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CANADA / JUDGMENT

## R. v. Sellars

2017 BCSC 2236

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COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 2236 R. v. Sellars

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sellars,

2017 BCSC 2236

Date: 20171213

Docket: 33863

Registry: Williams Lake

Regina

v.

Jordell Anthony Sellars

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Sentence

Counsel for the Crown:

Paul Swartz

Counsel for the Accused:

Ms. G. Eliany

Place and Date of Trial:

Place and Date of Sentencing Submissions:

Williams Lake, B.C.

March 13 to 17, 2017

Williams Lake, B.C.

October 13, 2017

Place and Date of Oral Result Given in Court:

Williams Lake, B.C.

December 13, 2017

Place and Date of Sentencing:

Williams Lake, B.C.

December 13, 2017

## Introduction

- [1] Mr. Sellars is a First Nations man who is before me for sentencing.
- [2] On March 17, 2017, following a four day trial, I convicted him of four counts of a five-count indictment as follows:
- a) Count 1: possession of a prohibited/restricted firearm with ammunition, contrary to s. 95(1) of the Criminal Code of Canada, [Code];
  - b) Count 2: occupying a vehicle in which there was a prohibited/restricted firearm, contrary to s. 94(1) of the Code;
  - c) Count 4: careless storage of a firearm, contrary to s. 86(1) of the Code; and
  - d) Count 5: possession of a firearm knowing that he was unauthorized, contrary to s. 92(1) of the Code,
- ("Convictions").
- [3] Given his heritage, I am guided by the Supreme Court of Canada's directions in *R. v. Gladue*, [1999] 1 S.C.R. 688 [Gladue] and *R. v. Ipeelee*, 2012 SCC 13 [Ipeelee], in crafting a sentence that is fit and proper in the circumstances.

## Mr. Sellars' Attendance

- [4] At his counsel's request, and citing safety concerns if he was transported to Williams Lake to attend both the sentencing submissions and today's sentencing in person, I allowed him to attend by video conference from Oliver.

## Failing to Appear

- [5] Mr. Sellars' sentencing was to take place on June 12, 2017. Regrettably, he chose not to attend court that day and an arrest warrant was issued. He was arrested on July 3, 2017, and has been held in custody at the Okanagan Regional Correctional Center in Oliver pending his sentencing.
- [6] As a result of his non-attendance, Mr. Sellars was charged with failing to appear. During sentencing submissions on October 13, 2017, Mr. Sellars pled guilty to that charge.
- [7] It is proposed that I deal with that matter at the conclusion of my sentencing for the Convictions.

## Circumstances of the Convictions

- [8] During his teenage years Mr. Sellars was involved in a "gang" operating in and around the Williams Lake area known as the "Indian Outlaws" ("IO Gang"). A rival gang known as the "721 Gang" operates in the same area. These gangs started out as loosely organized groups who taunted and fought each other using their fists. The violence soon escalated to the use of knives and later guns and has resulted in the deaths of a number of members of both gangs.
- [9] Indeed, after Mr. Sellars' trial in March 2017, Mr. Sellars' brother, who was a member of the IO Gang, was shot and killed bringing to four the number of unsolved, but suspected gang-related, homicides in the Williams Lake area in recent years.
- [10] The Convictions arose from a September 4, 2015, routine traffic stop of a truck owned and driven by Mr. Sellars' mother. Mr. Sellars was the right rear-seat passenger. His then girlfriend and now common-law wife, Ms. Samantha Duncan, was the front right seat passenger. They had travelled from Soda Creek to Williams Lake and were on their way back when they were stopped by the RCMP because of a broken tail light. When the officer arrived at the driver's window, he detected an odor of marihuana.
- [11] All occupants of the truck were removed and searched. The truck was also searched and disclosed a fully loaded .32-calibre Colt handgun ("Handgun") that was found partly hidden in the storage area underneath where Mr. Sellars was sitting. The search also produced an extendable baton, two knives, a small amount of marihuana and a can of mace.
- [12] As he was being searched, Mr. Sellars dropped nine rounds of .32-calibre ammunition into the box of the truck.

- [13] Mr. Sellars testified at trial. He stated that he bought the Handgun from someone on the street sometime before. He also bought the ammunition. He carried the Handgun with him at all times for his protection. He stated that on the day he was arrested, they had driven to his brother's residence in Williams Lake to retrieve a jacket he had left behind. He stated that that residence was the subject of a targeted attack by rival gang members a few months before.
- [14] He claimed to have the Handgun for his protection only.
- [15] As a result of admissions made by him during his testimony, the only real issue for determination at trial was whether he was entitled to an acquittal of the Charges because he was in possession of the Handgun for self-defence. He relied on s. 34 of the Code.
- [16] For the reasons given at the conclusion of the trial, that defence was rejected and I found that the Crown had proven all elements of Counts 1, 2, 4 and 5 beyond a reasonable doubt.

