PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. MacNeil*, 2021 NSPC 4

Date: 2019/05/19
Docket: 2770385, 2770386, 2770387
Registry: Sydney

Between:

Her Majesty the Queen

v.

John William MacNeil

Judge:	The Honourable Judge A. Peter Ross,
Heard:	January 16, 17, 18, 22, May 17, July 18, 20 of 2018 in Sydney, Nova Scotia
Decision	May 19, 2019
Charge:	s.86(2) cc, s. 91(1) cc, s. 244(1) cc, s. 267(1)(a) cc, s. 430(4) ccc
Counsel:	Mark Gouthro, for the Crown William P. Burchell, for the Defence

By the Court:

Introduction

[1] Put simply, the issue at this Charter hearing and sentencing is whether it would be cruel and inhumane to incarcerate Mr. MacNeil for his crimes.

[2] After a trial which occupied seven days over a ten month period, the accused was found guilty of the offence of discharging a firearm at a person with intent to wound contrary to s.244(1) of the *Criminal Code*. He was also found guilty of assaulting the victim with a weapon, having possession of a firearm without a license, careless storage of firearms and property damage.

[3] The s.244 offence carries a minimum sentence of four years where, as here, the firearm used in commission is not a restricted or prohibited one (in which case the mandatory minimum penalty (MMP) is five years).

[4] The trial was drawn out by the same thing which makes this sentencing an unenviable task – the accused's ill health. He suffers from colorectal cancer. A report filed just one day prior to this hearing confirms that the cancer has spread to his lung, though a PET scan suggests the spread may be confined to one spot.

[5] The accused initially elected trial by jury but re-elected trial in provincial court on January 30, 2017. Mr. MacNeil's illness accounted for much of the ensuing delay. At times it was unclear whether or how the matter could proceed. In the end, Mr. MacNeil was able to attend the courthouse in person and participate in his trial for short stretches of time. He took the stand in his own defence and was

questioned and cross-examined over two separate days. Following his conviction on October 9, 2018 the court scheduled a sentencing hearing for December 5, 2018.

[6] On that date submissions were heard and Crown submitted a brief, but the matter was adjourned because the court wanted Defence to provide a clearer statement of its application for Charter relief. Additional evidence and final submissions were received on April 3, 2019.

[7] I am cognizant of the evidence at trial and my findings of fact. I also have before me

- a victim impact statement,
- a presentence report,
- a series of letters from friends and relatives of the accused attesting to his good character (supplemented by some *viva voce* evidence from those same people),
- medical reports from two attending physicians,
- medical reports from a local hospital,
- testimony from the accused at the sentence hearing, and
- testimony from Mark Cormier, Regional Director of Health Services, Atlantic Region, for Corrections Canada.

[8] Crown submits, in a careful and fair submission, that Mr. MacNeil should receive a five year penitentiary sentence. Defence submits that this would, in effect, be a death sentence. It has led evidence suggesting that Mr. MacNeil would probably not survive a sentence of even 4 years in jail. Defence thus mounts a s.12 Charter challenge to the four year minimum sentence, arguing that a term of this

length would be unduly harsh and constitute a violation of Mr. MacNeil's s.12 right "not to be subjected to any cruel and unusual treatment or punishment". It contends that a community-based suspended sentence with probation would remedy this alleged breach.

[9] To succeed in its application the Defence must show that the four-year MMP is grossly disproportionate to what the court would impose on this accused, were the court not constrained by the legislated minimum. Theoretically, if the application for Charter relief is granted, I could impose a shorter jail sentence, including one of less than two years to be served in the local correctional center, close to the accused's family and friends. On the face of things, a conditional sentence of imprisonment of less than two years - served in the community under strict terms such as house arrest - is not available here because the existence of the MMP puts it outside the scope of s.742.1 of the *Criminal Code*. Counsel have not focused their arguments on 742.1. In practical terms, given the accused's health, there would be little difference in the effect of a conditional sentence on house arrest versus simple probation.

[10] There are a number of ancillary orders which are not contested and which will follow regardless – a lifetime firearms prohibition, forfeiture of seized firearms and ammunition, and a DNA order.

[11] Legislated MMP's do not supplant a person's Charter rights, but they express the will of Parliament and should be countermanded only where they work a clear injustice. The justice or injustice of an MMP involves more than its impact on the accused. At least as important is the seriousness of the crime and its impact on the victim and the community.

[12] Crown does not argue that the accused presently constitutes a risk to the community. Given the shortened time horizon of his life, rehabilitation is not an important consideration and specific deterrence is of diminished importance as well.

[13] Weighing heavily on this sentence are the principles of general deterrence and denunciation. Courts should give effect to these principles where crimes of violence are concerned, particularly those involving use of a firearm. It is a rare case indeed where these offences do not result in a lengthy custodial sentence, regardless of whether such is mandated by the *Criminal Code*.

Facts

[14] Detailed reasons for decision were delivered orally on October 9, 2018. I will briefly summarize the key findings here.

[15] The charges all arise from one episode at Point Aconi, N.S. on the evening of August 14, 2014.

[16] The accused lived next door to his niece. Learning that the victim, Mr. Colton Johnston, had smashed her car earlier that evening and left it abandoned on the highway, the accused went next door to confront him. He took a loaded .22 calibre rifle. He first fired three shots into the side of Mr. Johnston's empty vehicle which was parked in the niece's driveway. He then entered the house and forced Mr. Johnston outside, striking him with the rifle-barrel in the process. There, on the deck, with Mr. Johnston prostrate at his feet, he shot him - once, in the thigh - and left. His niece witnessed these events but soon after moved away and could not be produced to give testimony at the trial.

