

CANADA / JUDGMENT

R. v. Gallagher

2023 BCSC 1722

COURT

Supreme Court of British Columbia

DECIDED

5 October 2023

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

2023 BCSC 1722 R. v. Gallagher

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Gallagher,

2023 BCSC 1722

Date: 20231005

Docket: 48395

Registry: Penticton

Rex

v.

Steven Marlo Gallagher

Before: The Honourable Mr Justice Crerar

Oral Reasons for Sentence

Counsel for the Crown:

K.J. Short

Counsel for the Accused:

N. Selamaj

Place and Date of Hearing:

Penticton

September 26, 2023

Place and Date of Judgment:

Penticton

October 5, 2023

Table of Contents

Paragraph Range

I. INTRODUCTION

[1] - [5]

II. CIRCUMSTANCES OF MR GALLAGHER

[6] - [15]

III. TIME IN CUSTODY

[16] - [16]

IV. THE PRINCIPLES OF SENTENCING

[17] - [26]

V. POSITIONS OF THE CROWN AND DEFENCE

[27] - [28]

VI. DECISION AND DISCUSSION

[29] - [41]

VII. CONCLUSION

[42] - [49]

I. Introduction

- [1] On May 12, 2023, in reasons indexed as 2023 BCSC 824 (the "Reasons"), Mr Gallagher was found guilty of breaking into and committing arson at the Remedys RX Pharmacy in Oliver just after 4 AM on May 15, 2021, contrary to ss. 348(1)(b) and 434 of the Criminal Code, R.S.C. 1985, c. C-46. These are the reasons for sentence.
- [2] These reasons rely on and incorporate the facts of the case, which are set out in greater detail in the Reasons. In brief, around 1 AM, RCMP officers attended at Mr Gallagher's house on the Osoyoos Reserve, investigating a complaint about gunshots. Mr Gallagher provided a tour of his house to the officers, but became agitated around 2 AM, at which point the officers left. Soon afterwards, the officers saw several vehicles leaving the Gallagher residence at high speeds, but opted not to pursue. The officers returned to the Osoyoos RCMP detachment. Just before 4 AM, at the end of their shift, they were surprised to hear

gunfire outside the detachment, shooting the bumper of a police car. They saw a distinctive green truck owned by Mr Gallagher driving away towards the centre of Oliver.

- [3] Surveillance video shows Mr Gallagher parking the truck in Triangle Park, in the centre of Oliver, soon after. Mr Gallagher lights the truck on fire. He then walks slowly from the truck towards the pharmacy, carrying a large dark case. He walks past the pharmacy and stashes the case in the woods at the side of the parking lot. He then returns to the pharmacy and smashes in the glass front door. Entering the pharmacy, he lights several sundresses on fire. A few seconds later he leaves the pharmacy, during which exit he provides a clear view of his face on the security camera, which proved to be damning evidence at trial. He then disappears into the trees. The pharmacy is soon choked in haze and floating embers. A few minutes later, firefighters arrive to fight the blaze. While the inventory and store were largely destroyed, and neighbouring premises also harmed, the building did not suffer structural damage.
- [4] The Court directed that a Gladue Report be prepared: the Court has the benefit of that report, dated August 22, 2023.
- [5] The Court also directed that the Ministry of Justice provide a copy of these reasons to the appropriate contact person in the leadership structure of the Osoyoos Band, and that members be invited, as an organisation or individuals, elders or otherwise, to provide written or oral submissions or statements with respect to Mr Gallagher's sentencing. No members of the Osoyoos Band, or his friends or family provided letters of support for Mr Gallagher, although the Gladue Report contains statements by his mother, grandmother, and an Osoyoos Band elder, along with statements from the Osoyoos Chief and an elder about resources on the reserve not specific to Mr Gallagher. As such, I do not know whether or to what extent the Band would welcome or oppose Mr Gallagher's return to the reserve, or support his rehabilitation efforts on the reserve.

II. Circumstances of Mr Gallagher

- [6] Mr Gallagher turned 31 years old last week. He has four children, aged between two and nine years, by two different women.
- [7] The Gladue Report indicates that Mr Gallagher had a relatively supportive and happy childhood. He has lived for most of his life on the Osoyoos Reserve, of the Osoyoos Indian Band, of which he, his mother, and grandmother are status members. He is of mixed heritage: his father is of German ancestry. Both of his parents hold regular employment. He was also supported, raised, and taught by his maternal grandmother. His parents did not abuse substances, although they did drink from time to time.