### **Mr. Sellars' Background**

- [17] Mr. Sellars is 28 years old, is in a settled and supportive relationship with Ms. Duncan and is the doting father of a one-year old son. Prior to his arrest in July 2017, he was employed full-time as an equipment operator at the Mount Polley Mine and was a productive member of society.
- [18] This was not always the case.
- [19] In his mid-adolescent years, Mr. Sellars was an active member of the IO Gang having been pressured into joining by his older cousins. Also from an early age, he began drinking alcohol and consuming illegal drugs. As a gang member, he did things he is not proud of.
- [20] After graduating from high school, he decided to change his lifestyle, rejected the IO Gang, attended the Round Lake Treatment facility and tried to start a new life. He moved to Alberta where he received training and became an equipment operator.
- [21] In September 2015, when he was arrested on these charges, he had disassociated with the IO Gang and had no other gang associations.
- [22] Mr. Sellars has a dated and mostly unrelated criminal record. The only relevant conviction is possession of a weapon, a machete, for a purpose dangerous to the public peace, an offence that occurred in December 2012 and that he plead guilty to on December 10, 2014. He was fined \$200.
- [23] Until his arrest for failing to attend his sentencing in June 2017, he was living in Kamloops with Ms. Duncan and their son. He worked a seven-days-on/seven-days-off rotation at the mine.

## Gladue Report

- [24] The law says that for Aboriginal offenders, I have a duty to gather as much information as I can about that person. In order to provide the court with that information, a Gladue Report ("Gladue Report") dated May 25, 2017, was prepared by Mr. Stuart Cadwallader, of Kulus Consulting and Development.
- [25] Mr. Cadwallader interviewed Mr. Sellars, his mother Ms. Lorna Frank, his father Arthur Sellars, his paternal aunt Elaine Sellars, Ms. Duncan, Ms. Donna Dixon, the Chief of Xat'sull First Nations, Ms. Rae-Lynn Betts, the Community Health Counsellor of the Xat'sull First Nations, and his Kamloops bail supervisor Mr. John Burrows.
- [26] The Gladue Report was illuminating. While perhaps not having an ideal upbringing, Mr. Sellars' family was not dysfunctional either. Indeed, Mr. Sellars described his formative years as relatively positive with everyone at home getting along relatively well. His father worked in the logging industry which required his family to move around the province to accommodate his work.
- [27] It would seem that Mr. Sellars started his gang involvement at the age of 16 when his family moved back to Soda Creek and his older cousins persuaded him to join the IO Gang. Like his older brothers, he was struggling to fit in. He admits that his use of alcohol and drugs became more entrenched at that time. His behaviour began to go downhill. His cousins were involved in organized crime to support their substance abuse and criminal lifestyle and dragged Mr. Sellars along with them. Mr. Sellars states that he stopped listening to his family and by the time he was eighteen, moved into Williams Lake and began a "gangster" lifestyle. In so doing, he consumed alcohol, drugs and engaged in criminal activities. He told Mr. Cadwallader that he "never looked past the end of my nose and as I didn't think I had any future, and didn't care if I died the next day".
- [28] His substance abuse eventually resulted in a diagnosis of alcoholic pancreatitis and he was admitted to the Round Lake Treatment Center.
- [29] Following the targeted murders of his cousin in June 2013, and best friend in May 2014, Mr. Sellars recognized the necessity of making changes in his life. He was determined to disassociate from his previous gang-related peers. He moved to Red Deer, Alberta, with Ms. Duncan where he successfully trained and obtained employment in what is commonly called the "oil patch". He was soon laid off and moved back to Williams Lake. He obtained employment at the Mount Polley Mine. He rented a home in Ashcroft and then in Kamloops and commuted to work from there.
- [30] He became a father on November 9, 2016, and states that his whole world and priorities changed then. He became focussed on his family. He told Mr. Cadwallader that "my life now consists of working to take care of my family. I want to ensure my kid isn't going to grow up like I was."

- [31] Ms. Duncan and Mr. Sellars' extended family members have all noted that Mr. Sellars has made a positive commitment to change his life. It appears he was headed in the right direction when he was arrested on September 5, 2015, on these charges. After his release on September 9, 2015, he continued working and was a productive member of society until his arrest on July 3, 2017, for failing to appear at his sentencing.
- [32] The Gladue Report recognizes the negative effects of the residential school system on Mr. Sellars' parents and grandparents who were part of that system, and the deleterious lasting effects that system has had on the First Nations community in general.
- [33] A number of factors that affect First Nations persons in general are also present in Mr. Sellars' life including a multigenerational family history of substance abuse, familial instability, fragmentation and breakdown, and premature death. This legacy continues to impact the lives of successive generations within Mr. Sellars' family including Mr. Sellars himself. The Soda Creek community continues to struggle with significant drug and alcohol issues. Mr. Sellars' inability to deal with unresolved grief and loss played a prominent role in two suicide attempts and continued unabated until he developed alcoholic pancreatitis at age 19 prompting his treatment at the Round Lake Treatment Center.
- [34] Mr. Cadwallader set out a number of options available to the court in considering a fit and proper sentence for Mr. Sellars, both custodial and in the community.
- [35] On this background, the question that remains is: What now, over two years after his arrest, is a fit sentence for this offender for these offences in these circumstances?