[17] Motive need not be proven, but it appears that the accused's violent actions spring from the very close relationship with his niece. He supported her financially and harboured great hopes for her success. It bothered him that his niece was pregnant by Mr. Johnston. He believed Mr. Johnston was involved in the drug scene. The taking and wrecking of her car, which she needed to travel to school, seems to have enraged him.

[18] Mr. Johnston's life was not in immediate danger. He made his way to hospital with the assistance of friends. For the first few hours he hid Mr. MacNeil's involvement from Police, contriving a story about being shot in a drive-by. He had major surgery. He now has a steel rod in his leg from hip to knee.

[19] The next morning the accused surrendered to Police at his home without incident. Police located a number of firearms including the Ruger SR-22 used to commit the offence. Three months later he was granted bail and has been in the community on conditions ever since.

[20] Curiously, despite the serious injuries suffered by the victim, none of the charges police laid against the accused directly connect to these injuries - they are not an element of any of the offences for which the accused was convicted. The injuries may thus be viewed as an aggravating factor to the s.244 offence, which is subject to a four year MMP whether harm ensues or not. Had the accused shot and missed he might have a stronger case for a s.12 remedy. The law demands, and the public expects to see some relation between the harm occasioned by a crime and the punishment received for it. Here, the victim will suffer from Mr. MacNeil's actions for the rest of his life.

The Presentence Report

[21] From the PSR I learn that the accused is 51 years old. He recalled a rancorous home environment which included mental, physical and sexual abuse. The latter was never reported and cannot be confirmed. Siblings lend support to the former. His mother suffered mental illness; the marriage dissolved when he was eight; he stayed with is father. He lacked structure and nurturing. He completed Grade 12. He has a work history as a farm and construction labourer. He worked for a number of years in western Canada. He dislikes being out of the workforce because of his illness. He has modest assets and a modest pension. His first marriage lasted 16 years. They had two children, one who died of the drug overdose and a son Michael who testified in support of his father at the sentencing. His former wife remains supportive, helps him get around and believes he deserves to remain at home in his current condition.

[22] Mr. MacNeil developed a common law relationship with Suzanne LeBlanc some 11 years ago. She too is very supportive of the accused. She attends to his medical needs which includes occasional assistance with the ostomy. It is reported that the accused suffered a mental breakdown after the death of his son and has received treatment for depression and possible suicide.

[23] In his thirties, Mr. MacNeil developed serious issues with alcohol and drugs. However, he stopped drinking a number of years ago and is currently in the Opiate Recovery Program. Dr. Ali confirms this.

[24] Mr. MacNeil does not accept full responsibility for his actions. He claims that he was trying to save Mr. Johnston’s life, believing that he was going to

commit suicide. I found no basis in the evidence for this. None the less, Mr. MacNeil says he does not resent Mr. Johnston for how things have turned out.

Medical Evidence

[25] A brief written report from the accused's family doctor dated February 11, 2019 advises that the accused "has a potentially life-threatening diagnosis of lung cancer that is presently being worked up". It confirms that he previously had multiple surgeries for bowel cancer and associated complications. The letter says that "incarceration . . . could be detrimental to his health."

[26] Medical records document visits to hospital in 2014 (little detail as to reason or treatment), 2017 (little detail), April 2018 (swelling and pain around ostomy site), January 2019 (abdominal pain, and discovery of lesion in lung). He seems to have been ambulatory on each occasion. The records don't show the time spent in hospital, although Mr. MacNeil testified that he has spent long periods in hospital fighting sepsis after his wound "opened up" and following repeated surgeries for hernias.

[27] Letters from Dr. J. E. Ali, the accused's psychiatrist, dated October 7, 2016 and December 1, 2018 express concern about the physical and psychological stress incarceration will place on Mr. MacNeil. The latter, titled a "psychiatric report" outlines a long history of substance abuse by the accused. He diagnoses PTSD following the death of the accused's son in 2012 from an opiate overdose. He describes feelings of depression and occasional thoughts of suicide. He details the medications Mr. MacNeil is taking to maintain mental health.

[28] Dr. Ali also speaks about Mr. MacNeil's physical ailments, which are really the central basis of the Defence application. He indicates, as the accused himself did at trial, that he suffers from bowel cancer, has undergone surgery, chemotherapy and radiation, and has a permanent colostomy which requires special attention. He says "life expectancy as a result of his terminal condition has been seriously compromised" and that "he will not be able to endure the inevitable ordeals of incarceration" and "would not be able to receive the appropriate treatment." Crown did not object to the introduction of this evidence. Dr. Ali did not testify. His opinion was not tested in cross-examination. As such, it is uncontradicted, but nevertheless the basis for its conclusions are less than clear. I do not know what Dr. Ali knows about medical care within penitentiaries or provincial jails. It is not clear how much of his opinion is based on assumption. Dr. Ali, as I understand it, has not treated Mr. MacNeil for his cancer or other physical ailments. There is no stated basis upon which he draws the conclusion that Mr. MacNeil's medical needs cannot be met in the federal prison system.

