# SUPREME COURT OF NOVA SCOTIA

**Citation:** *R. v. Steed*, 2021 NSSC 71

**Date:** 20210302
**Docket:** Halifax, No. 490969
**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Javon Dominick Steed

## Sentencing Decision

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| **Judge:** | The Honourable Justice Peter P. Rosinski |
| **Heard:** | February 5 and 26, 2021, in Halifax, Nova Scotia |
| **Counsel:** | Steve Degen, for the Crown<br>Mark Bailey, for the Defendant |

**By the Court:**

**Introduction**[1]

[1] February is African Heritage Month, and the years 2015–2024 have been designated as the United Nations' International Decade for People of African Descent in Nova Scotia. These years and that month are intended to recognize and celebrate the history, culture, and contributions of Nova Scotians of African descent (who also self identify as African Nova Scotians – "ANS").

[2] Gun violence is prevalent across all of the Halifax Regional Municipality, and perpetrated by diverse groups of offenders. Some are from the ANS community.

[3] In a month where we are celebrating the culture and heritage of our ANS residents, we have been reminded of the losses suffered by then.

[4] Gun violence is a societal issue. In *R v Fraser*, 2019 NSSC 368, Justice Duncan (as he then was) sentenced Mr. Fraser for possession of crack cocaine

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[1] While there is no publication ban in this case, the Nova Scotia Supreme Court has a policy urging restraint in publishing sensitive private information in our decisions. There are some such references herein (e.g. regarding the events of February 7, 2013). Although the Court concluded it was important to include them, it would encourage those re-publishing or reporting on the contents to consider not doing so in relation to such sensitive private information.

(62.7 g) and of a loaded 9 mm semi-automatic handgun to 4 years and 9 months imprisonment:[2]

> 32 Gun violence has increased in our society particularly among young people engaged in the drug trade. It seems increasingly commonplace to hear of the use of firearms, especially handguns, in public places where residents and visitors alike frequent. Injuries from gun violence are not restricted to warring factions in the criminal element. Because of the presence and use of weapons in populated areas, innocent bystanders are at risk of being injured. The location where Mr. Fraser was apprehended is in the middle of a busy commercial and residential area. He may have seen the weapon as necessary for his self defence, but he puts others in danger by his armed presence there.
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> 33 These crimes impact on the safety of the community and on our sense of security as we go about our daily lives in the city. These are not victimless crimes. Bringing drugs and guns back into a community, such as Uniacke Square, perpetuates the cycle of addiction and lost potential for the youth of that community. It represents the same lifestyle that drew Mr. Fraser into the trade and put him here today.

[5] These realities form the backdrop for a sentence I must impose on Mr. Steed for having, on March 27, 2019, possession of a loaded restricted firearm (handgun) and other weapons.

[6] I am in the very fortunate position of having the benefit of an Impact of Race and Cultural Assessment ("IRCA") authored by Natalie Hodgson (as supervised by Robert Wright). This report has given me a better understanding and appreciation of how Mr. Steed's ANS heritage and mental status, and the ANS community

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[2] Summarized by Chief Judge Williams in *R v Anderson*, 2020 NSPC 10 (presently under appeal) at para. 18: "In *R. v. Fraser*, 2019 NSSC 368 (N.S.S.C.), a 4-year, nine-month sentence was imposed on a young African Nova Scotian who possessed a loaded 9 mm semi-automatic firearm and 62 grams of cocaine. He had 51 prior convictions including 8 *Conditional Drug and Substances Act* convictions for trafficking, three firearms offences within five years and 34 breaches of court orders. He was also subject to two firearm prohibition orders at the time."

history and experience generally, influenced his own unique history and status, as I consider what is a proper sentence for him and the circumstances of these offences.

**Background**

[7] In my *voir dire* decision (2020 NSSC 86), I concluded that a search of Mr. Steed's vehicle pursuant to a warrant was valid. Thereafter, Mr. Steed pleaded guilty to eight counts in an Indictment, namely, that he did on March 27, 2019, at Halifax:

1. possess a firearm knowing that the serial number on it had been altered defaced or removed contrary to section 108(1)(b) *Criminal Code* ["*CC*"]

2. **possess a loaded restricted firearm** without being the holder of an authorization or license… [and] having a registration certificate for the firearm, contrary to section **95(1)** ***CC***

3. was an occupant of a motor vehicle in which he knew there was at that time a firearm, contrary to section 94(1) *CC*

4. have in his **possession a prohibited weapon, to wit, an overcapacity magazine**, without being the holder of a license under which he may possess it, contrary to section **91(2)** ***CC***

5. did have in his **possession a restricted weapon, to wit, a conducted energy weapon**, without being the holder of a license under which he may possess it, contrary to section **91(2) *CC***

6. did have **possession of a firearm while he was prohibited** from doing so, by reason of an order of prohibition pursuant to section 109 of the *Criminal Code* dated… June 24, 2016, contrary to section **117.01(1) *CC***

7. did have in his **possession a prohibited device**, to wit, a conducted energy weapon **while he was prohibited** from doing so, by reason of an order of prohibition pursuant to section 109 of the *Criminal Code* dated… June 24, 2016, contrary to section **117.01(1) *CC***

8. did have in his **possession ammunition while he was prohibited** from doing so, by reason of an order of prohibition pursuant to section 109 of the *Criminal Code* dated… June 24, 2016, contrary to section **117.01(1) *CC*.**

[8] These are my reasons for sentencing Mr. Steed to 4 years imprisonment (less pre-sentence credits) and 2 years probation to follow.

## Factual Background

## 1-The nature and circumstances of the offences

[9] In my earlier decision I recounted the basic facts:

> 6 At 11 PM March 27, 2019, near 2300 Gottingen Street Halifax, someone discharged multiple gunshots at another individual. A police officer was nearby on Creighton Street with his police cruiser window down. Witnesses described the offender quickly drive off in a Dodge Charger, and video in the area contemporaneously showed a four-door blue Dodge Charger with a white plate on the front of the vehicle. The shooter was identified as a male dressed all in black clothing. The vehicle had previously been parked on nearby Prince William Street.
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> 7 At 11:44 PM, Constable Ash Lewis of HRP saw a blue four-door Dodge Charger (with a white plate on the front bumper) on Quinpool Road heading toward Cogswell Street, Halifax. He was aware of the shooting and description of the vehicle. He followed the vehicle, which accelerated as he got closer to it in his police cruiser. The vehicle entered the rotary which intersects North Park Street and Trollope Street, when it turned sharply onto Trollope Street in an apparent effort to avoid contact with the police. Constable Lewis pursued the vehicle and pulled it over shortly after 11:44 PM. The driver was Mr. Steed, who was dressed in all black clothing. The roadside vehicle search (assisted by Constable Jordan Chestney Constable Myles Rattray, and ultimately Sergeant Kevin Hovey) revealed handcuffs in a box on the driver's side of the vehicle, and a loaded "pistol magazine loader" in the area of the front passenger door, as well as a black bandanna under the front passenger seat.[6]
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> 8 The vehicle was confirmed to be registered to Mr. Steed's mother. The vehicle was seized and taken to HRP's secure garage, given traffic and lighting issues affecting officer safety. Sergeant Hovey decided to have a search warrant drafted in relation to further search the car.
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> 9 Two search warrants were issued permitting a search of the Dodge Charger (which generally fit the description given by multiple witnesses at the scene) which Mr. Steed (who generally fit the description of the shooter) habitually operated, including during the time of the offences on March 27, 2019.
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> 10 Based on an ITO sworn by DC Aaron Head, the first search warrant was issued March 29, 2019 and a search executed that day on the Dodge Charger. No firearm or other evidence was then discovered.[7]

11 Within two days, confidential informant information was received by HRP providing a further basis for a follow-up search of the vehicle.

12 The second search warrant was issued April 1, 2019 and a more intensive and intrusive search executed April 2, 2019 revealed, secreted within the body of the car, the following items:

1. a Taser;

2. a knife;

3. a plastic bag with a loaded black handgun (fabricated of metal and of non-metal components) with a magazine containing 20 rounds of ammunition;

4. additional rounds of ammunition in a clear plastic bag.

[10] The Crown supplemented these facts during the sentencing:[3]

- The loaded restricted firearm possessed by Mr. Steed is described as an FN Herstal Semi-Automatic Pistol model P90 Five-seven, 5.7 x 28mm. The 5.7 X 28mm describes the diameter of the bullet as 5.7mm and the case length as 28mm. The overall length of the ammunition rounds are 1.594 inches. This type of firearm was initially restricted to use by military and law enforcement but is available for sale in some markets, including the United States, albeit with controversy. Some cartridges which are designed for use in this firearm are designated as armour piercing, although the 'sporting' variety of cartridges have a slightly slower velocity and are therefore not designated as such. The Crown is not alleging that the ammunition which was loaded within the firearm, nor the ammunition contained in the bag near the firearm were 'armour piercing,' but that the firearm is capable of firing such ammunition had it been acquired. The firearm was loaded with one round in the chamber and nineteen additional rounds contained in the magazine which was secured in the firearm ready to be used. The serial number for this firearm was partially obliterated but restored using chemical techniques. The firearm was traced as last being sold by a Pawn Shop in Georgia, U.S. to an individual named Soraya Jessica Barker on November 7th, 2018. It is unclear whether this is a real person given the proximity to actress Sarah Jessica Parker. The firearm has been classified as 'smuggled' given that it had no lawful entry into Canada.

- Contained within the secret hide in the vehicle Mr. Steed was operating was also a sandwich style bag of twenty-two rounds of the same caliber ammunition as that loaded

[3] Mr. Steed accepted and adopted these facts – see his January 22, 2021 dated brief at paragraph 2.

within the firearm. The ammunition was tested and capable of being discharged within the firearm. The knife that was also contained within the secret compartment was within a sheath and the taser/conducted energy weapon was also in a case. The taser was operable. To be clear, a total of 42 rounds of the same ammunition were located either loaded in the firearm or within easy access, all within the same secret compartment of the motor vehicle. Pictures of all of the above will be provided at sentencing.

- Mr. Steed's DNA was located on the firearm including near the trigger area.

- At the time Mr. Steed was pulled over he was bound by a lifetime weapons prohibition entered into on June 24th, 2016, in relation to convictions under section 86(2) and 117.01(1) of the *Criminal Code*.

**2-Mr. Steed's background**

[11] The court has available to it two documents which address Mr. Steed's circumstances: a Pre-Sentence Report ("PSR") dated November 2, 2020 and authored by Jennifer Keeler, Probation Officer, and an "Impact of Race and Culture Assessment" (IRCA) dated December 15, 2020 authored by Natalie Hodgson as Assessor, and co-signed by Robert S. Wright, as IRCA Supervisor.

[12] The latter report was requested by Mr. Steed, as he is an African Nova Scotian ("ANS"), and the court ordered production thereof.[4]

[4] Ms. Hodgson states at page 2 of the IRCA: "The IRCA originated in Nova Scotia, home to Canada's largest and oldest African Canadian communities. They have been accepted as nearly standard tools for people of African descent who are facing serious sentences in Nova Scotia and have also been introduced in Ontario and British Columbia. The first assessments done in both of those jurisdictions were completed by African Nova Scotian assessors." I attach the Order that was issued in relation to Mr. Steed as Appendix "A".

[13] Since the IRCA is a relativity recent phenomenon, and some questions were raised by the court in relation to the assessment in the case at Bar, I believe it helpful to examine its purposes and applications to sentencing ANS criminal offenders.[5]

**An examination of issues arising in relation to Impact of Race and Cultural Assessments regarding African Nova Scotian ("ANS") offenders**

[14] With the assistance of Mr. Wright and his team of assessors, I am in a better position to more fully appreciate, and understand their history, experiences, struggles, perspectives, and culture.

[15] On the other hand, while it is of utmost importance to respectfully approach, analyse and draw conclusions from the information provided by the assessors, as a

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[5] It appears that the first documented usage of an IRCA in our jurisprudence appears in Judge Derrick's decision (as she then was) regarding an ANS youth: *R v X*, 2014 NSPC 95. While they may have been used by courts in this Province in unreported cases, the reported cases thereof include: *R v ES*, 2015 NSPC 81; *R v Gabriel*, 2017 NSSC 90 (which coincidentally involved an offender who was both ANS and Aboriginal); *R v Downey*, 2017 NSSC 302; *R v Boutilier*, 2017 NSSC 308 (involving an Aboriginal/ANS offender-reversed on appeal on other grounds 2018 NSCA 65); (*Re*) *JC,* 2017 NSPC 14; *R v Perry*, 2018 NSSC 16; *R v Faulkner*, 2019 NSPC 36; *R v Etmanskie*, 2019 NSPC 68; *R v Dykeman*, 2019 NSSC 361; *R v Downey*, 2019 NSSC 384; *R v Fisher*, 2020 NSSC 325; *R v Robinson*, 2010 NSPC 1; *R v Murphy*, 2020 NSSC 265; *R v Anderson*, 2020 NSPC 10 (presently under appeal and to be heard on March 30, 2021- CAC No. 497430) . The contrasting Ontario courts' positions are generally captured by a comparison of Justice Nakatsuru's reasons in *R v Morris*, 2018 ONSC 5186 (under appeal) and *R v Jackson*, 2018 ONSC 2527, with that of Judge S.A. De Filippis in *R v Hazell*, 2020 ONCJ 358. In British Columbia see for example Justice DeWitt-Van Oosten's (as she then was) reasons in *R v Ferguson*, 2018 BCSC 1523 at paras. 119-129. See also Maria C. Dugas' article which asserts that "Canadian judges have made notable, although too limited, strides to recognize the unique conditions of Black Canadians in sentencing processes and decision-making.": *Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders*, 2020 43-1 *Dalhousie Law Journal* 103, 2020 CanLIIDocs 1843, <https://canlii.ca/t/svmj.

court of law, I am also constrained by the law as it relates to admissible evidence, and the applicable legal principles in Mr. Steed's case.

[16] For example, there are a number of issues that are presently unresolved by courts in relation to the authorship, content, and proper use that can be made of IRCAs.

[17] Some of the general questions that arise in relation to IRCAs include:[6]

**i)-When is it appropriate to order IRCA reports, if requested?**

[18] At present there is only a limited jurisprudential trend to ordering IRCAs (apparently confined to Nova Scotia, and to lesser degrees in British Columbia and Ontario). Although comparisons have been made with the so-called *Gladue* reports prepared in relation to Aboriginal offenders, the comparison has significant limitations: there is no similar statutory or constitutional basis to order IRCAs, and the history of the ANS community is a distinct one, in terms of geography and history ( *inter alia*, their displacement from Africa to the United States, and then to Nova Scotia).[7]

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[6] The court is very appreciative of the extensive brief filed by the Crown in this matter in relation to these issues, as well as its sentencing position. Notably, Mr. Steed's counsel endorsed the Crown's position regarding the nature of an IRCA, whether its authors are "experts", the legal limitations regarding their content, and the proper use thereof in sentencings of ANS offenders (see his January 22, 2021 brief at paragraph 4).
[7] As a consequence, studies and statistics of the Black experience in the United States in particular, and even in other parts of Canada, may not be reliably applicable to the circumstances of the ANS community.

[19] Ultimately in Nova Scotia, the decision to order an IRCA is in the discretion of the individual sentencing judge.

[20] In Mr. Steed's IRCA, Natalie Hodgson, writing as the primary Assessor stated:

> "The IRCA … have been accepted as nearly standard tools for people of African descent who are facing serious sentences in Nova Scotia…"

[21] While exceptions may arise, ordering such reports should be limited to cases of ANS offenders "who are facing *serious* sentences". I interpret this as referencing terms of imprisonment in a federal penitentiary.

**ii). Is an author of an IRCA properly characterized as an "expert" witness, and if so, must the strict expert witness qualification procedures be followed (including the requirement for them to be impartial, independent, and unbiased per *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23)?**

[22] In the Nova Scotian experience, to my knowledge, the credentials of authors of *Gladue* reports have not required to be examined through the formal "expert opinion witness" process.

[23] In *R v X*, 2014 NSPC 95 - the first case where an IRCA was presented- Robert Wright was the proposed Assessor, and the Crown insisted upon his credentials being examined by the court, and a ruling made.

[24] In that case, Judge Derrick (as she then was) was considering the Crown's application under section 71 and 72 of the *Youth Criminal Justice Act*, that the youth X serve an adult sentence for the attempted murder (by shooting a .300 calibre rifle) of another 15-year-old ANS youth.

[25] Therein, she noted that "Robert Wright, … was qualified to give opinion evidence on issues of race and culture (para. 16). She elaborated in a section entitled "Qualifying the Defence expert, Robert Wright" at paras. 163-176:

> **"I qualified him to give opinion evidence on social factors relating to ' …', the effect of those factors on X, and rehabilitative recommendations for X.**
>
> **Mr. Wright was also permitted to express his opinion about the absence in the psychological and psychiatric assessments of any reference to race and culture."…** Following the qualifications *voir dire*, I found that **Mr. Wright was shown to have acquired special or peculiar knowledge through both study and practical training and experience. I determined that he possessed 'special knowledge and experience' that went beyond my own.** I noted that although Mr. Wright had never been previously qualified in the context of the sentencing were issues of race and culture were being raised, he has been qualified as an expert or race and culture were relevant in a family law setting."

[26] In the next section entitled "Robert Wright's Evidence" Judge Derrick stated:

> Mr. Wright testified that X's father located X's offence in the context of very troubling patterns of criminal activity that, Mr. Wright indicates, have been 'fairly well established in [X's community].' It is Mr. Wright's opinion that 'X's early introduction to criminal behaviour, though it may include some influences from his brothers, was largely due to peer and other community influences'."

> In his report, and elaborated upon in his testimony, Mr. Wright explained the social phenomenon that is occurring in communities 'whose very fibers are being affected by criminal activity'…. X's community… has transitioned from a long history of being an intact, self-sufficient, if subsistence community, to a present-day community experiencing intense social and economic pressures… Mr. Wright testified to the changes that [X's community] has experienced, as witnessed by elders such as X's grandmother:
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> > '… A proud, relatively isolated, racially uniform community… and in the space of a generation and a half, the sons of deacons are going to jail in large numbers for pimping and for drug and violent offences.
> >
> > … To understand that phenomenon, one needs to understand it as a social – cultural phenomenon that is like a future shock phenomenon, that is related to the dramatic shifts and changes in demographics and the like.'" (paras.183-184)

[27] Under a section entitled "The Relevance of Evidence about Race and Culture in This Case" Judge Derrick stated:

> In the context of sentencing adults, 'systemic racism and background factors faced by black youths…' have been acknowledged as important and possibly influential in sentencing [citing *R v QB*, 2003 OJ No. 354 (CA)]. And **although in the context of an African Canadian offender, the seriousness of the offence has been identified as so determinative a factor in sentencing that 'systemic and background factors could not affect the length of the sentence', this was said in the context of sentencing an adult where a consideration of denunciation and deterrence is mandated**… The Ontario Court of Appeal has recognized in the context of sentencing in adult offender, that the sentencing principles, '.. Generally applicable to all offenders, including African Canadians, are sufficiently broad and flexible to enable a sentencing court in appropriate cases to consider both the systemic and background factors that may have played a role in the commission of the offence and the values of the community from which the offender comes.'
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> …
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> … **I have asked myself what the evidence of Robert Wright contributes to the process of determining whether the presumption of X's diminished responsibility has been rebutted such that he is no longer entitled to its protection?** I find it raises significant questions about the assessment of X as a criminally entrenched, sophisticated youth. It provides a more textured, multidimensional framework for understanding X, his background and his behaviours… It suggests that X's character and maturity are still in a formative stage." (para 198)

[28] Thereafter, Nova Scotian jurisprudence has generally seen IRCA reports authored by, or supervised by Robert Wright, to have been admitted by consent without formality regarding the process usually applied to "expert" opinion evidence witnesses.[8]

[29] I am content to do so here in relation to the report of Natalie Hodgson, as supervised by Robert Wright.[9]

**iii). Are the factual statements contained in the IRCA as reported by the assessor (related to personal circumstances of an accused, including direct and indirect references to the commission of the offence and circumstances of prior convictions) admissible without independent evidence thereof?**

[30] I could find no clear answer in the Nova Scotian jurisprudence.

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[8] Since each case for which an IRCA is ordered must be offender and context specific, it follows that the IRCA assessor's primary function is to put a historical, cultural and socio-economic context before the court that is *relevant to the offender*, (e.g. see my reasons in *R v Downey*, 2017 NSSC 302 at para. 10) which will assist the court in fashioning a just sentence. Seen in this light, properly qualified authors of IRCAs have "special knowledge and experience" which is a form of expertise recognized by courts. Absent circumstances that require an inquiry be made into the expertise of a proposed assessor, and speaking entirely for myself, I would be content to accept reports supervised and approved by Mr. Wright without the necessity of a formal process to determine the qualifications of proposed assessors.

[9] A broad range of these issues were confronted by the Ontario Court of Appeal on February 11, 2020, Docket #65766, which is an appeal from Justice S. Nakatsuru's reasons in the case of a 26-year-old Black offender: *R v Morris*, 2018 ONSC 5186. Similarly our Court of Appeal will consider the sentence imposed (2020 NSPC 10) in *R v Rakeem Anderson*, CAC No. 497430 on March 30, 2021, which involves similar circumstances to those of Mr. Steed: an ANS male who was found, on a traffic stop and pat down search for officer's safety, in possession of a loaded .22 calibre handgun in his waistband. An IRCA was prepared and considered by Chief Judge Pamela Williams, who stated: "I conclude that the appropriate range of sentence in the circumstances is two years less a day to three years incarceration. And given the factual similarities with *Muise* [2008 NSSC 340] I am persuaded that a sentence on the lower end of that range is appropriate." (para.81). She went on to impose a conditional sentence of imprisonment for two years less one day, followed by two years probation. Interveners have also filed submissions which will ensure the court has a full canvas before it regarding the significant issues relevant to sentencing ANS offenders for such offences.