### Crown's Position

- [36] The Crown submits that taking into account the seriousness of the Convictions, in particular the seriousness of Mr. Sellars possessing the loaded prohibited Handgun in a community where gang violence is high and where there are currently four unsolved gang murders, a sentence of imprisonment of four years would be fit and proper.
- [37] In addition, Crown seeks various ancillary relief including the imposition of a lifetime firearms prohibition order, a DNA sample, and forfeiture of the Handgun, ammunition, knives and sheaths, extendable baton, marihuana and can of mace seized by the police at the time of his arrest.
- [38] The Crown points to the latest two decisions from our Court of Appeal dealing with sentencing for weapons offences: *R. v. Racette*, 2016 BCCA 275 [Racette] and *R. v. Kachuol*, 2017 BCCA 292 [Kachuol]. In *Kachuol*, the Court stated that for possession of illegal firearms offences simpliciter, a fit sentence at the bottom of the range is three years' imprisonment.
- [39] The Crown also relies on the following authorities in support of the four year sentence it seeks: *R. v. Frohock*, 2008 BCSC 735, where an offender with a serious criminal record was sentenced to four years, six months for possession of a loaded sawed off shotgun; *R. v. Ball*, 2013 BCSC 2372; *affm'd* 2014 BCCA 120 (BCCA), where, in a case similar to the case at bar, an

offender who was warned that he might be in danger because of his association with unsavory persons involved in the illegal drug world, was sentenced to three years by the trial judge. That sentence was increased on appeal to four years, six months; *R. v. Holt*, 2015 BCCA 302, where a first time offender was sentenced to 30 months' imprisonment; *R. v. Kennedy*, 2016 MBCA 5, where a first time offender who possessed prohibited firearms, including a prohibited automatic rifle, was sentenced to three years; *R. v. Sanghera*, 2012 BCSC 901 [Sanghera], where sentences of seven years, seven years and six years, and one month were handed out to three accused who were in possession of loaded handguns; and *R. v. Heathcote*, 2016 BCSC 1246, where the offender was given 26 months' imprisonment for possession of a loaded restricted firearm.

- [40] The Crown argues that this case does not fit within the typical cases involving First Nations persons charged with such things as sexual assault, or had PTSD or FASD, which have a clearer focus on the holistic approach that Gladue and Ipeelee address.
- [41] Given the situation in Williams Lake, despite Mr. Sellars' First Nations heritage, this case, the Crown asserts, cries out for a four year sentence.

#### Mr. Sellars' Position

- [42] On Mr. Sellars' behalf, Ms. Eliany emphasizes the importance of considering a restorative approach to his sentencing.
- [43] She argues that the violence in Williams Lake has been ongoing for generations. It is not a problem that will be fixed with Mr. Sellars' sentence. She says that he was pressured to fight in the IO Gang by his older cousins who wanted to turn him into one of their soldiers. After rehabilitation and meeting Ms. Duncan his life changed. He made a conscious decision to reject and stay out of gang life and he has been successful in so doing. He obtained skills training, obtained employment and became a productive and law abiding member of society.
- [44] She asserts that the court cannot underestimate the level of violence Mr. Sellars was accustomed to and must consider his actions from his perspective. By carrying the Handgun with him, he thought that he was protecting his family, not endangering the public.
- [45] She sees this case as putting the court on the front lines of the current violence in Williams Lake and in playing a role in reconciliation with First Nations communities. She states that everyone is at a loss to know how to address the violence in the community. Incarceration of Mr. Sellars, she argues, is not the answer. She refers to Gladue and Ipeelee as highlighting the important role sentencing judges have in reconciliation.
- [46] She argues that the court should also not underestimate the importance of Mr. Sellars testifying during the trial and how difficult it was for him because it breached the "code of honor" that exists between the IO Gang members even after they no longer belong.

