

CANADA / JUDGMENT

R. v. Hiscock

2020 BCCA 355

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 355 R. v. Hiscock

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Hiscock,

2020 BCCA 355

Date: 20201204

Docket: CA46899

Between:

Regina

Respondent

And

Coda Dayne Gheslain Hiscock

Appellant

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia, dated
May 28, 2020 (R. v. Hiscock, 2020 BCSC 1319, Kelowna Docket 88837).

Oral Reasons for Judgment

Counsel for the Appellant:

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Counsel for the Respondent:

C. Lusk

Place and Date of Hearing:

Vancouver, British Columbia

November 26, 2020

Place and Date of Judgment:

Vancouver, British Columbia

December 4, 2020

Summary:

This appeal is from sentences totalling, before credit for time spent in custody, six years' incarceration, for four firearms offences. Three sentences were concurrent, the most onerous of which was five years' incarceration, before credit for time served, on conviction of possession of a loaded prohibited firearm. To this was added a sentence of one year incarceration on breach of a firearms prohibition. The judge found the appellant had fired the gun seven times, that there was no evidence he possessed it at all until the moment he discharged it, and that his discharging of the gun was in a drug-induced psychosis. He is an Aboriginal offender with a moderate criminal record. A report prepared addressing his circumstances as an Aboriginal person identified several Gladue (R. v. Gladue, [1999] 1 S.C.R. 688) factors that played a significant role in his childhood and throughout his life. The judge gave "only very modest" weight to his background. Held: Appeal allowed and the effective sentence of five years on the count of possession of a loaded prohibited firearm is reduced to an effective sentence of four years. Giving credit for time served, the sentence imposed is one year, 315 days. The judge failed to give tangible effect to the serious systemic issues and background factors noted in the Gladue report that are applicable to the appellant's life, and so erred in principle in his application of s. 718.2(e) of the Criminal Code.

[1] SAUNDERS J.A.: The appellant Coda Hiscock applies for leave to appeal from sentence and if leave be granted, appeals from an effective global [total] sentence of six years' incarceration on convictions on four counts of weapons-related offences. The Crown applies for leave to introduce as fresh evidence, the criminal record of the appellant which is referred to in the pre-sentence report, but is not in the record before us.

- [2] As I consider that Mr. Hiscock's criminal record should be part of the record in this court, I would give leave to the Crown to file it as fresh evidence. I also would give leave to Mr. Hiscock to appeal from sentence.
- [3] On the appeal, Mr. Hiscock contends that the judge erred in applying s. 718.2(e) of the Criminal Code, R.S.C. 1985, c. C-46 to his circumstances as an Aboriginal offender as required by *R. v. Gladue*, [1999] 1 S.C.R. 688, and erred by failing to consider the totality principle.
- [4] The effective global [total] sentence was distributed to the four offences in this way: unauthorized possession of a firearm contrary to s. 92(1) of the Criminal Code, a sentence of two years' incarceration; unauthorized possession of a loaded prohibited firearm contrary to s. 95(1) of the Criminal Code, a sentence of five years' incarceration; careless use of a firearm contrary to s. 86(1) of the Criminal Code, two years' incarceration; and possession of a firearm while under a prohibition order contrary to s. 117.01(1) of the Criminal Code, 12 months' incarceration.
- [5] The sentences on the first three offences are concurrent. The sentence on the offence under s. 117.01(1) is consecutive, producing the effective global [total] sentence of six years.
- [6] After deduction for pre-sentence custody, this global [total] sentence reduced by 1,145 days to 1,045 days, described as approximately two years, ten-and-a-half months. The reduction was reflected in the actual sentences imposed on all four gun offences, reflected in the s. 92(1), s. 86(1) and s. 117.01(1) offences as "jail time served".
- [7] By his appeal Mr. Hiscock asks us to reduce his sentence. In considering this, we start from the observation that in a sentence appeal, the question is not the sentence we would have imposed. This court must approach the appeal from a deferential standard. We may intervene in the sentence imposed only when the sentencing judge has committed an error in principle that had an impact on the sentence, or imposed a demonstrably unfit sentence. In *R. v. Friesen*, 2020 SCC 9 at paras. 26-28, Chief Justice Wagner and Justice Rowe, for the Court, explained:
- [26] As this Court confirmed in *Lacasse* [2015 SCC 64], an appellate court can only intervene to vary a sentence if (1) the sentence is demonstrably unfit (para. 41), or (2) the sentencing judge made an error in principle that had an impact on the sentence (para. 44). Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. The weighing or balancing of factors can form an error in principle "[o]nly if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably" (*R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, cited in *Lacasse*, at para. 49). Not every error in principle is material: an appellate court can only intervene if it is apparent from the trial judge's reasons that the error had an impact on the sentence (*Lacasse*, at para. 44). If an error in principle had no impact on the sentence, that is the end of the error in principle analysis and appellate intervention is justified only if the sentence is demonstrably

