legal nexus

- [22] However, simply having the same act or transaction underlying more than one offence is not sufficient; there must also be a legal nexus between the offences. The offences must involve the same "matter" or "delict". Thus, it is common for a person to be convicted of more than one offence when there is only one act.
- [23] In determining whether the *Kienapple* principle applies, the focus is not on common elements between the offences, but whether there are any additional or distinguishing elements.
- [24] In *R. v. Andrew* (1990), 57 C.C.C. (3d) 301 (B.C.C.A.), Mr. Justice Lambert, for a five-judge panel of this Court, analyzed the decision of Dickson C.J.C. in *Prince*, and extracted four clear "keys" to when there is an additional, distinct element and when the *Kienapple* principle will apply. At 306, Lambert J.A. summarized these "keys" as follows:
1. Where the offences are of unequal gravity, *Kienapple* may bar a conviction for a lesser offence, notwithstanding that there are additional elements in the greater offence for which a conviction has been registered, provided that there are no distinct additional elements in the lesser offence (*Prince*, p. 49).

2. Where an element of one offence is a particularization of essentially the same element in the other offence (Prince, p. 50).
 3. Where there is more than one method, embodied in more than one offence, to prove a single criminal act (Prince, p. 50, but I have used "criminal act" instead of "delict").
 4. Where Parliament has deemed a particular element to be satisfied on proof of another element (Prince, p. 51).
- [25] Put simply, the Kienapple principle will apply when "the offences charged do not describe different criminal wrongs, but instead describe different ways of committing the same criminal wrong" (R.K. at para. 37).
- [26] Chief Justice Dickson in Prince articulated three factors that will defeat a claim that different offences have the legal nexus to warrant the application of Kienapple (at 51-54). In R.K., Doherty J.A. summarized these factors at para. 38. First, where the offences are designed to protect different societal interests, convictions for both offences will not offend the Kienapple rule. Second, where the offences concern violence against different victims, Kienapple will not foreclose convictions for offences relating to each victim. Third, where the offences proscribe different consequences, Kienapple will not bar multiple convictions. These factors, however, remain subject to Parliament, which, if it so chose, and clearly imparted, could create two separate offences out of the same wrong.
- [10] In its written submission the Crown submits that the effect of Kienapple is that conditional stays should be entered with respect to Counts 8 and 9 for the following reasons:
- a) Count 8 (s. 92(1) - possession of a restricted firearm without a license) is Kienapple as a lesser included offence of Count 7 (s. 95 - possession of a loaded restricted firearm without a license).
 - b) Count 9 (s. 430(1)(a) - mischief) is Kienapple by Count 10 (s. 434 - arson).
- [11] The Crown submits that Kienapple does not apply to the convictions for s. 244(1) and s. 244.2(1)(b) because a factual nexus is not present. The convictions for s. 244(1) (discharge of a firearm with intent), are particularized with regards to Suter, the injured man, and Matson, the owner of the residence. The conviction for s. 244.2(1)(b) relates to the third person observed by the eye witness, Mr. Harju, on the front lawn of 221 Crysedale Drive, Mackenzie, B.C.
- [12] The Crown notes that at paragraph 59 of the Trial Reasons, the evidence is summarized as follows:

That person then raised a handgun and shot three to four times towards the residence and the three people on the front lawn.

- [13] Counsel for Ms. Dingwall, Mr. Gilson, acknowledged that "there was a route" to the Crown's submission. Counsel for Mr. Richet, supported by counsel for Mr. Russell argued that Counts 3 and 4 should also be subject to Kienapple since, based on Mr. Harju's evidence, there could not be both intent and recklessness. This reasoning should also result in a conditional stay on Count 5.
- [14] I agree with the Crown. Based on Mr. Harju's evidence and my findings of fact that the shots were fired in the direction of Matson, Suter and an unidentified woman who then fled into the residence, I conclude that there exists a factual nexus to recklessness--the action of firing at the group--which was separate from the intent with regard to firing at Suter, who was in fact wounded.
- [15] Accordingly, there will be conditional stays entered with respect to Counts 8 and 9 in relation to all three accused.

III: CONSTITUTIONAL CHALLENGE TO THE MANDATORY MINIMUM SENTENCES IN ss. 244(2)(a) (i) and 244.2(3)(a)(i) of the CRIMINAL CODE

A: Relevant Provisions of the Criminal Code

- [16] Ms. Dingwall was convicted of two counts of discharging a firearm with intent to wound, maim or disfigure contrary to s. 244(1) of the Criminal Code, and one count of recklessly discharging a firearm contrary to s. 244.2(1)(b).
- [17] Section 244 of the Criminal Code provides:

Discharging firearm with intent

244 (1) Every person commits an offence who discharges a firearm at a person with intent to wound, maim or disfigure, to endanger the life of or to prevent the arrest or detention of any person -- whether or not that person is the one at whom the firearm is discharged.

Punishment

- (2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable
- (a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for a term not exceeding 14 years and to a minimum punishment of imprisonment for a term of
- (i) in the case of a first offence, five years

[18] Section 244.2 provides:

Discharging firearm -- recklessness

244.2 (1) Every person commits an offence

I.

II. (b) who intentionally discharges a firearm while being reckless as to the life or safety of another person.

Punishment

- (3) Every person who commits an offence under subsection (1) is guilty of an indictable offence and
 - (a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if the offence is committed for the benefit of, at the direction of or in association with a criminal organization, is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of
 - (i) five years, in the case of a first offence

[19] The mandatory minimums at issue are established by ss. 244(2)(a)(i) and 244.2(3)(a)(i) for a first offence, being 5 years imprisonment respectively.

B: The Legal Framework - Section 12 of the Charter

[20] The foundation of Ms. Dingwall's constitutional challenge is s. 12 of the Canadian Charter of Rights and Freedoms, which provides:

Everyone has the right not to be subjected to any cruel or unusual treatment or punishment.

[21] The Supreme Court of Canada has examined the protection afforded by s. 12 in a number of cases involving mandatory minimum sentences, including *R. v. Morrissey*, 2000 SCC 39; *R. v. Ferguson*, 2008 SCC 6; *R. v. Nur*, 2015 SCC 15; and *R. v. Lloyd*, 2016 SCC 13. Given this level of judicial consideration, the legal framework to be applied when an accused challenges a mandatory minimum sentence is well established.

[22] The bar is high for an offender to establish that a mandatory minimum sentence constitutes cruel and unusual punishment. A sentence must be grossly disproportionate to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender. A provision will offend s. 12 if it imposes a grossly disproportionate sentence on the individual before the court, or if it is reasonably foreseeable application will impose grossly disproportionate sentences on others: *Nur* at para. 39; *Lloyd* at para. 22.