[31] In *R v Husbands*, 2019 ONSC 6824 Justice O'Marra considered similar issues in the context where Mr. Husbands opened fire 14 times with a loaded handgun in the crowded food court of the Eaton Centre in the heart of Toronto and killed two men and injured six others. He was motivated against the two deceaseds because they were among a group of men who had attacked, confined, threatened and stabbed him some four months prior.

[32] The case also provides insights on the Ontario jurisprudential landscape regarding these issues, so I will reference it at length.

[33] Mr. Husbands was born in Guyana in 1989. His parents separated while there and his father moved to Canada while he stayed with his mother who developed a serious drug addiction to crack cocaine and became HIV-positive. He witnessed acts of violence related to his mother's lifestyle. He and siblings eventually went to live with their grandmother in Guyana. Then, in December 2000 he moved to live with his father in Regent Park, Toronto, Ontario.[10]

[34] Justice O'Marra stated that:

> 68 Christopher Husbands acknowledged that he began selling marijuana in high school and continued up to June 2, 2012. He also started dealing crack cocaine. He claimed he

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[10] Mr. Husbands status is more analogous to that of Mr. Fisher [2020 NSSC 325 who is an African Caribbean Black ("ABC") Canadian.

never used cocaine personally. He testified that selling drugs is a dangerous business, but he never felt the need to have a gun "prior to my stabbing."

69 **Christopher Husbands testified it was not uncommon to see people with guns in Regent Park. Sometimes older guys would ask younger ones to hold onto guns for them. Christopher Husbands held onto guns in this scenario. He would hide them. He would receive $20 or $50 to hold onto a gun.**

70 **There was no dispute at trial** that on February 28, 2012 **Christopher Husbands was the victim of a protracted, serious assault by several young men.** They included Nixon Nirmalendran and Nisan Nirmalendran. Christopher Husbands was confined, bound, threatened and stabbed. Christopher Husbands **later told police that he did not know or recognize any of his attackers. That was not true, but he did not identify anyone out of concern for the "code of silence" in the neighbourhood. In his testimony at both trials Christopher Husbands said he still does not know why he was attacked on February 28, 2012.**

**…**

73 **A further review of the personal history of Christopher Husbands specifically related to his experience as a young black male was completed by Camisha Sibblis** in support of the Impact of Race and Culture Assessment (**IRCA**). I will refer to that later in these Reasons.

…

*IRCA*

75 The impact of race and culture on young Black males was considered and applied by Justice Nakatsuru in *R. v. Jackson*, 2018 ONSC 2527 (Ont. S.C.J.) and also in *R. v. Morris*, 2018 ONSC 5186 (Ont. S.C.J.). Both of those cases involved serious crimes of possession of illegal loaded firearms. Significantly neither involved the use of a firearm or deaths or injuries.

76 In *Jackson* the accused pleaded guilty to possession of a prohibited firearm with one bullet in the chamber as well as breach of a weapons prohibition order. He was in fact subject to five such orders at the time of the offences. The court found that he was genuinely remorseful. The Crown sought a sentence of 8.5 - 10 years less credit for time served. The defence sought a term of 4 years less credit for time served. The court imposed a sentence of 6 years less time served.

77 In *Morris* the accused was found guilty by a jury of possessing a concealed prohibited firearm and ammunition. He was a youthful first offender. The Crown sought a sentence of 4 - 4.5 years less credit for time served. The defence sought a sentence of 15 months less credit for time served. The court found that there were violations of

the *Charter* that merited a remedy on sentence. The court imposed a sentence of 15 months less 3 months credit for time served as well as a remedy for breaches of the *Charter*.

78 **On both *Jackson* and *Morris* the defence tendered evidence related to how the criminal justice system treats African Canadians,** including "the unfair and disproportionate jailing of Black offenders" (*Morris* at para. 7). **In *Jackson* the defence filed an IRCA report without objection by the Crown. There was no cross-examination of the author of that report**. In *Morris* **the Crown objected to the admission of the report on the basis that it was not necessary since "the law has now long taken notice of these sorts of things. Experts are not required to consider them". Justice Nakatsuru ruled the report was admissible.**

79 **In *R v. Brissett and Francis***, 2018 ONSC 4957 (Ont. S.C.J.) both accused were convicted of serious crimes related to living off the avails of juvenile prostitution. The Crown and defence were far apart on their sentencing positions. Both accused were black men who had immigrated to Canada from Jamaica. One accused had lived in poverty before coming to Canada. Both accused had stable and supportive family lives in Canada. **Both accused submitted that the court should take judicial notice of the racism and discrimination Black Canadians have historically suffered as well as the effect of this discrimination on the offenders in crafting the appropriate sentences. They relied on the decision in *Jackson*. Justice LeMay declined to follow *Jackson* for the following reasons at paras. 57-71:**

- **Based on *R. v. Hamilton* (2004), CanLII 5549 (ONCA) the court is not permitted to take judicial notice of systemic racism and then automatically consider it in individual cases.**

- **Mitigation of sentence based on systemic racial bias requires specific information about the individual offender. None of that was available in this case.**

- **Systemic racism is only relevant on sentence to the extent that there is a connection between the systemic racism that an individual has experienced and the commission of the crime or their own personal circumstances. The connection must be direct.**

- Even in the context of Aboriginal offenders some connection is required between the systemic and background factors and the offence, or the circumstances of the offender, before these systemic and/or background factors will affect the sentence. *R. v. F.L.*, 2018 ONCA 83at paras. 40-42, *R. v. Ipeelee*, 2012 SCC 13 at para. 83.

- Over emphasis on societal ills will result in an individual's personal culpability being lost. The relevant factors in one person's background will be case specific. A single factor will rarely be determinative. *R. v. G.B.* (2003), O.J. No. 3218 (ONSC) at para. 45.

80 **The IRCA of Dr. Marta-Marika Urbanik, supplemented by the thorough biographical review of Christopher Husbands prepared by Camisha Sibblis, provides relevant information at this sentencing stage.** Christopher Husbands presents as a young black man, born into poverty, turmoil and violence in Guyana and then living in Regent Park. From his pre-teen years until his twenties he committed crimes of varying seriousness, including drug trafficking and holding onto illegal firearms for others. He also participated in pro-social activities, including volunteering and working at community organizations working with younger children. The court must consider the choices he made based in part on the environment he grew up in and over which he had little control. The subculture he grew up in limited the choices available to him.

81 The issue of moral blameworthiness is an important factor in determining the appropriate sentence for these offences. A properly qualified and sourced IRCA, as in this case, acknowledges the existence of race and systemic racism in society. It is one factor to be assessed along with all the others in the sentencing process.

…

83 **The specific area where I find mitigation based on the IRCA relates to the drug convictions for Christopher Husbands and the drug activity, including the sale of crack cocaine, which he acknowledged but was never charged for.** He grew up in extreme poverty in Guyana. He later experienced a different level of relative financial distress as he went through his teen years in Canada. He graduated from selling marijuana to the preparation and sale of crack cocaine to make money for clothes, food and transportation to school and to employment. **While his drug activity cannot be excused it must be understood in his specific context**. **By all accounts he sold drugs to allow him to purchase necessities. Somewhat ironically this permitted him to participate in pro-social activities in the community and employment.** To some degree the impact of race and discrimination specifically on him mitigates the seriousness of his criminal record and criminal activity for which he was never charged.

**84 How much does the impact of race and culture impact on the ultimate decision in this case? There is no doubt that Christopher Husbands was victimized on various levels after his arrival in Canada based on his race. There is also no doubt that the opportunities and choices available to him were restricted through no fault of his own based on his race.**

85 In ***R. v. Gabriel*, 2017 NSSC 90** (N.S. S.C.) Justice Campbell referred to the purpose of such reports related to racial or cultural groups that have been the subject of notorious long systemic discrimination at paras. 52-54 inclusive:

> The purpose is not to justify a discount with respect to an otherwise appropriate criminal sentence. In a community wracked by violence and struggling to find ways to deal with the complex web of causes that have its young men being killed or sent

> to jail, it would be wrong to suggest that there should be a lowered standard of moral responsibility. The purpose of the Cultural Assessment is not to justify lower expectations or to offer excuses. It is to provide some level of understanding.
>
> Sentencing involves attention to both incident and context. The seriousness and devastating consequences of a crime are considered in the context in which it was committed. The context may be narrow, and it may be broad. The context may involve the capacity for moral judgment or regulation that is diminished by immaturity or intellectual deficit. Those are both examples of context that are easily related to the individual and the crime that he committed. A background of family dysfunction and childhood abuse may, in part, form the person who committed the crime and despite sometimes being less obviously related to the offence are widely considered as part of the relevant context in sentencing. What may be otherwise inexplicable may become understandable with the benefit of that contextual information.
>
> A person's racial background is also a part of his identity. It does not determine his actions. It does not establish a lower standard for assessing moral culpability. It does not justify or excuse criminal behaviour. It may however help in understanding the broader circumstances that acted upon the person.

86 At para. 114 he added the following:

> Sentencing involves elements of denunciation and retribution as well. It is important that crimes of violence be treated in a way that reflects society's abhorrence at the taking of the life of another person. Punishment for a crime is not an outdated concept.

*Evidence of Camisha Sibblis*

87 **Camisha Sibblis was called as a fact witness related to the IRCA report prepared by Dr. Urbanik**. She is currently completing her PhD in social work at York University. She also has a practice as a clinical social worker. She conducts clinical investigations for the Office of the Children's Lawyer. The focus of her work is systemic anti-black racism. She testified at the sentencing hearing on the *Morris* case. **Counsel for Christopher Husbands did not seek to qualify her as an expert. Rather she provided a detailed social history of Christopher Husbands related to the impact of anti-black racism on his life**. **She prepared a report that was filed as an exhibit.**

88 **The material reviewed by Camisha Sibblis included the following:**

- The transcript of the trial evidence of Christopher Husbands.

- The notes made by counsel for Christopher Husbands of the trial testimony of Natoya Husbands.

• The reports of Dr. Gojer and Dr. Pomichalek who testified as expert witnesses for the defence at trial.

89 **Camisha Sibblis interviewed Christopher Husbands and the following collateral sources**:

• Sheena Robertson who had been a teacher of Christopher Husbands when he was in elementary school. Over time she became a mentor to him.

• Omar Sybbliss, a prior acquaintance and colleague of Christopher Husbands.

• Kenyatta Stennett, a "best friend" of Christopher Husbands.

• Natoya Husbands, sister of Christopher Husbands.

90 Camisha Sibblis testified that she has experience interviewing people from neighbourhoods like Regent Park and other marginalized communities.

91 Natoya Husbands told Camisha Sibblis that she and her siblings had a hard time adjusting to the Regent Park community when they arrived. They were made fun of because other youth in the community were not as dark. Their dialect and the clothes they wore were highlighted by others and made them feel insecure.

92 **The information she received from and about Christopher Husbands included the following:**

• He was bullied and ridiculed due to his very dark skin.

• He was insulted by police related to the darkness of his skin.

• He was called the "n" word.

93 **Christopher Husbands said he had never experienced racism until he came to Canada.** Camisha Sibblis noted that his experience of poverty and oppression was fundamentally different from his sisters who had different mobility paths and ability to leave and succeed outside the community.

94 **Christopher Husbands recalled always being accused of stealing when something went missing from parties hosted by and largely attended by white people. He attributed this to his skin colour and the clothes he wore.** He felt as though being accepted by white people elevated his status considering the negative connotations ascribed to his black skin.

95 **Christopher Husbands and his sister Natoya said** that the family poverty in Guyana included their mother forcing the children to steal for her to support her addiction. Their father was absent. They referred to physical and sexual abuse by caregivers and routine corporal punishment. This made Christopher Husbands fearful and hyper-vigilant before coming to Canada. He observed violent incidents involving his mother and uncle in Guyana. Their father would send large containers of goods from Canada. This led to theft and robbery incidents at their home in Guyana.

96 **Christopher Husbands described being the victim of police harassment.** About one year after his arrival in Regent Park he says the police pulled a gun on him. The problem was that living by legal means and separating oneself from the street social life also made him a target. There appeared to be no escape from victimization. **Christopher Husbands felt his options were limited. He claims he was falsely labelled a gang member by police**. **The mistreatment by the police made him feel rebellious and angry. The "street code" portrayed the police as the oppressors and discouraged any cooperation with the police.**

97 **Christopher Husbands described a process in Regent Park where older young men would recruit younger ones to hold on to contraband, such as drugs or weapons. Christopher Husbands claimed that he held on to contraband when he was younger but did not recruit others to do so when he was older and dealing drugs himself.**

98 Camisha Sibblis concluded with her opinion as to the prospects for rehabilitation for Christopher Husbands. **I have considered her comments in the same way that I would consider those routinely contained in Presentence Reports.** She reported the following:

> Considering Mr. Husbands resilience, sense of justice, and ambition juxtaposed against the plethora of tragedies in his life, it is a reasonable expectation that he will respond well to counselling and will be a good candidate for rehabilitation. With an opportunity to start his own family, intensive therapy to unpack his childhood, family relationships, his losses and his trauma, as well as opportunities for success through leadership and positive influencing the lives of others, there is reason to believe that Mr. Husbands could be a positive contributor to society.”

[35] It appears to me that Mr. Husbands’ recitations of his claimed life circumstances and experiences in Canada, generally and specifically, were transmitted by him to the assessor-and that similar information also arose as a result of Mr. Husbands’ testimony at the two related trials. Justice O’Marra

mentions no instances where that information was objected-to by the Crown or court.

[36] In my opinion, insofar as such background recitations (not otherwise independently established) are repeated by the assessor in an IRCA, while the assessors cannot outright vouch for the factual statements made by an offender, courts should be able to take comfort that there has been some level of scrutiny applied to that provided information to ensure its accuracy. Some reasonable measure of scrutiny is expected. Therefore, confirmatory evidence from the offender (or other sources) should not generally be required.

[37] However, the more specific and material the information becomes to the outcome of a sentencing, the more leeway will be given to Crown counsel to insist upon proof by admissible evidence. Sometimes, the court itself will have to intervene - see the court's comments in *R v Corbiere*, 2017 ABCA 164 at paras. 14-16, and *R v Alcorn*, 2015 ABCA 182 at para. 11.[11]

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[11] It must be borne in mind that the self-described objectives of the IRCA are: "to understand how an individual's ANS heritage and mental status have affected their involvement in criminal behaviour… how might [ANS experience] have influenced Javon Steed's involvement with criminal behaviour… how should this [ANS] history and Javon Steed's unique history and status as an ANS be considered when delivering sentence".

[38] For example, in Mr. Steed's IRCA, Ms. Hodgson could be considered to have crossed the line from the provision of permitted to prohibited information in the following respects:[12]

1. The reference to "[Laura Langille, Clinical Social Worker at CNSCF] spoke of **Javon's narrative in which the cops gave him information about someone trying to kill him**,..." - (p.13);

2. The reference to "He attempted suicide when he was 17 years old… He was considering shooting himself in the head. He raised his gun up to put it to his head and he shot the ceiling by accident. His girlfriend came down to the basement, he told her what he did, she took the gun from him, and called his mother. Fearful that he was going to commit suicide before she made it home, his mother contacted the police. **The police arrived and apprehended his gun and found two more guns present. The other guns belong to his friends.** They had asked him to keep their guns at his house… **The incident resulted in him serving approximate 3 months in Waterville"** (p. 15) - I note his

[12] Firstly, let me say that this is no criticism of Ms. Hodgson. No court has previously made pronouncements about this issue – therefore she would not have been aware of this concern. Arguably it might be said that the court, as is the case with other experts, could simply rather conclude that Ms. Hodgson's opinion is made less reliable to the extent that she relied upon that information. Having said that, it is apparent that in the context of IRCA experts, the IRCA assessor's assistance to the court is less about giving "opinion" evidence, but more about specialized knowledge and experience. Therefore, the suggestion that the court merely reduce the weight of her "opinion" is not practically useful in the circumstances.

criminal record includes five weapons related charges on February 7, 2013 - ss. 86(1), 88(1), 91(2), 92(2), 95(1) and 117.01(1) *CC* convictions, and that he was sentenced as a youth on May 14, 2013 to six months deferred custody followed by 12-months' probation (he would typically have served 4 of the 6 months);[13]

3. The reference to "**with the given information from a police officer that someone wanted to kill him (this will be explored further in the report) safety concerns led to gun accessibility**" (p.16);

4. The reference to "**at age 16 or 17** Mr. Steed encountered a near-death event. He was **sleeping at his mom's house when he was robbed at gunpoin**t. A group of males crept into the house put a blanket over Mr. Steed's head and put a gun to the back of his head. He thought he was going to die. They robbed him and left. **This is another incident that led Mr. Steed to having guns for protection**" (p. 17);

5. The reference to "**when he was 18 or 19 years old,** he took the bus to Spryfield with his girlfriend Lexi to meet some guys to do a trade.

[13] At the February 5, 2021 sentencing hearing, the Crown's counsel was unable to provide what were the circumstances of the incident because it was difficult to locate and access the 2013 youth file. Thereafter, by email of February 17, 2021, the Crown was able to confirm that the general circumstances thereof we're as reported by Mr. Steed to Ms. Hodgson. The other two firearms were found after the residence was searched by police.

This event turned out to be a set up. **He was jumped by five guys. They hit him in the head with a pistol, took his money, phone, belt and other belongings**." (p. 18) - is suggested to be relevant to why Mr. Steed might have a handgun "in case" he needs it;

6. The reference to: "an event that has had the most intense impact on Javon's life was the day **a police officer warned him that someone was out to kill him.** The policeman came to his mother's house looking for Javon, but he wasn't living with her at this time. She gave the officer Javon's phone number. **The police got in touch with him and said they had information to suggest that someone was plotting his murder. The police did not tell him who this was or any details pertaining to the warning.** He felt like the police put him in an awful position, without any support. **Mr. Steed was overwhelmed with paranoid feelings and felt it was necessary to have access to guns. The need to defend himself became a lived reality**." (p.18)[14]

[14] By agreement in open court on February 5, 2021, counsel confirmed that **in January 2017, a police officer aware of Confidential Informant, received information regarding a generalized threat only in relation to Mr. Steed's life, operating under their "duty to warn" process, advised Mr. Steed of the threat, and offered police assistance** – Mr. Steed had reservations about further speaking to police, and I infer he did not do so. At page 19 of the IRCA, we find: "Mr. Steed said his paranoia is starting to go away. He said as time passed, and there haven't

[39] In summary, regarding the nature of factual recitations that may appear in an IRCA, among those that are prohibited, I would include the provision of information which *only or primarily* has relevance to the specific circumstances of the commission of the offence for which the offender is being sentenced, or attempts to contextualize the circumstances of his commission of offences in his prior record.[15]

**iv) is it problematic that Mr. Wright, as supervisor of the assessor Natalie Hodgson, is closely related to Javon Steed via Mr. Steed's father Jason White?**

[40] In the IRCA at page 7 Ms. Hodgson states:

> "Javon Steed is the son of two Black parents. His mother, Rosalind Steed, has community linkage to Uniacke Square and Truro. His father, Jason White, also has community linkage to Uniacke Square. Mr. White has an extensive criminal record including serving time for trafficking and manslaughter. Robert Wright is related to both Mr. White and Mr. Steed. Mr. Wright has completed a cultural assessment on Mr. White. Mr. Wright's involved in Mr. Steed's assessment is that of a supervisory role. However, it is significant to mention the existence of Dual Relationships and African Nova Scotian communities. Specifically, when a Black person require support or services from Black professional kinfolk."

[41] The Crown states in its brief:

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been any attempts on his life, he has become more comfortable." See also the reference in the "Revisiting the Issues" section on p. 20 of the IRCA.

[15] That is not to say that such hearsay information could not be independently established by admissible evidence or agreement with the Crown - however, otherwise it should not be included in the IRCA or considered by the court - See also ss. 723, 724, 725 and 726.1 *CC* - see also cases regarding Pre-Sentence Reports which bear some analogy to an IRCA (see *R v Ipeelee*, 2012 SCC 13 at para. 60 in relation to *Gladue* reports): *R v Urbanovitch and Brown*, (1985) 19 CCC (3d) 43 (Man. CA.) at paras. 28-30 and 105-111, and *R v Riley* (1996) 107 CCC (3d) 278 (NSCA) at paras. 38-9 per Bateman JA dissenting; *R v Junkert*, 2010 ONCA 549 at para . 59.

> "it appears an accurate description that Mr. Wright's role was limited to that of a supervisor and that he was not directly involved in obtaining the information from Mr. Steed nor in drafting the report in any capacity… Ms. Hodgson references that Mr. Wright was directly involved in the preparation of Mr. Jason White's cultural impact assessment related to convictions in 2018. Mr. White does have convictions in 2018 for trafficking drugs and it appears a report was ordered in anticipation for that sentencing. It is unknown what the specific relationship status is between Mr. White and Mr. Wright, but it would seem that the familial connection would have to be closer between them then between Mr. Wright and Mr. Steed, given that there appears to be no reference to Mr. Wright being related to Mr. Steed's mother… In any event, there is no concern from the Crown's perspective given Mr. Wright's role as a supervisor of the report instead of the actual author….
>
> As a final thought, it is the view of the Crown that ultimately the value of these types of reports in approaching an individualized sentencing hearing for African Nova Scotians weights heavily for their inclusion and that in specific instances where the court may have concerns about partiality due to extra commentary or editorial by an author, including in this case, the preferred approach is to favour admissibility, but additionally referencing the offending portions, should they exist, as a form of guidance for future reports and authors."

