
CANADA / JUDGMENT

R. v. Miller

2021 BCSC 1833

COURT

Supreme Court of British Columbia

DECIDED

19 February 2021

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2021 BCSC 1833 R. v. Miller

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Miller,

2021 BCSC 1833

Date: 20210219

Docket: 66767-2

Registry: Chilliwack

Regina

v.

Glenn Jr. Allen Miller

Before: The Honourable Mr. Justice Crabtree

Oral Reasons for Sentence

Counsel for the Crown:

J. Lester

Counsel for the Accused:

O.A. Snowdon

Place and Dates of Trial/Hearing:

Chilliwack, B.C.

February 8, 12 & 19, 2021

Place and Date of Judgment:

Chilliwack, B.C.

February 19, 2021

- [1] THE COURT: Mr. Miller appeared before this Court on July 27, 2020, at which time pleas of guilty were entered as follows on Indictment 66767-2:
1. Count 2 - that on July 29, 2017, he broke and entered the dwelling home located at 52194A Mam Mam Crescent, in Chilliwack, B.C., and committed an indictable offence therein;
 2. a plea of not guilty was entered to Count 3, the use of a firearm or an imitation firearm while committing the indictable offence of conveying a threat, but he entered a plea of guilty to the lesser included offence of uttering threats, which is contrary to s. 264.1(1) of the Criminal Code; and
 3. a guilty plea to carrying or having in his possession a firearm, a rifle or imitation thereof, for a purpose dangerous to the public peace, or for the purpose of committing an offence contrary to s. 88(1) of the Criminal Code.
- [2] All of these matters occurred on July 29, 2017.
- [3] After entering pleas of guilty, the matter of sentencing was put over in order to enable the preparation of a Gladue report. During that period, letters of support were also acquired. All of which were placed before the court last week, at which time I heard fulsome submissions from both the Crown and defence as to the appropriate disposition with respect to this matter.
- [4] If ordered transcribed, I reserve the right to edit these reasons for clarity, but not for the manner in which I have analysed the issue or the result.
- [5] With respect to circumstances, they are as follows.
- [6] In the early morning hours of July 29, 2017, Mr. Miller attended the residence at the address noted above on the Cheam Reserve near Chilliwack, B.C. He entered the residence and went upstairs to the second floor, where he encountered the complainant, Mr. Douglas, and his friend, Ms. Louie. After a period of time, the complainant became upset at Mr. Miller's behaviour and requested he leave. Mr. Miller did not do so.
- [7] As a result, the complainant physically interacted with Mr. Miller. At one point, pinning him down on the floor. Mr. Miller left the residence after the physical altercation. Mr. Miller did not take his cellphone or wallet with him when he left the residence.

- [8] After Mr. Miller left the residence, the complainant wedged two hockey sticks behind the front door, in an effort to secure it as the door had no lock. He then returned to the second floor. A short time later, the complainant heard a noise from the area of the front door. He subsequently discovered that Mr. Miller had made his way back to the residence and was coming up the stairs with a rifle in his hand.
- [9] Ms. Ashley Douglas was with Mr. Miller. Mr. Miller and Ms. Douglas demanded the return of Mr. Miller's phone and wallet; and while Mr. Miller had the rifle in his hand, he made remarks of a threatening nature toward Mr. Douglas. Mr. Miller subsequently retrieved the two items, following which the two left the residence.
- [10] A short time later, noises were heard outside the residence. The complainant looked out of the second storey window and observed Mr. Miller a short distance away on the driveway, facing the front of the house. He noted that Mr. Miller had the rifle in his hand and subsequently a shot was fired. The complainant heard a loud bang and observed drywall dust in the air near where he was located. He noted holes in the wall and ceiling of the room, at the front of the house.
- [11] In the course of the investigation based on various inquiries, the police obtained the rifle believed to be involved in the incident, together with a shell casing. A forensic examination confirmed that the casing was fired from the rifle seized by the police.
- [12] An analyst observed the scene, including the various holes in the front room window, wall and ceiling. Based on the observations, the analyst determined the trajectory of the bullet, which in turn allowed the officer to determine the approximate location where the rifle was fired from on the driveway of the residence.
- [13] Mr. Miller had been identified as a person of interest in the matter, as a result of the preliminary investigation of the RCMP. Mr. Miller was subsequently arrested. After he was taken into custody, Mr. Miller provided a statement. He stated, in part, that in the evening leading up to the event he had consumed a significant amount of alcohol, to the extent he only had intermittent recollection of what transpired. He was unable to recall events during parts of the evening and early morning hours. He did recall an altercation with the complainant at the residence and being choked by the complainant. He recalled going back to his residence, obtaining a rifle, returning to complainant's residence, and standing outside the residence, at which point he fired a shot up in the air. It was his intention to scare the complainant.
- [14] Counsel agreed that, in the circumstances, the shot fired occurred after Mr. Miller had attended and gone into the residence for a second time to retrieve his wallet and cellphone. It was further agreed that placing the hockey sticks behind the front door was in an effort to prevent Mr. Miller from re-entering the residence. However, placing the hockey sticks in the manner the complainant did was not a significant impediment to Mr. Miller gaining re-entry into the residence.