[23] For a sentence to be grossly disproportionate it must be more than merely excessive. The question is whether the sentence is "so excessive as to outrage standards of decency" and "abhorrent or intolerable" to society: *Morrissey* at para. 26; *Lloyd* at para. 24.

- [24] A challenge to a mandatory minimum sentence involves two steps. First, the court must determine what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the Criminal Code. This does not involve identifying an exact sentence or sentencing range, but the rough scale of the appropriate sentence should be considered. Second, the court must ask whether the applicable mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the offence and its circumstances: Lloyd at para. 23.
- [25] With respect to the first step, a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. In determining what constitutes a proportionate sentence, judicial discretion is informed by the principles found in s. 718 of the Criminal Code, which I shall not repeat in these reasons.
- [26] In addition to these principles, a sentencing judge must have regard to the additional sentencing principles listed in s. 718.2 of the Criminal Code, including any aggravating and mitigating factors; the principle that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; the principle that where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh; and the principle that courts should exercise restraint in imposing imprisonment: Nur at para. 41.
- [27] As evidenced by the number of competing considerations, imposing a proportionate sentence is a highly individualized and discretionary exercise. Mandatory minimum sentences, by their very nature, have the potential to depart from the principles of proportionality in sentencing because they "emphasize denunciation, general deterrence and retribution", and inherently alter the normal judicial process of sentencing: Nur at para. 44.
- [28] With respect to the second step, the Supreme Court of Canada has identified a non-exhaustive list of factors to be considered when assessing whether or not a mandatory minimum sentence is grossly disproportionate and amounts to cruel or unusual punishment. These include the gravity of the offence; the particular circumstances of the offender and the case; the actual effect of the punishment on the offender; the penological goals and sentencing principles that underlie the mandatory minimum; the existence of valid alternatives to the mandatory minimum; and a comparison of punishments imposed for similar crimes: Morrissey at paras. 35-49.
- [29] Even if a mandatory minimum sentence is not found to be grossly disproportionate in the case of the offender before the court, the court may assess other hypothetical scenarios in order to determine whether it is reasonably foreseeable that the impugned law will impose cruel and unusual punishment on others: Nur at paras. 58 and 65. An assessment of reasonably foreseeable hypotheticals must be grounded in judicial experience. Hypothetical situations that are fanciful or remote must be excluded to ensure that laws will not be set aside on the basis of mere speculation: Nur at para. 62.

- [30] When considering hypothetical scenarios, it is proper to consider previously reported cases as well as other situations that are reasonably foreseeable. Previously reported cases allow the court to assess conduct that the offence has already captured, and offer concrete examples which inform the court's perspective about the likelihood of other hypotheticals: Nur at para. 72.
- [31] Finally, it is appropriate and necessary to consider the personal characteristics of offenders when assessing reasonable hypotheticals. Personal characteristics are a central part of the judicial sentencing process and the court should only decline to consider characteristics used to construct the most innocent and sympathetic case imaginable, which inevitably results in remote or far-fetched scenarios: Nur at para. 76.
- [32] Ultimately, the assessment of reasonable hypotheticals as a whole must be grounded in experience and common sense.
- [33] If a mandatory minimum sentence is found to be grossly disproportionate with respect to the offender before the court, or on the basis of a reasonable hypothetical, the sentence is inconsistent with s. 12 of the Charter and will fall unless justified by the Crown under s. 1.

C: Considerations Specific to this Application

- [34] There are two broad themes specific to this application that inform what is a fit and proportionate sentence. The first is the fact that the offences at issue are serious firearms offences. The second is that the offender, Ms. Dingwall, possesses mitigating personal characteristics, which raises the issue of whether a long sentence is unduly harsh.
- [35] This application deals with firearms offences, specifically the serious offences detailed in ss. 244 and 244.2 involving the intentional or reckless discharge of prohibited firearms. The gravity of these offences is high. There is no question that gun crime is a matter of grave public concern, and that the danger posed by the use of firearms elevates the seriousness of the offences for the purposes of sentencing.
- [36] In *R. v. Oud*, 2016 BCCA 332, the Court was faced with a challenge to s. 244.2(3)(b), which prescribes a mandatory minimum sentence of 4 years for crimes under s. 244.2(a) or (b) that are not committed with a restricted or prohibited firearm or in association with a criminal organization. Madam Justice Saunders commented on the serious nature of firearms offences generally, and discussed the distinction between the offences detailed in s. 244.2 and the categorization and licencing scheme at issue in Nur at para. 33:
- [33] Considerable legislative attention has been directed to offences involving firearms. This attention was a response to instances of misuse of guns, some resulting in great harm. This legislative scrutiny has resulted in various prohibitions on the use of firearms, as well as a highly regulated system in which some firearms are prohibited, some are restricted, and some, such as the ones involved in this case, are subject to a less strict regulatory regime. This categorization and regulatory scheme is at the centre of s. 95 discussed in Nur. On the

other hand s. 244.2 addresses use of firearms, which I take to be qualitatively different, and of elevated concern to the public and Parliament. It addresses the physical employment of a firearm with a double mens rea requirement – intentional discharge of the firearm and knowledge or recklessness as to the presence of a person in the place fired upon.

- [35] the Minister's opening reference to "drive-by and other intentional shootings involving reckless disregard for the life and safety of others" and his closing reference to "any shooting which involves consciously reckless behaviour" demonstrates that it is all intentional discharges of firearms in situations highly dangerous to others, with knowledge or recklessness, that is targeted. [Emphasis added.]
- [37] In the recent case of *R. v. Cardinal*, 2018 NWTSC 12, Madam Justice Charbonneau found that the 5-year mandatory minimum sentence prescribed by s. 244.2(3)(a)(i) is unconstitutional, which is one of the sentences at issue in this case. In coming to this conclusion, Charbonneau J. noted the comments of the Court of Appeal in *Oud* to which I refer above, and reinforced the seriousness of the offences detailed under s. 244.2 at para. 64:
- [64] Before I turn to the analysis of the hypothetical put forward by Mr. Cardinal, I want to make certain things clear. First, I reject the notion that the offences set out at section 244.2 are defined in such a broad way as to capture conduct that is not particularly serious. I find that the requirement for recklessness combined with the requirement that a firearm be intentionally discharged makes both of these offences very serious. As was noted by the Supreme Court of Canada more than two decades ago, a firearm "presents the ultimate threat of death to those in its presence". *R v Morrissey*, para 43, quoting from *R v Felawka*, [1993] 4 S.C.R. 199.
- [38] A further consideration discussed in *Cardinal* is that concerns about the misuse of firearms are every bit as pressing in rural Canada as they are in urban areas. As stated at paras. 66-67:
- Firearms are prevalent in northern communities. They are essential tools for those who spend time out on the land hunting, fishing and trapping. They are often readily accessible in our communities. The criminal justice system's response to the misuse of firearms in this jurisdiction must be stern.
- Deterrence and denunciation must be emphasized when firearms are misused. And those objectives are at the heart of Parliament's choice to establish mandatory minimum sentences.
- [39] It is clear that denunciation and deterrence are the overriding considerations when sentencing persons convicted of firearm offences.