unfit.

- [27] If a sentence is demonstrably unfit or if a sentencing judge made an error in principle that had an impact on the sentence, an appellate court must perform its own sentencing analysis to determine a fit sentence (Lacasse, at para. 43). It will apply the principles of sentencing afresh to the facts, without deference to the existing sentence, even if that sentence falls within the applicable range. Thus, where an appellate court has found that an error in principle had an impact on the sentence, that is a sufficient basis for it to intervene and determine a fit sentence. It is not a further precondition to appellate intervention that the existing sentence is demonstrably unfit or falls outside the range of sentences imposed in the past.
- [28] However, in sentencing afresh, the appellate court will defer to the sentencing judge's findings of fact or identification of aggravating and mitigating factors, to the extent that they are not affected by an error in principle. This deference limits the number, length, and cost of appeals; promotes the autonomy and integrity of sentencing proceedings; and recognizes the sentencing judge's expertise and advantageous position (Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 15-18).
- [8] Mr. Hiscock contends that the criteria for interfering with the sentences imposed is met, and that the judge's reasons for sentence demonstrate errors in principle that had an impact on the sentences, which in the result is unfit.
- [9] The sentences concern gun offences, which by their nature pose a serious threat to the safety of the community: R. v. Guha, 2012 BCCA 423; R. v. Hart, 2015 BCCA 302. There is no suggestion by either party that these offences would attract, globally, anything other than a custodial sentence of substance; denunciation and deterrence play a significant role. The sentence imposed, however, must be faithful to the principles of sentencing set out in the Criminal Code. One of these principles is that established by s. 718.2(e) directing a sentencing judge to give particular attention to the circumstances of Aboriginal offenders.
- [10] The content of the principle embedded in s. 718.2(e) is expressed in the two leading cases on that provision, Gladue and R. v. Ipeelee, 2012 SCC 13. In R. v. J.L.M., 2017 BCCA 258, Madam Justice Bennett applied Ipeelee, and said this concerning the analysis required in crafting a sentence for an Aboriginal offender:
- [33] In Ipeelee, the Court was clear that s. 718(2)(e) of the Code "calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders" (at para. 59). The Court said, at para. 60:

- [60] To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders.
- [35] The Court in Ipeelee repeatedly emphasized that a proportional sentence is the essence of a just sanction, and it found that proportionality is a principle of fundamental justice under s. 7 of the Charter (at paras. 36-37). As in Nur, [2015 SCC 150] the Court in Ipeelee stated that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender (at para. 36; Code, s. 718.1). The degree of responsibility is based on the offender's moral blameworthiness, a principle that dates back to Henry II (see generally Henry de Bracton, *On the Laws and Customs of England*, ed. by George E. Woodbine, translated by Samuel E. Thorne, Cambridge, MA: Harvard University Press, 1968).
- [36] The Court in Ipeelee affirmed that in sentencing an Aboriginal offender, the Court must consider "the unique systemic and background factors which may have played a part in bringing the particular Aboriginal offender before the courts", as these factors "may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness" (at paras. 72-73).
- [11] The Court in Ipeelee rejected the view that it was necessary to establish a causal link between background factors discussed in Gladue and the commission of the offence before the Court. Justice LeBel said:
- [83] the operation of s. 718.2(e) does not logically require such a connection. Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.
- [12] Justice LeBel rejected, as well, the view that the Gladue principles do not apply to serious offences.
- [13] The judge in this case recognized the principle set out in s. 718.2(e), with particular reference to Gladue. Nonetheless, in my respectful view, he failed to give s. 718.2(e) tangible effect, and so erred in the fashion asserted by Mr. Hiscock, with the result, in my view, that the appeal should be allowed and we should substitute a lesser sentence, as I will explain.