- [8] Mr Gallagher did reasonably well in school, and played sports. Life started to go sideways when he was around 14. He started to consume alcohol and marijuana. Activities with his two older brothers, and his group of friends, began getting him into trouble. His grades began to drop. Around this time he also began nurturing an antagonistic relationship with the local police, whom he accused of targeting him.
- [9] Mr Gallagher quit school in grade 11, at age 17, after being accused of arson by school authorities.
- [10] In 2013, when he was 20 years old, he was found guilty of weapons charges and placed on a nine-month probation order, with a ten-year weapons prohibition. He was then found guilty of five breaches of probation orders: not being home at the designated time, and failing to provide a letter from his probation officer to go to work. These resulted in minor fines and 15 days in jail.
- [11] In his adult life, he has held employment as a labourer in vineyards and campgrounds in his community. He also has worked as a labourer in the logging industry, including excavating and driving heavy equipment. His stated career goal is to complete the meat-cutting course in Victoria, and then own and operate his own meat-cutting store.
- [12] The Gladue Report recounts that Mr Gallagher blames much of his current troubles on three incidents of trauma in the years and months before the arson. In 2020, his girlfriend died of a drug overdose, a month after their child was born. That same year, the tenant of his basement suite was shot; the man died in Mr Gallagher's arms. Police investigated Mr Gallagher for both of these deaths; Mr Gallagher states that this suspicion added to his trauma. In 2021, Mr Gallagher's older brother was killed in a car accident; Mr Gallagher was first on the accident scene.
- [13] Mr Gallagher quit marijuana at age 20. When his brother died in 2021, he started taking MDMA and became addicted. Since the start of his pre-trial custody in July 2022, he has not consumed drugs or alcohol.
- [14] In his time in custody, he has attended weekly counselling aimed at addressing grief, addiction, and trauma. His counsellor states that he is pleasant to work with, and is committed to positive change. They have started an application for the Baldy Hughes Therapeutic Community & Farm, a men's long-term residential addiction recovery centre; it was not clear why this application was not made earlier than just before the sentencing hearing. He has also worked with an elder from his community, who serves as an Indigenous support worker at the correctional centre. That elder has assisted Mr Gallagher with traditional activities such as smudging, crafting medicine pouches, and beadwork. He wore a bead necklace at the sentencing hearing.
- [15] The Gladue Report sets out the general difficulties faced by Mr Gallagher's Indigenous community after colonisation, including linguistic and cultural deprivation, dislocation, low income, high unemployment, crime, violence, and abuse. Mr Gallagher's maternal

grandparents specifically attended the Kootenay Indian Residential School, but declined to provide details of any specific trauma. The Gladue Report does not set out much in the way of direct impacts on Mr Gallagher, in the form of abuse or violence. The primary difficulty identified is his "disconnection from the history, traditions and culture of the Osoyoos people due to the number of community members forced into Indian Residential Schools, including his grandparents, instead experiencing his Indigenous heritage in the form of the impacts of colonization...." This colonial disruption within his community has led to Mr Gallagher's formative experiences being based on people in crisis, which "have had a lasting impact on shaping his values, norms, and beliefs well into adulthood."

III. Time in custody

- [16] Mr Gallagher has been in custody since July 28, 2022: 427 days. This translates as a credit of 641 days time served, on the principles set out in *R. v. Summers*, 2014 SCC 26.

IV. The Principles Of Sentencing

- [17] The parties were largely in agreement on the applicable jurisprudence governing sentencing generally, as well as the sentencing of Indigenous offenders and of offenders convicted of arson.

- [18] The principles and purposes of sentencing are codified in Part XXIII of the Criminal Code:

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

- [19] Under s. 718.1, the fundamental principle is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

- [20] Section 718.2 requires the court to take into account a number of sentencing principles. Among them is a requirement to increase or reduce the sentence to account for any relevant aggravating or mitigating circumstances: s. 718.2(a). A sentence should be similar to those imposed on similar offenders for similar offences in similar circumstances: s. 718.2(b).