- [40] While the serious nature of the firearms offences at issue on this application generally suggest a longer sentence, Ms. Dingwall's personal characteristics could be seen to warrant a different approach. Bearing in mind the highly individualized approach to be followed for the purposes of sentencing, two of the most salient characteristics are the absence of a criminal record and the fact that Ms. Dingwall identifies as a member of the Saddle Lake Cree Nation.
- [41] S. 718.2 of the Criminal Code provides that an offender should not be deprived of liberty if less restrictive sanctions may be appropriate under the circumstances, and requires a sentencing judge to pay particular attention to the special circumstances of Aboriginal offenders.
- [42] The unique approach judges must take when sentencing Aboriginal offenders is set out in *R. v. Gladue*, [1999] 1 S.C.R. 688, and *R. v. Ipeelee*, 2012 SCC 13. The court in *Ipeelee* described the Gladue principles and their justification at paras. 72-73, to which I shall return later in these reasons.
- [43] No causal link is required between the offender's Aboriginal background and the offence in order for the Gladue principles to apply: *R. v. J.L.M.*, 2017 BCCA 258 at para 38, leave to appeal ref'd 2018WL1465574 (S.C.C.).
- [44] Ms. Dingwall has pointed to a number of the same realities that are discussed in *J.L.M.* These are explored in further detail later in these reasons, but they suggest the fit and proportionate sentence is arguably below that of the five-year mandatory minimums prescribed by ss. 244(2)(a)(i) and 244.2(3)(a)(i).

D: Discussion

- (i) What is the appropriate sentence? - The "particularized inquiry"

[45] The first task is to determine the fit and proportionate sentence for Ms. Dingwall.

[46] The aggravating factors in this case include the following:

- Residential Neighbourhood - The evidence at trial established that the shooting occurred in a residential neighbourhood in a small town. This raises additional public safety concerns.
- Early Morning Hours - The shooting took place in the early morning hours (approximately 4:00 a.m.) when people could reasonably be expected to be inside their residences.
- Occupied Dwelling House - The evidence at trial established that the dwelling house was occupied by at least one other sleeping person. Several bullets penetrated the exterior of the dwelling house and were located within the dwelling house.
- Multiple Shots Fired and Multiple Potential Victims - The evidence at trial established that four bullets were recovered. Lyle Suter, Michael Matson, and a third person were present on the front lawn for the shooting. Fortunately, only Lyle Suter sustained physical injury.

- Evidence of Planning - The evidence at trial established that Ms. Dingwall, Mr. Richet, and Mr. Russell were residents of Prince George. The shooter emerged from a vehicle stolen in Prince George, approximately a two-hour drive from the location of the shooting in Mackenzie. Ms. Dingwall waited in a nearby get-away vehicle to facilitate the escape. There is no evidence of impulsivity as the offences do not appear to have occurred out of anger in response to an immediate insult.
- No Serial Number - The serial number of the handgun was removed.
- Disposal of the Firearm - The restricted handgun used in the offence was disposed of along the side of a road accessing a logging cut-block. Ammunition was readily accessible. The handgun could have been located by an unsuspecting member of the public.
- Subject to Court Orders - Ms. Dingwall was subject to a Recognizance of Bail with conditions to keep the peace and be of good behaviour, not to have contact with Mr. Richet, and not to possess weapons.

[47] The following are mitigating factors:

- The lack of a criminal record.
- Age - Ms. Dingwall was 24 at the time of the offence.
- Gladue factors - Ms. Dingwall's maternal grandmother went through the residential school system and there are significant substance abuse issues in Ms. Dingwall's mother's side of the family. Substance abuse appears to have played a role in Ms. Dingwall's relationship to her co-accused, Kelly Richet, and may have contributed to her role in the offence. Ms. Dingwall stated in the Pre-Sentence Report that she is open to Aboriginal Justice Sanctions and/or programming.
- Rehabilitation prospects - Ms. Dingwall enjoys the support of her family. The Pre-Sentence Report is positive. Addiction issues are identified and Ms. Dingwall appears very willing to undertake rehabilitation efforts.
- Remorse - Ms. Dingwall is remorseful for her actions and has empathy for the victim as indicated in the Pre-Sentence Report.
- Statements of Support - There were many statements of support and character references which were submitted on Ms. Dingwall's behalf which speak to her character, her history of substance abuse and her remorse for her involvement in the events in question. Ms. Dingwall also provided her own statement to this effect, which I accept as being genuine.

[48] Defence counsel submitted that based on the various Gladue factors and the fact that Ms. Dingwall was convicted as an aider or abettor with respect to the firearms offences, the appropriate sentence is 18 months to 2 years. The court was referred to no legal authorities which could provide the basis for such an argument.

[49] The Crown referred to the following examples of convictions under ss. 244 (discharging a firearm with intent) and 244.2 (recklessly discharging a firearm), which I would summarize as follows:

R. v. Seymour, 2011 BCSC 1682 - 6 year sentence for an offence under s. 244(1). The offender discharged a restricted firearm near a busy intersection in downtown Victoria. He was 21 years old, came from a dysfunctional family, had a history of drug and alcohol abuse, and had a lengthy criminal record. He was bound by firearms prohibitions and was on probation at the time of the offence. R. v. Lyta, 2013 NUCA 10 - the Nunavut Court of Appeal substituted a 5 year sentence for an offence under s. 244.2(1)(a) in place of the 4 year mandatory minimum prescribed by s. 244.2(3)(b). The offender fired 11 shots at the house of an RCMP officer in Kimmirut, then surrendered and pled guilty. He was 22 years old, Aboriginal, and had a minor criminal record. He submitted, and it was generally accepted, that he did not specifically intend to hurt anyone, but was drunk and suicidal. R. v. Utye, 2013 NUCJ 14 - an effective 7 year sentence for an offence under s. 244.2(1)(a). The offender shot at an RCMP detachment multiple times, then took up a position on a nearby hill and continued firing. He pled guilty and expressed remorse. He was 21 years old, Aboriginal, was drunk and angry at the time, and had a prior youth record including a prior conviction for pointing a firearm. R. v. Abdullahi, 2014 ONSC 272 - 5 year sentence for an offence under s. 244.2(1)(a) in line with the mandatory minimum prescribed by s. 244.2(3)(a)(i). The offender was involved in a gunfight in an apartment complex. He brought an unsuccessful constitutional challenge to the 5-year mandatory minimum prescribed by s. 244.2(3)(a)(i), which is also at issue in this case, based primarily on his particular circumstances. An insufficient hypothetical was also advanced. R. v. Brandon Wyatt Sutherland, 2015 NSSC 354 [Brandon Wyatt] - 5-year sentence for an offence under s. 244.2(1). The offender fired through the bedroom window of a house he knew to be occupied. He was 19 and had no criminal record.