- [47] Instead of the approach taken by the Crown, she proposes a "holistic" approach. She asserts that the Crown's submissions come from the traditional approach to sentencing, a perspective of supreme privilege that most First Nations communities or their members do not have. She urges a consideration of the approach adopted by Professor Benjamin L. Berger of the Osgoode Hall Law School, in a paper he authored called Sentencing and the Salience of Pain and Hope, Osgoode Hall Law School, 2015 Vol. 11 Issue 04 ("Berger Paper"), who points out that recent jurisprudence of the Supreme Court of Canada urges sentencing judges to account for " pain, loss, estrangement, alienation, and other features of the offender's aggregate experience of suffering at the hands of the state in response to his or her wrongdoing" and calls on judges to " think about sentencing in ways better attuned to the lived experience of punishment". He argues that the general principles of proportionality should be drawn down into the life and circumstances of the individual offender.
- [48] She proposes that the court help Mr. Sellars with a sentence that will give him hope that he can succeed in life. She points out that s. 718.2(e) calls on judges to use a different method of analysis in determining the fitness of Mr. Sellars' sentence. This, she argues, is why Professor Berger's paper is so important. Its premise is that in dealing with First Nations offenders, the construction of the sentence must provide Mr. Sellars with hope for the future.
- [49] In response to the Crown's submissions regarding Racette and Kachuol, she argues that the Supreme Court of Canada is the ultimate authority, and while Court of Appeal decisions are binding, they do not rise above the principles set out in Gladue and Ipeelee which are binding on me. She points to research that suggests imprisonment of First Nations offenders is not a strong deterrent and there is a high degree of recidivism among the First Nations population.
- [50] Despite our Court of Appeal's recent pronouncements that a three year minimum sentence is required for possession of prohibited weapons, she urges me to rely on the Supreme Court of Canada directions and consider options besides incarceration. In particular, she emphasises the broad discretion trial judges have on sentencing outside the typical "ranges" and refers me to the Supreme Court of Canada's comments in R. v. Lacasse, 2015 SCC 64 [Lacasse], to that effect.
- [51] Ms. Eliany argues that although it is serious that Mr. Sellars possessed the Handgun in his mother's truck, a non-custodial sentence that would allow him to maintain his family ties, in particular, to his son, and give him hope of having a supporting family, staying out of gang life and staying positive would be fit and proper in the circumstances.
- [52] She relies on the following cases in support: R. v. Brereton, 2015 BCSC 1553, where a 33 year old convicted of a number of firearms offences including possession of a handgun received 26 months' incarceration; R. v. Sears, 2016 BCSC 965, where a 19 month conditional sentence in addition to time already served was ordered in a case of a 59 year old convicted of a

number of firearms offences including possession of a handgun; *R. v. Mingo*, 2016 ONCJ 556, where an 18 year old with no prior criminal record who was in possession of a loaded revolver for self-protection was given two years less one day and three years' probation; *R. v. Devink*, 2016 BCSC 1658, where a 38 year old paraplegic who slept with a gun under his pillow and possessed a Taser for self-defence received a one year conditional sentence; *R. v. Woodward*, 2015 BCSC 2227, where the offender received a two year sentence, despite five drug offences and four weapons offences because he had taken steps since his arrest to turn his life around; *R. v. Filian-Jimenez*, 2014 ONCA 601, where an 18 month sentence was upheld for possession of a loaded gun for self-protection in a case where the offender had repudiated his membership in a gang, had full time employment and had fundamentally changed his lifestyle; *R. v. Pelletier*, 2016 BCSC 2497, where an First Nations woman with a number of challenges such as PTSD, FASD and ADHD was given a suspended sentence and three years' probation for possession of two handguns; *R. v. Jacko*, 2010 ONCA 452 where the Court of Appeal reduced a four year sentence given to a First Nations offender to a two year conditional sentence because he had shown that he had changed his ways, made rehabilitation efforts, was enrolled in full-time school and posed no danger to the community.

- [53] All of these cases, she says, are good examples of where sentences for similar offences were far below what the Crowns seeks.
- [54] She points out that *Racette* involved an offender with an unrelenting criminal record, *Kachuol* was not of First Nations decent and was driving in a densely populated section of Vancouver with a loaded handgun and *Sanghera*, involved automatic pistols that were well concealed in a sophisticated and hidden compartment in the offenders' vehicle.
- [55] Given the Gladue Factors that are in play and given Mr. Sellars' sincere efforts to change his ways by spurning the gang lifestyle, successfully obtaining full-time employment and becoming a responsible member of society, she urges that the four year sentence the Crown seeks would not be fit or proper.
- [56] Ultimately, she asks that his sentence take into account the local circumstances and that I craft a sentence that the community will accept while at the same time not set Mr. Sellars up as an example.

### Principles of Sentencing

- [57] The purposes and relevant principles of sentencing are set out in s. 718, 718.1, and 718.2 of the Code.
- [58] The primary objectives are deterrence and denunciation subject to the overriding principle that the sentence must be proportionate to both the gravity of the offence and the degree of responsibility or blameworthiness of the offender.

- [59] Section 718.2(e) is of particular significance when sentencing First Nations offenders. It requires the sentencing judge to consider all available sanctions, other than imprisonment, that are reasonable in the circumstances with particular attention to the circumstances of First Nations offenders.
- [60] In Gladue and Ipeelee, the Supreme Court of Canada set out the factors to consider in sentencing a First Nations offender. The Court noted that imprisonment should be the penal sanction of last resort and that prison should be used "only where no other sanction or combination of sanctions is appropriate to the offence and the offender: Gladue at para. 36. This direction applies equally in the context of so called "serious" offenses: Ipeelee, at para. 86.
- [61] The question then is: what is fit and appropriate - What is the proportionate sentence - given Mr. Sellars' particular circumstances and the circumstances of the offences.