[29] Mr. MacNeil spoke at length about his illness in his statement to police (which was tendered at trial) and during his trial testimony. He detailed episodes of infection, "going septic", subsequent surgical procedures to repair hernias, etc. He said that he has become almost house-bound and is reliant upon his partner who, as it happens, is a continuing care assistant. In his testimony at the sentence hearing of April 3, 2019, he spoke about his recent diagnosis of lung cancer. He understands that this is a spread of the same cancer he had in the bowel. The tumor was discovered "by accident" when he attended the regional hospital complaining of abdominal pain. The hospital records support this. Surgery may be required, and this may have to be done, together with follow-up care, in Halifax.

Character Evidence

[30] I heard character evidence at trial from Thomas Blanchard, Executive Director of Talbot House, a residential alcohol treatment facility. He describes the accused as a "gentleman" who was compassionate and respectful and helpful to others at the facility. In addition, a series of eight letters were submitted at sentence attesting to the accused's good character. Some of the letter-writers also testified. They speak very movingly, and with sincerity, about the toll which Mr. MacNeil's illness has taken on him, physically and psychologically. They say he is virtually imprisoned by his illness, sometimes unable to get out of bed, rarely leaving the house. He sees few people.

[31] His son Michael has a successful computer networks business in Vancouver and credits if father for this. Suzanne LeBlanc describes the accused's medical condition, the ongoing problem with infection and the challenges which his ostomy, hernias and open incision present. She describes the inflammation at the site of the ostomy and the pain this causes. She concludes by saying "I fear for John's mental and physical health in a prison setting and am concerned it will change his caring loving personality or worsen his conditions both physical and mental. I would like to see him stay at home where he has a support system, and I would be part of it.". Others say he was a hard worker and is well-liked in the community. The accused's uncle, Mr. David, credits the accused with giving him a place to live and a job, supporting his efforts to maintain sobriety and being a loyal friend and confidant. Other friends and family make eloquent pleas for compassion, based on his generous nature, and the serious health challenges he presently faces. In the words of one, "I would like to see my brother be able to

remain within his support system and carry on the rest of his life in peace, however long that may be."

Evidence regarding medical care in penitentiaries

[32] Mark Cormier testified about the health care which is available to federal inmates. If the mandatory 4-year sentence is imposed, it will be served in a federal penitentiary. Importantly, Mr. Cormier was given the accused's medical reports prior to testifying and was tested in cross-examination. He described how inmates are assessed upon entry - a 90 day period which includes a security as well as a health assessment by medical staff, including "an institutional physician". Prescriptions are maintained during this period. The level of health need can determine where an inmate is placed. There is a "regional hospital" entirely within the penitentiary at Dorchester where multi-level 24 hour care is provided. In the Atlantic region doctors are also contracted by Correctional Services of Canada to monitor the patients and provide care. If the four beds at that facility are full to capacity, or if medical needs require, the inmate is placed in a hospital in Moncton, under security.

[33] In addition to the specialist physicians on contract with CSC other doctors are consulted as required, in which case the inmate is escorted to the appropriate hospital under guard. The facility at Dorchester has psychiatric services supported by social workers, psychologists, etc.

[34] On intake a reconciliation is done of an inmate's medications and their regime is maintained until adjusted, if necessary, by a physician. Medications may be administered by staff or a small number of doses may be given to the inmate to self-administer. There are four pharmacists and six pharmacy technicians at a

regional centre in Moncton. There is no medication available to a member of the public which is not also available to them.

[35] With specific reference to Mr. MacNeil's recent diagnosis of lung cancer, Mr. Cormier expected that any necessary surgery and post-op care could be provided in Moncton until Mr. MacNeil was ready to return to the penitentiary. He testified that "we have cancer patients there on an ongoing basis". Some chemotherapies can be done within the institution, some are done in the Moncton hospital, on a daily basis if necessary. If Halifax is the only place where an inmate can receive needed care or diagnostics, he or she will be taken there.

[36] Mr. Cormier said, "we are very familiar with the care and treatment required for patients with colostomy bags." Inmates are taught to clean and change them and can get help at the local institution or if necessary, at the regional hospital at Dorchester penitentiary. He said, "we have inmates with terminal illness and palliative care guidelines where they are not eligible for parole." He said that every institution has a health centre which gives 12 hour per day nursing services.

The accused's criminal history and jail experience

[37] The instant charges date from 2014. There are no convictions or charges after that, while he was awaiting trial. Prior history includes mischief and driving while prohibited in 2012 and, more notably, possession of a weapon, a utility knife, for a dangerous purpose (s.88), uttering threats and evading police (s.249.1) from 2011. More dated convictions from the 1990's include assaulting a police officer, simple assault, and careless use of a firearm.

[38] I accept from his testimony that Mr. MacNeil was brutally assaulted while incarcerated at the CBCC in 2010. Defence argues that he would be put in danger in federal penitentiary because one of 3 people who assaulted him in jail is now serving a federal sentence. However, it is part of CSC's job to protect inmates from this sort of harm. Nothing prevents him from telling them the name of the person he fears, even if he is reluctant to give the name in open court. I grant that there is increased risk of violence inside a jail, but this is always to true to some degree of every offender. The event the accused points to is quite dated. He has been at large during most of the intervening time, as have his attackers. He has not been subject to further harm. The possibility that he will be harmed again seems too far-fetched and finds little foundation in the evidence. Mark Cormier acknowledged that there is violence within penitentiaries – threats, fights and assaults, and the occasional death. He did not have statistics on this when he testified, likely because did not expect the question.