[50] Further, defence counsel raised the fact that Ms. Dingwall was convicted as an aider and abettor as an additional mitigating circumstance. While I accept that, theoretically, based on a given set of circumstances, an offender's role as an aider and abettor may be a relevant consideration in sentencing, I do not agree that Ms. Dingwall's role as an aider and abettor to the actual shooting is a mitigating factor in this case.

[51] The impact of an offender's role as an aider or abettor on sentencing was addressed by this Court in R. v. Kalmikoff, 2016 BCSC 1050, and also addressed in R. v. Hennessey, 2010 ABCA 274, and R. v. Nouri, 2015 ONSC 116.

[52] Kalmikoff involved several charges related to armed robbery, and the offender before the court was convicted as a party, not the principal. At paras. 30-32, Mr. Justice McEwan discussed the limited impact of this factor on sentencing:

[30] It is however a feature of our law that assisting in the commission of a crime or crimes makes one a party to those crimes. Ms. Kalmikoff was a participant in armed robberies carried out in a highly dangerous manner by the man she was living with. She was beginning to enjoy the things that the proceeds of crime were bringing into their home. The robberies and the car chase were not victimless: the victim impact statements bespeak traumatic experiences with ongoing consequences.

Ms. Kalmikoff's personal circumstances must be considered but it must also be remembered that, as stated in *R. v. Olsen* [1994] B.C.J. No. 1284, citing *R. v. Roberts* [1989] B.C.J. No. 1251 "it is idle to suggest that those who drive getaway cars are to be treated differently than those who enter the premises, present a weapon, and rob the storekeeper " [Emphasis added.]

[53] Hennessey involved the ambush and murder of four RCMP officers as they were executing a warrant outside Mayerthrope, Alberta. The gravity of the offences at issue was extreme.

[54] The Court of Appeal of Alberta rejected the argument that when an offender does not physically participate in the commission of a crime their role in the offence is minor, and their sentence should be commensurately short. In particular, the court relied on the following passage from *R. v. Church* (1985) 7 Cr. App. R. (S.) 370, 372, at para. 47:

each of whom in our view without one shadow of doubt played an all important part in this crime, even though one cannot pinpoint precisely what the part of each was. In our view there is no distinction in a crime of this kind to be drawn between those who actually use the violence and those who stand outside and though not using violence are ready to drive away, to kidnap, or perform whatever other task may be appropriate. If this Court or a trial judge is dealing with a case of armed robbery of a bank at gunpoint or with iron bars, or of a security van carrying large quantities of notes to a branch of a bank, it does not normally stop to consider whether a particular prisoner actually held up the cashier or held up the guard, had a gun or had an iron bar or was the driver standing outside ready to drive away. All are equally guilty because without each playing his full part the crime could not be perpetrated. [Emphasis added.]

[55] The court recognized this is not an inflexible rule of law, but rather a form of reasoning legitimate for a sentencing judge to adopt. It also accords with the reasoning in *R. v. Overacker*, 2005 ABCA 150, which emphasized the importance of assessing whether an offender who aids or abets in the commission of an offence is a trusted individual with a necessary role. It is not sufficient to simply consider an offender's physical contributions.

[56] In *Nouri*, the court addressed a situation that is somewhat similar to Ms. Dingwall's. One of the offenders played a distinct role in an armed robbery that primarily involved driving, and was a first-time offender. The court stated at paras. 30-31:

While both Mr. Ferguson and Ms Nouri were parties to the Annam robbery, they played different roles. Unlike Ferguson, Ms Nouri was not present at the time of the robbery and she did not participate in the actual theft or the violence that accompanied it. Further, Ferguson had a prior criminal record consisting of ten criminal convictions, largely for offences of dishonesty, whereas Ms Nouri is a first offender.

- [31] Although Ms Nouri was not present at the robbery, she played a central part in the planning and preparation that led up to it, she drove the principals to the scene, and she participated in the post-offence division of the spoils. In all of those respects, she played a greater role than Ferguson, whose role was principally to carry out the robbery itself. On balance, I regard her involvement to be somewhat lower on the spectrum of gravity than that of Mr. Ferguson, but not substantially lower. [Emphasis added.]
- [57] Accordingly, I conclude from these cases that although an offender's role as an aider or abettor is a relevant consideration, the extent to which it may be a mitigating factor is highly contextual and it will likely, at most, be a minor factor in the analysis.
- [58] Another factor raised by defence counsel is whether a conviction based on wilful blindness as opposed to actual knowledge is a relevant consideration on sentencing. It is submitted that wilful blindness was an essential basis for Ms. Dingwall's conviction and this fact should mitigate her sentence. I disagree.
- [59] I acknowledge that while wilful blindness may be a mitigating factor, it is not so in this case.
- [60] In *R. v. Downey*, 2017 ONCA 789, the court stated at para. 10:
- [10] It is argued on the appellant's behalf that the trial judge erred by failing to take into account what is described as a lesser form of mens rea, that being wilful blindness, as a factor in mitigation of sentence. We do not agree. The elements of the offence were made out, resulting in the appellant's conviction. In the circumstances of this case, the appellant's wilful blindness did not act as a factor in mitigation of sentence. We note that the trial judge had specific regard to the fact that the appellant was a courier and that there was an absence of evidence that she was behind the scheme to bring the guns into Canada. [Emphasis added.]
- [61] *R. v. Sidhu*, 2009 ONCA 81, involved an offender who was found to be a drug courier. The Ontario Court of Appeal rejected that wilful blindness should be a mitigating factor on sentencing and stated at para. 17:

As a matter of principle and policy, we ought not to be sending a message to would-be couriers that if they wear blinders, they will receive a lower sentence than if they actually learn the nature and quantity of the substance they are importing. In assessing degrees of moral blameworthiness, we see no meaningful distinction between the two.

- [62] This reasoning was adopted in *R. v. Smith*, 2017 BCCA 112 at paras. 29-31; and *Mohamed v. R.*, 2017 QCCA 1643 at paras. 14-17.