- [14] The offences occurred at Mr. Hiscock's residence in Kelowna, British Columbia. On the night of March 10, 2018, Mr. Hiscock fired at least seven shots from a semi-automatic firearm from the interior of the residence. Three of the shots struck an unoccupied car parked in front of the residence. Other bullets penetrated the interior walls of the residence and damaged fixtures and property. The semi-automatic firearm was loaded when seized. It is a "prohibited firearm" as defined in the Criminal Code.
- [15] The judge found that Mr. Hiscock had used methamphetamine earlier on the day of the offences, and that his demeanor following his arrest "strongly indicated that he was high at the time that he shot off the firearm, and possibly in a psychotic or manic state".
- [16] Much of the focus of the defence in the sentencing hearing was directed to the theory that Mr. Hiscock's conduct was a result of a major mental illness. The judge did not accept this proposition.
- [17] At the time of the offence, Mr. Hiscock was 31 years old and he was 33 years old at the time of sentencing. The judge described his criminal record as a "moderate history of involvement in the criminal justice system". That history began in 2010 and consisted of breaching court orders, drug offences, property offences, and some violent offences. The criminal record includes one firearms prohibition for a term definite, and two lifetime firearms prohibitions. Until the sentences imposed in this case, none of the prior sentences imposed on Mr. Hiscock approached in length a sentence in a federal penitentiary.
- [18] Two reports were placed before the judge, a traditional pre-sentence report, and a Gladue report. Both are commendably complete.
- [19] Mr. Hiscock's mother was a member of the Ojibwe First Nation. The appellant's maternal grandmother and great-great-grandmother attended residential schools in Saskatchewan. We do not know the background of his biological father, and in any case he left the family shortly after Mr. Hiscock's birth.
- [20] Mr. Hiscock was born in Squamish, British Columbia, and lived the early years of his life there with his five siblings, his mother, and his stepfather. When he was ten years old, his mother's relationship with his stepfather ended. He moved with his mother and his siblings to Surrey, British Columbia, where life was more difficult: his mother began to drink heavily; the family moved frequently. Mr. Hiscock's mother is reported to have had "numerous dysfunctional relationships with men who drank, used drugs and exhibited violent behaviour toward her". One of those partners was violent toward Mr. Hiscock.
- [21] Mr. Hiscock is reported to have only tenuous connections to his family history and Indigenous heritage, although he is not entirely disengaged from that culture in that he has some knowledge of Aboriginal spiritual beliefs and practices.

[22] Mr. Hiscock's mother was a drug user and is described as having had mental health challenges before her death. When Mr. Hiscock was 28 years old he discovered his mother dead from a drug overdose. He also lost a nephew to drug overdose. Six months after Mr. Hiscock's mother died, one of Mr. Hiscock's brothers was murdered. In October 2017, Mr. Hiscock's girlfriend was the victim of homicide near Kelowna, British Columbia. The index offences occurred approximately six months after the girlfriend's murder.

[23] The reports record Mr. Hiscock's struggle to maintain stable housing between periods of incarceration and frequent moves between communities in British Columbia and Alberta. He has not maintained stable, gainful employment throughout the past five years. Mr. Hiscock has taken some programming during periods of incarceration, but at times has been resistant to counselling and programming.

[24] Mr. Hiscock acknowledges that the majority of his friends and associates are individuals who adhere to a criminal lifestyle. It is apparent that many, but not all, members of Mr. Hiscock's extended maternal family are involved in criminal activity.

[25] In summary, the Gladue report states:

Unfortunately, for a number of reasons, Coda experienced a childhood that included many of the features of Indigenous people in Canada, including being a witness to, and a victim of physical and emotional abuse, insecurity, instability, an early exposure to alcohol and drug abuse and a general loss of his cultural heritage.

[26] The Gladue report lists these Gladue factors as ones that played a significant role in his childhood and throughout his life:

- Intergenerational trauma
- Emotional and physical violence
- Loss of connection with Indigenous heritage/culture
- Criminal involvement
- Mental Health Diagnoses, including trauma diagnosed disorders
- Early death of family or friends because of substance abuse, violence or suicide
- Family breakdown and dysfunctional behaviour
- Violence/witnessing violence.