- [15] That said, it is acknowledged that the offender's actions on that date constituted a break and enter; a conclusion I have no difficulty accepting.
- [16] I will now address the background of the offender. Mr. Miller was, at the time of the offence a young man, 21 years of age. He is now 25. Mr. Miller is of Indigenous ancestry. His mother and father are from and grew up in local Indigenous communities in the Chilliwack area. Mr. Miller grew up on the Reserve. His parents separated, at which point he initially went to live with his mother. Later, his father obtained custody of him and he went to reside with his father.
- [17] Tragically, his mother died as a result of a drug overdose which occurred while she was in police cells. Mr. Miller was only 12 years of age at the time of his mother's death.
- [18] Mr. Miller has three stepbrothers, a brother and a sister. He graduated from high school in 2015. When one considers Mr. Miller's background, particularly from the age of 14 years on, I acknowledge he demonstrated significant perseverance and talent in terms of being able to achieve this milestone.
- [19] Mr. Miller has worked as a logger from time to time. He has not worked since approximately August 2019, in large part due to his rehabilitative efforts undertaken since the incident occurred. These efforts became more focused since the adjournment of the first preliminary inquiry date, as a result of Mr. Miller's non-attendance.
- [20] One of Mr. Miller's aspirations is to seek further training to be able to operate heavy machinery.
- [21] Mr. Miller had a significant issue with addiction to alcohol and drugs. He was a heavy user of marihuana, as he grew up. It is noted that he began consuming alcohol after the death of his mother. He was able to stop for periods of time, but would return to the consumption of alcohol. He used illicit substances prior to and during the period that these offences were committed.
- [22] Mr. Miller was taken into custody approximately two years ago and that appears to have been a catalyst for him to face his addiction issue head-on. Since that time, he has been engaged in treatment programs: the first, at Mann Ford Recovery Centre; and the second more recently, at the Seabird Island Community Treatment Program, during which he has been actively engaged in the longhouse, as well as attending counselling, AA, and NA sessions. He is currently single and has no dependants.
- [23] Having provided this overview, I will review in a little more detail his conduct since the offence. I think it is useful to do so, as it serves to highlight the extensive steps taken by Mr. Miller in the course of his rehabilitation. Mr. Miller was originally released following his arrest on these matters. He was placed on a curfew wherein he was directed to be at his residence from 10:00 p.m. until 6:00 a.m. the following morning. I am told that he has remained on that curfew without any reported breach, since August 2017. The matter was fixed for hearing in December 2018, or early January 2019. Mr. Miller did not attend and, as

a result, a warrant was issued for his arrest. The warrant was executed and he was then held in custody for 21 days. He has spent other very brief periods of time incarcerated, including the period following his initial arrest.

- [24] The 21 days spent at Surrey Pre-trial for a young person appears to have provided a new perspective, particularly when one considers that he was placed in that environment as a young Indigenous person.
- [25] Mr. Miller was subsequently released and directed to reside at a treatment centre. I understand that until the point he was taken into custody and went to Surrey Pre-trial he had not addressed his addiction issues in any meaningful way, other than his own attempts to stop consumption of alcohol from time to time.
- [26] On Mr. Miller's first attendance at the Mann Ford Recovery Centre, he spent three months. The executive director reports that when Mr. Miller first came to the facility, he was scared and very shy about his life in general; and very concerned about his life's pattern and where it was taking him. The executive director speaks of a progression in which Mr. Miller began to understand how his drinking played a significant part in his life spiralling out of control, and the changes that he would need to make in order to create a normal lifestyle.
- [27] At the Centre, Mr. Miller often spoke about how important his young niece and his father were to him. The executive director observed that Mr. Miller matured during his time at the Centre; he took full responsibility for his past actions, and worked to turn the wrongs to rights.
- [28] Later in his stay, Mr. Miller volunteered his time back to the Centre. He started showing other clients how they could effect change in their lives. I am told that he became a house monitor; and when his recovery at the Centre had come to an end, he was offered a position there.
- [29] Mr. Miller then made his way to the Centre for Hope and Healing, located on Seabird Island Reserve. There he was a participant and a resident in the program, for approximately 15 months. It was reported that he had no relapses during that period. He left the program as a result of the subsidy (which assisted in funding the attendance at the Centre) coming to an end.
- [30] Ms. Chapman, the case manager, reports she strongly believes Mr. Miller has learned a lot while being in the program; and that he is fully capable of being on his own, as he takes his recovery and wellness very seriously.
- [31] Ms. Percher, the clinical counsellor and mental health team lead at the Centre, was glowing in her report regarding the efforts that Mr. Miller engaged in, to work towards his recovery while at the program. She reported that he came to the program in July 2019; and while there, he attended 28 psycho-educational groups, eight trauma-processing group therapy sessions, and 11 individual counselling sessions. Of significance, it was reported that Mr. Miller reconnected to his culture and spirituality through the longhouse and participated in

several important ceremonies in support of others. She reports that he was sought after by the elders of his longhouse to do some intensive spiritual work and he never once hesitated to step up, despite what she described as the taxing nature of the work.

- [32] It bears remembering that, at this point, Mr. Miller was only approximately 24 years of age.
- [33] With respect to his rehabilitation, Mr. Miller is involved in a significant way with his culture. He has engaged in longhouse activities and volunteered one to two days per week to prepare the longhouse for various ceremonies and meetings held there. He has volunteered with a local resource community group in Chilliwack, called "Ruth and Naomi's". That resource assists individuals who are homeless and those working on their path to recovery. He has also participated in delivering Meals on Wheels on the Cheam Reserve.
- [34] In the therapy Mr. Miller undertook, he began to process the trauma suffered during his childhood and other significant issues. Of note, in addition to his own personal work, was the comment I made earlier that Mr. Miller was a support and mentor. This carried on at the Seabird Island program where Ms. Percher stated:

I hope one day he considers pursuing training in a career as a support worker - he has the innate ability to connect with people with empathy and compassion that cannot be taught, and his lived experience, and successes and set backs are worth sharing with others.