- [21] Under s. 718.2(e), all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention paid to the circumstances of Indigenous offenders. *R. v. Ipeelee*, 2012 SCC 13 at para. 85 confirms that courts are duty-bound to consider the heritage and circumstances of an Indigenous offender in tailoring a just and appropriate sentence.
- [22] In the recent British Columbia Court of Appeal decision in *R. v. Kehoe*, 2023 BCCA 2, Marchand JA helpfully summarises the sentencing court's necessary consideration of the special circumstances of an Indigenous offender in crafting the appropriate sentence:
- [36] In *R. v. Gladue*, [1999] 1 S.C.R. 688, and *R. v. Ipeelee*, 2012 SCC 13, the Supreme Court of Canada made clear that s. 718.2(e) is remedial and is intended to deal with the continuing crisis of over-representation of Indigenous offenders in the Canadian criminal justice system: *Gladue* at para. 33; *Ipeelee* at para. 59.
- [37] This crisis is driven by the alienation, poverty, substance abuse, lower educational attainment, lower rates of employment, and prejudice experienced by Indigenous people in Canada. Sentencing judges are to take judicial notice of how Canada's colonial history and post-colonial assimilationist policies have translated into these terrible outcomes: *Gladue* at para. 83; *Ipeelee* at para. 60. These systemic and background factors do not excuse or justify criminal conduct. Rather, they provide the necessary context for understanding and evaluating case-specific information during the sentencing exercise: *Ipeelee* at para. 83.
- [38] Systemic and background factors affect the incidence of crime and recidivism for all offenders. However, as the Supreme Court recognized, the circumstances of Indigenous offenders are different from other offenders because many Indigenous people are "victims of systemic and direct discrimination" and "dislocation" and are "substantially affected by poor social and economic conditions": *Gladue* at para. 68.
- [23] At para. 40, the Court confirms that the sentencing court must pay particular attention to two considerations arising from the "significantly different" circumstances of Indigenous offenders:
1. The unique systemic or background factors that may have played a part in bringing the particular Indigenous offender before the courts; and
 2. The types of sentencing procedures and sanctions that may be appropriate for the offender in the circumstances given their particular Indigenous heritage or connection.
- [24] With respect to the first consideration, the direct and indirect effects of colonialism on the Indigenous offender must be considered in assessing his moral blameworthiness:

- [42] It is not necessary to establish a direct causal link between systemic and background factors and the offence at issue. How the complex interplay of historical factors impacted a particular Indigenous offender may be difficult or impossible to establish. Nevertheless, the specific systemic or background factors at play are critically important. They may help the court assess the moral blameworthiness of the offender or identify appropriate sentencing objectives: Ipeelee at paras. 81-83; Hamer at para. 98.
- [25] With respect to the second consideration, an Indigenous offender will not necessarily receive a shorter or non-custodial form of sentence:
- [43] As for the appropriate sanctions, while restorative sentences may be more appropriate for Indigenous offenders, applying Gladue principles will not necessarily lead to a reduced sentence. There is no automatic heritage-based discount: Gladue at para. 88; Ipeelee at paras. 71, 75; Mero at para. 73. Generally, the more serious or violent the crime, the more likely it will be, as a practical matter, that the terms of imprisonment will be the same for an Indigenous and a non-Indigenous offender: Gladue at para. 33; R. v. Wells, 2000 SCC 10 at paras. 42-44; Ipeelee at paras. 84-85; Mero at para. 73.
- [26] In R. v. Sellars, 2018 BCCA 195, our Court of Appeal confirms that the unique circumstances of Indigenous offenders may serve as a mitigating factor allowing for a sentence outside the established range for an offence:
- [28] Aboriginal offenders pose unique circumstances that must be considered for sentencing. This has long been recognized in the well-established decisions of Gladue, Wells, and Ipeelee, and the codification of s. 718.2(e), which directs that all available sanctions, other than imprisonment, be considered for Aboriginal offenders in particular where that would be reasonable and consistent with the harm done to victims or to the community.
- [29] The sine qua non of a just sanction is proportionality. Proportionality ensures that a sentence reflects the gravity of the offence and does not exceed what is appropriate given the degree of responsibility or the moral blameworthiness of the offender (Ipeelee at para. 37). This fundamental principle of sentencing applies to every offender.
- [30] Assessing the moral culpability of Aboriginal offenders requires special consideration of their unique historical, systemic, or background factors that may have played a part in their offending conduct (Ipeelee at para. 73). In determining an appropriate sanction for Aboriginal offenders, courts must consider (i) their different world views including "the substantive content of justice and the process of achieving justice" (Royal Commission on Aboriginal Peoples, Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada (Ottawa: The Commission, 1996) at 309), which focus to a greater extent on restorative justice principles; and (ii) their different cultural values and experiences (Gladue at paras. 62-63; Ipeelee at para. 74).