- [27] I note here that whereas the author of the Gladue report, in this listing of applicable Gladue factors, refers to mental health diagnoses which he reported applied to Mr. Hiscock, the judge did not accept this conclusion. He said that Mr. Hiscock had not been medically assessed as suffering post traumatic stress disorder, declined to accept an assessment of schizophrenia, and did not accept that the offences before the court were a result of a mental illness other than a drug-induced psychosis.
- [28] I turn to the judge's reasons. He referred to *R. v. Nguyen*, 2005 BCCA 115; *Guha*; and *R. v. Nur*, 2015 SCC 15, as establishing that the offence of possession of a prohibited firearm poses extreme danger to the public, but recognized that the offence can range from "true crime" at the high end, to a regulatory offence at the low end.
- [29] The judge then reviewed some of Mr. Hiscock's circumstances. As to the Gladue report, he said:
- [11] The Gladue report is particularly revealing. The report does not draw any direct ties between Mr. Hiscock's present circumstances and the sad legacy of European interaction with First Nations, but it does give very rich contextual information
- [30] The judge described Mr. Hiscock's involvement in the justice system as moderate, and addressed the question of mental illness. He then said, in respect of the effect of the Gladue report:
- [24] Mr. Hiscock's background, as I have described it, apart from his drug use, has many tragic and disturbing features. The Gladue report, however, does not point to any particular systemic issues or background factors particular to Mr. Hiscock's Aboriginal status that have played a role in him being before this court today. I am not suggesting that such must be demonstrated before the Gladue sentencing principles become operational in the case of an Aboriginal offender, only that it is more difficult to weigh Mr. Hiscock's Aboriginal background, absent such a tie-in, against the other principles and purposes of sentencing prescribed by the Criminal Code. As noted in Gladue, the more serious and violent the crime, the more likely it will be that the term of sentence will be the same for Aboriginal and non-Aboriginal offenders who are otherwise similarly situated. These are serious crimes we are dealing with and the weight I accord Mr. Hiscock's background is only very modest.
- [31] The judge next held that Mr. Hiscock's conduct was not at the "truly criminal end of the spectrum". He observed that there was no evidence that the firearm belonged to Mr. Hiscock, or that he possessed it for "any purpose at all up to the moment when, in all likelihood in a drug-induced psychosis, he picked it up and began firing".
- [32] The judge recognized that the offence of possession of a loaded prohibited firearm was the most serious of the offences before him. He said it would merit a sentence in the range of perhaps three years, but increased the sentence in recognition of two aggravating factors: Mr. Hiscock was under three prohibition orders at the time of the offences; and Mr. Hiscock had "pulled the trigger" seven times. He said:

- [27] Mr. Hiscock's possession of the firearm, however, is complicated by two very significant aggravating factors. One is that he was under three separate prohibition orders at the time. It is clear that that factor may - I would go further, and even say "must" - be treated as an aggravating factor on a firearm possession charge, notwithstanding a separate conviction for breach of the prohibition orders, without violating the double jeopardy principle: see *R. v. Endean*, 2017 BCCA 125. The second aggravating factor, of course, is that Mr. Hiscock pulled the trigger at least seven times. That no one was killed or seriously injured is mere happenstance. This, too, in my view, can be properly regarded as an aggravating factor, even in the face of a concurrent conviction for careless use. These two aggravating factors, I find, on top of the inherent danger of a loaded restricted firearm, justify a sentence of five years on Count 2.
- [33] In respect of the conviction for possession of a firearm while under the firearms prohibition, the judge said:
- [30] As to Count 6, the Court of Appeal held in *R. v. Melnick*, 2019 BCCA 390, that the typical range for a s. 117 .01 (1) offence is a consecutive sentence of six to 12 months. I agree with the Crown that given the number of prohibitions Mr. Hiscock was under and given his history of convictions for non-compliance with court orders, the upper end of the range is appropriate. Under Count 6, Mr. Hiscock will serve a consecutive sentence of 12 months.
- [34] Mr. Hiscock contends that the judge erred in applying s. 718.2(e) of the Code to his circumstances as an Aboriginal offender in two ways. First, he says he gave weight to the absence of a link between Mr. Hiscock's circumstances as an Aboriginal offender and the offences, rather than addressing the connection between his circumstances as an Aboriginal offender and his moral blameworthiness, as required by the section and explained in *Gladue* and *Ipeelee*. Second, he says the judge wrongly focused on the seriousness of the crimes, and in doing so wrongly attenuated his circumstances as an Aboriginal offender, deflecting away from a focus on his circumstances and the assessment of his moral blameworthiness.
- [35] The Crown says that the reasons for judgment, read in their entirety, do not contain these errors. The Crown says that the judge adequately demonstrated his understanding that he was required to consider the unique historical systemic and background factors, as demonstrated by his reference in his para. 11 to the *Gladue* report as "particularly revealing". It is not an error, says the Crown, for the judge to consider that the more serious and violent the offence, the more likely the term of imprisonment for an Aboriginal offender and non-Aboriginal offender will be similar, and that the weight in any individual case remains a case and fact-specific matter of discretion. Nor, says the Crown, did the judge require a causal link between Mr. Hiscock's Aboriginal circumstances and the offences of which he was convicted. The result, says the Crown, is a fit sentence that we should not interfere with.