The victim impact statement

[39] Clearly the accused is in ill health. Presently, the victim's health is not good either. It took a turn for the worse on August 14, 2014. The victim is not to blame for the accused's ill health. The accused *is* to blame for the victim's health problems.

[40] The victim impact statement, written November 12, 2018, which was entered uncontested at the sentence hearing, paints a rather grim picture. Mr. Johnston says he feels angry, depressed, anxious and isolated. He has been late seeking help for this but intends to begin. He refers to his surgery, the steel rod "put in from my hip to my knee" and the constant pain, "some days worse than

others". The rod is permanent and limiting. He is uncertain about the future. While he has regained basic motor ability his use of that leg will always be compromised to some degree. He worries about future contact with the accused. He concludes "I don't want any trouble for myself of my family. I just want to go on with our lives. It's been a long road."

Caselaw

Length of sentence

[41] *R. v. Reis* [2017][O.J No. 2044 (OntSC) concerns an application to declare the imposition of the four year mandatory minimum penalty prescribed for s.244(1) unconstitutional. At par. 12 it sets out the approach mandated by the SCC in *R. v.Nur* and *R. v. Lloyd*. The court notes at par. 18 that in Ontario "appellate authority has established the range of between seven and eleven years for serious gun related offences." It continues:

> 23 The issue of mandatory minimum sentences with respect to similar offences have been considered by other courts. The Supreme Court of Canada, in *R. v. Ferguson*, 2008 SCC 6, found that the mandatory minimum sentence for the offence of manslaughter committed with a firearm did not violate s. 12. In *R. v. Oud*, 2016 BCCA 332, the British Columbia Court of Appeal held that s. 244.2(3)(b) of the *Code* survived a s. 12 challenge because it was not a grossly disproportionate sentence. The court distinguished *Nur* noting the difference between the use and possession of a firearm. In *R. v. Abdullahi*, 2014 ONSC 272, McWatt J. upheld the constitutionality of the five-year minimum sentence for the offence of recklessly discharging a firearm. Finally, in *R. v. Roberts* (1998), 125 C.C.C. (3d) 471, the Nova Scotia Court of Appeal found the mandatory minimum sentence contained in what is now s. 244(2)(b) of the *Code* to be constitutional.

> 24 Finally, the Supreme Court of Canada, in *Morrisey*, at para. 54, has explained the rationale for the mandatory minimum in relation to firearms even when their use is simply reckless rather than intentional:
>
> > Extra vigilance is necessary with guns, and while society would expect people to take precautions on their own, unfortunately people do not always do so. Consequently, Parliament has sent an extra message to such people: failure to be careful will attract severe criminal penalties. The sentence represents society's denunciation, having regard to the gravity of the crime; it provides retributive justice to the family of the victim and the community in general; and it serves a general deterrent function to prevent others from acting so recklessly in the future.

[42] In *Reis* the court went on to consider the impact of the MMP on the particular offender before the court, a young man with no prior record. It found that the Crown's submission for a six year prison term was in fact on the low end of the appropriate range of sentence. The court went on to consider hypothetical situations but found none to be persuasive. The Charter challenge was accordingly dismissed. Six years was imposed on the s.244(1) offence, and six years concurrent for aggravated assault.

[43] *R. v. Oud* [2016] B.C.J. No. 1589 was an appeal by the Crown from the sentence imposed for mischief causing danger to life and intentionally discharging a firearm into a place knowing or being reckless as to whether another person is present (s. 244.2(1). Oud gave money to a woman to buy crack cocaine for him at a house. When she failed to return, Oud knocked on the door, spoke to a man, returned to his vehicle, loaded a gun used earlier in the day for target shooting, and shot seven times at the door. The bullets entered the premises. One grazed the cheek of a person in the suite, and three lodged in a wall above a person. Section

244.2(3)(b) of the *Criminal Code* created a mandatory minimum sentence of four years for an offence under s. 244.2. The B. C. Court of Appeal set aside the trial court's declaration that the section was of no force and effect and imposed a 5 year sentence.

[44] In *R. v. Dockrill* [2016] N.S.J. No. 78 at par.115 Justice Arnold says:

> 115 In *R. v. Skinner*, 2015 NSPC 28 Derrick Prov. Ct. J. took the view that *Morrisey* remained authoritative on the "inflationary floor" in sentencing for firearms offences, and that this had not been altered by *Nur*:
>
> > 43 Mr. Skinner is subject to the mandatory minimum sentence that applies to a section 244 conviction. At a minimum he faces a five year sentence. The Supreme Court of Canada in *R. v. Morrisey*, [2000] S.C.J. No. 39, had this to say about mandatory minimum sentences for firearms offences:
> >
> > > 75 ...the mandatory minimum sentences for firearms-related offences must act as an inflationary floor, setting a new minimum punishment applicable to the so-called "best" offender whose conduct is caught by these provisions. The mandatory minimum must not become the standard sentence imposed on all but the very worst offender who has committed the offence in the very worst circumstances. The latter approach would not only defeat the intention of Parliament in enacting this particular legislation, but also offend against the general principles of sentencing designed to promote a just and fair sentencing regime and thereby advance the purposes of imposing criminal sanctions.

[45] In *R. v. Barr* [2016] B.C.J. No.255 the accused was found guilty of discharging a firearm with intent (s.244). As in the case before me, there was also actual wounding of the victim. The accused and victim shared an illegal grow-op. Disagreements arose. The victim, who had been drinking and taking pills the night

before, went to a residence of a third party suspected of stealing from him, armed with a shotgun. There he was attacked by the accused who fired three shots into the victim, injuring his arm and foot.