[42] I accept the Crown's position in the present circumstances-however it is problematic when a sufficient nexus exists between the assessor (or supervisor) and an offender, which is capable of raising a reasonable concern that the assessor may have purposefully, or innocently, drifted away from their strict duty of impartiality to the court.[16]

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[16] A related yet different issue arises where an assessor's strays beyond their area of specialized knowledge and experience. An example can be found in *R v Boutilier*, 2017 NSSC 308, where Mr. Wright as the author of an IRCA had speculated that the accused suffered a traumatic brain injury which may have contributed to his offending behaviour. The Crown sought exclusion of the report and subpoenaed Mr. Wright and was permitted to cross-examine him. The court ruled that the report was admissible, although certain portions were redacted, and others given less weight based on Mr. Wright's straying from his qualifications (paras. 20-23). The issue of the extent to which IRCA authors' responsibilities are coincident with those of other "experts" therefore arose - at para. 21 Justice Chipman ruled in part that "Mr. Wright strayed beyond his qualifications and failed to meet the tests as set out by the Supreme Court of Canada in *White Burgess Langille Inman v Abbott and Haliburton Co*., 2015 SCC 23 and *R v Abbey*, 2017 ONCA 640."

[43] With those thoughts in mind let me turn to the IRCA regarding Mr. Steed.

## The Impact of Race and Cultural Assessment regarding Mr. Steed

[44] Ms. Hodgson sets out the objective of the report:

> "… It is critical to understand how an individual's ANS heritage and mental status have affected their involvement in criminal behaviour, will be a factor in their treatment while housed in institutional settings and will be a factor in their rehabilitation and reintegration in the community. Will present the following information in this report:
>
> > 1-what is known about ANS experience, and how might that have influenced Javon Steed's involvement with criminal behaviour;
> >
> > 2-how should this history and Javon Steed's unique history and status as an ANS be considered when delivering sentence; and
> >
> > 3-what services or resources should be made available to Mr. Steed to support his rehabilitation and reintegration given his unique history and status as an ANS?"
>
> "ANS people continue to suffer from historical traumas that have plagued Black community since forced migration. These traumas include but do not exhaust: segregation, inaccessibility of resources, systemic racism within institutions such as education, justice and health, incarceration rates racial profiling, and violence (beef) within the Black community…
>
> …
>
> **Robert Wright has written elsewhere about the unique patterns of criminal activity that have been seen in recent years in ANS communities: the rise in drug trafficking, explosion of juvenile prostitution, the spread of a loosely formed ANS criminal organization across the country (and internationally) and the proliferation of gun violence.** Though the criminal justice system holds people individually accountable for the crimes they commit, there is a recognition that social forces are at the root causes of crime. Understanding these social forces, however, are critical to properly understanding and adjudicating persons of ANS descent. I will offer discussion of two such factors as examples to form a basis for considering issues in Javon Steed's case:
>
> Community displacement:

…

> There are places around the province where ANS lived in very large numbers in cohesive communities, yet today those communities barely exist… Though Mr. Steed did not grow up in public housing, his parents certainly grew up in these settings (as in the case of his mother) and adjacent to them (as in the case of his father). As a young man he certainly experienced residential instability that is consistent with that experienced by urban Blacks.
>
> Particular patterns of ANS violence:
>
> Mr. Wright has written earlier about the cohesive and extensive relational bond that exists between ANS communities… this recognition of the large extended family bond means that each tragic loss of an ANS life to violence is felt as a deep personal loss throughout a wide network of extended families and throughout the entire affected community. Mr. Steed's exposure to violence happened at a very early age. His exposure to domestic violence contributes to the complexity of factors that cause Javon to exhibit delinquent behaviour in the community as a normalized and traumatic response."
>
> Mr. Steed's parents are still living. His mother's (Rosalind Steed nee Brown) father's family home was in East Preston. His father's (Jason White) father's family home was also in the Dartmouth, NS. area, although he was originally from the Caribbean.

[45] However, as Ms. Hodgson puts it under the subsection entitled, "Javon Steed: Fatherless and Without Male Role Models":

> Mr. Steed grew up without a father. His father, Jason White, was absent from his childhood. Mr. White was in and out of jail for most of Javon's upbringing. Even when Mr. White wasn't in jail he maintained very minimal contact with young Javon… The only real bonding the two of them had was through conversations and advice on street life."
>
> …
>
> Mr. Steed acknowledges that he had a stepfather… His stepfather was not a father figure and wasn't around very often… His pattern was to be "home" for a week or two and then gone for months. [Mr. Steed's mother] said when he was around, he was often abusive.
>
> Two Black "fathers" and both were negative influences. The only male role model that existed for Mr. Steed was his high school football coach named Joe. This coach was a White man that never judged him and always pushed him to his potential.
>
> …

Effects from Domestic Violence

…

The two Black men in Mr. Steed's life, whose role it should have been to shape and mold him into a man that can be successful and be a loving husband and family man, failed him on all fronts. Instead they showed him the Black men beat their women and children, don't take care of home, and that criminality is part of Black male culture. Mr. Steed would like to break that cycle. He wishes to be in a healthy caring relationship with a partner. However, living in an unhealthy domestic-violence household there has been some normalization of behaviours… Mr. Steed's father is currently in custody in a federal institution. Mr. Steed is determined to make this the last time he is in jail.

…

Suicide: Ideation, Grief and Cultural Impacts

…

As a teenager, he found it challenging to not have some of the things he wanted. He started hanging with older males. He said he looked up to them and wanted to be accepted. In the absence of a father, he created his own father like figures from any older men that spent time with him. Unfortunately, this crowd wasn't a good influence, and he began "car hopping" and doing other things he shouldn't to get some quick cash.

…

**Mr. Steed recognizes that his lifestyle contributed to his suicidal thoughts. He was selling drugs and hated the idea that drugs ruin people's lives. He admitted that being a drug dealer bothered him the most. He was raised in an environment of fast cash, illegal activity and street life, and this was all he knew**."[17]

[My emphasis added throughout]

[46] Much greater detail is reported by Ms. Hodgson.

[17] I take this statement as an indication of Mr. Steed's rehabilitative potential – I cannot, and do not consider it an aggravating circumstance in his sentencing.

[47] However, generally it paints a consistent picture of a young man growing up in a community where violence is prevalent, normalized, and in some corners celebrated- without positive direction and encouragement, without stability in his life, and largely surrounded by family and peers who were either unwilling, or ill-equipped, to be positive influences on Mr. Steed.

[48] Mr. Steed has lived consecutively in Truro; on Bilby Street in Halifax; in Newfoundland for three years; Fairview for 1 year; Cole Harbour for 3 Years; Calgary, AB for 1 year (Grade 7); two different locations in Dartmouth during 1 year; moved in with his aunt in Truro, and thereafter started to be incarcerated as a youth. Next, he lived in Woodside with his mother's friend; then Wallis Heights; and in Spryfield around the time he received his first adult sentence [i.e., the Fall of 2014].

[49] After his return from Calgary where he completed Grade 7, he switched schools three times in the next two years. Next, he went to Prince Andrew High School which he found to be a fairly good experience, as he was on the football team and that was important for him. He only needed six credits to graduate from high school, but he did not. He completed his General Equivalency Diploma while serving a custodial sentence at CNSCF and thereafter went to the Nova Scotia

Community College to take a welding program – although he did not complete that program as he felt welding "was really not for me".

[50] His complex family circumstances include that he has three siblings: two from his mother and one from his father. His mother had three children with three different fathers. Javon is the oldest of all his siblings. He has a three-year-old daughter named [K].

[51] Although he suggests he has had "multiple jobs" - there is a reference in the IRCA regarding his "work history" where we find the following statement: "Mr. Steed's work history consists of low paid wages and odd jobs" - I infer from the lack of detail and the remaining sources that he has not yet had any significant periods of ongoing employment.

[52] The **PSR** records under "financial situation" that:

> When asked about having any savings or debt, the subject advised **he has some debt noting he had a car that was allegedly destroyed by the police during a search, which his insurance company will not cover.** According to Mr. Steed, he is generally good with his money. The subject informed he was paying his mother $200-$300 per month while residing with her in order to help out with the bills. A check with the Justice Enterprise Information Network indicates the subject owes $350 in outstanding fines."[18]

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[18] The Dodge Charger he was driving, had an after-market "hide" installed. In that "hide" were found a Taser in a case, a sheathed knife, a plastic bag with a loaded black handgun (fabricated of metal and non-metal components) its magazine containing 20 rounds of ammunition, with additional 22 rounds of ammunition in a clear plastic bag. Handcuffs were in a box on the driver's side of the vehicle. A loaded so-called "speed loader" was found in the area of the front passenger door. This constellation of items is not consistent with his purported claim that he only had the handgun for self-defence. Furthermore, although Mr. Steed habitually operated the motor vehicle, and has claimed

[53] The author goes on to state under "Health and Lifestyle" that:

> Mr. Javon Steed informed he was in a bad car accident approximately three years ago at which time he broke his neck.… **In discussing mental health, the subject commented ever since the police informed him that someone wanted to "kill" him, his anxiety has been bad";**

[54] And under "Offender Profile":

> In discussing the matters before the court Mr. Steed accepted responsibility stating 'I was fully in the wrong and understand there are severe consequences'. The **subject admitted to having had a handgun, claiming *ever since* police informed him someone wanted to kill him, he has been "paranoid and scared" for his own life."**[19]

[55] The writer of the PSR contacted Ms. Laura Langille, social worker at the Central Nova Scotia Correctional Facility, and Ms. Langille provided the following comments to her:

> "I have been working with Javon in a clinical manner since September 2, 2020, totaling three sessions. Javon requested clinical counselling well before this date, but due to Covid

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responsibility for the weaponry therein, it is his mother who is the registered owner. The suggestion that he helps his mother out with the bills, and his reference that *he* has "some debt" associated with the car, raises questions about why he would prioritize having a car, when he is not regularly working, and no other reason is put forward? There is more here than meets the eye – but I don't intend to speculate about it. I am very sceptical that the exclusive reason he had possession of the handgun was for "self defence".

[19] As I noted in relation to the IRCA, writers of such reports should not put any commentary in those reports which only or primarily has relevance to the specific circumstances of the commission of the offence or attempts to contextualize the circumstances of his commission of offences in his prior record. Moreover, counsel have agreed that it was in **January 2017** when he was warned about the threat on his life – and as I understand it *thereafter* he found it necessary to have a firearm for self-defence reasons. Some inconsistencies arise with that timeline – I note he was convicted of being in possession of **firearms** on **February 7, 2013** (and they were seized – the Crown agrees that police records confirm them to have been: .22 calibre bolt action sawed-off rifle; .303 calibre Lee Enfield sawed off rifle; Browning 12 gauge shotgun.) – he turned 17 years old on January 22, 2013. He also had a . 22 calibre firearm on June 8, 2015. He could not have had the handgun in question here *before* it was sold to the pawn shop in Georgia – on **November 7, 2018** - *and* illegally made its way to Canada.

19 and facility operations it was not possible to meet with him individually before this time. I have however had many conversations with Javon in the day room prior to our individual sessions. Javon resides in the Integration Day Room (IDR) at CNSCF, which I oversee as the clinical social worker.
Our work together has been focused on several topics including interpersonal relationships, emotional regulation, and the systemic racism that Javon faces every day. Javon is incredibly open and honest during the counselling process. Through talk therapy, we have discussed Javon's prosocial plans for the future, and how his goals revolve around the safety and well-being of his daughter, whom he cares greatly for.

To supplement the talk therapy portion of our clinical work together, I have provided Javon with the Dialectical behaviour Therapy Skills Workbook, which he has worked through diligently. The purpose of this program is to reflect on and learn coping skills to aid in emotion regulation and distress tolerance – both of which are topics that would be helpful for Javon. Javon has put great effort into completing both the reading and activity portions of the workbook.

Due to Javon's level of engagement in the counselling process, I would recommend that he continue to seek mental health support either in a correctional facility setting or in community, as it would help to keep him accountable to his goals, and provide them space to explore his emotional well-being."[20]

[56] Under "Corrections History" the **PSR** records:

"This writer contacted Ms. Jolene Dominix, Case Manager at the Central Nova Scotia Correctional Facility [Dartmouth]… [She stated]:

Javon Steed was admitted to CNSCF April 3, 2019. He was transferred to Northeast Nova Correctional Facility [at Priestville, Pictou County], Southwest Nova Scotia Correctional Facility [Yarmouth] and eventually returned to CNSCF since the Yarmouth facility shut down due to Covid 19. Since his admission he has completed Options to Anger, attended school in the facility to work on his education; he was

[20] At pages 11-13 of the IRCA, Mr. Steed's work with Laura Langille is reviewed, and has culminated with him developing a five-year plan for his life. His plan is to return working with a dry walling crew he had worked with prior to his incarceration (although in is PSR he stated: "he really enjoyed the work, but the crew he was working with were *'a bit crazy'* and he stopped working… He is contemplating going back to work with that same crew, upon his release from custody, because he did learn a lot from them and really enjoyed the job." He hopes to achieve his mastery thereof within two years. Next, he plans to get his own crew together and facilitate his own sub-contracting work which he hopes to have completed in a further two years. Thereafter he will focus on paying off his existing debts; and during the final phase of the five-year plan he would like to build a house for himself, likely in East Preston. He sees the house as part of his potential legacy to pass on to his daughter.

involved with the Limitless Program through NSCC (NS Community College). He participated and completed a cultural program during African Heritage Month while in Yarmouth.

When he was transferred to CNSCF there was a decease to programs offered to inmates due to Covid 19 restrictions. Javon is always polite and courteous to this writer when speaking in the day room, or during a round. He participates when motivated and is helpful in the day room. He currently holds an incentive job in the day room where he is paid every two weeks."[21]

[57] **In summary, Ms. Hodgson states in the IRCA**:

"At the beginning of this report we outline the three issues that this report would consider. We re-present them here with comments for consideration:

1-What is known about ANS experience, and how might that have influenced Javon Steed's involvement with criminal behaviour?

Though ANS [community members] have a long, rich and proud history, unfortunately this history is also plagued with the legacy of enslavement, segregation, racial discrimination, economic and educational marginalization and criminality. Mr. Steed's history with poverty, family violence, residential instability and multi-generational trauma and criminalization made it difficult for him to chart an easy path to adulthood that allowed him to avoid criminal behaviour.

2-How should this history and Javon Steed's unique history and status as an ANS be considered when delivering his sentence?

At sentencing there are three main issues that IRCA seemed to speak to most forcefully: the issue of historical criminalization and differential criminal justice response experienced by people of African descent; the issue of moral blameworthiness of criminalized people of African descent who have been affected by powerful, multi-generational influences; and the issue of the absence of a need for

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[21] At page 19 of the IRCA we find the following statement: "Through the course of my interviews with correctional staff there was an overwhelming consensus of positive perceptions of Mr. Steed. Staff spoke highly of him as being respectful and easy to get along with… He scores well on his risk assessments, and has had only one past disciplinary level… A very likable inmate and has more initiative and motivation than others… Due to Covid, programs and opportunities have been put on hold. His reputation has gained his trust with CMOs and Ms. Dominix would have trusted him with various different jobs if it wasn't for limitations from current public health orders. Mr. Steed was very engaged with programs… She sees him as very capable and has more to offer in life than being in jail… Craig Benedict was Mr. Steed's CMO [in Yarmouth]… noted that Mr. Steed would take every program and that he was an active participant. He said his main challenges would be the people in his life that have influenced him negatively".

culturally specific programming to meet the unique circumstances of people of African descent who come in contact with the criminal justice system. Considering these things during sentencing empowers courts to arrive at sentences that help to address these historical injustices experienced by criminalized people of African descent, plan interventions that will support effective rehabilitation, and promote public safety needs for all peoples.

3-what services or resources should be made available to Javon Steed to support his rehabilitation and reintegration given his unique history and status as an ANS?

… **I offer the following specific recommendations**:

Javon Steed would benefit from continued counselling. Specifically, a Black counsellor. Javon has been demonstrating that he responds well to counselling. He seems to be aware that it is helping change him. This progress would only be heightened if he were able to access the services of an African Nova Scotian, African Canadian, or Black counsellor who can also identify with his lived experiences. A counsellor that is experienced with trauma-informed treatment and specifically understands how Javon's trauma has affected him given his race and culture.

It is recommended that Mr. Steed participates in a Black Men's Wealthness group. The Nova Scotia Brotherhood offers programs such as this in the community. Due to Covid restrictions, it is unclear what their group support looks like. It is likely online or restricted at present.

Mr. Steed could benefit from a Music Therapy group. He really enjoyed the day he participated in the Rap program at CNSCF. He found it therapeutic. This could be embedded within the Black Men's Wealthness group.

Mr. Steed has had limited opportunities to have strong pro-social mentors in his life. He could benefit from having a relationship with a mentor or model. Preferably a man. A man from the ANS community. 902 ManUp or IMOVe would be a service that may be helpful to him if he were in the community.

Mr. Steed demonstrates determination to be successful in the community. His five-year plan is well thought out and attainable. But it lacks concrete steps and challenges. Working with a career counsellor would offer assistance to his plan's achievement. A career counsellor with knowledge of employment resources for people of African descent. Opportunities for funding, sponsorship and other services through Black organizations such as the Black Business Initiative (BBI)."

[58] Mr. Steed addressed the Court. He is an insightful, intelligent, and well spoken young man. He assured the Court that he has turned the page on his former life, and is fully prepared to focus on his rehabilitation. I found his comments sincere; the challenge for him will be to resist the negative influences that have previously led to his criminal behaviour.

[59] In *R v Nur*, 2011 ONSC 4874, Justice Code's statements in *Nur* bear repeating:[22]

> 63 I am satisfied that the right to make a "dock" statement, codified in s. 726 of the *Criminal Code*, cannot be used to circumvent the normal rules relating to proof of aggravating and mitigating circumstances set out in s. 724(3). J.C. Martin Q.C., the learned author of the 1955 edition of *Martin's Criminal Code*, (Cartwright and Sons Ltd.) at pp. 880-1, sets out the legislative history of the present s. 726, noting that the original provision was to the effect that the accused was to be asked, upon conviction, "whether he has anything to say why sentence should not be passed upon him according to law". Mr. Martin then proceeds to explain the origins of this provision which was found in both the original 1892 *Criminal Code* and in the 1878 *English Draft Code*:
>
>> This provision, called the *allocutus* is a survival of the time when the accused could not give evidence nor call witnesses. It gives him or his counsel an opportunity to plead for clemency, or (subject now to s. 510(1) *ante*) to raise questions of law.
>
> 64 The modern s. 726 is framed in somewhat broader terms than its historical predecessors, as the Court now asks the accused whether he "has *anything* to say". **In the case at bar, the accused attempted to use this provision to advance a mitigating explanation for his possession of the gun. The circumstances surrounding the possession of the gun, whether aggravating or mitigating, were the very subject of the *Gardiner* hearing. I warned the accused, before he resorted to his "dock"**

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[22] More recently see: *R v Graham*, 2020 ONCA 692 at paras. 24-26.

**statement, that he should give his explanation from the witness box. He declined to do so.**

65 **Section 726** is a historical provision, dating from the 19th century, that was intended to relieve against the accused's incompetence as a witness at common law. It **must now be read harmoniously with s. 724(3) which sets out the modern approach to proof of facts on a sentencing hearing, in an era where the accused is no longer incompetent to testify. Indeed, there is authority for the proposition that the accused is not only competent but is also compellable at a sentencing hearing.** See: *Adgey v. R.* (1973), 13 C.C.C. (2d) 177 (S.C.C.), at 183 per Laskin J., as he then was, in dissent but arguably not on this point; *R. c. Richard* (1996), 110 C.C.C. (3d) 385 (S.C.C.) at para. 21.

66 I am satisfied that what happened in this case was a misuse of the right to make a "dock" statement pursuant to s. 726. **As a result, I am left with no proof, one way or the other, as to when and in what circumstances the accused Nur came into possession of the gun.** The Crown did not prove their aggravated version of these facts beyond reasonable doubt and the defence did not prove their mitigated version on a balance of probabilities. This is the same situation that the Court of Appeal described in its most important post-*Gardiner* decision, *R. v. Holt* (1983), 4 C.C.C. (3d) 32 (Ont. C.A.), at pp. 51 -2:

> It was held by the majority of the Supreme Court of Canada in *R. v. Gardiner* ...that if the Crown advances contested aggravating facts in a sentencing proceeding for the purpose of supporting a lengthier sentence, it must prove those aggravating circumstances beyond a reasonable doubt. But that case does not support the reverse proposition — that in the absence of such proof all possible mitigating facts must be assumed in favour of the accused. The plain fact is that it was not established one way or the other whether the respondent was a low level dealer selling merely to support his own habit or a large scale dealer. [Emphasis added.]

Also see: *R. v. Donovan* (2004), 188 C.C.C. (3d) 193 (N.B. C.A.) at paras. 38-9; Justice S.C. Hill et al, *McWilliams Canadian Criminal Evidence*, (Canada Law Book 2010), at 34.70.