#### Sentencing Considerations for these Convictions

[62] I shall review the aggravating and mitigating factors.

##### i. Aggravating Factors

[63] The aggravating factors are:

- a) Mr. Sellars chose to voluntarily possess the Handgun in a public place;
- b) he had additional ammunition with him and when he was being searched he attempted to throw it away; and
- c) he put his mother and girlfriend at risk by bringing the Handgun with him in his mother's truck to Williams Lake for the purpose of picking up his jacket at his brother's residence that was the subject of an attempted home invasion a few months before.

##### ii. Mitigating Factors

[64] There are no mitigation factors directly related to the circumstances of the offences.

[65] The indirect mitigation factors include that he has a large extended family, is in a stable common-law relationship with Ms. Duncan, has a one year old son, has developed a good work history in the last three years, holds a good job at the Mount Polley Mine and is the sole source of financial support for Ms. Duncan and his child. He has upgraded his skills by participating in on-site training programs and intends to take further upgrading. He has attended counselling and has the support of his family and Band. He has exceptional prospects of rehabilitation.

[66] Save for possessing the Handgun, he has exhibited commendable pre and post-offence conduct, including his full-time employment, adherence to the terms of his release and successful efforts at self-improvement including upgrading and training.

- [67] In a very positive letter written to the court Ms. Yochmans, an addiction counsellor at the Soda Creek Indian Band who counselled Mr. Sellars between 2011 and 2016, stated that Mr. Sellars attended counselling sessions as scheduled, was consistent in attending, actively participated and completed assignments, attended and graduated from a vigorous training program called "Changeways" and participated in the community. She describes him as "thriving" and expects he will continue to do so provided he continues to take advantage of his support systems.
- [68] Gladue Factors are mitigating in nature but are not "traditional" in the same way an absence of a criminal record, a guilty plea or other personal circumstances might moderate the nature and severity of a sentence. They are, however, to be taken into consideration in assessing Mr. Sellars' moral culpability or blameworthiness: Ipeelee; R. v. Eustache, 2014 BCCA 337 at para. 14.

## Discussion

- [69] Mr. Sellars' circumstances fall squarely within the matrix of concerns that Gladue and Ipeelee address and invite a more creative approach to sentencing than has traditionally been taken.
- [70] As Mr. Sellars' sentencing judge, my fundamental duty is to fashion a sentence that is fit and proper in the circumstances. It must individualize and give effect to the restorative justice approach required by s. 718.2(e) and the Gladue Factors.
- [71] Section 718.2(e) requires a different methodology for assessing a fit sentence for a First Nations offender.
- [72] Although the Crown suggests this case does not have a clear focus on the holistic approach, Ipeelee tells us that Gladue Factors apply in all cases involving Aboriginal offenders. As Mr. Sellars is Aboriginal, I must consider all his circumstances and the Gladue factors: para. 86. The methodology does not involve a comparison to a non-Aboriginal offender, because as the Court stated at paragraph 86, "there is only one offender standing before the court" and that person is Mr. Sellars.
- [73] Mr. Sellars' conduct must be measured against his background and upbringing, his involvement in the IO Gang and the ensuing violence. The Convictions are a direct result of his involvement in the IO Gang and the fallout from that. The deaths of his cousin and best friend by suspected members of the 721 Gang motivated his ill-conceived decision to arm himself in case his own life, or the lives of his family, were threatened. As noted in Ipeelee and Gladue, in assessing the appropriateness of a sentence, I must consider these factors to evaluate whether imprisonment would serve to deter or denounce the crime, in a way that would be meaningful to Mr. Sellars' community: Ipeelee, at para. 73.