- [35] Again, Ms. Percher noted that Mr. Miller took responsibility for his actions related to the offences, he expressed remorse over the harms he had caused and did so voluntarily.
- [36] Since completing the program, Mr. Miller has resided with the Kenworthy family. Ms. Kenworthy notes that Mr. Miller, Glenn to her, is her first cousin, but she says he is more like a little brother to her. The Kenworthy family have five children, ranging in age from 18 to 1½ year-old twin boys. Ms. Kenworthy talks about the ongoing commitment to culture and spirituality that she has observed and participated in with Mr. Miller. Ms. Kenworthy notes the family is culturally strong. They have drumming and singing all year round, cultural gatherings in the fall and winter, and canoe racing in the summer. Each one of these are significant events in the community and cultural elements of the family.
- [37] Mr. Miller participates in all those activities and, Ms. Kenworthy notes, he has been building confidence in his singing, to the point one day where he will be a drummer in the community.
- [38] It is confirmed that Mr. Miller continues to spend time with the family at the longhouse or smokehouse, a safe place for the community, particularly for youth, elders, and people to gather, share songs and dancing in a healthy drug-and-alcohol-free environment. These gatherings, have afforded the opportunity for Mr. Miller and others to learn about the old teachings passed down through generations. Mr. Miller has contributed by helping to chop wood and prepare for those gatherings, as well as to help clean up after them.

- [39] Ms. Kenworthy's letter ends with her stating:

This letter can't compare or even show how proud I am of him. He continues to grow and makes me even more proud everyday.

- [40] The letters of support indicate Mr. Miller has worked in the logging industry for a number of years. The most recent letter relating to work indicates that he is conscientious and a hard-worker.
- [41] Finally, Ms. Francis, the case manager for the Seabird Island Men's Recovery Home, spoke of the time Mr. Miller spent at Seabird Island. She reported that he has developed into a young, strong Indigenous leader and will continue to strive for the positive healthy lifestyle which he has created for himself.
- [42] The court had the benefit of a Gladue report prepared by an experienced Gladue report writer, Mr. Cadwallader. The report confirms Mr. Miller's parents separated due to the mother's chronic substance misuse and that she passed away in 2008, as a result of a heroin overdose. After the parents' separation, he documents how Mr. Miller continued to reside with his mother for a period of time, during which he was exposed to substance abuse and trauma. As I indicated, Mr. Miller went to live with his father but continued to struggle with a lack of closure due to his mother's passing. It was during that time that he used alcohol to deal with issues of grief and loss.
- [43] At 14 years of age, he left home and resided with his then-girlfriend. He continued to consume alcohol, which continued to cause problems. But to his credit and with the help of his girlfriend's mother, Mr. Miller completed high school and graduated in 2015.
- [44] At approximately 18, he returned home to live with his father. Soon after, he entered into a relationship with Ms. Douglas and they moved into her aunt's place at the Cheam Reserve. It was there that his addiction led him to use cocaine, methamphetamines, and heroin. His addictions escalated and remained largely unchecked, until his involvement in the offences before the court and the experience brought about in late 2018 and early 2019.
- [45] The Gladue report confirms Mr. Miller is the product of intergenerational and Residential School trauma. His grandparents and many others from his extended family were forced to attend Residential Schools. It is reported that family members subsequently struggled with unresolved trauma, familial fragmentation, chronic substance misuse, violence, lack of parenting capacity, and other economic and social barriers. This legacy carried forward in Mr. Miller's life, as he struggled with the emotional manifestations from the premature loss of his mother due to a drug overdose, and the consequent personal misuse of illicit substances as a coping mechanism, and his current involvement in the criminal justice system.
- [46] The report writer notes there are a number of adverse factors that affect Aboriginals, in general. They are present in Mr. Miller's personal life and they include:
1. multigenerational family instability;

2. absence of any positive Indigenous adult role models/mentors;
3. premature overdose death of his mother and the resulting unresolved grief and trauma from her passing;
4. misuse of alcohol and drugs, to the point where he attempted to use substances to self-medicate to manage his emotions; and
5. intergenerational effects flowing from the imposition of the Residential School system.

[47] The report concludes with outlining a number of resources, both in the community and in institutions, which may be given consideration in addressing Mr. Miller's healing needs.

[48] I turn to the relevant principles of sentencing to be applied. Those principles are well known and are set out in ss. 718, 718.1, and 718.2 of the Criminal Code. For Mr. Miller's benefit, I am going to read the first part, as they are the guiding principles that Parliament has set out for the courts to take into account when considering what the appropriate sentence that ought to be imposed.

[49] Section 718 provides that:

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.

[50] It is through a combination of those principles, applying them to the circumstances of a particular case, which enables a court to determine what the appropriate penalty is. It is important that the penalty be proportionate to the gravity of the offence and the degree of responsibility of the offender, as set out in s. 718.1.

[51] The Criminal Code goes on at 718.2 to say that:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender

- and then goes on to particularise a number of them, which I will not review here, except to highlight the last four points:
- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (c) [that a] combined sentence should not be unduly long or harsh;
- (d) [that] an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[52] There are a number of mitigating factors in this case, including:

1. Mr. Miller's cooperation with police during their initial investigation, and then in providing a statement detailing his involvement in the offence.
2. A guilty plea. The guilty plea here, takes on added significance, in my view, as the Crown noted that a primary witness was not necessarily cooperative and it is unclear whether that witness would have attended and provided evidence at trial. In addition, the Crown noted that there was an issue regarding the continuity of the rifle, which again raised issues, had the matter proceeded to trial. In my view, Mr. Miller's entering of a guilty plea bolsters his expression of remorse and his willingness to accept responsibility, which he had previously indicated on several occasions during his attendance at the treatment facilities.
3. Mr. Miller lacks a criminal record.
4. The steps taken towards rehabilitation in addressing the underlying cause which, in my view, was the driving force as to why he became engaged in the criminal offence.
5. His age. He was 21-years-old, at the time of the offence.
6. Finally, his performance on bail which, as noted by counsel, was restrictive in the sense that he has been under a curfew for the past three-and-a-half years.

[53] The aggravating factor, the primary one, Mr. Miller, is that these events involved the discharge of a firearm outside a residence when individuals were located in the home.

[54] The Crown, in their very helpful submissions, relied on a number of authorities in support of the position that they adopted:

1. R. v. Oud, 2016 BCCA 332 [Oud];
2. R. v. Dragani, 2018 BCCA 225 [Dragani];
3. R. v. McKay, 2020 BCPC 139 [McKay];

4. R. v. Jalal, 2020 BCPC 238;
5. R. v. Baptiste, 2019 BCSC 2339;
6. R. v. Hiscock, 2020 BCCA 335; and
7. R. v. Alphonse, 2020 BCSC 1882.