67 In *Holt*, *supra*, neither the accused nor the victims of his heroin trafficking testified on the sentencing hearing as to the scale of the accused's drug dealing. Similarly, in the case at bar neither the accused, nor the young man who was apparently threatened, testified as to Nur's role. As a result, I cannot be sure as to exactly what role the accused Nur played in the events outside the Community Centre, and when he played that role, except that he ended up with the gun and he fled when the police arrived. On the other hand, the defence has not satisfied me on a balance of probabilities that Nur was given the gun and was told to run with it at the last moment, as he was about to enter the Centre to play basketball and as the other young men were moving away. Similarly, the defence has not satisfied me that the accused Nur did not know "what they were up to".

[60] **Mr. Steed's criminal record**

| Offence | Offence date | Sentencing date | Sentence |
|---|---|---|---|
| s. 252(1) CC | May 4-7, 2010 | June 15, 2011 | 18 months probation |
| s.334(a) CC | May 11, 2010 | June 15, 2011 | 18 months probation |
| s. 355(1) CC | May 4- 7, 2010 | June 15, 2011 | 18 months probation |
| s. 348(1) CC | June 7, 2010 | June 15, 2011 | 18 months probation |
| s. 88(1) CC | June 7, 2010 | June 15, 2011 | 18 months probation |
| s. 145(5.1) CC | June 15, 2010 | June 15, 2011 | 18 months probation |
| s. 342(1) CC | August 22- 25, 2010 | June 15, 2011 | 18 months probation |
| s. 145(3) CC | September 3-7, 2010 | June 15, 2011 | 18 months probation |
| s. 348(1)(b) CC | September 3-7, 2010 | June 15, 2011 | 18 months probation |
| s. 348(1)(b) CC | September 20-21, 2010 | June 15, 2011 | 18 months probation |
| s. 145(3) CC | September 29, 2010 | June 15, 2011 | 18 months probation |
| s. 334(b) CC | September 29, 2010 | June 15, 2011 | 18 months probation |

| | | | |
|---|---|---|---|
| s. 145(2)(b) CC | November 5, 2010 | June 15, 2011 | 18 months probation |
| s. 145(2)(b) CC | November 9, 2010 | June 15, 2011 | 18 months probation |
| s. 348(1)(b) CC | May 31, 2011 | June 15, 2011 | 18 months probation |
| s. 348(1)(b) CC | June 6, 2011 | June 15, 2011 | 18 months probation |
| s. 264.1(1)(a) CC | May 8, 2010 | July 29, 2011 | 1 month deferred custody(concurrent) |
| s. 267(a) CC | May 8, 2010 | July 29, 2011 | 1 month deferred custody<br><br>(concurrent) |
| s. 266 CC | June 28, 2011 | July 29, 2011 | 4 months deferred custody<br><br>(concurrent) |
| **s. 344 CC** | June 28, 2011 | July 29, 2011 | 4 months deferred custody<br><br>(concurrent) |
| **s. 344 CC** | June 28, 2011 | July 29, 2011 | [* **2-year s. 51 YCJA firearms/weapons Prohibition Order- July 29, 2011 – 2013**] |

| | | | |
|---|---|---|---|
| s. 264.1(1)(a) CC | June 28, 2011 | July 29, 2011 | 4 months deferred custody<br><br>(concurrent) |
| s. 264.1(1)(a) CC | June 28, 2011 | July 29, 2011 | 4 months deferred custody<br><br>(concurrent) |
| s. 267(a) CC | June 28, 2011 | July 29, 2011 | 4 months def. custody<br><br>(**consecutive**) |
| s. 129(a) CC | July 11, 2012 | November 22, 2012 | 30 days custody |
| **s.117.01(1) CC** | **February 7, 2013** | May 14, 2013 | 6 months custody<br><br>(concurrent) + 12 mos. probation **[* 5-year s. 51 YCJA firearms/weapons Prohibition Order – May 14, 2013 – May 14, 2018]** |
| **s. 95(1)** CC | **February 7, 2013** | May 14, 2013 | 6 months custody<br><br>(concurrent) + 12 mos. probation **[* 5-year s. 51 YCJA firearms/weapons Prohibition Order – May 14, 2013 – May 14, 2018]** |

| **s. 92(2) CC** | **February 7, 2013** | May 14, 2013 | 6 months custody<br><br>(concurrent) + 12 mos. probation **[* 5-year s. 51 YCJA firearms/weapons Prohibition Order – May 14, 2013 – May 14, 2018]** |
|---|---|---|---|
| **s. 91(2) CC** | **February 7, 2013** | May 14, 2013 | 6 months custody<br><br>(concurrent) + 12 mos. probation **[* 5-year s. 51 YCJA firearms/weapons Prohibition Order – May 14, 2013 – May 14, 2018]** |
| **s. 88(1) CC** | **February 7, 2013** | May 14, 2013 | 6 months custody<br><br>(concurrent) + 12 mos. probation **[* 5-year s. 51 YCJA firearms/weapons Prohibition Order – May 14, 2013 – May 14, 2018]** |
| **s.86(1) CC** | **February 7, 2013** | May 14, 2013 | 6 months custody<br><br>(concurrent) + 12 mos. probation **[* 5-year s. 51 YCJA firearms/weapons Prohibition Order – May 14, 2013 – May 14, 2018]** |
| **Mr. Steed turned 18 years old on January 22, 2014** | | | |

| | | | |
|---|---|---|---|
| s. 145(3) CC | September 3, 2014 | September 15, 2014 | (one day deemed served) |
| s. 145(3) CC | September 30, 2014 | October 8, 2014 | 20 days concurrent |
| s. 137 YCJA | March 11, 2014 | December 5, 2014 | (one day deemed served) |
| s. 4(1) CDSA | June 9, 2015 | February 3, 2016 | $120 fine |
| **s. 117.01(1) CC** | **June 8, 2015** | June 24, 2016 | (deemed time served)[23] |
| **s. 86(2) CC** | **June 8, 2015** | June 24, 2016 | $400 fine |
| s. 4(1) CDSA | March 29, 2018 | January 30, 2019 | $200 fine |
| s. 264.1(1)(a) CC | December 10, 2018 | November 6, 2019 | (one day deemed time served) |
| **ss. 95(1); 94(1); 91(2); 91(2); 108(1)(b); 117.01; 117.01; 117.01** | **(March 27, 2019 offence date) pending sentencing** | | |

## Crown position on sentencing

[23] As a result of a search of Mr. Steed's residential premises, police located a .22 calibre firearm under a deck outside, which he was prohibited from possessing at that time. He had been in custody the entire time since his arrest on June 8, 2015 which the court accepted was equivalent to a 572-day sentence. He pled guilty to both offences on June 24, 2016. The Crown and Defence joint recommendation was for time served, and a lifetime s.109 prohibition order.

[61] In its brief, the Crown is seeking a global sentence of 5-6 years for all of the matters for which Mr. Steed has entered guilty pleas. It suggests that:[24]

1. the s. 95 *CC* (possession of a restricted firearm with ammunition in the magazine) is the most serious offence and first should be assigned a sentence (10 year maximum/the three year first offender and five-year second offender minimum sentences were declared unconstitutional *R v Nur*, [2015]1 SCR 773).

[24] The Crown stated at the sentencing that given the circumstances of the offences and criminal record of Mr. Steed, for a s. 95 "true crime" possession of a firearm offence, the range is such that Mr. Steed could be sentenced between 7 to 10 years imprisonment, and that after taking into account the mitigating factors including the IRCA report, they are recommending 5 to 6 years imprisonment in total for Mr. Steed. For the 7-10 year range they cite: *R v Charles*, 2013 ONCA 681 (7 years imprisonment]; *R v Slack*, 2015 ONCA 94: "Nothing in *Nur* or *Charles* displaces the developed sentencing range applicable to offenders convicted of a second or subsequent offence. Both *Nur* and *Charles* affirm that offenders convicted of "truly criminal conduct" in relation to firearms must receive exemplary sentences that emphasize deterrence and denunciation… was in unauthorized possession of a loaded restricted firearm in circumstances that posed a real and immediate danger to the public… readily accessible in an unlocked car, which the appellant abandoned, leaving the engine running, in a public parking lot during daylight hours. Given the appellant's serious and lengthy prior record which included crimes of violence and multiple weapons -related offences, the serious nature of the predicate offences, and the four-year sentence of imprisonment imposed for his first section 95(1) offence, the appellant's conduct can only be viewed as falling at the "true crime" end of the section 95 offences discussed in *Nur* and *Charles*. The offences at issue cried out for a substantial penitentiary sentence, higher than the sentence imposed for the appellant's first section 95(1) offence… I see no basis for appellate interference with the eight-year jail sentence imposed…"; More recently, in *R v Brown*, 2020 ONSC 6355, Justice Roberts discussed the range of sentence for s. 95 CC offences, and stated: "Justice Code confirmed that the range is between 3 to 5 years for 'a first section 95 offence where the use and possession of the gun is associated with criminal activity, such as drug trafficking'… For those who are repeat offenders in relation to section 95, the range post-*Nur* is between 6 to 9 years imposed for a second offence [though I note that Mr. Brown was also found guilty of possession of cocaine and fentanyl for the purpose of trafficking in relation to drugs found at the same time as the firearm at issue in that sentencing – he received the equivalent of two years and three months custody on that charge alone]; in *R v McNichols*, 2020 ONSC 6499, Justice S. Akhtar imposed a 7-year sentence for a s. 95 offence and 18 months consecutive for a s. 117.01 CC offence (albeit he had two prior convictions involving the possession of a loaded firearm- para. 33; he also noted there was a lack of remorse). He stated at paragraph 21: "In *R v Graham*, 2018 ONSC 6817, Code J, conducting a review of the appropriate authorities, concluded that the range of sentences for a recidivist offender convicted of a firearms offence to be in the 8-10 year range. This certainly seems to be borne out by the cases…".

Consecutive sentences should be imposed for:

2. the section 117.01 *CC* offences (possession of the firearm, conducted energy weapon, and ammunition-maximum 10 years), and

3. for the s. 91(2) *CC* offences -for possession of prohibited weapon (an overcapacity magazine) and a restricted weapon (conducted energy weapon)-(five year maximum);

And the remaining offences should result in concurrent sentences:

4. s. 94(1)-occupant of motor vehicle knowing there was a firearm present (maximum 10 years) – and

5. s. 108 - possessing a firearm knowing the serial number has been altered, defaced or removed (five year maximum).

[62] The Crown notes that Mr. Steed is already bound by a lifetime firearms/weapons prohibition, and his DNA is contained within the National DNA Data Bank.

[63] Nevertheless, section 109 of the *Criminal Code* mandates orders under s. 109(3) *CC* for s. 95 *CC* offences, and for "an offence that involves, or the subject matter of which is, a firearm… a prohibited weapon, a restricted weapon, a

prohibited device, any ammunition, and prohibited ammunition… and, at the time of the offence, the person was prohibited by any order made under this Act or any other Act of Parliament from possessing any such thing".

[64] Therefore, I must make a s. 109(3) *CC* lifetime prohibition order in relation to all of the offences committed by Mr. Steed, except those under ss. 108 and 117.01 *CC*.

[65] None of the offences here are eligible for DNA orders - s. 487.051 *CC*.

[66] In a supplementary written submission dated February 3, 2021, the Crown elaborated upon the proper amount of pre-sentence credit for Mr. Steed. In summary it noted that no evidence had been provided for enhanced pre-sentence credit regarding the conditions of his housing while on remand, the incidence of lockdowns that he has experienced if any, and the quality of the conditions of his incarceration, other than an acknowledgement that the available programming had to be curtailed because of the Covid 19 pandemic.

[67] On February 26, 2021, evidence was presented by Superintendent Adam Smith, CNSCF, regarding the conditions of his incarceration since March 27, 2019. I accept his testimony.[25]

[68] The Crown draws attention to the following **mitigating factors**:

1. his guilty plea and acceptance of responsibility [not guilty pleas were entered on September 5, 2019 and guilty pleas were taken on September 18, 2020- a *voir dire* regarding the search of his car was held January 17, 24 and March 2, 2020 and a decision rendered in writing on March 17, 2020];

2. his behaviour and conduct while on remand including the programming he has taken; his development of the future five-year

[25] Mr. Steed in his January 22, 2021 brief also makes reference to "[he] was the victim of a significant assault while in custody, that resulted in injuries that may persist for the remainder of his life." The Crown concedes that "Mr. Steed did appear in court on one occasion with a "blackeye" but no further information has been forthcoming and therefore no credit should be given - see *R v Suter*, 2018 SCC 34 per Moldaver, J. at para. 51: "Our courts have held that where an offender is attacked by fellow inmates in a prison and the attack is related to the offence for which the offender is in custody, such violence may be considered as a factor at sentencing: see *R. v. MacFarlane*, 2012 ONCA 82, 288 O.A.C. 114 (Ont. C.A.), at para. 3; *R. v. Folino*, 2005 ONCA 258, (2005), 77 O.R. (3d) 641 (Ont. C.A.), at para. 29; *R. v. Anderson*, 2014 ONSC 3646 (Ont. S.C.J.), at paras. 14 and 18 (CanLII). Although being assaulted by a fellow inmate is not the same thing as being abducted and attacked by vigilantes, the rationale for taking these collateral consequences into account when sentencing an offender remains. In both scenarios, attacks relating to the commission of the offence form part of the personal circumstances of the offender. To ensure that the principles of individualization and parity are respected, these attacks are considered at sentencing." I accept that Mr. Steed was "sucker punched" by another (considered incompatible) inmate on September 17, 2020 while in a Captain's office at CNSCF, and his right eye area was severely bleeding from which he now has blurry vision. While not "related to the offence for which he is in custody", its consequences have made his remaining incarceration more difficult I find – see also *R v Simms*, 2020 NSSC 239 at para. 52 per Arnold, J.

plan; his participation in behavioural therapy; and continued participation as a father for his daughter;

3. his insight into offending behaviour and steps to address those issues, including emotional management;

4. the contextual analysis of his status as an African Nova Scotian and his difficult upbringing.

[69] The Crown lists the following **aggravating factors**:

1. the firearm had a chambered bullet, a full (illegal/overcapacity) magazine, and a separate bag of ammunition which was readily accessible, which in itself would be two avenues for the Crown to establish a section 95 offence. The volume of ammunition is aggravating (42 rounds in total);

2. the nature of the firearm itself, being of a composite material (hard to detect by metal detectors), being designed initially for use in law enforcement and having the capability to discharge ammunition (if it were acquired) which could pierce armour;

3. the firearm was smuggled into Canada via the United States (it was sold to a pawnshop in the State of Georgia, USA on November 7, 2018 – and by March 27, 2019 Mr. Steed had it);

4. the partially destroyed serial number of the firearm – [it is itself an offence for which he has been convicted and therefore it should not have the status of an "aggravating factor"- see recently a discussion thereof in *R v Butcher, 2020 NSCA 50*, and by Justice Beveridge dissenting, albeit in the context of two statutory sentencing aggravating factors];

5. the firearm was located in a secret compartment or "hide" which very greatly helped to conceal a firearm, even after a Canadian Border Services Agency x-ray search – the fact that the hide was professionally built-in suggests of the decision to do so was thoughtfully considered and not impulsive ;

6. the hide was in a motor vehicle, again an offence in itself; [the fact that the gun was in a motor vehicle constitutes the offence under s. 94(1) *CC* to which he has pled guilty – therefore it should not be considered an aggravating factor on sentence]

7. a knife and prohibited Taser were also located within the hide with the firearm, again an offence in itself; [he has not pled guilty to this s. 94(1) *CC* offence regarding these items, however he pled guilty to the offences of possessing them under s. 91(2) *CC,* therefore it should not be considered an aggravating factor on sentence- see *R v Phinn*, 2015 NSCA 27 at para. 44 per Saunders and Bourgeois, JJA.]

8. a magazine speed-loader was also located in the vehicle; [this can constitute an aggravating factor on sentence]

9. handcuffs were also located in the vehicle; [this can constitute an aggravating factor on sentence – I am satisfied that they are part and parcel of the weaponry and ammunition found in the vehicle.]

10. a balaclava was also located in the vehicle; [there is no proof beyond a reasonable doubt that this constitutes an aggravating factor on sentence – he was arrested on March 27, 2019 – in the season referred to as Winter]

11. at the time of the offence Mr. Steed was on a lifetime weapons prohibition Order (June 24, 2016); [he is separately charged with breaches of that Order – in relation to the firearm, the Taser, and the

ammunition per s. 117.01 *CC* – therefore it should not be considered an aggravating factor on sentence]

12. Mr. Steed has a significant criminal record at his young age of 24 years – 46 convictions beginning in June of 2011

13. many of his convictions are for serious offences:

    a. 5 convictions for breaking-and-entering [in 2010-11 when he was 14-15 years old- he received under the YCJA, 18 months-probation on those and many other offences on June 15, 2011]

    b. 8 firearms offences including two prior breaches of a firearms prohibition order and one prior s. 95 *CC* conviction [the two significant offence dates are February 7, 2013 (his mental health crisis when he was a youth); and June 8, 2015 (after he had turned 19 on Jan. 22, 2015, a .22 calibre firearm was found under a deck outside his residence)]

    c. 10 conviction for crimes of violence including 2 robbery convictions, 2 convictions for assault with a weapon, 5 convictions for uttering threats, 1 conviction for simple assault. He also has 2 convictions for possession of drugs (*CDSA*) and a

> large number of convictions related to breaching court orders. [His convictions are for simple possession of drugs, not trafficking related offences; all his crimes of violence occur between June 2010 and June 2011 as a youth, but for a s. 264.1 *CC* offence on December 10, 2018, for which he received one day's imprisonment: deemed time served. His last sentence of incarceration before March 27, 2019 was served by him between June 8, 2015 and June 24, 2016.

[70] The Crown also relies upon the comments of the Supreme Court of Canada in *R v Nur,* 2015 SCC 15, regarding the appropriate range of sentences for s. 95 *CC* offences (at paras. 27-33 and 105), which run the gamut from most serious ["the outlaw who carries a loaded prohibited or restricted firearm in public places as a tool of his or her criminal trade"] to the least serious ["the licensed and responsible gun owner who stores his unloaded firearm safely with ammunition nearby, but makes a mistake as to where it can be stored"].

[71] Therein, the court stated:

> 82 **Section 95(1) casts its net over a wide range of potential conduct. Most cases within the range may well merit a sentence of three years or more but conduct at the far end of the range may not. At one end of the range, as Doherty J.A. observed, "stands the outlaw who carries a loaded prohibited or restricted firearm in public places as a tool of his or her criminal trade. ... [T]his person is engaged in truly**

> **criminal conduct and poses a real and immediate danger to the public" (para. 51). At this end of the range — indeed for the vast majority of offences — a three-year sentence may be appropriate. A little further along the spectrum stands the person whose conduct is less serious and poses less danger; for these offenders three years' imprisonment may be disproportionate, but not grossly so.** At the far end of the range, stands the licensed and responsible gun owner who stores his unloaded firearm safely with ammunition nearby, but makes a mistake as to where it can be stored. For this offender, a three-year sentence is grossly disproportionate to the sentence the conduct would otherwise merit under the sentencing provisions of the *Criminal Code*.
>
> 83 Given the minimal blameworthiness of the offender in this situation and the absence of any harm or real risk of harm flowing from the conduct (i.e. having the gun in one residence as opposed to another), a three-year sentence would be grossly disproportionate. Similar examples can be envisaged. A person inherits a firearm and before she can apprise herself of the licence requirements commits an offence. A spouse finds herself in possession of her husband's firearm and breaches the regulation. We need not focus on a particular hypothetical. The bottom line is that s. 95(1) foreseeably catches licensing offences which involve little or no moral fault and little or no danger to the public. For these offences three years' imprisonment is grossly disproportionate to a fit and fair sentence. Firearms are inherently dangerous, and the State is entitled to use sanctions to signal its disapproval of careless practices and to discourage gun owners from making mistakes, to be sure. But a three-year term of imprisonment for a person who has essentially committed a licensing infraction is totally out of sync with the norms of criminal sentencing set out in the s. 718 of the *Criminal Code* and legitimate expectations in a free and democratic society. As the Court of Appeal concluded, there exists a "cavernous disconnect" between the severity of the licensing-type offence and the mandatory minimum three-year term of imprisonment (para. 176). Consequently, I conclude that s. 95(2)(*a*)(i) breaches s. 12 of the *Charter*.
>
> 84 It may be noted that the offence in s. 95(1) captures less serious conduct than other gun-related crimes that attract mandatory minimum terms of imprisonment. For example, in *Morrisey*, the Court upheld a four-year mandatory minimum term of imprisonment for the offence of criminal negligence causing death with a firearm. Unlike the offence of criminal negligence causing death with a firearm, s. 95(1) does not require proof of harm — it is a simple possession offence.
>
> [My bolding added]

[72] The Crown also relies on the Ontario Court of Appeal decision, *R v Slack*, 2015 ONCA 94, where it referenced the effect of the Ontario Court of Appeal's decision and comments in *Nur:*

21 I turn now to the appellant's submission that the sentencing judge erred by using the five-year mandatory minimum sentence set out in s. 95(2) of the *Criminal Code* as a sentencing "floor". I would reject this submission.

22 This court's decisions in *Nur* and *Charles* were released after the date of the sentencing hearing in this case. In *Nur*, this court declared the mandatory three-year minimum sentence provided for under s. 95(2)(*a*)(i) of the *Criminal Code* for a first conviction under s. 95(1) of no force or effect on the basis that the mandatory minimum in question unjustifiably violated s. 12 of the *Charter of Rights and Freedoms*. In the companion case of *Charles*, the mandatory five-year sentence of imprisonment under s. 95(2)(*a*)(ii) of the *Criminal Code* for a "second or subsequent" conviction under s. 95(1) was struck down on the same basis.