- [74] I accept that Mr. Sellars now appreciates the consequences of possessing the Handgun, that he regrets his gang involvement and that he has moved forward in a positive direction with his life and with his new family.
- [75] Mr. Sellars' rejection of the IO Gang, the advancement of his own rehabilitation and his ability to obtain and maintain employment are commendable. They are to be acknowledged and encouraged.
- [76] It goes without saying that the possession of loaded handguns in public cannot be condoned. They pose a serious threat to our society and must be denounced. The weight of appellate authority in this province favours, as a general rule, a lengthy period of incarceration for possession of prohibited handguns to address the sentencing principles of denunciation and deterrence. Exceptional circumstances must justify the departure from a lengthy period of incarceration. It must be demonstrated that the principles of sentencing, including deterrence and denunciation, can be recognized in the individual case without such a period of incarceration (this is also discussed in *R. v. Voong*, 2015 BCCA 285 [Voong] at paras. 45, 63).
- [77] Section 95(1) captures a wide range of conduct. The authorities to which I have been referred distinguish between possession of handguns as part and parcel of criminal activities and cases, as here, where the possession of a handgun was for purely defensive reasons. The range of sentences tends to depend on the facts of the individual case.
- [78] The Supreme Court of Canada in *R. v. Nur*, 2015 SCC 15 [Nur], declared unconstitutional the three year mandatory minimum sentence for s. 95(1) offences. Since then, sentencing judges have reacquired the discretion to sentence an offender below what was the minimum if the circumstances of the offence and the offender so warrant.
- [79] In my view, the sentence the Crown urges prioritizes the "gravity" of the offences over Mr. Sellars' moral "blameworthiness". Proportionality requires that full consideration be given to both factors: *R. v. Proulx*, [2000] 1 S.C.R. 61 [Proulx] at para. 83. As noted in *Ipeelee*, systemic and background factors can bear on the culpability of an offender in that they may diminish the offender's moral culpability: para. 73. Failing to consider this violates the principle of proportionality.
- [80] I don't take the Court of Appeal's comments in *Racette* and *Kachuol* as directing a three year minimum sentence for any offence involving the possession of a prohibited handgun by any offender in any circumstance. Rather, the Court is providing guidelines that, in the normal course and barring mitigating and exceptional circumstances, three years should be the minimum sanction. Although, in *Holt*, decided after *Nur*, the Court of Appeal increased the sentence to 30 months and stated this was "the bottom of the range". Defining the range is not an exact science.
- [81] While affirming the value of ranges, the Court of Appeal has also affirmed the need for flexibility in sentences and the need for an individualized process.

- [82] As was recently stated by the Supreme Court of Canada in *R. v. Nasogaluak*, [2010] 1 S.C.R. 206 at para. 44:
- [44] The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the Code. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.
- [83] In sum, sentencing ranges are guidelines only. There will always be cases calling for a sentence outside a particular range. The circumstances of the offence and of the offender are always unique and cannot be disregarded: *Lacasse*, at paras. 57 - 58. The exercise of the sentencing judges' flexibility and discretion is fettered only by the caveat that the sentences must be in accordance with the principles and objectives of sentencing.
- [84] I accept that Mr. Sellars' reason for carrying the Handgun was that he felt his life could be threatened and felt he needed the Handgun for his protection and for no other purpose. He was motivated by fear for his safety and had the Handgun for defensive purposes only.
- [85] But that does not give him a licence to break the law. As stated in *R. v. Pilon*, 2009 ONCA 248, a person who associates with the criminal/gang culture is not thereby licenced to carry a loaded weapon in public for safety.
- [86] This theme was reinforced in *Kachuol*, where the Court of Appeal stated at para. 26:
- As Madam Justice Smith recognised in *Guha* at para. 30, when an offender possesses a firearm, particularly a handgun, for an illicit purpose, that purpose can only be to threaten or inflict serious bodily harm or death, if and when considered necessary. Common sense and human experience suggest no other reasonable explanation or lesser risk posed by possession of this sort. As Crown counsel aptly put it, most unlawful possession of loaded firearms represents nothing short of "tragedy in gestation". By criminalizing such conduct via s. 95(1), the law intervenes before someone is actually harmed or some other crime actually committed. By imposing severe exemplary sentences for possession simpliciter, courts support and advance the goals of this intervention.
- [87] Mr. Sellars' conduct must be characterized and he must be sentenced in this context, while at the same time considering the Gladue Factors which are part and parcel of the determination of a fit sentence. Mr. Sellars' background has a diminishing effect on his moral blameworthiness. As to the circumstances of the offence, the distinctions I draw from these cases is that Mr. Sellars was not in possession of the Handgun as part of an illicit

purpose. He had it for defensive purposes. Also, with the guidance of Gladue and Ipeelee, I draw the distinction of Mr. Sellars' personal circumstances and exceptional rehabilitative initiatives.

- [88] In the end, mechanical adherence to a sanctioned minimum range does not reconcile with the unambiguous requirement for individualized sentencing. For this reason, the Supreme Court has cautioned against adherence to "starting-point" penal sentences (see for example Proulx; Ipeelee, at para. 86; and Lacasse at para. 61).
- [89] I view Mr. Sellars' highly distinctive personal circumstances, rejection of the gang culture and sincere and tangible rehabilitation efforts as exceptional and justify a departure from the minimum sentence set out in Kachuol. These include the fact that he has had no criminal convictions since 2012, significant and objectively identifiable steps towards rehabilitation, gainful employment, remorse and positive change in his lifestyle. In short, he has turned his life around.
- [90] Mr. Sellars' sentence must be focussed on the fundamental principle of proportionality. A sentence must be proportional to both the offender and the offence, and by comparison to sentences imposed for similar offences in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate. However, the principle of parity of sentences is secondary to the fundamental principle of proportionality: Lacasse at para. 53. If the personal circumstances of the offender are different, different sentences will be justified: R. v. Pham, 2013 SCC 15 at para. 9.
- [91] At the end of the day, the question is this: for these Convictions, committed by this offender, in this community, what is the appropriate sanction? (Gladue at para. 80).
- [92] Denunciation and deterrence do not always require a jail sentence. Both conditional sentence orders and probation orders can have deterrent effects. As noted in Voong, a breach of a probation order can result in a revocation and sentencing on the original offence. The Court of Appeal referred to this as the "Sword of Damocles" hanging over the offender's head: Voong at para. 39; R. v. Carrillo, 2015 BCCA 192. "Put another way, a condition need not be punitive in nature in order to achieve deterrence or denunciation": Voong at para. 43.
- [93] The protection of the public is also served through non-custodial sentences. When a former offender is rehabilitated and deterred from committing more crimes, the public is protected: Voong at para. 43.
- [94] As was stated in Lacasse at para. 4, "[r]ehabilitation is one of the fundamental moral values that distinguishes Canadian society from the societies of many other nations in the world, and it helps the courts impose sentences that are just and appropriate."