[46] The aggravating and mitigating factors outlined at par 61 and 62 of the decision resemble those in the case before me. The accused had a brief, dated record. The victim suffered daily bouts of pain and needed a brace for walking. His arm was also permanently damaged. The injuries appear to be somewhat worse than those suffered by Mr. Johnston. The court found the operative range of sentence to be from 5 to 8 years incarceration. It sentenced the accused to seven.

[47] In *R. v. Mohammed* [2017] O.J. No.2367 the accused was convicted of discharging a firearm with intent. As the weapon was a restricted firearm the mandatory minimum penalty was 5 years incarceration per s.244.2. The accused was a party to the offence. His role was "instrumental" in a drive-by shooting of another vehicle in a busy downtown Ottawa street. He was a young man with one related conviction under s.95(2). The court noted that in *R. v. Bellissimo* 2009 ONCA 49 the Ontario Court of Appeal set a range of 7 to 11 years for serious firearms offences, but nevertheless imposed a slightly lower sentence of 6.5 years.

[48] In *R. v. Marsh* [2017] N.J. No.415 the accused received 12 years jail for two separate shootings. He had an extensive record. At paragraphs 19 to 30 the court canvassed case authorities and concluded that "for gun-related offences in which serious injuries result" the range of sentence was between 5 and 11 years.

[49] In *R. v. Maytwayashing* [2018] M.J. No.84 the Manitoba Court of Appeal increased a sentence to 8 years for an accused convicted under s.244, with 7 years concurrent for aggravated assault. One year consecutive was imposed for violating

a firearms prohibition. The accused went to the victim's home with a loaded .22 calibre rifle, intent on stealing marijuana. The accused and victim argued. The accused shot the victim in the leg, entered the house, stole the drugs and left, but not before applying a tourniquet to the victim's leg to staunch the bleeding. The victim suffered no long-term physical effects. The accused had an extensive record which was violent and firearms related. He was considered a very high risk to reoffend.

[50] In *R. v. Jackson*, (2002) 58 O.R. (3d) 593 the Ontario Court of Appeal meted out a sentence of four years and 8 months to a youthful offender who fired a handgun at a police officer (who was not hit). Because of strong mitigating factors the court reduced what would otherwise have been a 7 year sentence.

[51] In *R. v. Dingwall* [2018] B.C.J. No.1211 (BCSC) a 24 year old aboriginal woman was a party to a s.244 offence, discharging a firearm with intent to wound. She had facilitated the escape of the principal in a drive-by shooting in a residential neighbourhood. The 5 year MMP – it was a restricted handgun – was found not to violate s.12 of the Charter in the circumstances of that case. (The companion charge, discharging recklessly under s.244.2(1), *was* found to violate s.12.)

[52] In *Sheppard* [2011] N.J. No.252 the victim was shot in the shoulder. Extracts from the decision follow:

> 1 Mr. Sheppard has entered guilty pleas to the following charges:
>
> (1) discharging a firearm with intent to wound Thomas Hickey, contrary to s. 244(a) of the *Criminal Code;*
>
> (2) aggravated assault on Thomas Hickey, contrary to s. 268 of the *Criminal Code*;

(3) possession of a firearm while prohibited, contrary to s. 117.01(1) of the *Criminal Code*;

(4) Using a handgun in robbing Dominion Store, contrary to s. 344(a.1) of the *Criminal Code*;

(5) forcible confinement, contrary to s. 279(2) of the *Criminal Code*;

2 Counts 1 and 4 are subject to a mandatory minimum sentence of four years. Counsel has filed an agreed statement of facts.

30 In the Supreme Court of Canada ruling on *R. v. Morrisey* [2000] 2 S.C.R. 90, Justice Gonthier summarized the purpose of serious sanctions associated with firearms related offences at paragraph 43:

"... Unquestionably Parliament is entitled to take appropriate measures to address the pressing problem of firearm-related deaths, especially given that it has been consistently a serious problem for over 20 years. Further, it is appropriate for Parliament to discourage the careless use of firearms generally since, as Cory J. noted in *R. v. Felawka*, [1993] 4 S.C.R. 199 (S.C.C.), at p. 211, a firearm always "presents the ultimate threat of death to those in its presence."

31 The offence as set forth under section 244(a) is comprised of the act of deliberately discharging a firearm with the intent to wound a victim. The *actus reus* and the *mens rea* are serious and grave. There can be no doubt that an offence such as this with extremely violent and grave elements will warrant a severe sentence.

[53] In *R. v. Stevens* [2010] N.S.J. No.196 the accused pled guilty to two counts of discharging a firearm with intent under s.244. The accused shot at two people who had surrounded his car outside a bar. One was struck in the throat, suffered serious injury, and required ongoing surgery to maintain his ability to speak. The

accused had no significant record and had expressed remorse. He received two concurrent 6 year sentences.

[54] In addition to the foregoing I note the other cases in the Crown's written submission on sentencing dated November 20, 2018, most of which resulted in a jail sentence of seven years.