[55] The defence, in their equally helpful submissions, relied on a number of cases including:

1. R. v. Gladue, [1999] 1, S.C.R. 688;
2. R. v. Ipeelee, [2012] 1 S.C.R. 433;
3. Dragani;
4. R. v. Grandbois, 2013 ABPC 253;
5. R. v. T.A.P., 2014 ONCA 141;
6. R. v. Hockley, 2013 BCSC 113; and
7. R. v. Luttman, 2005 BCSC 405.

[56] I have reviewed those cases. I will make some reference to them in the comments that follow, but have considered them all in the context of determining the appropriate sentence.

[57] Counsel acknowledged that it was difficult to find cases that were directly on point with the circumstances and issues in this case.

[58] The Crown takes the position that the court ought to consider the period of time that Mr. Miller spent in custody, the pre-trial time, and impose a lengthy conditional sentence in order to address the various principles of sentence; and to reflect and recognise the significant efforts that Mr. Miller has undergone and succeeded in, towards his rehabilitation over the past 3½ years.

[59] The defence submits that the appropriate sentence is time served, together with a suspended sentence; and placing Mr. Miller on probation for a period of two years.

[60] The Crown, in support of their position, provided an analysis of two cases: Oud and Dragani, with the purpose of highlighting the differences in the approach adopted by the courts, driven by the circumstances of the incident and of the offender. The Crown submits that in this context, based on the totality of the circumstances, the court could look towards a sentence similar to the one imposed in Dragani.

[61] The Crown referred to the Oud decision. Mr. Oud was charged with an offence contrary to s. 244.2(1) of the Criminal Code. He provided money to a woman in a downtown area of Nanaimo, expecting her to purchase crack cocaine for him at a local drug house. The woman entered the residence, but did not return. At some point, Mr. Oud thought he had been ripped off and as a result, went to the door of the residence and knocked on it. It was answered by someone located inside and he was told by that person to leave. Mr. Oud went

to his vehicle, removed the rifle and, from a distance of approximately 60 feet from the residence, fired seven shots at the door in a manner which demonstrated he was a reasonably good shot. There were eight or nine individuals in the residence at the time. One bullet grazed the cheek of a male attendee. Bullets also travelled in close proximity to where people were located.

- [62] Mr. Oud had one unrelated conviction. He was a drug user, an addict. Here the range of sentence for the offence was viewed to be five to six years, on the basis that he had a high degree of culpability, having fired multiple rounds into a residence knowing that there were people present in the residence at the time. He was initially sentenced to a term of four years and, on appeal, the Court of Appeal increased Mr. Oud's sentence to five years less time served.
- [63] In contrast is the decision of Dragani. This involved offenders who attended the residence to retrieve money or property from an individual. The complainant was grabbed outside the residence, his hands bound, and his head covered. He was then taken inside and beaten. At the time, the complainant's parents and brother were in the house. The offenders pointed an imitation gun at them, covered their heads and bound their hands with plastic straps.
- [64] None of the offenders had a previous record. Each offender had taken significant steps to improve their circumstances following the offence. The prosecution sought a period of incarceration in the range of four to five years. The defence sought a suspended sentence with probation. The offences that the offenders were convicted of were break and enter a residence, robbery, and unlawful confinement, as well as assault causing bodily harm.
- [65] The trial judge held that exceptional rehabilitative steps had been taken by the offenders that justified departure from the ordinary range of sentencing. Based on that finding, the trial judge imposed a sentence of 90 days in jail to be served intermittently, together with two years' probation. On appeal, our Court of Appeal held that the sentence was not demonstrably unfit.
- [66] One further case I will refer to is that of McKay. I refer to this case, in part, because it has some of the elements where something went terribly wrong. This could have occurred in this case, had those in the residence been situated in a slightly different position or the shot fired from a slightly different angle. In McKay, the offender discharged a shotgun when he and his girlfriend were sitting on a bed in his bedroom. The gun was discharged, striking the complainant in the forehead. This was neither an accidental shooting, nor a situation where the accused had intended to shoot her. It was simply a circumstance where something went horrifically wrong in the negligent manner in which that weapon was held and positioned at the time that it was discharged. As a result the complainant suffered significant injuries and had to undergo surgery to remove parts of her skull that had been imbedded in her brain.