- [95] The principles of restorative justice where positive rehabilitation has been demonstrated suggest that a long sentence of imprisonment serves little purpose. As stated by the Court in Gladue at para. 43:
- [43] but as a general matter restorative justice involves some form of restitution and reintegration into the community. The need for offenders to take responsibility for their actions is central to the sentencing process: D. Kwochka, "Aboriginal Injustice: Making Room for a Restorative Paradigm" (1996), 60 Sask. L. Rev. 153, at p. 165. Restorative sentencing goals do not usually correlate with the use of prison as a sanction. In our view, Parliament's choice to include (e) and (f) alongside the traditional sentencing goals must be understood as evidencing an intention to expand the parameters of the sentencing analysis for all offenders. The principle of restraint expressed in s. 718.2(e) will necessarily be informed by this re-orientation.
- [96] In appropriate circumstances, the concept of restorative justice for a First Nations offender can command the greatest weight in sentencing, notwithstanding the serious nature of the crime: R. v. Wells, 2000 SCC 10 at para. 49.
- [97] Taken in isolation, the possession of a loaded handgun in public strongly favours a lengthy period of incarceration. However, and as earlier mentioned, s. 718.2(e) requires me to consider all available sanctions other than imprisonment "with particular attention to the circumstances of aboriginal offenders."
- [98] It is also important that Mr. Sellars is commended for his post-offence conduct, marked by expressions of remorse, rejecting alcohol and drugs, and working towards being a productive member of society. He has been successful at self-improvement and has maintained employment.
- [99] I find that this post-offence conduct confirms he is receptive to rehabilitation efforts and to the promotion of a sense of responsibility for moving his life forward in a positive manner, in particular the spurning of the gang culture, alcohol and drugs. It highlights that specific deterrence is not a primary issue in this case, as Mr. Sellars has already made positive changes away from criminality. Mr. Sellars' continued rehabilitation will lead to the prevention of crime, and individual and social healing.
- [100] I am prepared to acknowledge these efforts.
- [101] I will go further. If more youth would take the positive and responsible steps taken by Mr. Sellars post-offence, the attraction towards gangs and violence would be significantly reduced.

## Sentence

- [102] I accept that Mr. Sellars is a changed person. I accept that imprisonment is unlikely to do him any good and in fact is likely to be an obstacle to his rehabilitation. Protection of the public will not be served by hampering his rehabilitation and connection with his family.
- [103] While denunciation and deterrence are of prime importance, I say again that I must be mindful of the principles set out in ss. 718.2(d) and (e) that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and all available sanctions, other than imprisonment, that are reasonable in the circumstances should be considered for all offenders. It deserves repeating that non-custodial sentences can still serve denunciation and deterrence. A suspended sentence still requires careful adherence to the probation order and any violations will result in the imposition of a custodial sentence.
- [104] In the exceptional circumstances of this case, I agree with Ms. Eliany's submissions for sentencing.
- [105] At para. 81 of Gladue, we are instructed that:
- [81] The analysis for sentencing aboriginal offenders, as for all offenders, must be holistic and designed to achieve a fit sentence in the circumstances. There is no single test that a judge can apply in order to determine the sentence. The sentencing judge is required to take into account all of the surrounding circumstances regarding the offence, the offender, the victims, and the community, including the unique circumstances of the offender as an aboriginal person. Sentencing must proceed with sensitivity to and understanding of the difficulties aboriginal people have faced with both the criminal justice system and society at large. When evaluating these circumstances in light of the aims and principles of sentencing as set out in Part XXIII of the Criminal Code and in the jurisprudence, the judge must strive to arrive at a sentence which is just and appropriate in the circumstances.
- [106] Accordingly, in my judgment, there is an alternative to incarceration in the circumstances of this case, while still taking into account the guiding principles of sentencing. In crafting Mr. Sellars' sentence, I have born in mind that fact of his First Nations ancestry, the application of the Gladue Factors and restorative justice principles that the Supreme Court has repeatedly mandated sentencing judges to consider.
- [107] I am persuaded that, in this case, the principles of sentencing can be met with a suspended sentence. As was the case in *R. v. Pelletier*, 2016 BCSC 2497, incarceration makes no sense where, as here, Mr. Sellars does not represent a danger to the public and will be subject to strict conditions of probation. Mr. Sellars has displayed exceptional behavior since rejecting the gang life and has full-time employment. Having a son has changed his life for the better.