23 **Nothing in *Nur* or *Charles* displaces the developed sentencing range applicable to offenders convicted of a second or subsequent s. 95(1) offence.**
**Both *Nur* and *Charles* affirm that offenders convicted of "truly criminal conduct" in relation to firearms must receive exemplary sentences that emphasize deterrence and denunciation.**

24 **This is such a case. This was the appellant's second conviction for a s. 95(1) offence. On his first conviction, he received a sentence of four years in jail for the possession charge and nine months in jail, consecutive, for breaching a prohibition order and recognizance. The appellant has a lengthy criminal record, consisting of 18 prior criminal convictions, including convictions for using an imitation firearm in the commission of a robbery, assault, trafficking in a scheduled substance, breaching a firearm prohibition order, and possessing a prohibited or restricted firearm with readily accessible ammunition. Moreover, at the time of the instant offences, the appellant was on probation and subject to an order prohibiting him from possessing a firearm or ammunition.**

25 In addition, the appellant was in unauthorized possession of a loaded restricted firearm in circumstances that posed a real and immediate danger to the public. The loaded firearm was readily accessible in an unlocked car, which the appellant abandoned, leaving the engine running, in a public parking lot during daylight hours.

26 **Given the appellant's serious and lengthy prior record, which included crimes of violence and multiple weapons-related offences, the serious nature of the predicate offences, and the four-year sentence of imprisonment imposed for his first s. 95(1) offence, the appellant's conduct can only be viewed as falling at the "true crime" end of s. 95 offences discussed in *Nur* and *Charles*. The offences at issue cried out for a substantial penitentiary sentence, higher than the sentence imposed for the appellant's first s. 95(1) offence.**

27 **There were also several aggravating features that compelled a sentence closer to the high end of the range. These included**:

• the firearm was loaded;
• the firearm was found in an unlocked car in a public parking lot during the daytime. The car's engine had been left running;
• this was not merely a regulatory or licensing offence. The appellant was not authorized to possess a firearm under any circumstances;
• the appellant fled the scene when a police officer told him to move his car;
• after abandoning the car, the appellant telephoned a friend, who had rented the car for him, and told her to report the car as stolen; and
• the appellant's criminal record, described above, reflects a consistent pattern of criminal conduct.

28 **In all these circumstances, I see no basis for appellate interference with the eight-year jail sentence imposed by the sentencing judge for the appellant's weapons-related convictions.** Given the circumstances of these offences and this offender, a sentence of eight years' imprisonment was appropriate and within the applicable range even in the absence of the mandatory minimum.

[73] Further comment thereon came from Justice Roberts, in *R v Brown*, 2020 ONSC 6355, in relation to the Supreme Court of Canada's decision in *Nur*, 2015 SCC 15:[26]

27 Since *Nur* was decided, the Court of Appeal has continued to affirm that those who commit s.95 offences falling at the "truly criminal conduct" end of the spectrum can expect exemplary sentences emphasizing deterrence and denunciation. ***In the trial decision in Nur, Justice Code noted that the range of sentence for a first offence of possession of a loaded handgun simpliciter (without additional convictions such as for drug trafficking) prior to the enactment of the mandatory minimum "tended to be between two years less a day and three years imprisonment",*** with much longer sentences for recidivists: *R. v. Nur*, 2011 ONSC 4874 (Ont. S.C.J.) at para.42. In *R. v. Graham*, 2018 ONSC 6817 (Ont. S.C.J.), at paras. 38 Justice Code confirmed this range for the *"well-situated first offender"* relying in particular on *R. v. Smickle*, 2014 ONCA 49 (Ont. C.A.). **In *Smickle*, originally heard together with *Nur*, the Court of Appeal confirmed that a sentence of *two years less one day* was the appropriate sentence on a Crown appeal. Mr. Smickle was found in possession of a loaded firearm while alone in his cousin's apartment. He was 27 years old, had no criminal record, and there were substantial mitigating circumstances.**

[26] Though notably Mr. Brown was also found guilty and separately sentenced, but in relation to the same incident, for possession of cocaine and fentanyl for the purpose of trafficking - para. 2.

28 **Justice Code confirmed that the range is between *three to five years "for a first s.95 offence where the use and possession of the gun is associated with criminal activity, such as drug trafficking"*.** The Court of Appeal rejected the argument that the defunct mandatory minimum improperly inflated the bottom of the appropriate range, concluding instead that "recent sentences reflect Canadian society's intolerance for gun crime and are in keeping with the direction given by the Supreme Court of Canada": *R. v. Ellis*, 2016 ONCA 598 (Ont. C.A.) at paras.77-79. In these kind of cases, **the Court of Appeal has consistently upheld sentences in the range identified by Justice Code even where the offender is young and does not have a criminal record**: *R. v. Marshall*, 2015 ONCA 692 (Ont. C.A.); *R. v. Mansingh*, 2017 ONCA 68 (Ont. C.A.); *R. v. Omoragbon*, *supra*, at paras.22-24.

29 **For those who are *repeat offenders in relation to s.95, the range post-Nur is between six to nine years***. In *R. v. Slack* (2015), 321 C.C.C. (3d) 474 (Ont. C.A.) a total sentence of ten years was upheld, consisting of eight years for a repeat breach of s.95, **plus two years consecutive for breach of weapons prohibition orders**. See also *Graham*, at para.39, and *R. v. Hector*, 2014 ONSC 1970 (Ont. S.C.J.).

30 As noted, the Crown drew my attention in particular to *R. v. Omoragbon*, *supra*, in which the Court of Appeal upheld a global sentence of 7 years for a 23 year old (21 at the time of the offences) who was found to have been in a car containing a loaded .38 calibre revolver, five different drugs, including cocaine and a heroin and fentanyl mix and cash found to be proceeds of crime. Mr. Omoragbon had a record for property offences, fail to comply, carrying a concealed weapon and flight from police. His longest previous sentence was 10.5 months. Mr. Omoragbon appealed on the basis that the sentence was too high, especially in light of his young age. The Court of Appeal disagreed, noting:

> [22] *Yet again, this is a case involving that toxic combination of drugs and a handgun. Cocaine and crack cocaine. And fentanyl. A loaded .38 calibre handgun. In a motor vehicle, aptly characterized as a mobile pharmacy. Each a pernicious and persisting threat to the safety, welfare and indeed the lives of members of our community*: R. v. Wong, 2012
>
> [23] *These offences command exemplary sentences. The predominant sentencing objectives are denunciation and deterrence. Substantial jail terms are required even for youthful first offenders*: *R. v. Mansingh*, 2017 ONCA 68, at para.24.
>
> [24] We do not gainsay the importance of the sentencing objective of rehabilitation in respect of youthful offenders. But its influence on the ultimate determination of a fit sentence is a variable, not a constant. In the absence of any realistic rehabilitative prospects, its impact on the nature and length of a sentence may be attenuated. [emphasis added]

…

> 31 Defence counsel noted that the range of sentence was well set out and did not take me to specific cases, but commended the reasoning process in *R. v. Tewolde*, 2020 ONSC 532 (Ont. S.C.J.). Having taken up defence counsel's suggestion to consider this case, it is certainly well-reasoned, but I do not think it has great bearing on this case. Justice Dunphy carefully explains how and why he factored in the accused's youth and demonstrated rehabilitative potential in fashioning a fit sentence for a gun offence otherwise requiring an exemplary sentence. Mr. Tewolde was 22 years old (21 at the time of the offences) and completed his GED while in pre-sentence custody at the Toronto South Detention Centre (TSDC). However, Mr. Brown is neither youthful, nor has he demonstrated rehabilitative potential. If anything, he has demonstrated a need for specific deterrence.[27]

[74] The Crown notes that it is appropriate to impose consecutive sentences in relation to breaches of weapons prohibition orders, as the Ontario Court of Appeal confirmed in *R v Ellis*, 2016 ONCA 598. I agree.

[75] It also relies upon as representative of the Ontario jurisprudence regarding the range of sentences, *R v McNichols*, 2020 ONSC 6499 by Justice Suhail Akhtar:

> 20 Both parties have placed a number of prior precedents before the court. As is always the case, the sentences in each case differs as it must because of the sentencing process.
>
> 21 In *R. v. Graham*, 2018 ONSC 6817 (Ont. S.C.J.), Code J., conducting a review of the appropriate authorities, concluded that the range of sentences for a recidivist offender convicted of a firearms offence to be in the 8-10 year range. This certainly seems to be borne out by the cases: *R. v. Slack*, 2015 ONCA 94, 125 O.R. (3d) 60 (Ont. C.A.) (8 years); *R. v. Grant*, [2005] O.J. No. 4599 (Ont. S.C.J.) (8 years); *R. v. Alexander*, 2012 ONSC 6117 (Ont. S.C.J.) (10 years); *R. v. Dunkley*, 2014 ONSC 4893 (Ont. S.C.J.) (10 years); *R. v. Barton*, 2017 ONSC 4039 (Ont. S.C.J.) (10 years).
>
> 22 In *R. v. Brown*, 2010 ONCA 745, 277 O.A.C. 233 (Ont. C.A.) [*Brown*, C.A.], the recidivist offender pleaded guilty to possession of a loaded restricted firearm and breach of a lifetime firearms prohibition order. The Court of Appeal increased the sentence imposed by the trial judge to 8 years after a Crown appeal, finding that the judge had initially imposed an unfit sentence of 5 years and 6 months.

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[27] In that case Justice Dunphy sentenced him to 44 months in custody and three years probation stating at paragraph 52: "… this is a lenient sentence".

> 23 In *R. v. Chambers*, 2013 ONCA 680, 311 O.A.C. 307 (Ont. C.A.), a 25 year-old offender was convicted for a third firearms offence along with two breaches of a firearms prohibition order and failing to comply with a recognisance. He received an 8-year sentence which was upheld on appeal.
>
> 24 Finally, in *Grant*, the offender, 22 years of age, received 8 years for possession of loaded firearm and related charges including breach of a prohibition order and fail to comply with a recognisance. He was arrested as a result of police surveillance and a foot chase. His adult criminal record included prior convictions for possession of restricted firearm and possession of a firearm while prohibited.
>
> 25 On the other hand, the defence relies on a number of cases that fall between 7-9 year range.
>
> 26 In *R. v. Brown*, [2019] O.J. No. 2846 (Ont. S.C.J.), an offender who pleaded guilty to possession of a loaded firearm and breach of a prohibition order received 7 years after a police officer stopped the offender in his car and found a 9mm handgun in his waistband. The sentencing judge indicated that but for the presence of mitigating factors she would have imposed a nine year sentence.
>
> 27 In *R. v. David*, 2019 ONSC 3758 (Ont. S.C.J.), the judge imposed an 8 year sentence for a recidivist firearms offender found guilty of possession of loaded firearm offences and breach of a firearms prohibition order. The offender had a prior criminal record which included two prior firearms offences.
>
> 28 In *R. v. Newell*, [2012] O.J. No. 4014 (Ont. S.C.J.), a 31-year old offender who had three prior convictions for firearms offences was given an 8 and a half year sentence after being found with a loaded handgun after a traffic stop. He was also convicted of a breach of a firearms prohibition.
>
> 29 In *R. v. Ferrigon*, [2007] O.J. No. 1883 (Ont. S.C.J.), the 24 year old offender received 6 and a half years for possession of a loaded handgun and breach of prohibition orders after he ran from the police and was seen depositing a handgun in a window well. He had two prior convictions for firearms offences.

[76] Justice Akhtar sentenced Mr. McNichols to 7 years custody for the possession of the loaded prohibited firearm, with the other related offences to run concurrently, and a consecutive sentence of 18 months for all of the offences

related to breaching court orders prohibiting his possession of firearms, for a total of 8.5 years imprisonment.

[77] The Crown also considered Chief Judge Pamela Williams' February 10, 2020 decision in *R v Anderson*, 2020 NSPC 10 (presently under appeal, and to be heard March 30, 2021). She sentenced a 23-year-old ANS offender to a two years-less one day, Conditional Sentence Order (CSO), and 2 years probation, for offences resulting from a traffic stop on November 2, 2018 ( which revealed he had in his waistband a loaded .22 calibre revolver). He was found guilty after trial of the following offences: ss. 86(1); 90(1); 91(1); 95(2)(a); and 94(1) *CC*.[28]

[28] He remained at large on a recognizance with a curfew for 15 months preceding the sentencing (para.101). In her decision there is no express mention of his prior criminal record – save a reference at paragraph 35 to "Mr. Anderson's criminal record… given his 71 criminal contacts including a connection to a homicide and an attempt homicide.". In a February 17, 2021 email-communication the Crown herein confirmed that Mr. Anderson had a prior conviction for breaking and entering in December 2013 and he was sentenced in January 2015 to a two-year federal sentence of imprisonment as an adult which was confirmed by an email sent on February 23, 2021 wherein the Crown provided a JEIN Bail Report for Rakeem Anderson (Person ID 652609). In an effort to understand further the jurisprudence in relation to firearms offences involving young male members of the ANS community and the proper usage of IRCAs, although not directly relevant to Mr. Steed's sentencing, I obtained copies of the Respondent's, Appellant's and Intervenor factums for the upcoming *Anderson* appeal on March 30, 2021. Therein, the Crown/Appellant's factum written by Mark Scott, Q.C. stated at paragraph 18: "Mr. Anderson came before the court with a number of motor vehicle -related convictions as well as violence and weapons related offences as a youth. On January 7, 2015 he received two years federal custody for a break and enter committed on December 3, 2013 [Appeal Book Tab 5 (this is an adult conviction)". Therefore, I say that I "understand" that Mr. Anderson also had violence and weapons related offences as a youth. By email of February 25, 2021, Crown Counsel confirmed Mr. Anderson's youth record included (DOB August 1995) sentences for: s. 267(a) CC x2 and one count s. 264.1(1) CC on April 21 and July 27, 2011; s. 88 CC on July 27, 2011; and otherwise 5 convictions for breach of probation or release conditions. In that case the Crown recommended a 2 to 3-year period of incarceration, while his counsel suggested probation, or alternatively- a conditional sentence order, or a sentence of 90 days or less served intermittently. Although Mr. Anderson was a first-time offender regarding the possession or use of firearms, his criminal record notably includes that as an adult, he had already served a two-year period of imprisonment in a federal penitentiary.

**Mr. Steed's position on sentencing**

[78] He argues that a 4 year sentence is appropriate, citing in particular: *R v Nur*, 2015 SCC 15, suggesting that Mr. Steed is similarly situated on the "regulatory offender" to "outlaw" criminal spectrum as was Mr. Anderson wherein Chief Judge Williams stated (paras. 30-34): "I accept that having a loaded gun for defensive purposes is a 'true crime' as set out in *Nur*. But there are *true crimes* and then there are *really true crimes*. Then there are crimes that courts consider more regulatory in nature like *MacDonald*, 2014 NSCA 102… The facts in this case are more in keeping with *Muise* (2-year sentence) and *Nur* (range of 2 years less a day to 3 years)".[29]

[79] He argues that he merely had the gun for self-protection and was not shown to have had the gun in association with any incidental crime (which is often associated with, *inter alia*, drug trafficking).

[80] He also relies upon *R v. Robinson*, 2020 NSPC 1 and other cases (regarding taking proper account of an IRCA); and regarding an enhanced credit for "harsh

[29] Mr. Nur was 19 years old, had no prior criminal record, and was an outstanding student who received 40 months imprisonment – which both the Ontario Court of Appeal and Supreme Court of Canada affirmed (see paras. 20-3, 26 and 120 of SCC decision). With respect, *Muise* is not a useful case as a precedent – the court was presented with a true joint recommendation, and neither counsel nor the court researched, cited and therefore considered the range of sentence from existing jurisprudence.

conditions" and the impact of Covid 19 on institutional freedom and access to programming: *R v Lambert*, 2020 NSPC 39; *R v KM*, 2020 NSSC 278; *R v Lemmen*, 2020 BCPC 67; *R v Morgan*, 2020 ONCA 279; and *R v Young*, 2020 BCPC 6.

[81] He argues for a remand credit of 1:1.5 for each day he has been in custody since March 28, 2019; and a further 6-12 month credit for the poor quality of conditions during his pre-sentence detention whether arising from the effects of Covid 19 or extended lockdown periods, reduced outdoor time, rolling lockdown periods, and staffing shortages as these have impacted on his rehabilitative progression, mental health and education.

[82] Therefore, in summary he sees his remaining period of incarceration as follows: four years less (number of days exclusively in custody on this matter times 1.5 plus a harsh conditions/Covid 19 credit of 6 to 12 months).

[83] He has no objection to the mandatory firearms orders pursuant to s. 109 (3) *CC*, and forfeiture of the seized weapons and ammunition pursuant to s. 491 *CC*.

**The range of sentence**

[84] It is extremely important to understand what is meant by "the range" of acceptable sentences, before one can seek out jurisprudence that establish those boundaries – as Justice Bateman said in *R v Cromwell*, 2005 NSCA 137:

> 26 Counsel for Ms. Cromwell says this joint submission is within the range. **He broadly defines the range of sentence, in these circumstances, as all sentences that might be imposed for the crime of impaired driving causing bodily harm. I disagree. In my opinion the range is not the minimum to maximum possibilities for the offence but is narrowed by the context of the offence committed and the circumstances of the offender (" . . . sentences imposed upon similar offenders for similar offences committed in similar circumstances . . ."** ***per*** **MacEachern, C.J.B.C. in** ***R. v. Mafi*** **(2000), 142 C.C.C. (3d) 449 (B.C. C.A.)). The actual punishment may vary on a continuum taking into account aggravating and mitigating factors, the remedial focus required for the particular offender and the need to protect the public. This variation creates the range.**
>
> [My bolding added]

[85] What cases therefore are reliable signposts of the range for the "context of the offences committed and the circumstances of the offender" (Mr. Steed)?[30]

**i)** the circumstances of the offender[31]

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[30] Ascertaining the range of sentences applicable in a given case is an attempt at achieving reasonable parity between similar offenders for similar offences committed in similar circumstances - see s. 718.2(b) *CC*. Once the range is established, as Chief Justice McLachlin stated in *Nur*: "in reconciling these different goals, the fundamental principle of sentencing under section 718.1 of the *Criminal Code* is that '[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. It is no surprise, in view of the constraints on sentencing, that imposing a proportionate sentence is a highly individualized exercise, tailored to the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime… 'Only if this is so, can the public be satisfied that the offender 'deserved' the punishment he received and feel a confidence in the fairness and rationality of the system'" (para. 42-3).

[31] I see Mr. Steed's ANS status as *not* relevant at this stage when ascertaining the range of sentence, but rather thereafter when the mitigating factors are considered.

[86] Mr. Steed is now 25 years old, with an extensive criminal record including:

1. weapons offences on May 8 and June 7, 2010; June 28, 2011; February 7, 2013; June 8, 2015; and March 27, 2019 – as well as two robbery offences on June 28, 2011.

2. Uttering threats to cause death or bodily harm on May 8, 2010, June 28, 2011 (two counts) and on December 10, 2018.

[87] His offending has persisted between May 2010 – March 27, 2019, with offences occurring on 24 different dates.

[88] Mr. Steed was 23 years old when he committed the offences herein. He is a young man, with an extensive criminal record- which notably has involved firearms-related offences on February 7, 2013, June 8, 2015, and now March 27, 2019.

[89] Overall, he presents as having realistic rehabilitative potential. He has completed is GED program. He has had the benefit of rehabilitative processes while in custody awaiting his trial and now sentencing on this matter, and I accept that during this period of custody he has gained genuine insights through access to the services of Laura Langille, and from speaking to Ms. Hodgson. He has put forward a five-year employment/financial plan which is a positive goal.

**ii)** circumstances of the offences

[90] The primary offence here is the violation of s. 95 *CC*. The circumstances of the offences committed may be summarized as:

> I am satisfied that although Rosalind Steed, his mother, is the registered owner of the of the four-door Dodge Charger, Mr. Steed had regular access to the vehicle, and treated it as his own.
>
> The fact that he has pled guilty *that he was aware of, and he did have hidden*: numerous weapons (a Taser; a knife; a plastic bag with a loaded black composite material handgun- an FN Herstal semi-automatic pistol model P90 designed for 5.7 x 28 mm bullets with one round loaded in the chamber and 19 additional rounds contained in an illegal overcapacity magazine which was secured in the firearm ready to be used; and 22 rounds of the same calibre ammunition- notably Mr. Steed's DNA was located on the firearm including near the trigger area) in what appears to be a professionally installed "hide" on the driver's side door *indicates a sophisticated effort to conceal these items on an ongoing basis;* He was also in possession of handcuffs in a box on the driver's side of the vehicle and a so-called speed-loader suited to the handgun found.
>
> The fact that this handgun was smuggled into Canada from the United States, having only been sold to a pawnshop in the State of Georgia, USA, on November 7, 2018, with his possession thereof on March 27, 2019; his possession of the required and unusual calibre ammunition therefor (ammunition for any firearm requires one to have proper licensing to acquire and possess it); and the prohibited weapon/ Taser-suggests *Mr. Steed has significant connections in the criminal-subculture*;
>
> Mr. Steed was *prohibited during his lifetime from having possession of any firearms prohibited weapons, restricted weapons, prohibited devices and ammunition* as a result of a June 24, 2016 order-yet breached this order on March 27, 2019 in relation to the handgun, the overcapacity magazine, the Taser, and the ammunition.
>
> He has not testified regarding his motivation for having this handgun. There is no direct evidence or admissible information before me on this material issue; other than the consented-to representation that in January 2017 he was told by police there was a generalized threat to his life.[32]

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[32] References in the IRCA (whether they are general references that in the young male subset of the ANS community, being armed with a firearm is believed to be necessary "in case" one is attacked ; or to a specific offender's perceived fears and justification for arming themselves with a firearm) standing alone are not evidence or

[91] Regarding the inferences that could be drawn, from the evidence and information I properly have before me, I am satisfied beyond a reasonable doubt that his possession thereof was *not* exclusively for the purpose of self- defence. Moreover, even if it were so, that is not a mitigating factor. Not even licensed firearms owners can lawfully possess firearms for "self defence" reasons.[33]

[92] In relation to establishing a range of sentences regarding the circumstances of this offender and the context of the offences committed, I look to the binding jurisprudence from the Supreme Court of Canada and our Court of Appeal; next I consider persuasive jurisprudence from Nova Scotia, and other regions in Canada. However regarding the latter, I prefer to be cautious when having reference to the jurisprudence of other regions as I believe a plain reading of their jurisprudence should be cautiously adopted given local or provincial/territorial conditions (e.g. particular urban areas of Toronto etc.) which may be quite different from ours in Nova Scotia, but not apparent in the reasons of decisions from those regions.