- [67] Mr. McKay pled guilty to criminal negligence and the Crown sought a sentence of incarceration of three to four years, while the offender argued for a conditional sentence order. In the sentence, the court reiterated the primary principles of sentencing in cases involving firearms, which includes general and specific deterrence, and protection to the public.
- [68] In the result, Mr. McKay was sentenced to 90-days' less time served and placed on a lengthy Conditional Sentence Order.
- [69] In the McKay case, reference is made to the concept of exceptional circumstances. This, where found to exist, has been held to justify a sentence that would fall below the usual range. This concept was discussed in *R. v. Voong*, 2015 BCCA 285.
- [70] In this case, Mr. Miller is charged with three offences. Break and enter is a serious offence reflected in the maximum penalty which, as set out in the Criminal Code, is life imprisonment. The range of sentence for break and enter can be from a suspended sentence to varying lengths of incarceration. As serious as that offence is, in my view, the actions of Mr. Miller entering the premises with a rifle, engaging in threatening behavior then leaving and firing a shot are more serious. I say more serious, Mr. Miller, because of the potential risk for significant injury or damage, that could have occurred while you were in possession of that rifle on that occasion.
- [71] Sentencings for convictions of offences involving firearms are treated very seriously and often result in significant periods of time in prison. Not to belabour the point, but as an example, the Supreme Court of Canada in *R. v. Nur*, 2015 SCC 15 [Nur] discussed the serious aspect of these types of offences. In that decision, the Court noted the range of sentencing for an offence under s. 95(1), absent special or exceptional circumstances, is between 30 months and 7½ years. I say that only as an example of how courts treat matters relating to firearms. I also remind myself that Mr. Miller did not plead guilty to the specific offence addressed in Nur.
- [72] Nevertheless, the circumstances in this case, as I have said, require careful consideration because they involve: Mr. Miller returning to his home and retrieving a rifle, returning to the complainant's residence, engaging in the threatening behaviour inside the residence, then leaving the residence and discharging the rifle towards the residence.
- [73] The principles that I bear in mind are deterrence, specifically general deterrence, denunciation, rehabilitation, and consideration of the Gladue factors. With respect to the last point, I refer to Madam Justice Bennett's comments in *R. v. J.L.M.*, 2017 BCCA 258, regarding the analysis required in crafting a sentence for an Indigenous offender, which she set out in paras. 35 and 36:
- [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, 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).
- [74] Suffice it to say, Bennett J. makes clear that consideration must be given to the unique systemic and background factors that play a part in bringing Indigenous offenders before the court.
- [75] The Court of Appeal also provides guidance to sentencing courts how to take into account addiction and rehabilitation in sentencing. Here, I refer to *R. v. Kukelka*, 2010 BCCA 180; *R. v. Hansen*, 2012 BCCA 142; and *R. v. Datt*, 2014 BCCA 484. These decisions support the proposition that where there is evidence of rehabilitation, the principle of deterrence can give way to the prospect of rehabilitation, particularly where public safety can be addressed in a fashion other than by way of a period of incarceration.
- [76] I also note that for each of these offences before the court, there is a wide range of potential sentences that the court could impose. In *R. v. Smith*, 2017 BCCA 112 at para. 35, the Court of Appeal stated that sentencing ranges are "merely guidelines" and not "straitjackets".
- [77] The issue here, Mr. Miller, is whether there are exceptional circumstances and, if so, what is a fit sentence that may fall below the generally-accepted range of sentence for these offences. Here, I have determined that Mr. Miller has concretely demonstrated that he has turned his life around since his arrest. I am also satisfied that the fundamental purpose of sentencing, as set out in s. 718 of the Criminal Code, is better served by a non-custodial sentence.
- [78] Through the steps that Mr. Miller has engaged in on his road to recovery over the past several years, his world view has expanded and he has reconnected with his culture and spirituality. Part of that process has enabled him, greatly assisted by elders, to find a way in which to contribute to his community in a positive fashion. That is evident by the various activities and functions he has engaged in, in the community and at the longhouse. In my view, Mr. Miller, your efforts are unique and extraordinary.

- [79] This is not the only unique aspect of the case. Another factor not often seen is the willingness to accept responsibility for what a person has done and the remorse felt as to the effect that his actions had on the complainant and others in the household. This point was made somewhat poignantly when Mr. Miller stated at one point, "I think about my actions every day."
- [80] For both these reasons and the following, I find there are exceptional circumstances in this case:
1. the efforts Mr. Miller has taken steps to stabilise his life and address his addiction to alcohol and drugs;
 2. demonstrating at a young age a willingness and ability to overcome personal challenges; and
 3. a commitment, self-awareness, and willingness to continue to work with the support of counselling agencies, to reduce the risk of relapse, including his decision to end a personal relationship for fear that the co-dependency between them could contribute to a possible relapse.
- [81] Exceptional circumstances enable a court to sentence in a way that is outside of the normal range, and I find those circumstances to exist here.
- [82] Mr. Miller, when I consider the circumstances of the offence, your personal circumstances, the very helpful submissions of both the Crown and your counsel, the cases that they have provided, and the principles of sentence that I have tried to outline for you, I consider that the appropriate sentence to be the following:
1. On Count 1, the break and enter, there will be a sentence of one day. I will not require you to be taken into custody and the record will reflect time served. In other words, if you are ever brought back before these courts again, the fact that you spent that time in pre-trial custody would be referenced to a judge, though I, in this circumstance, would think that not likely whatsoever.
 2. On Count 2, uttering threats, and Count 5, possession of a weapon for a purpose dangerous to the public, I am going to suspend sentence and place you on probation for a period of two-and-one-half years, with the following terms and conditions.
- [83] Now are there any submissions to be made with respect to the conditions? I appreciate the Crown did not have that opportunity and, if the Crown wishes, it can certainly take the opportunity to do so now. I have some terms and conditions that I have contemplated, but I will pause here.
- [84] CNSL J. LESTER: Perhaps we'll hear what Your Lordship is imposing and then if my friend - if we want to add or - certainly won't ask to subtract, but perhaps just to add.

- [85] THE COURT: There are the statutory terms which say that you must keep the peace and be of good behaviour. You must appear before the court when required to do so by the court. You must notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the officer of any change of employment or occupation.
- [86] One of the terms I will just note and return to once I have heard from the prosecutor and from your lawyer is with respect to no contact. So I will come back to that.
- [87] I will add the term that, given COVID concerns and the pandemic, that you must report by telephone to your probation officer by 3:00 p.m. on Monday, which I believe is February 22, 2021.
- [88] CNSL J. LESTER: It is, yes.
- [89] THE COURT: Thank you, February 22, and then thereafter to report as directed and in the manner directed by the probation officer.
- [90] For the first nine months of the probation order, you must obey a curfew by being inside your residence from 10:00 p.m. through to the following day at 6:00 a.m., each day.
- [91] You must present yourself to the front door of your residence or answer the phone when any peace officer or probation officer attends or calls to check on you during the curfew time. You may be away from your residence during the curfew with the prior written permission of your probation officer. Such permission is to be given for employment or other compelling reasons.
- [92] I am not going to make it a term of the order, but if you are outside your residence during this curfew period, I suggest you carry a copy of that condition with you.
- [93] I will also add, as the next term, you may also be away from your residence during the curfew hours while at, 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.
- [94] You must not possess or consume alcohol, drugs, or any other intoxicating substance, except with a medical prescription.
- [95] I will hear the Crown on whether, at the end, whether they are making any submission regarding any further counselling or treatment.
- [96] In imposing the next term, I recognise that you have done a significant amount of work in the community, but as part of this order, I am going to require you complete 50 hours of community work service under the direction of your probation officer. Your community work service must be completed within the first year of your probation order. Your community work service may be completed for the benefit of your community, and I leave that for you and your probation officer to sort out where you would best be served, because I

know that you have been involved to a considerable extent already.