- [63] In any event, I do not accept that wilful blindness, as a question of law involves a lesser form of mens rea. It is the legal equivalent of actual knowledge. See *R. v. Briscoe*, 2010 SCC 13 at para. 21; and *R. v. Ible*, 2015 ABCA 363 at para. 8.
- [64] In the circumstances of this case it is clear that Ms. Dingwall:
- (a) was at or around the burn site at the relevant time the truck was set on fire and the firearm disposed of; and
 - (b) was involved with the other two offenders who were linked to the firearm and the stolen truck.
- [65] A restricted weapon was also used in the drive-by shooting.
- [66] Accordingly, whether or not Ms. Dingwall actually knew of the specifics surrounding the use of the restricted firearm in the drive-by shooting or was wilfully blind in that regard, it does not affect my conclusion on what is a fit sentence.
- [67] I now turn to the Gladue factors.
- [68] Gladue and Ipeelee provide the principles and framework for sentencing Aboriginal offenders. See, in particular, Gladue at paragraphs 33, 75 and 80-81.
- [69] The Gladue framework for sentencing an Aboriginal offender requires that the court consider:
- (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts (Ipeelee at para. 73);
 - (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection (Gladue at para 66); and
 - (c) the significance of community in determining the appropriate sentencing principles (Gladue at paras. 77-78).
- [70] In Ipeelee at para. 75, the court makes it clear that "section 718.2(e) does not create a race-based discount on sentencing". Nor is there an automatic reduction in sentence. In fact, the Aboriginal offenders in somewhat similar cases such as *R. v. Lyta* and *R. v. Utye* did not have their sentences reduced at all, and one was increased. Those cases involved more impactful Gladue factors such as residence in isolated northern communities, but also involved serious attacks against the RCMP.
- [71] This simply reinforces the contextual approach described in *R. v. Nasogaluak*, 2010 SCC 6 at para. 43:

No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case. The relative importance of any mitigating or aggravating factors will then push the sentence up or

down the scale of appropriate sentences for similar offences. The judge's discretion to decide on the particular blend of sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines and principles in the Code and in the case law. [Emphasis added.]

[72] Accordingly, in this case, the Gladue factors are but one facet to consider within the context of other factors to which I have referred, both mitigating and aggravating, including the seriousness of the offences under ss. 244 (discharging a firearm with intent to wound, maim or disfigure) and 244.2 (recklessly discharging a firearm), which are significant aggravating factors for the reasons I have outlined.

[73] When I consider the totality of the circumstances as they relate to Ms. Dingwall, I conclude that the Gladue factors play a minor role in determining the fit sentence for the firearm offences which form the basis of this constitutional challenge.

[74] When I apply the above legal and Gladue framework to Ms. Dingwall's personal circumstances and consider the gravity of the firearm offences in question, I conclude that Brandon Wyatt, which also involved an adult, albeit youthful, offender with no criminal record, provides a reasonable basis for determining what the upper range of a fit sentence would be in this case for the firearm offences in question; that is a term of imprisonment of 5 years.

[75] I am of the view, taking into account all the factors to which I have referred, that a fit sentence for Ms. Dingwall's convictions on Counts 3 and 4 would be four years, and six months for Count 3 with the same sentence for Count 4, that sentence to be served concurrently to Count 3. I reach a similar conclusion with respect to Count 5.

[76] It follows that this sentence would not be grossly disproportionate to the 5 year mandatory minimum as that phrase has been considered in, inter alia, *R. v. Penner*, 2017 BCSC 1688 at para 60; *R. v. McGee*, 2016 BCSC 2175, aff'd 2017 BCCA 457 at para 95; and *R. v. Dickey*, 2015 BCSC 191, aff'd 2016 BCCA 177 at para 104.

(ii) Assessment of Reasonable Hypotheticals - The "generalized inquiry"

[77] Notwithstanding my conclusion regarding a fit sentence for the firearm offences in question in this case, I must nonetheless consider the constitutional challenge from the perspective of other potential offenders, that is, reasonable hypotheticals.

[78] I would summarize the applicable principles as they pertain to this issue as follows:

- (a) hypotheticals that are fanciful or remote must be excluded to ensure laws are not set aside on the basis of mere speculation;
- (b) it is appropriate to consider previously reported cases as well as other similar situations that are reasonably foreseeable;

- (c) it is appropriate to consider the personal characteristics of the hypothetical offender so long as those characteristics are not used to construct the most innocent and sympathetic case imaginable; and
- (d) ultimately, the assessment of reasonable hypotheticals is grounded in experience and common sense: Nur at paras. 62-76.

[79] Insofar as this case is concerned there are two main hypotheticals to consider.

[80] One hypothetical advanced by defence counsel is somewhat modeled on Ms. Dingwall's circumstances (the "Dingwall Hypothetical"):

A young Aboriginal female with no criminal record is asked by her boyfriend to "pick him up" near Mackenzie, BC. She arrives alone at the "pickup spot" and is directed to wait at another location by an unknown person in a newer white truck. It is dark outside on a largely deserted highway in northern BC and she does as she is told. She never sees the vehicle used in the commission of the drive-by shooting arrive at the pickup spot, or burn. Her boyfriend and another male meet her at the new location where she is waiting some time later, and they drive back to Prince George. Any of her inquiries as to what was happening are met with silence or "shut up". The woman is too scared to ask any more questions and is arrested in Bear Lake, BC. She is too scared to take the stand at trial.

[81] Defence counsel also raised the hypothetical advanced by the offender in Cardinal, which was the following (the "Cardinal Hypothetical"):

A young Aboriginal person, suffering from lived and inter-generational trauma, is intoxicated and distressed and attempts to take his own life. He takes a [restricted or prohibited firearm] from his stepfather's gun closet. The individual puts the gun to his own chin and fires, but in the moment of pulling the trigger the gun is pushed away by a friend or family member in the room. No one is harmed by the bullet, which exits through an exterior wall in the home.

[82] As a preliminary matter, the Crown, relying on Nur at paras. 65 and 71, submits that the court should not reconsider the constitutionality of provisions that have previously withstood constitutional challenge unless there is a significant change in the reasonably foreseeable application of the law:

[71] Second, can the offender in a future case argue that the provision as applied to others violates s. 12? The answer to this question is that it depends. Once a law is held not to violate s. 12, stare decisis prevents an offender in a later case from simply rearguing what constitutes a reasonably foreseeable range of the law. But stare decisis does not prevent a court from looking at different circumstances and new evidence that was not considered in the preceding case. A court's conclusion based on its review of the provision's reasonably foreseeable applications does not foreclose consideration in future of different reasonable applications: Morrissey, at para. 89, per Arbour J. That said, the threshold for revisiting the constitutionality of a mandatory minimum is high and requires a significant change in the reasonably foreseeable applications of the law. [Emphasis added.]