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admissible information as contemplated by s. 724 and 726.1 *CC* unless agreed to or independently proved. That there is a prevalence of firearms among young male ANS offenders is a generalized permissible observation.

[33] See the discussion of licensing and regulation of firearms in paragraphs 6 – 14 in *R v Nur*, 2015 SCC 15.

[93] **In *Nur*, 2015 SCC 15**, the Supreme Court of Canada provided some guidance in relation to the *spectrum of circumstances regarding the gravity of the offence* that underlies the sentencing for a section 95 *CC* offence (simple possession of a loaded restricted or prohibited firearm).

[94] As they saw it the spectrum runs from: (what I refer to as the first category ) “at one end of the range… ‘stands **the outlaw who carries a loaded prohibited or restricted firearm in public places as a tool of his or her criminal trade**… This person is **engaged in truly criminal conduct and poses a real and immediate danger to the public’**… At this end of the range – indeed for the vast majority of offences – a [mandatory] three-year sentence may be appropriate. A little further along the spectrum **stands the person whose conduct is less serious and poses less danger**; for these offenders a [mandatory] three years imprisonment may be disproportionate, but not grossly so. At the far end of the range, **stands the licensed and responsible gun owner who stores his unloaded firearm safely with ammunition nearby, but makes a mistake as to where it can be stored.** For this offender, a [mandatory] three-year sentence is grossly disproportionate to the sentence the conduct would otherwise merit under the sentencing provisions of the *Criminal Code*… [regarding reasonable hypotheticals, the majority stated] **The**

**bottom line is that section 95(1) foreseeably catches licensing offences which involve little or no moral fault and little or no danger to the public."**

[95] What is significant about their construction of the s. 95 *CC* spectrum is that placement of a particular set of offence circumstances thereon depends greatly on whether the conduct is "truly criminal conduct" or lesser versions thereof, and whether the conduct "poses a real and immediate danger to the public", or lesser versions thereof. While the court's spectrum of offences/offenders can be useful, it must be remembered that it was drawn in an effort to assess a generalized a range of reasonable hypotheticals.

[96] Although factually distinguishable, the circumstances of the offence and offender Erin McDonald- *R v MacDonald*, 2014 SCC 3 - are worthy of consideration because they reflect the intersection of the "truly criminal conduct" range and the "lawful gun owner" range ("stands the licensed and responsible gun owner who stores his unloaded firearm safely with ammunition nearby, but makes a mistake as to where it can be stored"), and demonstrate how judges and courts have struggled with the notion of what is a "just" sentence in such circumstances.[34]

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[34] As Justice Moldaver (in dissent with Justices Rothstein and Wagner) points out at footnote 2 to paragraph 126: "The majority at paragraph 80, uses *R v MacDonald* 2014 SCC 3, as an example that licensing -type cases are reasonably foreseeable. However, *MacDonald cannot be characterized as a licensing -type case, given the aggravating factors involved.* Mr. MacDonald's conduct went far beyond simply possessing the firearm in a place

[97] The case has a significant appellate history, but from comments in each of several decisions the range of sentence can be extracted, for what I consider the intersection of the lower range of sentence for “truly criminal conduct” which is generally where Mr. Anderson would sit on the range of sentence spectrum, and top of the range for “licensing-type” offences.

[98] It does appear that this range of moral fault and danger to the public can be better described, from most serious to least serious as (the first two ranges therefore including “truly criminal conduct”):

1. offenders who have *unlawful* possession of loaded prohibited/restricted firearms “as a tool of their trade” (i.e. for an unlawful purpose such as drug-trafficking);

2. offenders who have simple *unlawful* possession of loaded prohibited/restricted firearms (including offenders who have *lawful* possession thereof, but engage in “truly criminal conduct” by unlawfully handling or using the firearms – i.e. for an unlawful purpose or in a dangerous manner); and

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where he was not authorized to possess it under the terms of his license. Indeed, the majority of this Court held that the arresting officer had reasonable grounds to believe that he posed an imminent threat to the safety of the public or the police: *MacDonald* at para. 46.”

3. offenders who have *lawful* possession of loaded prohibited/restricted firearms and commit licensing - type offences.

[99] In the case of *Nur* 2015 SCC 15, (who is 19 at the time he had possession of a loaded prohibited firearm, which he pled guilty to so possessing) he had an outstanding academic record and no prior criminal record. Due to aggravating factors, the trial judge imposed a sentence of 40 months' custody. Both the Court of Appeal and the Supreme Court of Canada majority confirmed the sentence (paras. 20-3, 26 (Nur); 33 and 36 (Charles) and 120).

[100] In the case of *Charles* 2015 SCC 15 (he had a lengthy and serious criminal record, and during an incident reported to the police, they searched his bedroom and found a loaded semi-automatic handgun and ammunition there – it was equipped with an overcapacity magazine containing 13 rounds of 9 mm ammunition. The serial number on the gun had been removed. Mr. Charles was also subject to a firearms/ammunition prohibition order. He pled guilty to offences under ss. 95(1), 108(1)(b), 117.01(1) CC. He was sentenced to seven years' imprisonment. Both the Court of Appeal and the Supreme Court of Canada majority confirmed the sentence (para. 120).

[101] Both the majority and minority decisions in *Nur* referenced *R v MacDonald*, 2014 SCC 3.

[102] Chief Justice McLachlan at paragraph 80 referenced it as follows:

> "In [*MacDonald*], this court was concerned with the charge against the gun owner who, unaware that his license was confined to his Calgary residence, had it in his possession at his Halifax residence. The court… took a broad view of the offences, holding that the Crown is not required to prove that the accused knew the possession in the place in question was unauthorized… and upheld Mr. MacDonald's conviction."

[103] Justice Beveridge summarized factual circumstances in *MacDonald* arising after trial (2012 NSCA 50):

> "2 As an oil industry worker, Mr. MacDonald keeps a residence in both Calgary and Halifax. On the evening of December 28, 2009, he was entertaining friends at his condominium in Bishop's Landing in downtown Halifax. They were enjoying some wine. From here, we are presented with two different perspectives. From the Crown, we see an image of an intoxicated, rude neighbour with his music "blasting", who was politely asked repeatedly to turn down the volume only to finally respond to police at the door by opening it while carrying a loaded restricted weapon. I refer to its factum:
>
>> ¶4 On December 28, 2009 Erin Lee MacDonald was at his condominium located at 207 - 1479 Lower Water Street in Halifax drinking and listening to loud music.
>>
>> ¶5 MacDonald was described as intoxicated or quite intoxicated by various witnesses who encountered him during the events of the night.
>>
>> ¶6 The concierge, Mr. Sears, received a noise complaint from the occupants of apartment 206, across the hall from the MacDonald unit. His attempts to knock on the door of MacDonald's unit and get the occupant's attention went unheeded, until the door opened and MacDonald's guests were departing. Mr. Sears asked MacDonald to "please turn the music down". MacDonald told the concierge to "fuck off" and slammed the door in his face. Mr. Sears made further attempts to reason with MacDonald without success, finally deciding to call the Halifax Regional Police.

¶7 Cst. Shelley Pierce was dispatched to the noise complaint at 1479 Upper Water Street. She testified that at approximately 30 feet from the apartment she could hear loud music. She rang MacDonald's bell "at least three times" and knocked on the door announcing who she was. MacDonald answered the door and Cst. Pierce asked him "... Sir, do you mind turning down your music?" MacDonald responded by telling her to "Go fuck yourself" and slammed the door. Cst Pierce waited a few moments to give MacDonald a chance to turn down his music. She heard the music get louder and decided to call for assistance.

¶8 Sgt. Boyd arrived at the Bishop's Landing complex to assist with the matter. With Cst. Pierce and Mr. Sears, Sgt. Boyd attended at the MacDonald condominium. Sgt. Boyd heard the music "blasting" as soon as he exited the elevator. Sgt. Boyd testified that he knocked as loudly as he could, then kicked the door and yelled "Police".

¶9 Sgt. Boyd noticed that when MacDonald opened the door he had something "black and shiny" concealed in his right hand. Sgt. Boyd asked MacDonald: "what have you got in your hand". MacDonald did not respond. Sgt. Boyd testified that MacDonald just stared at him with "this crazy look on his face".

¶10 Sgt. Boyd's concern increased when MacDonald did not respond, as in his experience when he asked someone this question, if they are unarmed they will usually tell you. Sgt. Boyd thought the concealed item might be a knife.

¶11 Sgt. Boyd pushed on the door, which opened inward, to see what was in MacDonald's hand. MacDonald was armed with a loaded gun.

¶12 Sgt. Boyd yelled "Gun". A struggle for the weapon ensued, with Sgt. Boyd being successful in disarming MacDonald.

¶13 The firearm was a restricted 9 mm semi-automatic Beretta handgun."

[104] He continued:

"The Trial Judge's Decision

4 As I will describe in more detail below, **the trial judge, the Honourable William Digby** of the Nova Scotia Provincial Court, **essentially accepted the Crown's version of events.** He found Mr. MacDonald guilty of careless handling of a firearm contrary to s. 86 of the *Criminal Code*, possessing a weapon for a purpose dangerous to the public peace contrary to s. 88 of the *Criminal Code*, and possessing (without authorization) a loaded restricted firearm contrary to s. 95 of the *Criminal Code*. Section 95 is a hybrid offence. Here the Crown proceeded by indictment, thereby invoking a mandatory 3-year prison sentence.

> 5 **Turning to sentence, the judge ordered 2 years in a federal penitentiary for the careless use offence. For the danger to the public peace offence, he ordered 3 years concurrent to the careless use sentence. For the illegal possession offence, he issued the mandatory 3-year term, concurrent to the other two sentences. So, the total term was for 3 years.** The *Beretta* was also forfeited, and Mr. MacDonald was prohibited from possessing restricted weapons for life and all other weapons for 10 years."
>
> [My bolding added]

[105] The 2012 Court of Appeal concluded that Mr. MacDonald should have been acquitted of the s. 95 offence, and thus made no comment on the fitness of sentence for that offence.

[106] The Supreme Court of Canada (2014 SCC 3) reinstated the s. 95 conviction and remitted the matter for consideration of the constitutionality of s. 95 to the Court of Appeal.

[107] In its decision (2014 NSCA 102) Chief Justice MacDonald and Justice Saunders considered the constitutionality of the first offence mandatory minimum in s. 95 and found it have no force and effect (as did Justice Beveridge in dissent on other issues). The majority went on to conclude:

> "Guided by this case law and considering the entire circumstances of our case, **this particular offence, in my view, would have drawn a sentence in the two-year range** but for the mandatory three-year minimum… I therefore **accept the judge's two-year range as an appropriate starting point**." (paras. 24 and 55).

[108] The majority continued:

> 56 However, that was back in April 2011, over 3 ½ years ago. I must now I must now consider the fact that, since then, Mr. MacDonald has been incarcerated for 16 days… And has served a two-year term of probation. Taking these factors into account, I would reduce the sentence to 18 months going forward….
>
> …
>
> 60 Therefore, in these exceptional circumstances, it is appropriate to stay the enforcement of this sentence. …"

[109] Justice Beveridge dissented in relation to the matter of sentence. Rather than a sentence of 18 months incarceration, he would have been inclined to "impose a sentence of time served." (para. 64)

[110] Significant for present purposes however are his comments regarding the range of sentence:

> 120 **What then is the appropriate range of sentence? I acknowledge that ordinarily a conviction for a section 95 offences, where the Crown has proceeded by indictment, prior to the three year minimum, would routinely attracted sentences of at least 12 months to lengthy periods of incarceration in a federal penitentiary.**
>
> 121 The reasons for this are evident. The additional prohibition against possession of a restricted or prohibited weapon that is loaded, or with readily accessible ammunition, was a new offence introduced by the *Firearms Act*, SC 1995 c. 39, s. 139…
>
> 122 Furthermore, where the Crown did proceed by indictment, the circumstances of the offences were typically very serious. The possession was usually accompanied by circumstances indicating active involvement in either a violent offences or serious criminality, with the offender possessing a considerable criminal record.
>
> 123 **However, where the circumstances of the offence were arguably less serious and the offender of previous good character, the Crown proceeded by summary conviction. In these types of cases, discharges, fines, conditional sentences or short periods of incarceration are the norm.**
>
> …

134 **In *Nur,* the Ontario Court of Appeal accepted the trial judge's identification of the appropriate range of sentence, absent the three-year minimum, as being between two years less one day and three years** (paras. 108-9). Code J was the trial judge. He summarized a number of cases that he found the most helpful in determining the range of sentence. In each case, there was a mandatory minimum sentence of one year, and a variety of aggravating factors (para. 43).

135 this fact, and the necessarily fluid nature of a 'range' was recognized by Justice Code. He explained:[35]

> 43 I have reviewed a large number of cases but the most useful ones, which suggest the above range, are the following:
>
> • *R. v. Cross* (2006), 215 O.A.C. 228 (Ont. C.A.) where the Court held that **two years less a day** was the appropriate sentence for a **nineteen year old first offender who pleaded guilty**. He had a minor Youth Court record for which he had received probation. He had strong family support and good rehabilitative potential;
>
> • *R. v. Allen* (2006), 71 W.C.B. (2d) 915 (Ont. S.C.J.) where the Court held that **twenty-one months** was the appropriate sentence for a **twenty year old first offender who pleaded guilty** and had strong family support. It should be noted that this sentence, which is slightly below the range, appears to have been influenced by the "parity" principle, given that a co-accused had already received what appeared to be an unduly lenient sentence in another court;
>
> • *R. v. Mohamed*, [2008] O.J. No. 5492 (Ont. S.C.J.) where a **two year sentence was imposed** on a **twenty year old first offender after trial.** The accused, in association with two other co-accused, was found in possession of three unloaded handguns in a car. He had a good employment record, supportive family and a generally favourable pre-sentence report. He also appeared to be less culpable than the other two co-accused. The trial judge held that a **three to four-year sentence would have been appropriate but for the accused's rehabilitative potential;**

[35] Justice Beveridge only cited paragraph 45, but I have added as context paragraphs 43 and 44. I was unable to find clear indications in the persuasive jurisprudence that supported his statement in relation to an offender like Mr. MacDonald and the circumstances of that offence, that the appropriate range of sentence "where the Crown has proceeded by indictment, prior to the three year minimum, would routinely [have] attracted sentences of at least *12 months to* lengthy periods of incarceration in a federal penitentiary." - my italics added. I noticed that he referenced a number of cases of that nature at para. 123 of *MacDonald* 2014, but they all were elected as summary conviction procedure, or are outlier/truly exceptional cases.

• *R. v. Stephens*, [2009] O.J. No. 6102 (Ont. S.C.J.) where the Court noted that two years less a day had previously been held to be the upper end of the range for first offenders. He went on to hold that the range could move, depending on the aggravating and mitigating circumstances of a particular case. Stephens was a **twenty-five year old first offender who did not plead guilty but was convicted** after a trial. He had "a very positive pre-sentence report", had made "productive use of his time while on bail, including furthering his education" and had "very realistic" prospects of rehabilitation. A sentence of **twenty-seven months** was held to be appropriate;

• *R. v. Besito*, 2010 ONSC 7251 (Ont. S.C.J.) where a **thirty month sentence** was imposed, after trial, for possession of a loaded handgun in a "crack house" where cocaine was being consumed. The accused was **nineteen at the time of the offence and had a Youth Court record**. He had completed high school and worked full time while on bail. His recent progress was described as "remarkable";

• *R. v. Lawes* (2007), 72 W.C.B. (2d) 487 (Ont. C.A.) where a sentence of **three years** was upheld, after giving credit for an additional twenty-eight days of pre-trial custody. The accused did not plead guilty but was **convicted after a trial. He had a substantial Youth Court record, including convictions for robbery and assault with a weapon for which he received short custodial sentences. He also had an adult record for a number of relatively minor offences.**

44 **It can be seen that the bottom end of the above range was generally reserved for youthful first offenders with good rehabilitative prospects who plead guilty, and the higher end of the range was generally reserved for offenders with prior records who proceed to trial.** The accused **Nur**, in the case at bar, falls into the former category. **As a young first offender, who has pleaded guilty and who appears to have rehabilitative potential, it would be important to keep him out of a federal penitentiary**, as long as the appropriate sentencing range for this offence permits such a result. Accordingly, **he could potentially have received a sentence towards the two years less a day end of the range under the pre-2008 sentencing regime.** A sentence of less than two years would also have given the accused access to a full appellate hearing where "humanitarian and compassionate" grounds could be raised in relation to any deportation order flowing from his conviction and sentence. This would have been another factor suggesting a sentence of two years less a day, assuming that the bottom end of the range was otherwise appropriate for this offence and this offender. See: *R. v. Curry* (2005), 77 O.R. (3d) 587 (Ont. C.A.) at paras. 34-5; *R. v. C. (B.R.)* (2010), 259 C.C.C. (3d) 27 (Ont. C.A.); *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (Ont. C.A.) at para. 156; *R. v. Polio*, [2010] O.J. No. 4856 (Ont. C.A.); *R. v. Multani* (2010), 261 O.A.C. 107 (Ont. C.A.).

> 45 **I should note that the "range" of two years less a day to three years imprisonment, suggested by the above line of cases, is precisely that, a "range".** The effect of a "range" of appropriate sentences for a particular offence is not the same as a mandatory minimum sentence or a maximum sentence. A "range" is simply a flexible guideline for the normal case. It assists in achieving "parity", but without sacrificing "proportionality". **Departures from the "range" can be justified, by particularly strong aggravating or mitigating circumstances. Furthermore, there will always be unusual, rare or exceptional cases which, by definition, fall outside the normal "range". The above line of cases all involved accused who possessed loaded handguns for some unlawful purpose and where the Crown elected to proceed by indictment. As will be seen below, there are cases where handguns are possessed for lawful self-defence, but have simply not been licensed for that purpose.** There are also cases where handguns can be and have been lawfully possessed under the regulatory licensing provisions of the *Firearms Act* but, due to some brief violation of the regulatory regime, the accused's possession has become unlawful. These are all cases that would fall outside the normal "range" and where the Crown could properly proceed by way of summary conviction, in which case there is no mandatory minimum sentence. The case at bar is not one of these cases that fall outside the "range". **The accused Nur should be sentenced within the normal "range" for this kind of offence and offender**. See: *R. v. Wright* (2006), 216 C.C.C. (3d) 54 (Ont. C.A.) at paras. 16-24; *R. v. Cooper* (2010), 256 C.C.C. (3d) 113 (Ont. C.A.) at paras. 82 and 89-90.

137 *I do not mean to suggest that the appellant committed a mere regulatory offence.* It was unreasonable for him to believe that he needed the load the gun and take it with him to the door. The trial judge found this to be the case, and I agree.

138 *On the other hand, this case is one of the 'unusual, rare or exceptional cases' referred to by Justice Code (see para. 135 above).* The appellant was licensed to lawfully possess the restricted handgun (and other firearms) and did not knowingly possess a gun at a place that fell outside the terms of his license. *That mistake of law is a significant mitigating factor*."

[My bolding and italicization added]

[111] Let me first make the observation that the jurisprudence seems somewhat consistent in articulating that the beginning of the low end of the range of sentence for a "truly criminal" *first- time* s. 95(1) *CC* offender consistently ranges from 2 years- less one day to 3 years (*Nur*).

[112] In *MacDonald*, 2014, which I suggest is in what I have designated as category two, Chief Justice MacDonald, speaking for the majority, concluded at para. 24 that:

> "guided by this case law [*Nur* and *Smickle*] and considering the entire circumstances of our case, this particular offence, in my view, would have drawn a sentence in the two-year range, but for the mandatory three-year minimum."[36]

[113] Other regions have similar ranges of sentence:

**Ontario**

Two years less one day to 3 years - *Nur* per Code J, as affirmed by Ontario Court of Appeal and Supreme Court of Canada (and relied upon in Ontario) and *R v Smickle*, 2013 ONCA 678.

**British Columbia**

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[36] Justice Beveridge in dissent stated at para.149: "… offenders with no prior record who have violated s. 95(1)… have received sentences that range from discharges or fines, up to relatively short periods of incarceration. In light of the need to denounce the conduct of the appellant and ensure those who lawfully possess firearms understand the consequences, I would have thought at trial a relatively short period of incarceration plus probation would have been appropriate for his overall conduct that night. I offer no comment as to whether that incarcerations could be ordered to be served by way of a conditional sentence order." Notably Justice Beveridge was strongly influenced by the fact that: "the appellant honestly but mistakenly believed he was lawfully entitled to transport, and then possess the gun, with readily accessible ammunition at his home in Halifax. An honest but mistaken belief is usually a mitigating factor… I see no reason why it would not be so in this case. In these unusual circumstances, and considering the history of these proceedings, no additional penalty is warranted. I would impose a sentence of time served for the. 95 offence….".