- [36] I conclude that the judge erred in principle in failing to apply the Gladue factors present in this case as they relate to Mr. Hiscock as an Aboriginal offender. Principally, the reasons for judgment fail to accord recognition to the list in the Gladue report of Gladue factors that played a significant role in Mr. Hiscock's life, past and present.
- [37] On my reading of his reasons, the judge's engagement with Gladue considerations was directed to two aspects. One aspect was the question of the need for systemic issues or background factors particular to Mr. Hiscock's Aboriginal status to tie-in to the offences (which he correctly then said is not required to be demonstrated), and the difficulty produced by an absence of a tie-in to weighing the Aboriginal background against the other principles of sentencing set out in the Code. The other aspect was the effect of the seriousness of the offences. It was on these two considerations, without reference to the effect of Mr. Hiscock's Aboriginal background on his moral blameworthiness, that he accorded Mr. Hiscock's background "only very modest" weight.
- [38] In particular, on the issue of seriousness of the offence, the judge referred to a sentence in Gladue saying that the more serious and violent the crime, the more likely it will be that the term of sentence will be the same for Aboriginal and non-Aboriginal offenders who are otherwise similarly situated. That sentence, in Gladue, however, was the subject of considerable explanation in Ipeelee:
- [84] The second and perhaps most significant issue in the post-Gladue jurisprudence is the irregular and uncertain application of the Gladue principles to sentencing decisions for serious or violent offences. The passage in Gladue that has received this unwarranted emphasis is the observation that "[g]enerally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing" (para. 79; see also Wells, at paras. 42-44). Numerous courts have erroneously interpreted this generalization as an indication that the Gladue principles do not apply to serious offences (see, e.g., *R. v. Carrière* (2002), 164 C.C.C. (3d) 569 (Ont. C.A.)).
- [85] Whatever criticisms may be directed at the decision of this Court for any ambiguity in this respect, the judgment ultimately makes it clear that sentencing judges have a duty to apply s. 718.2(e): "There is no discretion as to whether to consider the unique situation of the aboriginal offender; the only discretion concerns the determination of a just and appropriate sentence" (Gladue, at para. 82). Similarly, in Wells, Iacobucci J. reiterated, at para. 50, that
- [t]he generalization drawn in Gladue to the effect that the more violent and serious the offence, the more likely as a practical matter for similar terms of imprisonment to be imposed on aboriginal and non-aboriginal offenders, was not meant to be a principle of universal application. In each case, the sentencing judge must look to the circumstances of the aboriginal offender.

This element of duty has not completely escaped the attention of Canadian appellate courts (see, e.g., *R. v. Kakekagamick* (2006), 214 O.A.C. 127; *R. v. Jensen* (2005), 196 O.A.C. 119; *R. v. Abraham*, 2000 ABCA 159, 261 A.R. 192).