- [83] With respect to s. 244 (discharging a firearm with intent to wound, maim or disfigure), I am aware of no decision that binds me with respect to the constitutionality of the mandatory minimum prescribed by s. 244(2)(a)(i). This section was not challenged in Oud or Cardinal.
- [84] However, with respect to s. 244.2 (recklessly discharging a firearm), I must consider the decision of the Court of Appeal in Oud, where the 4-year mandatory minimum sentence prescribed by s. 244.2(3)(b) was determined to be within Parliament's competence.
- [85] There are noteworthy differences between this case and Oud with respect to both the underlying offence and the applicable mandatory minimum.
- [86] Oud considered the constitutionality of the mandatory minimum prescribed by s. 244.2(3)(b), which applies if the underlying offence was committed with a non-restricted firearm. This is distinct from the mandatory minimum prescribed by s. 244.2(3)(a) in this case, which applies when the underlying offence is committed with a restricted or prohibited firearm, which is a more serious offence than a non-restricted firearm.
- [87] Further, the underlying offence in Oud was provided for in s. 244.2(1)(a), which states that every person who commits an offence "who intentionally discharges a firearm into or at a place, knowing that or being reckless as to whether another person is present in the place". In contrast, the underlying offence in this case is provided for in s. 244.2(1)(b), which states that every person commits an offence "who intentionally discharges a firearm while being reckless as to the life or safety of another person."
- [88] These important distinctions result in the reasoning in Oud being persuasive, but not binding on me. In particular, I recognize that similar considerations are engaged with respect to Parliament's intention and the gravity of the offences.
- [89] That said, since Oud, the circumstances in Cardinal have arisen and been subject to judicial analysis. And I am of the view that the hypothetical advanced in that case should play an important role in my analysis.
- [90] In its written submissions, the Crown concedes the analysis of Charbonneau J. in Cardinal is well reasoned:
- The [Crown] acknowledges that the analysis in Cardinal is thorough and considered. However, in the [Crown's] submission the finding in respect of the reasonable hypotheticals is in error.
- [91] I agree that the analysis is thorough and considered but disagree that the finding regarding reasonable hypotheticals is in error.
- [92] Given the existence of Cardinal, I consider that there has been a significant change in the reasonably foreseeable application of the law as discussed in Nur and, combined with the fact that the provisions at issue are different than those in Oud, this change is sufficient to justify examining the constitutionality of the mandatory minimum prescribed by s. 244.2(3)(a)(i).

[93] I now turn to a consideration of the reasonable hypotheticals.

Section 244(2)(a)(i) - Discharging a Firearm with Intent to Wound, Maim or Disfigure

- [94] Under s. 244(1) it must be established that the accused: (i) discharged a firearm; (ii) discharged the firearm at a person; (iii) did so with the intent to either wound, maim or disfigure, or to endanger the life of that person or another person; and (iv) the firearm was a restricted or prohibited firearm: *R. v. Rochemont*, 2017 BCSC 930, at para. 90.
- [95] I note again that the gravity of this offence is very high. The discharge of restricted or prohibited firearms with intent to wound, maim, disfigure or endanger life is a serious crime that cries out for deterrence.
- [96] Similar concerns have been raised in the context of robberies committed using restricted or prohibited firearms and which resulted in the 5 year mandatory minimum prescribed by s. 344(1)(a)(i) of the Criminal Code being upheld. See *R. v. Stocker*, 2017 BCSC 542; and most recently *R. v. McIvor*, 2018 MBCA 29.
- [97] With respect to the Dingwall Hypothetical, it is not surprising that the scenario satisfies the essential elements of the offence as it is modeled after Ms. Dingwall's actual circumstances, with the exception of certain inferences regarding lack of knowledge, duress and fear of testifying to which I shall return later in these reasons. I nonetheless find that it is a reasonably foreseeable hypothetical.
- [98] Despite meeting this threshold, I am of the view that the Dingwall Hypothetical does not raise particular circumstances that would justify a sentence so low as to render the 5 year mandatory minimum grossly disproportionate, particularly in light of the seriousness of the offence.
- [99] The hypothetical attempts to set out a scenario where the young, Aboriginal offender has no knowledge whatsoever of the offences being committed. The offender's role is limited to driving the principal offenders, and she does not witness the principals actually committing any of the crimes.
- [100] As I stated earlier, I do not find that wilful blindness or conviction as an aider or abettor are significant mitigating factors in the vast majority of cases, and they do not militate in favour of a significantly lower sentence even on these facts.
- [101] The Dingwall Hypothetical also hints at the issue of duress, which was never meaningfully explored in this case.
- [102] Duress in relation to moral culpability is discussed in *R. v. Datt*, 2014 BCCA 484 at paras. 26-27:
- [26] Mr. Datt argued that psychological duress or coercion, not amounting to the defence of duress, impacted and lessened his moral culpability, citing *R. v. Valentini* (1999), 1999 CanLII 1885 (ON CA), 132 C.C.C. (3d) 262, 43 O.R. (3d) 178 (C.A.). There is no case from this Court

that directly considers this issue. In *R. v. Holder*, 1998 CanLII 14962 (ON SC), [1998] O.J. No. 5102, 21 C.R. (5th) 277 (Sup. Ct.), Hill J. summarized the principles from the Ontario authorities, which deal with the relevance of facts underlying a failed duress defence at sentencing:

[30] [A]n offender who has acted criminally because of serious threats of harm, without taking advantage of an obvious safe avenue of escape, should generally be deserving of greater leniency than the accused who has advanced an entirely invented account of coercion. Accordingly, the factual existence of a degree of compulsion falling short of duress is material to the sentencing function. [O]n the sentencing phase, the factual existence of some circumstances of the failed duress defence is properly considered a mitigating factor to be established by [the accused]. As such, the court must be satisfied, on a balance of probabilities, of the existence of the disputed facts surrounding the making of threats (s. 724(3)(d) of the Code).

[Emphasis added.]

[27] These same authorities require that the facts underlying a failed duress defence must be proven by an accused person on a balance of probabilities at the sentencing proceeding before they can be considered as possible mitigating factors. This is because of the "natural skepticism that such an account [of duress] is simply an after-the-fact excuse": *R. v. Johnston*, [2003] O.J. No. 4210 at para. 45, 59 W.C.B. (2d) 575 (Sup. Ct.).

[103] On a fair reading, the Dingwall Hypothetical indicates that the offender voluntarily assists her boyfriend by picking him up at some undisclosed location in the middle of the night. There are no threats, simply repeated instructions to "shut up" after the offence is committed, which frighten her. She is subsequently too frightened to testify. These facts do not make out duress in the commission of the offence.