Two years less one day to 3 years - *R v Jarsch*, 2007 BCCA 189 - where the circumstances were as follows:

> 4 On June 8, 2005, the trial judge imposed a global sentence on the appellant of twenty-one months less a day. She also imposed a lifetime mandatory firearms prohibition pursuant to s. 109 of the *Criminal Code* and a mandatory forfeiture of weapons pursuant to s. 491.
>
> …
>
> 7 She described the appellant's circumstances as follows:
>
>> [13] *Mr. Jarsch was the driver of the Cadillac.* He was *convicted with respect to the loaded .25 calibre firearm at Mr. Ramnarain's feet on the front passenger side. He is 33 years old*, single, living in Kitchener and has been variously employed in construction or landscape work. From the letters of friends and family filed on his behalf, he and his family have suffered from health problems in the past. He has *no criminal record other than a minor conviction in 1994.* He has written a letter of apology to me and Crown counsel for the trouble he has caused, although he maintains his innocence of the offences for which he was been convicted.
>
> …
>
> 9 After summarizing counsels' submissions, the sentencing judge concluded:
>
>> [17] I have considered the submissions of both counsel, the case authorities provided to me, and the character references and letters filed as exhibits. I have not taken into account any of the evidence led at *voir dire* which was not admitted by me.
>>
>> [18] In order to balance the objectives of deterrence and denunciation with rehabilitation and the entire circumstances of this case, **I am of the view that two years less a day is a fit global sentence.**
>>
>> [19] **Mr. Jarsch has already spent about one-and-a-half months in jail. I will double that and deduct three months from the sentence. Therefore, I sentence him to a remainder of 21 months less a day.** He will be subject to a mandatory prohibition from possessing firearms for life and a mandatory forfeiture of any weapons that he may own or possess.
>
> …

13 Here, the appellant's criminal record is relatively minor — he has one conviction in 1994 for theft under $1,000 for which he received a $200 fine. As well, although they were not mentioned this morning, it seems from the *many positive character references* submitted by his family, friends, and members of his community, that he is making good progress toward becoming a responsible member of society. All of this information was before the trial judge when she imposed sentence.

14 The trial judge had to weigh these mitigating features with the facts disclosed in the evidence. The circumstances of the appellant's offences were egregious and fraught with danger. He was driving at night with three loaded weapons in his car. The handgun found to be in the appellant's possession, which was found at the feet of his front-seat passenger, was *a loaded prohibited firearm and its safety was off.* Two of his associates were convicted of possessing a firearm for a purpose dangerous to the public peace or to commit an offence.

15 The Crown cited a number of cases in support of its position that the sentence imposed was within the appropriate range. They were: *R. v. Cross*, [2006] O.J. No. 3893 (Ont. C.A.); *R. v. Grant*, [2006] O.J. No. 2179 (Ont. C.A.); *R. v. Lawes*, 2007 ONCA 10 (Ont. C.A.) ; *R. v. Manickavasagar*, [2002] O.J. No. 5828 (Ont. S.C.J.), aff'd (Ont. C.A.); *R. v. Nguyen*, 2005 BCCA 115 (B.C. C.A.) ; *R. v. Norris*, 2005 BCCA 576 (B.C. C.A.) ; and *R. v. Syed*, [2005] O.J. No. 716 (Ont. C.A.).

16 The appellant seeks to distinguish these cases on the basis of the factual differences. However, no two cases are alike and **the cases cited by the Crown are, in my view, sufficiently similar to support its submission that the sentence imposed here was within the range of fit sentences for similar offences committed in similar circumstances by similar offenders.**

17 I will mention one case, ***R. v. Nguyen*, 2005 BCCA 115 (B.C. C.A.)** . In that case, after noting **the appellant's youth, the absence of any adult record, and the positive prospect of his rehabilitation, the sentencing judge sentenced the appellant to 18 months for trafficking in cocaine and two concurrent terms of one year on counts of possessing a loaded restricted firearm, a .357 Magnum revolver, without a proper licence and possessing a firearm, a Mac 10 machine pistol, without having a licence. On appeal, the appellant argued that 18 months was unfit for an 18-year-old offender. In dismissing the appeal, Madam Justice Southin (for the Court), said this:**

> [5] In my view, **the sentences** which the learned judge here imposed **on the possession of weapons charges could well have been much higher and the sentence imposed on the trafficking charge much less. It appears to me from the cases which have been cited to us that the judges of the courts below are taking far too lenient an approach to the possession of restricted weapons which patently have some illicit purpose.** This Court where necessary and appropriate should do what we can do in order to help rid this community of people who possess firearms unlawfully for an illicit purpose — they should be treated severely.

> Therefore, **looking at this matter globally, 18 months does not seem to me to be inappropriate at all and although I would grant leave to appeal, I would dismiss the appeal.**
>
> [My bolding added]

In *R v Holt*, 2015 BCCA 302, the offender was 66 years old, had no criminal record, but had a serious addiction to crack cocaine. At a traffic stop his car was searched, and he was found in possession of a .22 calibre revolver with 43 rounds of ammunition. There was no suggestion or evidence of any gang associations or participation in criminal activity, other than personal drug use. The trial judge sentenced him to 18 months imprisonment. On appeal, the sentence was increased to 30 months imprisonment. The court stated:[37]

> 19 In my view, the fact a 40-month sentence was upheld almost without challenge in the *Nur* appeals, the comments of courts in other recent appellate decisions, but most especially the proliferation of guns in the Lower Mainland generally, **indicate that a re-alignment of the "range" is in order in British Columbia.** I would say that **Mr. Holt falls at the bottom end of the "criminal" range, and that a sentence of close to three years is called for**. I am also persuaded that the sentence of 18 months' imprisonment was unfit given the seriousness of the offence.
>
> 20 In the result, I would grant leave to appeal, allow the Crown's appeal and, placing this case at the bottom of the range, **I would increase the sentence to 30 months' imprisonment**, before credit for time served of 24 days.
>
> [My bolding added]

[37] In *R v Noonan*, 2020 PESC 28, at para. 91 Justice Campbell stated: “I agree with the Crown's submission that sentences for s. 95 offences are out of step in this jurisdiction with sentences imposed across the country. The sentences in this jurisdiction are not proportionate to the gravity of the offences or the importance of deterring and denouncing offences of this nature. As noted in *R. v. Lee*, *supra*, at para. 22, a three-year sentence for a firearm conviction in "true crime" circumstances is "near the bottom of the appropriate range of sentences".”

## **Manitoba**[38]

3 years imprisonment – in *R v Kennedy*, 2016 MBCA 5 (Mr. Kennedy was 54 years old and was sentenced as if he was a first-time offender. He had an arsenal of weapons in his home, however the Court of Appeal addressed as determinative to the Crown's successful sentence appeal, the s. 95 offence respecting the prohibited semi-automatic Armalite rifle.), the court stated:

> 58 Given all of this, **I am of the view that a sentence of three years is a fit sentence for the section 95(1) offence contained in count 15.** The facts that the *accused* is to be sentenced as a **first offender, he did not threaten anyone with the Armalite rifle and did not use it in any criminal activity are important considerations**. However, they do not detract from the fundamental seriousness of the offence. As explained in *Nur*, "Restricted or prohibited firearms must be stored unloaded, with a secure locking device and in a locked container or in a vault, safe or room that has been constructed or modified for the secure storage of firearms" (at para 9).
>
> 59 The section 95(1) offence, viewed in the context of the other offences, demonstrates the accused's alarming disregard for the law, the result of which posed a serious risk to the public. The evidence discloses that the accused previously had guns stolen in an earlier break-in. This alone should have alerted him to the danger posed by such a cavalier attitude towards the storage and possession of firearms and ammunition. Perhaps even more alarmingly, he was found to have two loaded handguns in the pockets of his pants at the time of his arrest outside his home, one of which was a prohibited firearm.
>
> [My bolding added]

## Nova Scotia

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[38] Regarding sentences for s. 95(1) *CC* recidivist sentences, see *R v Coutu*, 2020 MBCA 106.

[114] As I earlier observed, in Nova Scotia, there is some dispute about the range of sentence in relation to the *first-time* s. 95 offenders. Such cases are a useful baseline when sentencing Mr. Steed who is a recidivist s. 95 offender.

[115] *MacDonald* is a case of an offender lawfully entitled to possess the firearm, but who handled/used it in an unlawful manner. Our Court of Appeal suggested a sentence between 18 months (Beveridge, JA) to "around two years" (MacDonald CJNS). However, that court did not have the benefit of the Supreme Court of Canada's decision in *Nur* and *Charles.*

[116] From my observations of the jurisprudence, I would respectfully suggest (in offences proceeding as indictable) that when sentences are imposed of less than two years imprisonment, these cases usually reflect either of the following circumstances:

1. a "well-suited" first time offender (in category 2) who is not seen as an appropriate candidate for immediate exposure to a federal penitentiary ( see *Nur* per Code J. at para.44: " As a young first offender, who has pleaded guilty and who appears to have rehabilitative potential, it would be important to keep him out of a federal penitentiary, as long as the appropriate sentencing range for this offence permits such a result."); and

2. offenders who could have (or have received) a greater (nominal) sentence, but by virtue of pre-sentence credits or mitigation receive effective sentences of less than two years imprisonment.

[117] In Mr. Steed's case, I am not satisfied beyond a reasonable doubt that his possession of the handgun rises to the level that it was "a tool of his *criminal trade*".

[118] I note that for an offender to fall into the "truly criminal conduct" category on the spectrum of offences it is *not* necessary that the firearm was then being used in relation to his commission of incidental criminal offences, such as drug trafficking, human trafficking, extortion, robbery etc.

[119] In *R v Slack*, 2015 ONCA 94, the court pointed out that Mr. Slack stood "**convicted of 'truly criminal conduct'** in relation to firearms… This was the appellant's second conviction for a s. 95(1) offence. On his first conviction he received a sentence of four years in jail for the possession charge and nine months in jail consecutive for breaching a prohibition order and recognizance. The appellant has a lengthy criminal record consisting of 18 prior criminal convictions, including convictions for using an imitation firearm in the commission of a robbery, assault, trafficking in a scheduled substance, breaching a firearm

prohibition order, and possessing a prohibited or restricted firearm with readily accessible ammunition. Moreover, at the time of the instant offences the appellant was on probation and subject to an order prohibiting him from possessing a firearm or ammunition.… **Given the appellant's serious and lengthy prior record, which included crimes of violence and multiple weapons -related offences, the serious nature of the predicate offences, and the four-year sentence of imprisonment imposed for his first s. 95(1) offence, the appellant's conduct can only be viewed as falling at the 'true crime' end of the s. 95 offences discussed in *Nur* and *Charles*.** The offences at issue cried out for a substantial penitentiary sentence, higher than the sentence imposed for the appellant's first s. 95(1) offence." (paras. 23-26).

[My bolding added]

[120] The circumstances of the offences in *Slack* were summarized at paragraph 27:

> "27 There were also several aggravating features that compelled a sentence closer to the high end of the range. These included:
>
> • the firearm was loaded;
> • the firearm was found in an unlocked car in a public parking lot during the daytime. The car's engine had been left running;
> • this was not merely a regulatory or licensing offence. The appellant was not authorized to possess a firearm under any circumstances;
> • the appellant fled the scene when a police officer told him to move his car;

> • after abandoning the car, the appellant telephoned a friend, who had rented the car for him, and told her to report the car as stolen; and
> • the appellant's criminal record, described above, reflects a consistent pattern of criminal conduct."

[121] Notably, *Mr. Slack* did not have the firearm on his person, nor was he directly using the firearm passively or otherwise in relation to incidental crime- he had abandoned it in a car, yet he was still considered to fall at the "true crime" end of the s. 95 offences on the spectrum. Why he was considered to be in the most serious category was because of his serious record including crimes of violence and multiple weapons -related offences, and his previous four-year sentence of imprisonment for his first s. 95 conviction.

[122] Thus, an offender's ultimate placement on the spectrum is sensitive not only to the circumstances of the offence for which he is to be sentenced, but also to his prior criminal record- which can also be used to assess how close to the "true crime" end of the spectrum he should be placed.

[123] As Justice Moldaver stated for the minority in *Nur*:

> "136 **Section 95 targets the simple possession of guns that are frequently used in gang-related and other criminal activity: see *R. v. Nur*, 2013 ONCA 677, 117 O.R. (3d) 401 (Ont. C.A.), at paras. 54-57. Parliament has concentrated on simple possession for a reason: firearms — and particularly the firearms caught by s. 95 — are inherently dangerous. In *R. v. Felawka*, [1993] 4 S.C.R. 199 (S.C.C.), the Court recognized that "[a] firearm is expressly designed to kill or wound" and that "[n]o matter what the intention may be of the person carrying a gun, the firearm itself presents the ultimate threat of death to those in its presence"** (p. 211). As the Attorney General of Canada

observes in his factum, this sober reality resonates all the more for "restricted firearms (principally handguns) and prohibited firearms (principally machine guns and sawed-off rifles or shotguns)" (A.F. (*Nur*), at para. 64). **These firearms are "the most strictly regulated because they are either easily concealable or generally do not serve a legitimate hunting or target shooting purpose" (*ibid.*). Outside of law enforcement, these guns are primarily found in the hands of criminals who use them to intimidate, wound, maim, and kill**.

137 Courts have repeatedly emphasized the inherent danger associated with these types of firearms. In *R. v. Elliston*, 2010 ONSC 6492, 225 C.R.R. (2d) 109 (Ont. S.C.J.), Aston J. rejected the argument that simple possession of a prohibited or restricted firearm, absent a harmful outcome, is insufficient to warrant an exemplary sentence:

> The applicant submits that there are no actual adverse consequences that necessarily flow from the criminal conduct captured by s. 95 because the defined offence is simply the possession of the firearm as opposed to its actual use. It is true that adverse consequences do not *necessarily* flow from possession of a loaded handgun, but sometimes they do. And, because the risk is so grave that people will be seriously injured or killed, even when discharging the gun is not intentional, the gravity of the offence of simply possessing the weapon should not be underestimated .... [Emphasis in original; para. 15.]
>
> Similarly, in *R. v. Chin*, 2009 ABCA 226, 457 A.R. 233 (Alta. C.A.), the Alberta Court of Appeal observed that **"[m]ere possession of loaded firearms is inherently dangerous"** (para. 10). The court underscored the reality that **"[w]hen such weapons are allowed in the community, death and serious injury are literally at hand, only an impulse and trigger- pull away"** (*ibid.*)."
>
> [ My bolding added]

[124] This approach is consistent with the comments of the Supreme Court of Canada regarding s.85 CC [using firearm in commission of an indictable offence] – namely when it considered the statutory interpretation of the words "who uses a firearm". A helpful reference point in this exercise is what the Supreme Court of Canada (per Fish, J.) said in *R v Steele*, 2007 SCC 36:

18 Section 85(1) was enacted in 1977 as part of a comprehensive "gun control" legislative scheme that was aimed at curtailing the proliferation of firearm-related crime: R.S.C. 1970, c. C-34, s. 83(1) (rep. & sub. S.C. 1976-77, c. 53, s. 3); *McGuigan v. The Queen*, 1982 CanLII 41 (SCC), [1982] 1 S.C.R. 284, at pp. 316-17; *Krug v. The Queen*, 1985 CanLII 2 (SCC), [1985] 2 S.C.R. 255, at p. 267. For first-time offenders, it carries a mandatory minimum sentence of imprisonment for one year, to be served consecutively to any other sentence imposed for the predicate offence.

19 It is well established that Parliament's objective in enacting this provision was to prevent the danger of serious injury or death associated with the use of firearms: *R. v. Covin*, 1983 CanLII 151 (SCC), [1983] 1 S.C.R. 725, at p. 729; *Krug*, at p. 267; *R. v. Langevin* (1979), 1979 CanLII 2999 (ON CA), 47 C.C.C. (2d) 138 (Ont. C.A.), at p. 146; *McGuigan*, at p. 313.

20 The Crown submits that s. 85 serves a second purpose as well: the prevention of victim intimidation and alarm. This view finds support in *McGuigan*, at p. 319; *Langevin*, at p. 146; *R. v. Belair* (1981), 1981 CanLII 1625 (ON CA), 24 C.R. (3d) 133 (Ont. C.A.), at p. 136; *R. v. Scott* (2000), 2000 BCCA 220 (CanLII), 145 C.C.C. (3d) 52 (B.C.C.A.), *per* Braidwood J.A., at para. 43, aff'd on other grounds, [2001] 3 S.C.R. 425, 2001 SCC 73.

21 It is true that the Court, in *Covin*, expressly rejected the *prevention of alarm* objective. Imitation firearms, said the Court, were no less alarming or intimidating than real ones. Since Parliament had chosen not to target the use of imitation firearms, the prevention of alarm and intimidation could not have been contemplated by Parliament as an objective of s. 85 (*Covin*, at p. 729).

22 But *Covin* predated *Scott*, and Parliament in the interim amended s. 85 to include the use of imitation firearms. The Crown contends that this amendment was a legislative response to *Covin*, expressing Parliament's intention to include the prevention of victim alarm and psychological trauma as underlying objectives of s. 85, which must be read globally.

23 I find this submission persuasive. The use of a firearm in the commission of a crime exacerbates its terrorizing effects, whether the firearm is real or a mere imitation. Indeed, they share that very purpose.

…

27 "Use" has been held to include *discharging* a firearm (*R. v. Switzer* (1987), 1987 ABCA 23 (CanLII), 32 C.C.C. (3d) 303 (Alta. C.A.)), *pointing* a firearm (*R. v. Griffin* (1996), 1996 CanLII 3210 (BC CA), 111 C.C.C. (3d) 567 (B.C.C.A.)), "pulling out a firearm which the offender has upon his person and holding it in his hand to intimidate another" (*Langevin*, at p. 145, citing *Rowe v. The King*, 1951 CanLII 7 (SCC), [1951] S.C.R. 713, at p. 717; see also *Krug*, at p. 265), and *displaying* a firearm for the

purpose of intimidation (*R. v. Neufeld*, [1984] O.J. No. 1747 (QL) (C.A.)). In *Gagnon*, the court indicated in passing that "use of firearm" may include revealing its presence by word or deed.

28 It is thus settled law that use and mere possession (or "being armed") are not synonymous. But courts have almost invariably determined on a case-by-case basis whether the conduct alleged in each instance amounted to use of the firearm in question. They cannot be said to have articulated a principled test that fully captures the type of conduct that rises to the level of "use" within the meaning of s. 85(1).

29 The judgment of the British Columbia Court of Appeal in *Chang*, however, does shed some light on the nature of the distinction between use and mere possession in this context. In concurring reasons, Carrothers J.A. held in *Chang* that "uses" within the meaning of s. 85(1) "bears the clear connotation of the actual carrying into action, operation or effect", which is to be distinguished from being armed or possessing a firearm which "connote merely a latent capability of 'use', rather than actual 'use'" (p. 422).

…

32 In the absence of a statutory definition, I would therefore hold that an offender "uses" a firearm, within the meaning of s. 85(1), where, to facilitate the commission of an offence or for purposes of escape, the offender reveals by words or conduct the *actual presence* or *immediate availability* of a firearm. The weapon must then be in the physical possession of the offender or readily at hand.

[125] Examining the circumstances of the offence(s) in this case, I conclude that Mr. Steed's case falls in the middle category ("truly criminal conduct").

[126] While I am not satisfied beyond a reasonable doubt that that he, *at that moment*, possessed the firearm to achieve a related criminal goal, though I would be so satisfied on a balance of probabilities, I am satisfied beyond a reasonable doubt that his possession thereof posed an ongoing real and immediate danger to the public.

[127] Where the car went, so did the handgun and other weaponry-and the attendant dangers.

[128] He had ready access to the loaded handgun – any emotional inflection could have driven him to handle the firearm in a manner where only mere seconds were required to discharge it – intentionally or otherwise.

[129] I conclude beyond a reasonable doubt that the evidence herein collectively amounts to indicia that Mr. Steed did *not* exclusively have these weapons as an innocent bystander driven in desperation and as a matter of perceived self-preservation to have the handgun for a self-defence purpose-which in any event, I reject as being a valid *legal* basis to seek any material mitigation in such sentencings.

[130] I respectfully disagree with Chief Judge Williams to the extent that she appears to suggest unlawful possession of a firearm for defensive purposes can be a mitigating factor (at paragraph 30 in *Anderson*: "I accept that having a loaded gun for defensive purposes is a 'true crime' as set out in *Nur*. But there are *true crimes* and then there are *really true crimes*. Then there are crimes the courts consider more regulatory in nature like *MacDonald*… It is important therefore to consider the context.").