Health

[55] The court in *R. v. O'Reilly* [2017] Q.J. No. 10835 (CA) considered the possibility that the accused's health would decline in prison. The judgement states (par. 43) that a sentencing judge should not speculate on the possible deterioration of the offender's health following sentencing. While this possibility increases with age, the sentence must be determined in accordance with the evidence when rendered. If health subsequently declines, "it is incumbent on the relevant correctional authorities to take appropriate measures taking into account, notably, s.121 of the *Corrections and Conditional Release Act*.

[56] In *R. v. Ziegler* [2017] A.J. No. 878 (AltaQB) the accused provided medical reports at sentencing to confirm that his condition was fragile and that he would not receive appropriate care in jail. Ziegler was diabetic, with significant complications including chronic renal failure. He required hemodialysis treatments three times per week. He was awaiting a kidney transplant. He had repeated foot infections and had toes amputated. He was sentenced for attempt murder and possession of a firearm for a dangerous purpose. At par.125 the judgment reads: "As against the claimed lack of treatment stand the correctional authorities' legal duties and the evidence provided by the Crown".

[57] The decision in *Zeigler* refers to a deposition from the Director General of Clinical Services of the CSC and mentions another Alberta case, *R. v. Elander* 2015 ABQB 299 where evidence was received of clinical services available to offenders both within and outside the institution. The court said "I do not conclude that Mr. Ziegler's health condition is not relevant or significant to a proportional sentence. What I do conclude is that his condition is not such as to rule out imprisonment as a punishment, even if the period of punishment is diminished in consideration of his condition."

[58] *R. v. Al-Awaid* [2015] N.S.J. No. 369 was not a Charter challenge to an MMP but was nevertheless a case where a federal sentence of imprisonment would be appropriate but for the ill-health of the accused. The sentencing judge concluded, based on the material presented to the court, that the accused's health needs would not be met in jail. At par.152 Derrick, J. states

> I am not only concerned about the ongoing risks to Mr. Al-Awaid's heart, kidneys and eyes: based on the evidence, I find that the incarceration of Mr. Al-Awaid would expose him to a uniquely high risk of a hypoglycaemic incident with potentially fatal consequences. That is what Dr. MacLean testified could happen. Mr. Al-Awaid's diabetes is particularly serious and has been challenging to manage even in the community. I appreciate that offenders with diabetes are managed in the federal (and provincial) correctional systems. I am not persuaded that *this* diabetic can be and it is *this* diabetic that I am sentencing.

Beginning at par.117 the court reviewed a number of sentence decisions where the accused's health was argued as a mitigating factor, including a number where the accused's infirmity warranted a reduction in sentence that would otherwise have been imposed.

[59] Against the medical evidence presented by Mr. MacNeil, this court had the evidence of Mr. Cormier and a CSC Directive concerning essential health services. Unlike the court in *Al-Awaid*, I have the benefit of this *vive voce* evidence, subject to cross-examination, wherein Mr. Cormier was referred to and directly addressed the medical reports tendered on behalf of the accused.

[60] Additionally, *Al-Awaid* is also distinguishable on the facts of the crime. At par. 151 the court states "This is not a case where I am dealing with an offender who is a danger or has committed a violent offence."

[61] In *R. v. Fast* [2015] S.J. No. 274 (CA) the accused was 71, morbidly obese, with heart trouble and diabetes. The trial judge also noted that he was depressed and a inmates in ill health and upheld the seven year sentence imposed at trial.

Discussion

[62] *R. v. Morrisey* [2000] 2 SCR 90 concerned a different (though firearms-related) offence. It nevertheless provides guidance. The court states:

> 41 This factor requires the court to consider how the offender will be personally affected by the actual punishment imposed. It will be relevant to consider the nature and conditions of the sentence, as well as the duration of the sentence: *Smith*, at p. 1073; *Goltz*, at pp. 513-14. The availability of escorted absences and intermittent sentences will also be relevant for this inquiry: Goltz, at p. 514. In *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 62, Lamer C.J. said that "a grant of parole represents a change in the conditions under which a judicial sentence must be served" (emphasis omitted). Therefore, the possibility of day parole and full parole will also be relevant: Luxton, supra, at p. 725; *R. v. Lyons*, [1987] 2 S.C.R. 309, at pp. 339-43. In short, this factor requires the reviewing court to fully understand the impact of the sentence as it will be actually served.

> 42 A four-year term in a federal penitentiary is unquestionably a serious sentence. However, this seriousness does not constitute, by itself, cruel and unusual punishment. As the Attorney General of Canada correctly pointed out, there are no special punitive measures created to punish these offenders. Further, it is notable that on a four-year sentence, individuals convicted of criminal negligence causing death using a firearm would be eligible for parole after 16 months unless the trial judge directs otherwise: *Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 120(1); *Criminal Code*, s. 743.6. Day parole would be possible after 10 months: Corrections and Conditional Release Act, s. 119(1)(c)(i). Excessive hardship and physical or mental health problems are addressed by s. 121(1) of the *Corrections and Conditional Release Act*.

[63] In *R. v. Nur* [2015] S.C.J. No.15 at par 98 the Supreme Court of Canada notes, referring to *Morrisey*, that parole is a statutory privilege rather than a right, and that "the discretionary decision of the parole board is no substitute for a constitutional law." This comment appears to be directed to the law itself, rather than the cruel effect of an MMP on a particular offender. The paragraph following speaks about the danger of "using state discretion to prop up legislation that would otherwise be unconstitutional".