- [31] A disparity between sentences for Aboriginal offenders and other offenders can be justified where there are circumstances unique to the Aboriginal offender, even when considering the principle of parity as codified in s. 718.2(b) that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances (Ipeelee at paras. 78–79). Similarly, a sentence outside the established range of sentences for an offence can still be a fit sentence if it is proportionate to the gravity of the offence and degree of responsibility of the offender (Lacasse at para. 58).
- [32] Section 718.2(e) requires a different "methodology" for assessing a fit sentence for an Aboriginal offender, but does not require that goals of denunciation and deterrence be given less weight than the principles of restorative justice, particularly for serious crimes. Seriousness of a crime is determined by considering the gravity of the offence and the degree of responsibility of the offender (Wells at paras. 44 and 46).
- [33] As I have concluded, the nature of these types of firearms offences mandates that paramount consideration be giving to the principles of denunciation and deterrence for the reasons stated. However, the unique circumstances of Aboriginal offenders can diminish their degree of moral blameworthiness for an offence and therefore the weight to be given to those principles of sentencing.

V. Positions of the Crown and Defence

- [27] The Crown argues that the facts of the case, in light of the jurisprudence, indicate an appropriate sentence of three-and-a-half to four years' incarceration. The Crown emphasises that Mr Gallagher committed the arson with "chilling" calculation, indifferent to the hazards that his acts posed to firefighters and adjacent premises. The Crown emphasises the present absence of factors that lean other arson cases towards shorter sentences, such as a guilty plea, youth, mental illness, impetus of drugs or alcohol, restitution, or a first offence.
- [28] The defence, leaning heavily on the Gladue jurisprudence and Mr Gallagher's personal traumas, argues for a sentence in the range of 20 to 26 months, with three years of probation.

VI. Decision and discussion

- [29] Arson is a particularly serious offence, for which denunciation and deterrence, both general and specific, are the primary sentencing objectives. As Justice Marchand (before his elevation to the Court of Appeal) states in *R. v. Laforge*, 2020 BCSC 1269, a sentencing decision of an Indigenous offender, albeit one whose moral culpability was diminished through his profound schizophrenia:

- [47] Arson is a serious offence. The maximum punishment of 14 years imprisonment reflects that fire is erratic, unpredictable and may give rise to unforeseen consequences such as extensive property damage, serious personal injury and/or death: Sharun at para. 38 citing *R. v. K.H.*, (1994) 146 N.B.R. (2d) 372 (C.A.). Protection of the public, denunciation and deterrence, both general and specific, are the primary sentencing objectives: Leer at para. 124; Sharun at para. 37.
- [48] For sentencing purposes, arsonists can generally be divided into four types: pyromaniacs or persons suffering from mental illness; people who burn for no special reason; vandals; and people who burn for revenge or financial gain. Of these, persons who are suffering from mental illness are often considered to have the lowest level of moral blameworthiness while those who commit arson for revenge or financial gain are generally considered to have the highest: Sharun at para. 38 citing *R. v. K.H.*
- [49] Because arson is committed in so many different ways, by so many different types of offenders for so many different reasons, the range of sentences is particularly broad. That said, arson offences committed by offenders with mental health issues and no prior record that cause significant property damage but no loss of life have resulted in custodial sentences of two to three years: Leer; Barnes; Keber. Of these, only Barnes involved an Indigenous offender.
- [emphasis added.]
- [30] The Crown provides a useful review of arson sentencing jurisprudence. Mr Short correctly observes that there is no case that resembles the present: a pre-meditated arson committed by an adult Indigenous person, not motivated by mental illness or substance abuse, with a previous criminal record, and without the potential mitigating factor of a guilty plea. Along with *Laforge*, *R. v. Barnes*, 2005 BCCA 432 would appear to be the closest case factually: there, the Court confirms a sentence of two years imposed on an Indigenous offender. The Indigenous offenders in *Laforge* and *Barnes* both had significant mitigating circumstances indicating low levels of moral culpability. These included severe mental health or substance abuse issues, no prior records, and guilty pleas: all notably absent in Mr Gallagher's case.[1]
- [31] I agree with the Crown that Mr Gallagher's moral culpability lies towards the upper end of the arsonist scale. Of the four *Laforge* categories, Mr Gallagher's crime most resembles a vengeance-based arson, triggered by the police visit and Mr Gallagher's long-simmering resentment of authority figures. That his vengeance is directed towards an innocent and unrelated party--the pharmacy and the neighbouring premises--further increases his moral culpability. In contrast to many of the arson cases, the arson was not sparked by mental illness or specific substance abuse. Nor was it a spontaneous or impulsive action. Rather, the arson was calculated and deliberate, and executed over time, through multiple steps, with many points at which he could have changed his mind. Mr Gallagher selected an expendable vehicle, made arrangements with an associate or associates for a post-arson pick-up, drove into Oliver, shot up the police car, parked and ignited the truck, walked slowly towards the