[108] A suspended sentence coupled with a lengthy period of probation would, in my view, be a fit, proper and proportionate sentence and would meet the sentencing objectives of the Code. It would take into account the gravity of the offences, Mr. Sellars' personal circumstances and successful efforts at rehabilitation. It would be a "holistic", proportionate sentence that in my view fits precisely with what the Supreme Court contemplated in Gladue and Ipeelee.

[109] To drive the point home, at para. 86 of Ipeelee, LeBel J. stated:

[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.

[110] So, having regard to Mr. Sellars' age, his character, the nature of the Offences and the circumstances surrounding their commission, I suspend the passing of sentence, direct that he be released subject to the following terms of probation for a period of three years:

- a) you will keep the peace and be of good behavior;
- b) you shall appear before the court when required to do so by the court;
- c) you shall report in person to the probation officer within two working days of your release from custody and thereafter when required by the probation officer and in the manner directed by the probation officer;
- d) you shall remain within the jurisdiction of the court unless written permission to go outside the jurisdiction is obtained from the court or the probation officer;
- e) you shall abstain from the consumption of drugs except in accordance with a medical certificate, of alcohol or any other intoxicating substance;

- f) you shall not own, possess or carry any weapon as defined in s. 2 of the Criminal Code;
- g) you shall perform 100 hours of community services as approved by your probation officer, which is recommended to include speaking to students enrolled in the Kamloops school system;
- h) for the first 12 months, you must remain inside your residence between the hours of 8:00 pm and 6:00 am daily with the exception of when you are working outside of the community where you reside with the written permission of your probation officer; and
- i) The Gladue Report notes that the Kamloops Aboriginal Friendship Centre Society (KAFSC) offers family focused community-based programs to the First Nations population in the Kamloops area that includes alcohol and drug counselling, family preservation, education and culture supports and recreational programs for all ages. You must attend the KAFSC at your probation officer's direction as and when required.

#### Ancillary Orders

[111] In addition, I make the following ancillary orders:

i. DNA Sample: s. 487.051(3)

[112] There will be an order under s. 487.051 authorizing the taking of the number of samples of bodily substances that are reasonably required for the purpose of a forensic DNA analysis from you. This DNA order will be in Form 5.04 and be on Counts 1 and 2 only.

ii. Firearms Prohibition: s. 109

[113] Section 95(1) is listed in s. 109(1)(b) and therefore, pursuant to s. 109(2)(a), I must impose a minimum ten year firearms prohibition. The Crown seeks a lifetime ban.

[114] Given Mr. Sellars' testimony at trial, I do not agree a lifetime ban from the possession of weapons and/or ammunition is necessary. I am prepared to accept Ms. Eliany's submissions that a 10 year firearms ban is more appropriate so that after he serves his sentence, Mr. Sellars will be able to teach his son about hunting and other culturally important practices.

[115] A 10 year firearms ban is ordered under Counts 1 and 2.

iii. Forfeiture: s. 491

[116] There will be an order that the .32 caliber handgun, the .32 caliber ammunition, the extendable baton, the marihuana and the pink can of mace seized by the RCMP at the time of Mr. Sellars' arrest shall be forfeited and destroyed.

[117] I am prepared to accept Ms. Eliany's submissions that the two knives and sheaths seized by the RCMP have sentimental family value and should be returned to Mr. Sellars' father.

vi. Victim Surcharge: s. 737

[118] There will be a \$200 victim surcharge pursuant to s. 737(2)(b)(i).

## Final Comments

[119] What all this means Mr. Sellars, is, that your sentence is suspended and you will be released from custody and placed on probation for three years. You must follow the probation terms to the letter. If there is any breach, you will be brought back before me and I will sentence you then and deal with the breach. You can expect that, in those circumstances, you would be sentenced to jail.

[120] I want you to understand that, for the reasons I have mentioned, I am going to give you a chance to continue on the positive path you were on at the time of your arrest two years ago. But it is important that you comply with the terms of the probation order and treat them seriously. Any non-compliance can result in fairly immediate and significant consequences. Do you understand that, sir?

## Failing to Appear

[121] Both Crown and Ms. Eliany jointly submit that a sentence of seven days' incarceration for failing to appear in court on June 13, 2017, would be appropriate.

[122] Mr. Sellars, I accept the Crown's and your counsel's joint submission that an appropriate sentence for your conviction for failing to attend the sentencing hearing on June 12, 2017, is seven days consecutive.

"G.P. Weatherill, J."

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