- [97] So not part of the term of the order, but I see it as a way in which to contribute, but ways in which you have been contributing already, including whether it is preparing the longhouse, delivering Meals on Wheels, or supporting others that are in need, and if there is any issue with that, we can always have that spoken to.
- [98] I will also hear the Crown, because I know it was discussed on the last date, with respect to whether there is a restorative justice piece to this, or at least the opportunity left open, and I do not know if there had been any contact or whether the Crown had heard from Mr. Douglas in the interim.
- [99] Mr. Miller, it is not clear whether you have apologised to Mr. Douglas or not, but I am going to suggest that if you have not - well, I am not going to suggest, I am going to make it a term of your probation order that you are to apologise to the named complainants; and here I will also take some guidance from the Crown as to who the apology or the names of who the apology should be directed towards. So to go back, you are to apologise to the complainants for your actions in a manner that is directed by and to the satisfaction of your probation officer, and that shall be done within the first 60 days of your probation term.
- [100] All right, and you do not have to connect directly with them, it can all be done through your probation officer, but it is important that they hear from you.
- [101] It will be a term of your probation order that you must not possess, directly or indirectly, any weapon as defined by the Criminal Code, including firearms and ammunition, cross-bows, prohibited or restricted weapons or devices or explosive substances, any imitation of the foregoing, including any compressed airguns or BB/pellet guns. You must not be in any residence where any other person keeps or stores a firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, or explosive substance.
- [102] So I am going to let you speak to your lawyer about that to ensure that is not an issue, and those are the terms. I am going to pause here and first invite any comment by the Crown.
- [103] CNSL J. LESTER: Yes, Your Honour, regarding the no contact and as it relates to the apologies to the complainants, I take the names from the agreed facts at numbers 2 and 3, the complainant is Lyn, so Madam Registrar, L-y-n, next name Jason, usual spelling, Douglas, and also then the person at the scene at the time, My Lord, was the complainant and his friend, Wanda Louie, W-a-n-d-a, last name L-o-u-i-e, and the letter - I suggest he do a letter of apology, My Lord, because -
- [104] THE COURT: Yes.

[105] CNSL J. LESTER: - I haven't heard from Mr. Douglas, so the probation officer then could keep that and/or forward it to me, and then if and when I hear from Mr. Douglas, I would give it to him. But that then removes the obligation Mr. Miller has, in other words he has completed his obligation within that time by putting the letter on the record and then it is up to us, either the probation officer or myself, to get it to the complainants.

[106] THE COURT: Certainly.

[107] CNSL J. LESTER: I didn't - Your Lordship had said the curfew was for a period of time, I just didn't catch for how long. Was it for the entire time or for -

[108] THE COURT: No.

[109] CNSL J. LESTER: - part of -

[110] CNSL O. SNOWDON: You had said nine months - nine months.

[111] THE COURT: Nine months.

[112] CNSL J. LESTER: Nine months, thank you, I just didn't note that.

[113] THE COURT: Yes.

[114] CNSL J. LESTER: And regarding counselling, I would suggest the wording could be "as recommended". Certainly then Mr. Miller can work with the probation officer. The probation officer may say - be content with it and that would end the obligation. It does though then allow for the resources, although I would expect that the resources that Mr. Miller probably would use would be within the First Nations community, but it does allow then the probation officer the - both the authority and the obligation to assist Mr. Miller where necessary. So - and regarding rehabilitation, we have all heard that it comes and goes, the need sometimes is stronger than other times, so it at least then allows Mr. Miller to turn to someone to help him get into something if it is there.

[115] THE COURT: Yes.

[116] CNSL J. LESTER: So that would help the probation officer take those steps. And I think that's really it. And then -

[117] THE COURT: And no contact with those two named individuals.

[118] CNSL J. LESTER: Yes, it would be the same regarding the letter of apology -

[119] THE COURT: Yes.

[120] CNSL J. LESTER: - and the no contact. I don't think there needs to be a no-go. It - this incident, we do know occurred at the Cheam Reserve. I don't know where Mr. Douglas is living now. I don't know if that's something my friend can deal with. We do know that - we had no input from Cheam Reserve -

- [121] THE COURT: Yes.
- [122] CNSL J. LESTER: - in spite of us asking for it. Mr. Miller's connection seems to be - at least he's been at Seabird, which we know is across the Fraser over in Agassiz. But I will leave it to my friend -
- [123] THE COURT: All right.
- [124] CNSL J. LESTER: - if she can add any comments from what Mr. Miller says about whether he needs to be on the Cheam Reserve.
- [125] THE COURT: Yes, and the other matter is just the restorative aspect, but because you have not heard from Mr. Douglas, then that is really a non-issue at this point.
- [126] CNSL J. LESTER: Exactly, yes. I mean it's something that if Miller - Mr. Miller approaches and we have contact, it could still be arranged, the restorative aspect, outside the order. Just -
- [127] THE COURT: Yes.
- [128] CNSL J. LESTER: - would not be any obligation by Mr. Miller. I'm not in any position to ask for it because I don't know if it's required by way of Mr. Douglas's request, so we don't have that from him.
- [129] THE COURT: All right. Mr. Miller, you can have a seat, sir. Thank you. So -
- [130] CNSL O. SNOWDON: All right, what were you wanting to canvass? His need to go to the Cheam Reserve or -
- [131] THE COURT: Well, that was - that was the last matter.
- [132] CNSL O. SNOWDON: Right.
- [133] THE COURT: But is - is that where some of his family is located?
- [134] CNSL O. SNOWDON: No, he tells me the only person that he is connected with is his - his ex-girlfriend, Ashley Wilson, who was there at the time of these events and she lives on Cheam, she's a Cheam member, so I think a no-go to any residence, known residence, school, or workplace is probably sufficient. Cheam Reserve is quite a large place. And then you were wanting some input as to counselling, as well?
- [135] THE COURT: Only giving you the opportunity, if there was something you wished to say, not -
- [136] CNSL O. SNOWDON: No, no, I think what's been discussed so far is - no, all of the terms that have been proposed by Your Lordship are agreeable and -
- [137] CNSL J. LESTER: If I could just add, My Lord, that - I'm just looking at the last bail order and this is from Judge Mundstock -