- [86] In addition to being contrary to this Court's direction in *Gladue*, a sentencing judge's failure to apply s. 718.2(e) in the context of serious offences raises several questions. First, what offences are to be considered "serious" for this purpose? As Ms. Pelletier points out: "Statutorily speaking, there is no such thing as a 'serious' offence. The Code does not make a distinction between serious and non-serious crimes. There is also no legal test for determining what should be considered 'serious'" (*R. Pelletier, "The Nullification of Section 718.2(e): Aggravating Aboriginal Over-representation in Canadian Prisons"* (2001), 39 *Osgoode Hall L.J.* 469, at p. 479). Trying to carve out an exception from *Gladue* for serious offences would inevitably lead to inconsistency in the jurisprudence due to "the relative ease with which a sentencing judge could deem any number of offences to be 'serious'" (Pelletier, at p. 479). It would also deprive s. 718.2(e) of much of its remedial power, given its focus on reducing overreliance on incarceration. A second question arises: Who are courts sentencing if not the offender standing in front of them? If the offender is Aboriginal, then courts must consider all of the circumstances of that offender, including the unique circumstances described in *Gladue*. There is no sense comparing the sentence that a particular Aboriginal offender would receive to the sentence that some hypothetical non-Aboriginal offender would receive, because there is only one offender standing before the court.
- [87] The sentencing judge has a statutory duty, imposed by s. 718.2(e) of the Criminal Code, to consider the unique circumstances of Aboriginal offenders. Failure to apply *Gladue* in any case involving an Aboriginal offender runs afoul of this statutory obligation. As these reasons have explained, such a failure would also result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality. Therefore, application of the *Gladue* principles is required in every case involving an Aboriginal offender, including breach of an LTSO, and a failure to do so constitutes an error justifying appellate intervention.
- [39] Looking from an Ipeelee lens, we see that the description of these offences as serious does not erase the obligation to apply s. 718.2(e).
- [40] Here, the connection between the systemic factors identified in the *Gladue* report -- inter-generational trauma, emotional and physical violence, a loss of connection with Indigenous heritage and culture, criminal involvement, early death of family because of substance abuse and violence, family breakdown and dysfunctional behaviour, and witnessing violence -- are all evident in the narrative of Mr. Hiscock's life as recorded both in the pre-sentence report and the *Gladue* report. They connect to his pre-offences situation of itinerancy, lack of family structure, unemployment, and substance abuse. As to the offending itself, the judge found that it occurred in a state of drug-induced psychosis. Mr. Hiscock's drug abuse follows his exposure for long periods of time during his young years to

drug abuse, and more recently his mother's death as a result of a drug overdose. This history is reflected in the Gladue report. In the minimum, it is the sort of connection between Mr. Hiscock's present circumstances and his Aboriginal status that calls for overt consideration of his moral blameworthiness in the sense discussed in Ipeelee. In sum, these factors are the sorts of connection that fatally undermine the minimal recognition given to them in crafting the sentence imposed.

- [41] In other words, the reasons for sentence do not give tangible effect to the serious systemic issues and background factors noted in the Gladue report that are applicable to Mr. Hiscock's life. In my view, the judge erred in principle in his application of s. 718.2(e) of the Criminal Code.
- [42] Apart from the issues under s. 718.2(e), Mr. Hiscock says that the judge erred in his application of the totality principle, and it was not open to him both to consider the breach of firearms prohibition as an aggravating circumstance and to impose a consecutive sentence for that offence. Such an approach, he says, is contrary to *R. v. Endean*, 2017 BCCA 125, which he presented as a case that does not endorse using a breach of a prohibition order as an aggravating fact while also imposing a consecutive sentence on the same breach.
- [43] I do not read *Endean* as deciding the point pressed by Mr. Hiscock. In *Endean*, Madam Justice Newbury for the court, did not say that the sentencing judge had erred in treating the breach as an aggravating factor and also sentencing consecutively for the offence of a breach, and she observed that in any event Mr. *Endean's* offence was aggravated by "his being in violation of two other court prohibitions".
- [44] In this case, I do not see an error in respect to the totality principle. The issue, as I have sought to explain, lies in the judge's approach to s. 718.2(e) of the Code. I would not give effect to the totality principle ground of appeal.
- [45] I have concluded that the judge erred in the approach he brought to sentencing. The error, in my view, had an impact on sentence. The question then becomes the sentence that should be imposed.
- [46] I have spoken of the individual circumstances of Mr. Hiscock. In my view, in the circumstances of this offence, his background must have a mitigating effect upon sentence.
- [47] As to the nature of the offence, case authority consistently describes possession of a loaded prohibited firearm as a serious offence. Likewise discharge of a firearm. The degree of seriousness, however, depends on the place it occupies on the spectrum of gun offences. The judge characterized the offence as not being at the "truly criminal end", noted that there was no evidence Mr. Hiscock possessed the gun at all up to the moment he discharged the weapon, and recognized the impulsivity of the offence while Mr. Hiscock was affected by drug consumption.