[104] Even if the Dingwall Hypothetical can be interpreted to make out duress, I do not find that it would significantly reduce the offender's moral culpability or render the mandatory minimum grossly disproportionate.

[105] Accordingly, I do not find that the mandatory minimum prescribed by s. 244(2)(a)(i) would impose grossly disproportionate punishment on the offender described in the Dingwall Hypothetical.

[106] With respect to the Cardinal Hypothetical, I do not find that it is a reasonable hypothetical when considering the underlying offence described in s. 244(1).

- [107] I am aware of no case where s. 244(1) has been employed to convict a person for a suicide attempt. Although the provision contemplates scenarios where a firearm is discharged at "a person", and this could technically include someone discharging a firearm at themselves with the intent to endanger life, this is not how the provision has been applied. Accordingly, I conclude that this hypothetical, if not "fanciful", is far fetched or, at the very least "remote" or speculative and should be excluded for the purposes of the analysis.
- [108] For these reasons, I find that the mandatory minimum prescribed by s. 244(2)(a)(i) for discharging a firearm with the intent to wound, maim or disfigure, to endanger the life of or to prevent the arrest or detention of any person is within Parliament's competence and does not constitute cruel or unusual punishment.

Section 244.2(3)(a)(i) - Recklessly Discharging a Firearm

- [109] Under s. 244.2(1)(b) it must be established that: (i) the accused discharged a firearm; (ii) the discharge was intentional on the part of the accused; and (iii) in intentionally discharging the firearm the accused was being reckless as to the life or safety of another person: Rochemont at para. 91.
- [110] This offence has a double mens rea requirement. It must be proven that an accused intentionally discharged a firearm, and they were reckless as to the life or safety of another person.
- [111] The gravity of the offence is very high.
- [112] However, and as noted in Cardinal at para. 76, the underlying offence under s. 244.2(1)(b) does not require that harm be caused or intended by the offender. This distinguishes it from the offence provided for in s. 244(1), which does require the intent to wound, maim, disfigure or endanger life. Accordingly, the weight of this factor is marginally reduced in comparison to the analysis under s. 244.
- [113] With respect to the Dingwall Hypothetical, for the same reasons described in relation to s. 244(1) above, I do not find that the circumstances raise sufficient mitigating factors to render the 5 year mandatory minimum grossly disproportionate.
- [114] However, with respect to the Cardinal Hypothetical, I agree with Mr. Gilson and the reasoning of Charbonneau J. in Cardinal. These facts satisfy the essential elements of the underlying offence provided for in s. 244.2(1)(b) are reasonably foreseeable, and give rise to a set of circumstances where it would be grossly disproportionate to impose the mandatory minimum sentence of 5 years prescribed by s. 244.2(3)(a)(i).
- [115] The Cardinal Hypothetical closely matches the actual conduct of the offender in that case. The only difference is that the hypothetical involves a single discharge of the prohibited firearm within the residence when others are present, but not subsequent discharges outside of the residence.

[116] These facts are sufficient to establish the essential elements of the underlying offence. The offender discharges a prohibited firearm, the discharge is intentional, and the offender is reckless as to whether the discharge inside the residence will endanger the life or safety of others. Given that bullets can pierce interior or exterior walls, the potential victims could be inside or outside the residence.

[117] The Cardinal Hypothetical is reasonably foreseeable. I can do no better than to quote from Cardinal at para. 70:

The Crown did not attempt to argue that this hypothetical is far-fetched, fanciful or remote, and rightfully so. Sadly, there is nothing remote about young men in northern Canada struggling with suicidal ideations and arming themselves with firearms in times of distress. There is also nothing remote about young aboriginal people suffering from lived and inter-generational trauma. Courts hear about such circumstances on a routine basis during sentencing hearings. This hypothetical, tragically, is actually very realistic.

[118] I now turn to the factors outlined in Morrissey that must be considered when assessing whether a mandatory minimum will result in a grossly disproportionate sentence. For the purposes of this section of these reasons, I adopt much of the reasoning of Charbonneau J. in Cardinal at paras. 70-87.

[119] As stated, the gravity of the offence is high.

[120] The particular circumstances of the case and the offender in the Cardinal Hypothetical raise significant mitigating factors.

[121] First, the offender's conduct is at the lowest end of the seriousness spectrum for this offence as discussed in Cardinal at para. 77:

In my view, the hypothetical is at the lowest end of the spectrum of seriousness for this offence for several reasons: only one shot is fired; the firearm is never aimed at anyone or anything aside from the offender himself; after the shot is fired the offender drops the firearm and the incident comes to an end immediately; beyond the risk inherent in any such act and the emotional impact on anyone frightened by the offender's actions, no harm is caused.

[122] Second, the offender's personal characteristics are highly sympathetic and mitigating. Cardinal presents a number of reasons why this is the case at paras. 78-79:

[78] As for the circumstances of the offender, in the hypothetical, the offender is suicidal and distressed. This may not reduce his blameworthiness significantly if that distress led to a rampage akin to what the offenders did in cases like Lyta, Mikkijuk, or Gunner. But this hypothetical offender does no such thing. His degree of blameworthiness pales in comparison to the level of blameworthiness of an offender who fires multiple shots at a house, reckless as to whether people are inside; who fires out of anger towards another person; who fires in retaliation for some perceived or actual wrong; who fires randomly in a residential area; who fires during a stand-off with police; or even one who, in a state of

distress, fires at police officers hoping that they will eventually kill him.

- [79] A further consideration is that the offender in the hypothetical is a young aboriginal man, with no prior criminal record. Age and lack of criminal record are always important considerations on sentencing. In addition, in this hypothetical, the principles outlined in *R v Gladue* 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688 and *R v Ipeelee*, 2012 SCC 13 (CanLII) would be engaged. The sentencing court would be required to consider whether systemic and background factors, as well as the lived and inter-generational trauma that the offender has suffered, reduce his blameworthiness. The offence set out at section 244.2 is serious, but it is beyond dispute that consideration of the circumstances of aboriginal offenders is mandated even when dealing with serious offences. *R v Gladue*, para 79; *R v Ipeelee*, paras 84-86. On the whole, in this hypothetical, several things would be mitigating and operate to reduce the offender's level of blameworthiness. [Emphasis added.]
- [123] The actual effect of punishment on the offender also suggest that a 5 year sentence is grossly disproportionate.
- [124] Incarceration in federal penitentiaries has a serious impact on Aboriginal offenders, particularly from northern communities. These federal institutions can be very far away from the offender's home community, and often cut the offender off completely from their social support networks. This, combined with the hypothetical offender's relatively young age and lack of a criminal record, suggests that a long period of federal incarceration would have significant negative consequences.
- [125] The penological goals and sentencing principles that underlie the mandatory minimum at issue must also be addressed.
- [126] As discussed in *Oud*, Parliament has emphasized the importance of denunciation and deterrence of the underlying offence by enacting this mandatory minimum. The relevant considerations are discussed in *Cardinal* at paras. 84-85, with reference to the comments regarding the offence in *Oud*:
- [84] These factors are analyzed to determine whether Parliament was responding to a pressing problem in enacting the mandatory minimum sentence, and whether its response is founded on recognized sentencing principles. With respect to the first question, as noted above at Paragraph 71, I agree entirely with the comments in *Oud* that the enactment of section 244.2 represents Parliament's response to a serious and pressing problem. In addressing that problem it was entirely legitimate for Parliament to emphasize deterrence and denunciation above all other sentencing principles, including rehabilitation and restraint.
- [85] That said, in examining the potential grossly disproportionate effect of the mandatory minimum in the hypothetical situation I am asked to consider, the method chosen by Parliament to achieve its goal has to be assessed taking into account the age, circumstances and lack of record of the offender. In other words, even accepting the legitimacy, and even