- [138] THE COURT: Yes.
- [139] CNSL J. LESTER: - on July 20, the no-go term was not to go within 1 km of that address on Mam Crescent.
- [140] CNSL O. SNOWDON: That -
- [141] CNSL J. LESTER: Just for guidance. I'm not saying that it's necessary here now, because I don't know if Mr. Douglas resides there. Probably doesn't considering it was in a pretty rough state at the time and -
- [142] THE COURT: Yes.
- [143] CNSL J. LESTER: - there were some discussions about it -
- [144] CNSL O. SNOWDON: It was owned by Ashley Wilson's uncle, I think, and they were in the process of trying to have Mr. Douglas leave when all these events transpired, and he doesn't live there.
- [145] THE COURT: All right.
- [146] CNSL J. LESTER: So that seems to have been consistent throughout the three and a half years, and that of course is a significant period of time already.
- [147] THE COURT: So just to finish off the probation order, you are to have no contact, directly or indirectly, with Lyn Jason Douglas and do you have the name of the other individual?
- [148] CNSL J. LESTER: Yes, it was - it's on the fourth - it's Wanda Louie.
- [149] THE COURT: Yes, thank you, and Wanda Louie. Those two names will be the names inserted in the condition requiring you to write the letter of apology.
- [150] With respect to the counselling term, I will craft it this way: After assessing the efforts Mr. Miller has undertaken to date - pardon me, let me try it a different way. You shall take such counselling as directed by your probation officer, following a review and assessment of the efforts that Mr. Miller has undertaken to date. So, at least, they will have that context when they consider if there is anything further that is required, and it is really there for your benefit in case that, through probation, they can offer any counselling that may not be available to you otherwise. All right, sir?
- [151] Now, turning to the other matters, first of all, with respect to the Crown's request for the weapons prohibition, pursuant to the provisions of s. 110 of the Criminal Code, and taking into account all of the circumstances, and the time that you have been under the bail term which has restricted or prohibited you from being in possession of weapons for the past 3½ years, taking all of that into account, I think the appropriate term or length of the order is 3 years.

- [152] Now, I make that order on the understanding that you have the right to come back before this court to make an application under s. 113 of the Criminal Code, because of your Indigenous background and because of the aspects of hunting and the importance of that to your family and your community, so that in the event that an exemption needs to be considered, you will have that opportunity. All right, sir.
- [153] Finally, with respect to the DNA order, as noted by counsel, these are secondary designated offences under s. 487.04 and 487.051(3) of the Criminal Code. Here the court has discretion in granting the order. In doing so, I need to consider an individual's criminal record, the nature of the offence, the circumstances surrounding its commission, and the impact that such an order would have on the person's privacy and security of the person.
- [154] Mr. Miller, as I noted, has no record. That was canvassed during the course of the submissions. The offences are serious and I acknowledge that while the DNA order will impact Mr. Miller's privacy and the security of his person, I do not find that the process of obtaining the DNA order or sample in compliance with the order is particularly intrusive.
- [155] So when I balance the nature of the offences and the impact upon privacy and security, I am satisfied that it is in the best interests of the administration of justice that an order be made authorising the taking of a sample of a bodily substance from Mr. Miller for the purpose of registering it at the DNA data bank.
- [156] I am not sure during COVID times, but if a timeline is required for the purpose of that order, I am going to say that Mr. Miller attend at the local detachment of the RCMP in the next 90 days, for the purpose of complying with the order to provide a DNA sample.
- [157] I am quickly going to add, Mr. Miller, this is simply - you need to phone the police station first, because they have certain times when you can stop in to provide that sample, usually during the week, so you will fit it into your schedule. And it involves generally taking a sample, a swab of the inside of your mouth, and that completes the process.
- [158] All right, sir, so I will leave it for you just to make that arrangement when it best works for you in the course of the next three months.
- [159] CNSL O. SNOWDON: There is also the victim fine surcharge.
- [160] THE COURT: Yes, where are we on that at this point?
- [161] CNSL O. SNOWDON: Your Honour has the discretion to waive it if it would cause a hardship, and I won't press the point too strongly, because Mr. Miller is getting disability social assistance, so it's not nothing, but it's certainly not substantial.