pharmacy, stashed the case, walked back to the pharmacy, smashed the glass door, and lit the fire. He then calmly exited the pharmacy, after stealing a drink, and was picked up by an associate in a car later seen shooting off guns and heading, in all probability, back to Mr Gallagher's home: Reasons at para. 19. In short, Mr Gallagher is an "ordinary, fully accountable offender" with a high level of moral blameworthiness, as per LaForge at para. 64.

- [32] While the arson was committed in the early hours, on a building that was not likely to be inhabited at the time, Mr Gallagher ought to have foreseen that he would put the lives of emergency responders at risk, and possibly also endanger security staff or police. Further, the pharmacy was not the only tenant of the building: there were two other businesses and one organisation, two of which also suffered fire damage.
- [33] The effect on the innocent victims of the arson was profound. The pharmacy owner provided a community impact statement. The pharmacy was wholly gutted inside, with all inventory destroyed. The shock inflicted by the senseless violence of the fire and year-long renovations levied an emotional toll on the owner, staff, and customers. The fire inflicted \$428,761 in damage on the building alone; the Court was not provided with the no-doubt high costs of the destruction of pharmaceutical and other pharmacy inventory. Losses of revenue, increased insurance costs, deductible expenses, and expenses not covered by insurance left the pharmacy out of pocket by roughly \$100,000. The neighbouring physiotherapist business lost \$43,673 worth of inventory and equipment. Neither Mr Gallagher nor his family nor members of his community have made any restitution efforts or commitments.
- [34] As set out in the Reasons at paras. 16-18 and 21, the arson was immediately preceded by Mr Gallagher shooting the police car. While that action did not lead to a charge in the present indictment, it serves as an aggravating factor. The Court is convinced beyond a reasonable doubt that Mr Gallagher alone pulled the trigger. The proximity of the police station to Triangle Park, and the officers' observation of Mr Gallagher's truck driving towards that park, and the surveillance video of that park, establish that Mr Gallagher was the sole person in the truck from which he fired the bullets, and which he promptly lit on fire after driving it into the park.
- [35] This dangerous gunplay is particularly aggravating given that Mr Gallagher's existing criminal record arises from a weapons offence, and included a mandatory 10-year firearms prohibitions that Mr Gallagher appears to have breached at least twice. While that previous conviction occurred in 2013, his abuse of weapons continued up to the date of his pre-trial detention. On November 17, 2022, in unreported reasons (Penticton 48439 Prov Ct), Mr Gallagher was found guilty of four more weapons offences that occurred on April 4, 2021, one month before the present offence. Those offences have some parallels to the present facts. Following complaints of multiple shots being fired from a truck, police pursued the vehicle. The vehicle ignored the police lights and siren, and only stopped to avoid a police spike belt. Mr Gallagher was found in the front passenger seat, with multiple firearms,

including restricted and prohibited firearms, and ammunition. He will be sentenced for those convictions in November 2023.[2]