[64] I do not interpret *Nur* to hold that no recognition should be given to the parole regime at the time of sentence. The observations made in *Morrisey* are still apposite, particularly in an application such as the instant one, where the effect on the individual accused is the critical issue rather than the constitutionality of the MMP *per se*. I have not been asked to consider hypothetical situations. This application for Charter relief is grounded entirely in the circumstances of this offender.

[65] In *R. v. Dockrill* [2016] N.S.J. No. 78 the Supreme Court of this province dismissed an application to declare the 4 year MMP grossly disproportional and

thus unconstitutional vis-à-vis an accused who shot another man with a gun. At par. 70 it cited with apparent approval the passage from *Morrisey* concerning the actual effect of the punishment on the offender, in which the SCC mentions to the potential use of s.121 of the Corrections and Conditional Release Act

[66] In *R. v. Swope* [2015] BCJ No. 829 the BCCA affirmed a jail sentence of 39 months for a 78 year old offender convicted of indecent assaults. The court noted that the sentence was likely to consume much of the offender's remaining lifespan and at par.36 of the judgment noted "there are special provisions in s. 121 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, that may be used to expedite parole in the event of certain deteriorations in a prisoner's health."

The line of responsibility

[67] This decision invites consideration of the interface between the courts, on the one hand, and the legislative/executive branch of government on the other. There has been considerable public debate about how each is or should be fulfilling its responsibilities. Those who question the exercise of power by executive officials to alter the nature of a sentence may count among their concerns the lack of uniformity and predictability which this brings. Some are concerned that such decisions are not made with the same transparency one finds in court proceedings. Generally speaking, public misgivings about parole arise from perceptions that it is granted too soon. Here the situation may be the reverse - that it won't be granted soon enough.

[68] I am mindful of the comment of the SCC in *Nur* (above) that "the discretionary decision of the parole board is no substitute for a constitutional law." The individual right of an accused not to be subjected to cruel and unusual

punishment should likewise not be sacrificed to the discretion of a statutory board. That said, I think I may properly consider the authority of the parole board to grant compassionate early release, if the actual circumstances of incarceration, as experienced by the accused, merit this exceptional measure. If an administrative board does not exercise its jurisdiction properly, remedies are available. I have no basis to assume that the board will not act properly. For reference I have set out sections 121 and 102 of the CCRA in an appendix to these reasons.

[69] In a sense the Charter remedy being sought - relief from a mandatory jail sentence on the one hand and the grant of early compassionate release on the other - overlap. As I see it, there is danger that these become muddled. If courts are quick to discount sentences because of health concerns, might this lead CSC to disregard its responsibilities? Should courts attempt to compensate for the anticipated failures of another branch of the justice system? CSC implements and administers federal sentences imposed by courts. In considering parole, it is bound to review the evidence and reasons for sentence. These reasons, and all the evidenced at the sentence hearing, will be forwarded to CSC for just this purpose. The relevant section of the federal *Corrections and Conditional Release Act* (CCRA) reads:

> 101 The principles that guide the Board and the provincial parole boards in achieving the purpose of conditional release are as follows:
>
> (a) parole boards take into consideration all relevant available information, including the stated reasons and recommendations of the sentencing judge, the nature and gravity of the offence, the degree of responsibility of the offender, information from the trial or sentencing process and information obtained from victims, offenders and

> other components of the criminal justice system, including assessments provided by correctional authorities;

[70] Availability of parole is not of the past like a person's record, nor of the present like his or her conduct at trial, but is for the future. Being a product of legislation, it is a continuing remedy open to all, although contingent on the adaptability of the individual to reform and rehabilitation. Availability of parole is an instrument providing relief in deserving cases from the necessary rigidity of sentences arising from the limitation of the powers of a court to modify sentences once imposed.

[71] In *R. v. Oliver* [1997] N.J. No. 10 (Nfld. C.A.) we find:

> 34 Without question, a sentencing judge should not consider post-sentencing decisions by corrections officials in determining fit sentences, but that pre-supposes that any post-sentencing decisions made by corrections officials are properly made within the law and according to established principles. It is inappropriate to adjust sentences on the assumption that they will not be carried out or to foil the impact of programs sanctioned by Parliament or the Legislature.
>
> 35 This case simply involves who is to do what under the Canadian Criminal Justice system. Judges do not decide what is a crime in this country - the people, through Parliament, do. Those same citizens, through Parliament, have dictated who is to sentence offenders - judges; what the objectives of sentencing are, and what options judges have in arriving at appropriate sentences... The sentence is determined by a judge who has knowledge of the particular crime, its impact on the victim and the circumstances of the offender. Even with this knowledge, sentencing is far from a science...The enforcement of sentences has been given to correctional services. The powers of correctional officials, both Federal and Provincial, are specified in legislation. It is correctional officials, not the courts, who determine in which prison a sentence is to

> be served... and are given, within limits, a great deal of discretion in the management of sentences".

[72] The Court in *Oliver* suggested that "no judge who has struggled with sentencing can object to more innovative measures to encourage rehabilitation and continued re-examination of the premises upon which sentences are to be served".

[73] The Nova Scotia Court of Appeal in *R. v. Hamilton* 54 N.S.R. (2d) 81 has discussed the issue in part. The judgement contains the following comment at par.17, consistent with the pronouncements of appellate courts of other provinces –

> ...an early release from prison can only be resolved by those authorities responsible for such actions. A court may pass what it considers to be a fit and proper sentence, taking into account all of the proper principles of sentence, but in carrying out this duty the court can give no assurance that the individual sentenced will serve even a small fraction of the total sentence in custody. The Parliament of Canada ... has delegated to the National Parole Board wide and exclusive jurisdictional powers "to grant, refuse or revoke parole" and if unfairness does arise...then it is to the Parole Board which he must look for its resolution.