- [162] THE COURT: All right. Mr. Miller, I am going to waive it in these circumstances because, in my mind, I know that you have not been working. You are not working now and you have not been working for a considerable period of time because of your focus on other matters, and so it strikes me that the imposition of the surcharge would be a hardship in these circumstances, and so it is waived.
- [163] CNSL J. LESTER: Two minor points, My Lord.
- [164] THE COURT: Yes.
- [165] CNSL J. LESTER: First up, the order for forfeiture of the two items seized.
- [166] THE COURT: Yes, there will be an order for forfeiture of the two items seized, that being the rifle and the shell casing.
- [167] CNSL J. LESTER: Thank you, and just so Madam Registrar is clear that the apology would be in writing, just so -
- [168] THE COURT: Yes, I am sorry, if I did not say that, to apologise in writing in a form and in a manner satisfactory to your probation officer. That letter of apology is to be provided to your probation officer, and I think I specified a time for you, Madam Clerk.
- [169] THE CLERK: Yes, My Lord, I did have that.
- [170] THE COURT: All right.
- [171] THE CLERK: And just to confirm, My Lord, are the ancillary orders only to apply to Counts 3 and 5?
- [172] CNSL J. LESTER: Yes, the DNA was not - was on - I don't think it related to Count 2. I'll just double check my notes here, My Lord, because I did -
- [173] THE COURT: Yes.
- [174] CNSL J. LESTER: The DNA relates to the threats and the break and enter, pardon me.
- [175] THE COURT: Yes, so Counts 1 and 3.
- [176] CNSL J. LESTER: Counts, sorry, 2 and 3.
- [177] THE COURT: Oh, I am sorry, you are right, the DNA was 2, yes.
- [178] CNSL J. LESTER: So that - and that's for the -
- [179] THE COURT: Counts 2 and 3.
- [180] CNSL J. LESTER: - DNA, Madam Registrar.
- [181] THE CLERK: So 2 and 3 for the DNA.
- [182] CNSL J. LESTER: And I would submit that the s. 110 order, I think it relates to certainly the threats and the s. 88 offence.

- [183] THE COURT: It would seem to me it would apply to both, but unless Ms. Snowdon has anything to add to that?
- [184] CNSL O. SNOWDON: No, that's my understanding as well.
- [185] THE COURT: Yes.
- [186] CNSL J. LESTER: All right.
- [187] THE COURT: So Counts 3 and 5.
- [188] THE CLERK: Three and 5, and victim surcharge waived on all counts?
- [189] THE COURT: Correct.
- [190] THE CLERK: Thank you, My Lord.
- [191] CNSL J. LESTER: And in my Columbo manner, just a couple more points, My Lord. I do need to direct a stay of proceedings on Counts 1 and 4, and I do that. And currently under the COVID regime, My Lord, the practice has been to read out the warning so that the - Mr. Miller would not have to attend for signing it in front of the judicial justice.
- [192] THE COURT: Yes.
- [193] CNSL J. LESTER: So I think there's some standard wording that we have been using. Madam Registrar, do we have that handy? I know some of the judges bring it into court. It's just basically reminding the person of a potential breach if he or she does not comply, and then that saves Mr. Miller waiting at the Registry.
- [194] THE CLERK: Unfortunately, My Lord, that's the one thing that the clerks don't have access to, so I don't think we even have it available in the courtroom. It's just been the judges that have had the access and brought it in, unfortunately.
- [195] CNSL J. LESTER: Yes, it's not within the Code. It's just - yes, it's been added on in COVID times regarding the - avoiding the need, and then I think it's put on the record, is it not, Madam Registrar, that -
- [196] THE CLERK: That's correct.
- [197] CNSL J. LESTER: - that the court then finds that there is no requirement to attend the Registry for signing. Otherwise the alternative, of course, is for Mr. Miller to wait here, but then that means that - I expect the Registry staff, considering it's 10 to four, would have to stay a little later.
- [198] THE COURT: Yes. I do not want anyone to have to stay unnecessarily.
- [199] CNSL J. LESTER: I don't know if there's one of the other judges that are in the building, I imagine Judge Mundstock or Young or Ormiston would have a copy perhaps framed on the wall, but I just don't know where they would keep those.

[200] CNSL O. SNOWDON: You'd think Mr. Lester and I would have memorised it by now.

[201] THE COURT: Yes.

[202] CNSL J. LESTER: I can get close to it, but I can't do the exact.

[203] THE COURT: All right, well, let me stand down, see if I can -

[204] CNSL J. LESTER: Sorry, there's always just one more item, but it is kind of important for the Registry, especially now.

[205] THE COURT: Well, it is, absolutely. Do you have it attached to any other order that may be in the Registry?

[206] THE CLERK: No, but I can - I should be able to locate it, My Lord.

[207] THE COURT: All right. Mr. Miller, bear with me for a moment, because if I can take care of it while you are in the courtroom, you do not have to wait for another hour or so while this is all being prepared. All right, I will stand down briefly, thank you.

[208] THE CLERK: Order in court, all rise.

(PROCEEDINGS ADJOURNED AND RECONVENED)

[209] THE CLERK: Recalling the matter of Her Majesty The Queen against Miller, My Lord.

[210] CNSL J. LESTER: I'm really hamming up the Columbo issue, just two more points, My Lord. I just want to double check on the no-contact, whether that also included a no-go to any residence, school -

[211] THE COURT: Well, I will add to it the no-go to any residence of either of those individuals if such location becomes known to you. So if you know where Mr. Douglas or Ms. Louie -

[212] CNSL J. LESTER: Louie, yes.

[213] THE COURT: - is, then you just do not go to their residence.

[214] CNSL J. LESTER: And did Your Lordship include a no-alcohol, no consume or possess? I'm sorry, I didn't make a note.

[215] THE COURT: Yes.

[216] CNSL J. LESTER: Thank you that is it for me.

[217] THE COURT: No, I did.

[218] CNSL J. LESTER: Thank you.

[219] THE COURT: Mr. Miller, just so you know, sir, and this will save you from having to wait, that for the probation order you need to know that if you fail to comply with any condition of that probation order, you could be charged with a breach of that order and a warrant could be issued for your arrest, so that you would be brought back to court to deal with a breach charge, for breaches or charges. And if you need to change a term of your probation order, you have the right to apply to a judge, all right.

[220] CNSL J. LESTER: All right. Good to have. And that does end the matter finally, My Lord.

[221] THE COURT: All right.

[222] CNSL J. LESTER: It's been a long time that my friend and I have been involved, but -

[223] THE COURT: Yes, thank you both for your very helpful submissions. Mr. Miller, I am sure you have copies of those letters that your counsel provided, but I encourage you to keep them, because they reflect a significant amount of work that you have spent the last two years actively involved in, and you should be commended for all of your efforts. Good luck to you in the future. Thank you.

"T.J. Crabtree J."

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