- [36] Finally, the fact that Mr Gallagher tried to avoid identification and arrest by committing the arson with his dark hoodie deliberately pulled forward on his face serves as an aggravating factor, although not to the extent that it would in the context of a robbery or kidnapping. But for his last-minute capricious decision to steal a drink and expose his face to the security camera in the glow of the refrigerator light, his concealment might have allowed him to evade identification and prosecution. Section 351(2) of the Criminal Code makes such identity concealment an offence in itself, punishable by up to ten years. In the context of rioting, where s. 65(2) expressly makes use of a mask an indictable offence in itself, such use will serve as an aggravating factor. As stated by Garson JA in *R. v. Peepre*, 2013 BCCA 115 at para. 30, it is appropriate for even a first-time offender to receive "a prison sentence of some significant length" where their conduct includes "engaging in additional criminal activity, such as assault (particularly of a police officer), arson, or wearing a mask"; see also *R. v. Ovando Renderos*, 2012 BCPC 467 at para. 24.[3]
- [37] I turn to mitigating factors. As set out above, the systemic Gladue challenges faced by Mr Gallagher and his family and society serve in themselves as an important mitigating factor and a critical consideration in crafting an appropriate sentence. The general disruption of his community flowing in part from assimilationist policies has led to societal difficulties with violence and substance abuse that have affected Mr Gallagher both directly and indirectly, including his recourse to substance abuse and violence as a means of addressing personal trauma. With respect to the specific effects of assimilationist policies on Mr Gallagher, however, his situation differs from those observed in many more stark Gladue cases. He himself did not attend residential school. His grandmother, who did, did not intergenerationally transfer any residential school or other colonial trauma onto Mr Gallagher through violence, neglect, or substance abuse. Rather, she has served in a particularly nurturing and supportive role to Mr Gallagher, not only as a grandmother, but also as a teacher, both in his school and with respect to passing on and promoting the Indigenous traditions of their people. While his people have suffered colonial dislocation, resulting in disconnection of individuals from the stabilising bedrock of their traditions and culture, Mr Gallagher reports in the Gladue Report that "he is very connected to his community and culture," citing specific cultural practices with respect to hunting, eating, and bathing.
- [38] There was scarce indication in the Gladue Report, completed the month before sentencing, of Mr Gallagher expressing remorse or attaining self-awareness of the severity and harm of his crime. In Court, however, he did express contrition, reading from a prepared statement. He apologised to the owners of the premises that he burned, as well as the customers whose prescriptions were delayed. He apologised to the firefighters, and expressed his gratitude that they were not injured by his actions. He said that with the assistance of his counsellor over the past year he has grown to understand the terrible decisions that he has made in his

life. He committed to move forward and "put in the work" towards leading a responsible life. He pledged never to victimise anyone again. He stated that his counsellor has also assisted him in coping with the death of his girlfriend and brother, whose deaths "put him in a very dark place." That said, importantly, Mr Gallagher recognised that those deaths did not provide any justification for his "inexcusable actions".

- [39] In his 14 months of pre-trial detention, Mr Gallagher has exhibited his commitment towards the straight and narrow path. He has obtained his high school diploma. He has completed 22 courses. As defence counsel notes, he voluntarily undertook and completed these courses, ordinarily taken post-conviction as a condition of sentencing, while he was still in remand custody, pre-conviction. While in custody he has also served as a representative of his unit, has volunteered for various jobs, and has enjoyed a generally good record.
- [40] Mr Gallagher's actions and commitments towards a law-abiding and substance-free life should be praised and encouraged. The Gladue analysis of his personal disruption, and that of his community, as well as the over-representation of Indigenous offenders in prison, also indicates that any custodial sentence should be tempered. That said, the Court cannot agree to the sentence suggested by defence. The defence's emphasis on a long probation period is undermined by Mr Gallagher's repeated breaches of his past probation order. As a practical matter, after receiving credit for his pre-trial detention time, he would receive no further custodial time for this most serious crime. Even apart from pre-trial detention credit, the sentence proposed would not address the high moral culpability of Mr Gallagher, or achieve the goals of denunciation and deterrence, particularly important to condemn deliberate and calculated acts of arson committed in stealth. Anything short of a custodial sentence for this deliberate, destructive, and dangerous crime would bring the administration of justice into disrepute.
- [41] Viewed conversely, further custody will continue to address some of the objectives and concerns discussed in the Gladue jurisprudence, and consolidate Mr Gallagher's gains. As set out in his statement to the Court, and the Gladue Report, Mr Gallagher has benefited greatly from his pre-trial detention, in terms of forced sobriety from drugs and alcohol; counselling and guidance to foster both his Indigenous and psychological well-being; and provision of courses and programmes designed to help him better function in society. It has removed him from associates who would seem to have exerted a malignant influence on him, based on the facts leading to his two most recent convictions. As indicated by his courtroom statement, it is only in custody that he has obtained the epiphanic resolve towards changing his life for the better.