- [48] Looking to other cases for guidance, I consider *R. v. Racette*, 2016 BCCA 275, and *R. v. Maskell*, 2019 BCCA 352, are most helpful. In *Racette* this court substituted a sentence of five years' incarceration in place of a four-year sentence, on a Crown appeal. *Racette* concerned an Aboriginal offender with a significantly more serious criminal record than Mr. Hiscock's. Mr. *Racette* was in possession of drugs, and the firearms offence was possession of a loaded sawed-off shot gun in a public place populated by students from a nearby school, in the description of Madam Justice Dickson, "as a tool of his criminal trade".
- [49] In *Maskell* the offender unsuccessfully appealed a 42 months' sentence imposed for one count of possessing a loaded prohibited firearm and 36 months concurrent for assault with a weapon. The firearm offences occurred in a residence. Mr. *Maskell* fired a handgun twice during an encounter with a tenant whom he mistakenly believed was armed with a hammer, hitting him with one shot in the abdomen.
- [50] I refer also to other cases noted by counsel: *Nur*; *Holt*; *R. v. Ball*, 2014 BCCA 120; *R. v. Kachuol*, 2017 BCCA 292; and *Guha*. *Nur* addresses the issue of a mandatory minimum sentence, in an appeal from a judgment of the Ontario Court of Appeal affirming the fitness of a 40-month sentence for a young adult with no criminal record, convicted of possession in public of a handgun loaded with an oversized clip. *Holt* is a case of a mature offender without a criminal record whose sentence of 18 months was increased to 30 months -- said to be the bottom of the range -- on possession of a loaded handgun in his vehicle. In *Kachuol* this court allowed a Crown appeal from a conditional sentence and imposed a three-year sentence for possession of a loaded prohibited firearm in a vehicle, located for ready access, found by this court to be at the "true crime" end of the spectrum. In *Ball* a four-year sentence and six months consecutive on a breach of a firearms prohibition was substituted for a global [total] three years' sentence on firearms and drug offences, wherein the judge found the accused's moral culpability was at the "high end" of the range. In *Guha* the court allowed the Crown appeal from a three-year sentence of an offender with a limited criminal record who was on bail on other charges, and was convicted of gun offences including possession of a loaded prohibited weapon, and the court substituted a four-year sentence on the gun offences and added a six-month concurrent sentence for breach of a prohibition order.
- [51] From that summary one can see that the sentence imposed on Mr. Hiscock for possession of a loaded firearm accords with the longest of these sentences, given to Mr. *Racette*, who had a more serious criminal record and was found to have the gun as a tool of his trade.
- [52] In the circumstances before us, including the aggravating circumstance of the shots fired, but recognizing that these firearm offences were not of the more serious "true crime" nature, that Mr. Hiscock's criminal record is moderate, and had not attracted a sentence near the federal range, and giving effect to this personal circumstances as they are known to the court, I consider that a global [total] sentence of five years' imprisonment is fit.

[53] In conclusion, I would give leave to appeal sentence, give leave to adduce as fresh evidence the criminal record of Mr. Hiscock, and allow the appeal so as to effect a global [total] sentence of five years. I would do this by setting aside the effective sentence on Count 2 of five years and substituting for it an effective sentence of four years, in other words in actual terms, I would allow the appeal from sentence on Count 2 by setting it aside, and substituting therefore a sentence of one year, 315 days.

[54] NEWBURY J.A.: I agree.

[55] HARRIS J.A.: I agree.

[56] NEWBURY J.A.: The appeal is allowed and the new sentence as described by Madam Justice Saunders is imposed.

"The Honourable Madam Justice Saunders"

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