wisdom, of Parliament's decision to elevate deterrence and denunciation as the primary sentencing objectives in cases like this, the fact remains that rehabilitation and restraint should play a much larger role for the hypothetical offender than it would for a more mature offender or a seasoned criminal. For this hypothetical offender, the mandatory minimum sentence, effectively, obliterates these principles. [Emphasis added.]

- [127] I agree that the hypothetical circumstances which are advanced militate against a sentence that emphasizes denunciation and deterrence to such a degree, despite Parliament's stated intention.
- [128] Finally, the existence of alternatives to the mandatory minimum sentence must be considered. Clearly, there is a wide range of choices available below a 5- year term of federal incarceration that may be appropriate for a young, suicidal, first-time Aboriginal offender.
- [129] As discussed in Cardinal at para. 87, imprisonment below the penitentiary range coupled with a term of probation would allow for a more flexible and responsive sentence to be crafted that emphasizes rehabilitation and makes a concerted effort to focus on re-integrating the offender into the community. In light of the hypothetical circumstances put forward, I am of the view that these objectives should be paramount rather than a simple focus on deterrence.
- [130] For these reasons, I conclude that the fit sentence for the offender described in the Cardinal hypothetical would be significantly lower than the mandatory minimum sentence of 5 years prescribed by s. 244.2(3)(a)(i) for intentionally discharging a firearm while being reckless as to the life or safety of another person --sufficiently so to render the mandatory minimum grossly disproportionate.

E. Conclusion

[131] In summary on this issue:

- The 5 year mandatory minimum sentence prescribed by s. 244(2)(a)(i) of the Criminal Code does not constitute cruel or unusual punishment and is within Parliament's competence.
- The 5-year mandatory minimum sentence prescribed by s. 244.2(3)(a)(i) of the Criminal Code does constitute cruel or unusual punishment and offends s. 12 of the Charter.

[Discussion with Counsel Regarding Section 1 Of The Charter]

- [132] The Crown takes no position on this issue, therefore I make the following declaration: those portions of paragraph 244.2(3)(a)(i) of the Criminal Code that impose a mandatory minimum punishment of five years when a restricted or prohibited firearm is used in the commission of the offence provided for in s. 244.2(1)(b) are of no force and effect under section 52 of the Constitution Act, 1982.

IV: MS. DINGWALL'S SENTENCE

[133] The Crown submits that an appropriate sentence is a global term of imprisonment in the 5-6 year range as follows:

- a) Counts 3-4 (s. 244(1) - discharging a firearm with intent to wound, maim or disfigure): 5-6 years, concurrent;
- b) Count 5 (s. 244.2(1)(b) - recklessly discharging a firearm): 5-6 years, concurrent;
- c) Count 6 (s. 268 - aggravated assault): 5-6 years, concurrent;
- d) Count 7 (s. 95 - unlawful possession of a loaded restricted or prohibited firearm): 40 months, concurrent;
- e) Count 10 (s. 434 - arson): 12-18 months, concurrent;
- f) Count 11 (s. 88 - possession of a weapon for a dangerous purpose): 6 months, concurrent;
- g) Count 12 (s. 86(2) - storage contrary to regulation): 6 months, concurrent;
- h) Count 13 (s. 145(3) - breach of recognizance): 30 days, concurrent; and
- i) Count 16 (s. 117.01(1) - possession of firearm contrary to order): 6-12 months, concurrent.

[134] Ms. Dingwall's submissions with respect to a fit sentence were predicated on the constitutional challenges being successful and reflected a considerably lower range.

[135] I have previously concluded that the mandatory minimum of five years applies to counts 3 and 4 and that a fit sentence for count 5 would be four and a half years.

[136] An issue arises as to whether the conviction with respect to count 16, being the breach of weapons prohibition, should be consecutive to the other sentences. While this is a serious offence, I agree with Crown that in the circumstances of this case the sentence on that count should be concurrent to the other sentences.

[137] THE COURT: Ms. Dingwall please stand.

[138] THE COURT: When I consider the principles to which I referred earlier in these reasons, apply them to your personal circumstances and take into account the minimum five-year sentence which results with respect to counts 3 and 4, I impose sentences as follows:

- (a) Counts 3-4 (s. 244(1) - discharging a firearm with intent to wound, maim or disfigure): a term of five years imprisonment the sentences to be served concurrently;
- (b) Count 5 (s. 244.2(1)(b) - recklessly discharging a firearm): a term of four years and six months, the sentence to be served concurrently to that for Counts 3 and 4;
- (c) Count 6 (s. 268 - aggravated assault): a term of four years and six months, concurrent;
- (d) Count 7 (s. 95 - unlawful possession of a loaded restricted or prohibited firearm): a term of 36 months, concurrent;

- (e) Count 10 (s. 434 - arson): a term of 12 months, concurrent;
- (f) Count 11 (s. 88 - possession of a weapon for a dangerous purpose): a term of 6 months, concurrent;
- (g) Count 12 (s. 86(2) - storage contrary to regulation): a term of 6 months, concurrent;
- (h) Count 13 (s. 145(3) - breach of recognizance): a term of 30 days, concurrent; and
- (i) Count 16 (s. 117.01(1) - possession of firearm contrary to order): a term of 6 months, concurrent.

[139] THE COURT: You may be seated.

[Discussion with Counsel Re: Time In Custody]

[140] The net sentence is 775 days.

[141] I also make the following ancillary orders:

- (a) s. 109 - mandatory firearms order for 10 years;
- (b) s. 491 - mandatory weapons forfeiture; and
- (c) a DNA order pursuant to s. 487.051, with ss. 244(1), 244.2, and 268 being primary designated offences.

"Abrioux J."

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