Conclusion

[74] A jail sentence of under two years would not ameliorate the potential risks with are put forward to support the s.12 argument. Mr. MacNeil would still be in a jail, albeit a jail administered by the province under different legislation. He would have friends and partner close by, which undoubtedly would be an emotional support for him. They would only be able to visit, not to minister to A's health

needs inside the institution. Mr. MacNeil would still be relying on staff in the jail and outside treatment facilities.

[75] Mr. MacNeil's health challenges, his battle to overcome addiction and the tragic death of his son all loom large in his life narrative. Given his preoccupation with these things it is quite possible they were contributing factors to the crime. He was enraged with Mr. Johnston, possibly resentful that he was alive while his son was dead. He was likely embittered by the pain and suffering he himself had endured.

[76] Mr. MacNeil did not just act "in the moment". His actions were persistently cruel. He loaded a rifle and walked across a wide lawn to reach the house. He fired three shots into the side of Mr. Johnston's car. He then entered, struck the accused, forced him outside, shot him, and left. Not once during this transaction did he desist. Nothing was enough until he shot the victim in the leg.

[77] Sentences must correspond to the crime. In the context of s.12 of the Charter, the matter of whether a given sentence is "cruel and unusual" cannot be divorced from the gravity of the offence. Canadian law has long disavowed "an eye for an eye" but the harm done to a specific victim, and by extension to the broader community, must be accounted for. Mr. MacNeil was diagnosed with bowel cancer in 2011. He had surgery for it in 2012. He was undergoing chemotherapy when he learned of his son's death from a drug overdose in western Canada. Mr. MacNeil's health issues, which he pleads now in support of Charter relief from a jail sentence, were well underway in 2014, at the time of the offence. Any person, in whatever circumstances, ought to know that behavior like this will land them in jail.

[78] The MMP of four years is not grossly disproportionate, even in the context of this accused's painful and difficult personal circumstances. Were it not for the aforesaid health concerns, I would accept Crown's recommendation of 5 years. The accused's health challenges are a strong mitigating factor which serve, in my mind, to reduce the sentence to the minimum prescribed by law. Clearly a jail sentence of any duration will have a more punitive effect on this offender than most. However, his health is insufficient reason to grant Charter relief under s.12. This case does not warrant, by any measure or standard, a suspended sentence and probation.

[79] John William MacNeil has committed a crime of significant violence, causing permanent harm to the victim. A sentence for this crime could easily be 5 or more years in jail even for a first offender with strong prospects for rehabilitation.

[80] If Mr. MacNeil's cancer continues as a chronic condition, the evidence satisfies me that it can be managed effectively with a federal penitentiary. If he must receive surgery or other treatment in a hospital, this can be arranged for him, as it has for others. If his condition becomes terminal, the accused has recourse to s.121 of the CRA. That is where one finds the authority to temper the mandatory minimum sentence with the demands of mercy.

[81] If Parliament chooses to enact mandatory minimum sentences, then surely Correctional Services Canada has a correlative duty to manage these sentences in a humane way.

[82] Mr. MacNeil was remanded between August 15, 2014 and November 12, 2014, which is 91 days. This entitles him to a credit of 1.5 that time, or 135 days,

which equates to about four and a half months. He will receive credit for this "time served" on offences which might otherwise have resulted in a sentence consecutive to the four years.

[83] Allocation of the jail sentence:

- Count 1 – s.86(2) – careless storage of a firearm - one day (time served)
- Count 5 – s.91(1) - possessing a firearm without license – one day (time served)
- Count 6 – s. 244(1) - discharging a firearm with intent to wound – 4 years incarceration
- Count 7 – s.267(1)(a) - assault with a weapon – three months incarceration, concurrent
- Count 9 – s.430(4) - damage to property – one day (time served)

[84] Orders:

- A DNA order – primary designated offence – 487.051
- s.109 firearms prohibition order for life
- forfeiture of all seized firearms
- an order under s.743.21 that there be no contact with Colton Johnston

A. Peter Ross, JPC

Appendix – From the Corrections and Conditional Release Act:

Criteria for granting parole

S.102

The Board or a provincial parole board may grant parole to an offender if, in its opinion,

(a) the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and

(b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.

Exceptional cases

S.121 (1)

Subject to section 102 — and despite sections 119 to 120.3 of this Act, sections 746.1 and 761 of the *Criminal Code*, subsection 226.1(2) of the *National Defence Act* and subsection 15(2) of the *Crimes Against Humanity and War Crimes Act* and any order made under section 743.6 of the *Criminal Code* or section 226.2 of the *National Defence Act* — parole may be granted at any time to an offender

(a) who is terminally ill;

(b) whose physical or mental health is likely to suffer serious damage if the offender continues to be held in confinement;

(c) for whom continued confinement would constitute an excessive hardship that was not reasonably foreseeable at the time the offender was sentenced; or

(d) who is the subject of an order of surrender under the *Extradition Act* and who is to be detained until surrendered.

(2) Paragraphs (1)(b) to (d) do not apply to an offender who is

(a) serving a life sentence imposed as a minimum punishment or commuted from a sentence of death; or

(b) serving, in a penitentiary, a sentence for an indeterminate period.