VII. Conclusion

- [42] Mr Gallagher, would you please stand.

- [43] Given all of the circumstances of the offence, your own circumstances, and Gladue considerations of moral culpability and fitting disposition, the Court finds that an appropriate sentence, apart from credit for pre-sentence custody, would have been three years and nine months in custody.
- [44] As set out above, you are entitled to credit of a total of 641 days representing the time that you have already spent in custody based on this offence.
- [45] Deducting that credit, the appropriate remaining and actual sentence the Court imposes on you is two years less a day.
- [46] As urged by your counsel, you must also comply with the terms of a probation order upon release. Given the seriousness of the offence, and the fact that the sentence is predicated significantly on your assurances to the Court that you will lead a responsible life, without resort to violence or crime, the appropriate probation period is the maximum: three years.
- [47] The probation conditions shall be:
1. You must keep the peace and be of good behaviour.
 2. You must appear before the court when required to do so by the court.
 3. You must notify the court or the probation officer two days in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.
 4. You must report by telephone to a probation officer at the Community Corrections office within five days of release. If the office is closed, you must continue calling daily during regular business hours until you have spoken to a probation officer and received further direction to report. After that, you must report as directed by your officer.
 5. When first reporting to your probation officer, you must provide them with the address where you live and your phone number. You must not change your address or phone number without prior written permission from your officer.
 6. You must obey a curfew by being inside your residence, or on its lot, between 9:00 PM and 6:00 AM every day.
 7. You must present yourself immediately at the door to your residence or answer the phone when any peace officer or probation officer attends or calls to check on you during the curfew.
 8. You may be away from your residence during the curfew hours with the prior written permission of your probation officer. Such permission is to be given only for employment or other compelling reasons. You must carry the permission, which may be in electronic format, with you when you are outside your residence.

9. You may also be away from your residence during the curfew hours while at, or going directly to, or returning directly from a healthcare facility because of a medical emergency. If asked, you must provide your probation officer with proof of your attendance at the facility.
 10. You must not possess or consume alcohol, drugs or any other intoxicating substance, except with a medical prescription.
 11. You must not possess drug paraphernalia that is suitable for the sale or consumption of drugs that have not been prescribed for you.
 12. You must attend, participate in and complete any intake, assessment, counselling, or education programme as directed by your probation officer. This may include counselling or programming for alcohol or drug addiction, or mental health.
 13. You must not possess, directly or indirectly, any weapon as defined by the Criminal Code, including:
 - a. firearms and ammunition;
 - b. cross-bows, prohibited or restricted weapons or devices, or explosive substances;
 - c. anything used, designed to be used or intended for use in causing death or injury to any person, or to threaten or intimidate any person;
 - d. any imitation of all of the above, including any compressed air guns or BB/pellet guns; or
 - e. any related authorisations, licenses and registration certificates, and you must not apply for any of these.
 14. You must not possess any incendiary device, flammable product or explosive substance, including but not limited to lighters, matches, jerry cans, fire accelerants, or fireworks, outside of your residence except with the prior written permission of your probation officer. You must carry the permission, which may be in electronic format, when you possess any of these items outside your residence.
- [48] The Court also imposes a restitution order, although it is unlikely that it will ever be realised: \$428,761 to the building insurer and \$43,673 to the physiotherapist business insurer.
- [49] Finally, the Court orders that Mr Gallagher provide a DNA sample under s. 487.051 of the Code.

"Crerar J"

- [1] To be clear: the absence of a guilty plea in this case does not constitute an aggravating factor, as it was Mr Gallagher's constitutional right to plead not guilty and insist on a trial. It only indicates the absence of a potential mitigating factor: *R. v. Kreutziger*, 2005 BCCA 231 at para. 10.

- [2] The Gladue Report does double duty for this sentencing, as well the sentencing for the firearm offences.
- [3] Both decisions arise from the 2011 Stanley Cup riots, where many looters, vandals, and rioters wore masks, bandanas, and hoodies to hide their identities.
-

Source & reproduction note

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

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/23/17/2023BCSC1722.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-gallagher-2023-bcsc-1722>

Prepared on 28 October 2026 · Esheria