[131] I agree with her, to the extent that she is suggesting possession of a loaded gun for defensive purposes should not be a material mitigating factor, but that the otherwise surrounding circumstances may place the possession thereof at different points on the ("outlaw" to "licensed gun owner who runs afoul of the licensing aspects of the criminal law") spectrum based on the seriousness of those circumstances- for example: possession of a handgun associated with drug trafficking as opposed to mere unlawful possession of a handgun not associated with incidental crime.[39]

[132] Since Mr. Steed also claims that he had the firearm as a result of being told in January 2017 that his life was in danger, I also include here for completeness from Justice Code's reasons in *Nur*:

> 55 **The defence also relies on two decisions involving offences under the pre-1995 legislation (possession of a restricted weapon, contrary to then s. 91) where both accused were in possession of a loaded handgun for the purpose of lawful self-defence.** In one case, the accused was the manager of a jewelry business and in the other case, the accused was a forty-eight year old former gang member who suffered from multiple sclerosis and who had been told by police that there was a contract on his life. In the former case, an effective sentence of seven months imprisonment was imposed and in the latter case, a sentence of twelve months was imposed. See: *R. v. Marnet*, [1990] B.C.J. No. 141 (B.C. C.A.); *R. v. Morin* (1998), 38 W.C.B. (2d) 349 (Ont. Gen. Div.). Another similar

[39] In *R v Sellars*, 2018 BCCA 195, the offender who was searched on a traffic stop, claimed he only possessed a .32 calibre Colt handgun because as a past member of the Indian Outlaw Gang, in light of the prevalence of gang-related violence, and the fact that he had been warned by police of a planned "hit" on him, *he had it for self-defence purposes*. The sentencing judge found this reasoning attractive and held *his possession did not fall on the "truly criminal" portion of the spectrum,* and because he had made great strides in becoming a productive member of society, a of three years suspended sentence was warranted. The Court of Appeal very directly rejected this reasoning at paras. 23, and 24 – 27.

> case in this range is *R. v. Gordon* (1995), 28 W.C.B. (2d) 305 (Ont. C.A.) where a nine-month sentence was imposed on an adult first offender of otherwise good character.
>
> 56 These cases appear to be amongst the most sympathetic fact situations for the offence of possession of a loaded handgun, especially *Marnet*, *supra*. As noted above, they are the kind of cases that fall outside the normal "range". Nevertheless, it is telling that the British Columbia Court of Appeal felt it necessary in *Marnet* to send a law-abiding businessman to jail, even though he was effectively a first offender and he had pleaded guilty, in order to achieve general deterrence in 1989 in Vancouver in relation to unlicensed possession of a loaded handgun. In today's very different climate, and after Parliament has doubled the maximum sentence from five years to ten years, a more severe sentence would be imposed. More recent decisions from the British Columbia Court of Appeal suggest that sentences in the range of two years imprisonment are appropriate for a first s. 95 offence under the pre-2008 regime. See: *R. v. Jarsch* (2007), 73 W.C.B. (2d) 75(B.C. C.A.); *R. v. Saumier* (2008), 261 B.C.A.C. 272 (B.C. C.A.); *R. v. Nguyen* (2005), 64 W.C.B. (2d) 226 (B.C. C.A.
>
> [My bolding added]

[133] In *Morin*, Justice Salhany imposed a period of one year's imprisonment- I would suggest that the jurisprudence in Ontario has evolved since then to be more focused upon denunciation and deterrence. Nevertheless, what he stated therein has direct relevance to Mr. Steed's case:

> 27 Why was this accused carrying a loaded pistol? He was doing so to protect himself from a rival biker who might wish to do him harm for revenge or because he was a former biker. As such *the accused is a potential danger to law abiding members of the community who may be an innocent victim of a cross-fire.* I cannot ignore the fact that there have been other incidents of innocent victims being injured in other parts of the country because of biker and ex biker acts of revenge.
>
> 28 There is also a denunciatory aspect of this offence that overrides any issue of entitlement to a conditional sentence. Bikers and ex bikers, because of acts of revenge, are required to arm themselves for defensive measures. Surely such conduct must be denounced as clearly unacceptable in a law-abiding civilized society. If such conduct was rewarded by a conditional sentence, the public would be outraged.
>
> 29 For over 20 years the accused has been part of a subculture who has shown contempt for the laws of this country and the rights of law-abiding citizens. His record shows that he

> has a lived a life of crime and has paid a penalty for it. Because he chose to live in a sub-culture he must live in fear that a rival member of this sub-culture might cause him harm. *He says to the courts that he is no longer a member of this sub-culture and because of his health no longer personally a danger to the community. In truth he is. He is a danger because he is carrying with him the possibility that someone will try to harm him. That risk of harm poses a danger to law abiding citizens who may be in the vicinity.*
>
> 30 If Mr. Morin were given a conditional sentence this would surely send a message to others who might someday leave this sub-culture that if they arm themselves to defend themselves they will be entitled to a conditional sentence, which is nothing more than house arrest if they are caught with the weapon on their person. *To impose a conditional sentence for Mr. Morin and any other ex biker who felt the need to carry a loaded pistol for protection would make a mockery of the seriousness of their conduct. The request for a conditional sentence is refused.*
>
> [My italicization added]

[134] Let me briefly next examine Chief Judge Williams' position in *Anderson* (who was a s. 95 first-time offender) that:

> "81 Given my review of the case-law, **I conclude that the appropriate range of sentence in these circumstances is two years less a day to three years incarceration**. And given the factual similarities with *Muise*, I am persuaded that a sentence on the lower end of that range is appropriate. Afrocentric programming is not available in either the federal or provincial system but a sentence of two years less a day, would at least place Mr. Anderson close to community where family and some culturally appropriate services exist. For that reason, I impose a sentence of two years less a day."

[135] In *R v Cody Muise*, 2008 NSSC 340, Mr. Muise pled guilty to multiple offences ( ss. 86(2), 88, 90(1), 92, 94(1), 96(1) and 109 *CC*) in relation to a .38 calibre Smith & Wesson five shot revolver which was loaded and found concealed next to where he was seated in a vehicle with three other individuals. He was also under an order of prohibition prohibiting him from possessing any firearm. He was

18 years of age at the time of the commission of the offences on August 26, 2008. The Crown and Defence presented a joint recommendation that he be sentenced to two years imprisonment, which sentence Justice Beveridge (as he then was) accepted.

[136] Justice Beveridge stated:

> 21 He says that he has accepted responsibility for the lifestyle that led him to commit this kind of offences and express to resolve to change that. *He says, through his counsel, the weapon was in his possession and essence for a defence mechanism due to the kind of individuals that he was associating with. Well, Mr. Muise, it is time to get new associations*."
>
> [My italicization added]

[137] Justice Beveridge noted that "neither the Crown nor Defence have suggested or proposed any particular case law that demonstrates what the range of sentence might be… In the time I had available I was not able to locate any Nova Scotia authorities in this area" (paras. 26 and 33).

[138] He concluded at paragraph 39:

> "In these circumstances, rehabilitation should not be ignored**. Even a minimum two-year sentence is a significant jump from how you have been treated before.** It is further a principle of sentence at the minimum period of imprisonment should be the one selected if that is sufficient to accomplish the principles and purpose of sentence. Mr. Scott is entirely correct that **the message will go out that if someone is caught with a firearm, the Crown will be asking for significant periods of incarceration- and [in] this case has asked for federal time- and I am certainly prepared to impose it. In fact, I was tempted to impose more than that.** But I am hopeful that your expressions today of your desire to rehabilitate yourself, disassociate yourself from the lifestyle that led you to

> commit this offence are genuine and sincere. And I note you are nodding your head in agreement."

[139] Justice Beveridge accepted the joint recommendation of two years imprisonment and added two years'-probation thereafter, including a clause requiring him not to associate with anyone known to him to have a criminal record except family members. As Justice Beveridge stated: "I hope that will assist you Mr. Muise in being able to dis-associate yourself with the individuals that you have been in the past."

**The range of sentences for s. 95 CC offences in Nova Scotia**

[140] Given the developing state of the jurisprudence in Nova Scotia, I will have regard to, what the Supreme Court of Canada has said in *Nur* and *Charles*, and generally adopt, the developed jurisprudence in Ontario in particular.

[141] Mr. Nur was 19 years old, no prior criminal record, and doing extremely well in school. He pled guilty to a s. 95 offence which had proceeded by indictment. He did not admit any facts relevant to the allegations beyond those essential to the plea. Nor had been standing by an entrance to a community centre in downtown Toronto when police arrived in relation to a complaint of threatening behaviour. He and three other men scattered. While running away, an officer saw him throw something to the ground. Police discovered a loaded .22 calibre semi-

automatic handgun in working condition with an oversized ammunition clip in which there were 23 bullets with one in the chamber. That gun is a prohibited firearm. When functioning properly the gun can fire all 24 rounds and 3.5 seconds.

[142] Justice Code found the appropriate range of sentences being between two years less one day and three years. He considered Nur to fall into the "**bottom end of the above range… generally reserved for youthful first offenders with good rehabilitative prospects who plead guilty**… As a young first offender, who has pleaded guilty and who appears to have rehabilitative potential, it would be important to keep him out of a federal penitentiary as long as the appropriate sentencing range for this defence permits such a result. Accordingly, he could potentially have received a sentence towards the two years less a day end of the range under the pre-2008 sentencing regime."

[143] He sentenced Mr. Nur to 40 months imprisonment- which sentence was affirmed by the Court of Appeal and the Supreme Court of Canada.

[144] The circumstances of Mr. Charles' case are more similar to those of Mr. Steed, although significant differences are apparent.

[145] As a result of a complaint police searched the house and found a loaded Ruger semiautomatic handgun and ammunition in Mr. Charles' bedroom. It was

equipped with an overcapacity magazine, which is a prohibited device under the *Criminal Code*, and contained 13 rounds of live 9 mm ammunition with one further round laying on a bed nearby. The serial number of the gun had been removed. The Crown proceeded by indictment Mr. Charles pleaded guilty to the s. 95 offences, as well as to possessing a firearm knowing the serial number had been defaced- s 108(1)(b), and possession of a firearm while subject to a firearms prohibition order contrary to s 117.01, and possession of ammunition while subject to a firearms prohibition order contrary to s. 117.01 *CC*.

[146] Justice Cronk for the court (2013 ONCA 681) described Mr. Charles' prior criminal record:

> 20 At the time of his convictions on the charged offences, Charles had a lengthy and serious criminal record. It included approximately 20 prior convictions, five of which involved crimes of violence. Five additional convictions concerned firearms-related offences.
>
> 21 Two of Charles' prior convictions are particularly germane to the issues on appeal. In 2004, Charles had pleaded guilty to robbing an employment agency, together with three accomplices, while using an imitation firearm and having his face masked with intent to commit an indictable offence, contrary to s. 85(2) of the *Code*. He was sentenced on a joint submission to 18 and one-half months' imprisonment on each count, concurrent, after credit of four and one-half months for pre-sentence custody.
>
> 22 As well, approximately two years earlier, in 2002, Charles had pleaded guilty to a charge of possession of ammunition while subject to a firearms prohibition order, contrary to s. 117.01(1) of the *Code*. This charge arose from a dispute between Charles and his grandmother regarding a gun. When the police arrived at the residence in question, they conducted a consensual search of the premises and discovered a locked box containing a single .38 calibre bullet, together with several of Charles' identification documents. When the police subsequently realized that Charles was subject to a firearms prohibition order, they returned to the residence to arrest him. On a search incident to arrest, Charles was

> found in possession of a large quantity of crack cocaine, electronic scales, a cell phone, scissors and a screwdriver. He was charged with possession of ammunition contrary to a prohibition order and possession of cocaine for the purpose of trafficking. Although the record before this court is less than clear, it appears that Charles was sentenced to a total of two months' imprisonment on each charge, concurrent, plus 96 days' credit for pre-sentence custody.
>
> 23 Offences under ss. 117.01(1) and 85(2) are listed offences under s. 84(5)(a). Charles' prior convictions under these sections therefore constituted earlier or prior offences for the purpose of determining, under s. 95(2), whether he had committed a second or subsequent offence. As a result, each of these prior convictions triggered the five-year mandatory minimum sentence imposed by s. 95(2)(a)(ii).
>
> 24 As I have indicated, s. 84(6) provides that for the purpose of s. 84(5), the sequence of convictions, rather than the sequence of commission of the offences, governs. In this case, Charles' ss. 117.01(1) and 85(2) convictions occurred several years before his s. 95(1) conviction. Consequently, his s. 95(1) conviction in 2010 was a second or subsequent offence, triggering the mandatory minimum penalty of five years' imprisonment. On these facts, Charles' prior convictions qualify as "earlier" offences under both s. 84(6) and the narrower common law rule.

[147] Justice Backhouse, the sentencing judge in *Charles*, concluded that:

> "There seems little hope of the accused rehabilitating himself, although he is, despite his lengthy record, still a young man. The principles that dominate in this matter are denunciation and deterrence."

[148] She sentenced Mr. Charles to 7 years imprisonment.

[149] While not intending to set a "range", effectively the Supreme Court of Canada has set goalposts in relation to sentences for s. 95 offences:

> **Mr. Nur** (first-time s. 95 offender who pleaded guilty, with no prior criminal record, was in public carrying .22 calibre semi-automatic handgun with an oversized ammunition clip carrying 23 rounds (which were aggravating factors that led to an increased sentence – para. 60, 2011 ONSC 4874) **40 months imprisonment** which was affirmed by the Supreme Court of Canada) and **Mr. Charles** (with a lengthy and serious criminal record of approximately 20 prior convictions, five of which involved crimes of violence and five

others for firearms -related offences pleaded guilty to s.95(1) CC (and 108,117.01) offence who's prior convictions under ss. 84(5) and (6) CC triggered s. 95(2((a)(ii) CC a minimum mandatory 5 year sentence **-7 years imprisonment**, affirmed by the Supreme Court of Canada)

[150] Since *Nur* and *Charles* Justice Code has addressed the range of sentence for a recidivist s. 95 offenders in *R v Graham*, 2018 ONSC 6817, by Justice Code (he imposed 8 years on the s. 95 offence and one year consecutive on the s. 117.01 offence):[40]

> 37 **There is now considerable guidance in the case law, since the mandatory minimum sentences were struck down in 2013, as to the appropriate range of sentence in these s.95 cases.** In *R. v. Carrol*, 2014 ONSC 2063 (Ont. S.C.J.), Molloy J. analyzed the effect of *Nur* and *Smickle* on the appropriate range of sentence for well-situated first offenders like the two accused in those cases. It will be recalled that Nur was 19 years old, he had pleaded guilty, he had strong support from his pro-social family, and he had excellent rehabilitative prospects. Smickle was found posing with a gun while alone in the privacy of an apartment. Both were first offenders. Molloy J. held in *R. v. Carrol*, *supra* **that two years less a day to three years was now the appropriate range of sentence in this kind of first offence s.95 case involving well situated first offenders**.
>
> 38 More recently, **the Court of Appeal has held that three years to five years is the appropriate range for a first s.95 offence where the use and possession of the gun is associated with criminal activity, such as drug trafficking**. In *R. v. Marshall* (2015), 340 O.A.C. 201 (Ont. C.A.) and *R. v. Gobire*, March 7, 2016, Ontario Court of Appeal, the court upheld a three and a half-year sentence for Marshall and imposed a three year sentence for Gobire, both of whom committed first s. 95 offences and both of whom where young first offenders. Marshall was 23 and Gobire was 21 and Gobire was held to have excellent rehabilitative prospects. Both accused were involved in the drug trade and were carrying the guns in association with drug crime. Also see: *R. v. Mansingh*, 2017 ONCA 68 (Ont. C.A.); *R. v. Crevier*, [2013] O.J. No. 2257 (Ont. S.C.J.), aff'd (2015), 330 C.C.C. (3d) 305 (Ont. C.A.).

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[40] Affirmed 2020 ONCA 692.

39 **In the case of s.95 recidivists, like Graham, MacDonnell, J. analysed the effect of the 2013 post-mandatory minimum sentence cases** in *R. v. Hector*, 2014 ONSC 1970 (Ont. S.C.J.). He noted that in *R. v. Charles* (2013), 303 C.C.C. (3d) 352 (Ont. C.A.) and in *R. v. Chambers*, 2013 ONCA 680 (Ont. C.A.), the Court of Appeal upheld sentences of seven years and eight years for s.95 recidivists who had each breached two prior s.109 prohibition orders. MacDonnell, J. implicitly held that **the cases indicate an appropriate total range of six years to nine years for s.95 recidivists who breach s.109 orders, after the 2013 striking-down of the mandatory five-year minimum sentence. More recently, in *R. v. Slack* (2015), 321 C.C.C. (3d) 474 (Ont. C.A.), the Court upheld a total sentence of ten years, made up of eight years for a s.95 recidivist who also received a two year consecutive sentence for breach of prohibition orders**. A number of recent cases in this Court have imposed total sentences of eight and nine years for recidivist s.95 offences and breaches of s.109 prohibition orders. See: *R. v. Grant*, [2005] O.J. No. 4599 (Ont. S.C.J.); *R. v. Alexander*, [2012] O.J. No. 5087 (Ont. S.C.J.); *R. v. Dunkley*, [2014] O.J. No. 3062 (Ont. S.C.J.).

40 **The defence relies heavily on *Hector*, the case at the bottom end of the above range, where MacDonnell J. imposed a total sentence of six years (five years for the s.95 offence and one year consecutive for the s.117.01 breaches). However, the one significant circumstance in *Hector*, that moved the case towards the bottom end of the range, was that the loaded handgun was found hidden in an air conditioning unit inside an apartment. It was not being carried about in public in association with unlawful activity, as in the present case**. As noted previously, the mix of aggravating and mitigating factors in the present case situate it much closer to the upper end of the appropriate range. That upper end of the range supports an eight to ten year total sentence for s.95 recidivists who breach s.109 orders.

41 As explained above, **I am of the view that the sentences for breach of the two s.109 orders should be consecutive to the sentence for the s.95 offence.** I adopt the reasoning of the leading authorities in this Court, to the effect that separate punishment is required if court orders are to have real meaning. See: *R. v. Manning*, [2007] O.J. No. 1205 (Ont. S.C.J.); *R. v. Ellis*, [2013] O.J. No. 2409 (Ont. S.C.J.) aff'd, *R. v. Ellis*, 2016 ONCA 598 (Ont. C.A.); *R. v. Carrol*, *supra*.

42 **The five to six year total range of sentence submitted by the defence for all six offences in this case, including the s.95 offence and the breaches of s.109, is at the top end of the range for first s.95 offences and at the bottom end of the range for second s.95 offences**. It depends on mitigating circumstances that have not been proved. It also fails to reflect the significant aggravating circumstances in this case and the number of distinct offences committed in this case. It would not be an appropriate sentence. In my view, eight years for the s.95 offence and one year consecutive for the s.109 breaches is the appropriate sentence for these offences in this particular case.

> 43 The conviction for possession of cocaine for the purpose of trafficking requires a separate consecutive sentence. It is an entirely separate offence, based on separate public policy interests, and it requires separate punishment. I agree with the reasons of Campbell J. in *R. v. Mark*, [2018] O.J. No. 270 (Ont. S.C.J.) at para 27 in this regard. Also see *R. v. Crevier*, *supra* at paras 128-9 where Rouleau J.A. agreed with the trial judge in imposing "a consecutive sentence for the cocaine conviction because it constituted a different legally-protected interest from the gun offences".

[151] More goalposts – **In Ontario**, using the sentencing range categories I earlier postulated, courts impose sentences for (indictable) s. 95 offences as follows:

> It does appear that this range can be better described, from most serious to least serious as (the first two ranges therefore including "truly criminal conduct"):
>
> **1**-first-time s. 95 offenders who have *unlawful* possession of loaded prohibited/restricted firearms "as a tool of their trade" (i.e. for an unlawful purpose such as drug-trafficking) - **3 to 5 years.**
>
> **2**-first-time s. 95 offenders who have simple *unlawful* possession of loaded prohibited/restricted firearms (including offenders who have *lawful* possession thereof, but engage in "truly criminal conduct" by unlawfully handling or using the firearms – i.e. for an unlawful purpose) - **2 years less one day to 3 years.**[41]
>
> **3**-first-time s.95 offenders who have *lawful* possession of loaded prohibited/restricted firearms and commit licensing -type offences- **up to two years less a day imprisonment**.

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[41] *R v Nur*, 2013 ONCA 677 at para. 109, but see *R v Samaniego*, 2020 ONCA 439, where a 4 year sentence was imposed.

> **4**-For first-time recidivist s.95 offenders- **5 years (usually plus 12 months consecutive for s. 117.01 CC offence) to 8 years.**

[152] I conclude that the Ontario jurisprudence has reached a principled and reasonable conclusion in relation to these crimes and their prevalence within a large urban centre setting.

[153] Generally speaking, as modified by our own jurisprudence, it is an appropriate starting point from which to impose individualized sentences here in Nova Scotia.

[154] To the extent that an offender is from the ANS or Aboriginal community, in proper cases the individualized sentences for those offenders can be mitigated to the extent that is justifiable on the facts of the case and the jurisprudence. In that regard Justice Wood in *Perry* helpfully pointed this out in relation to Aboriginal offenders:[42]

> 10 Gladue reports derive their name from the Supreme Court of Canada decision in *R. v. Gladue*, [1999] 1 S.C.R. 688(S.C.C.). In that case the Court described the many ways in which Canada had failed Aboriginal peoples, resulting in their over representation in the prison population. The Court concluded that this over representation led parliament to include the specific reference to Aboriginal people in s. 718.2(e) of the *Criminal Code* which reads:

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[42] The differential treatment of Aboriginal offenders has been statutorily recognized in the *Criminal Code* (s.718.2(e) *CC*) and therefore in the jurisprudence – it is hoped that our Court of Appeal in its review of *R v Anderson*,2020 NSPC 10 will address the proper use that can be made of IRCAs, including whether sentences can be mitigated on the basis of an offender's ANS status, and how that should be done on a principled basis.

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> . . .
>
> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

11 The decision in *Gladue* called upon Canadian judges to undertake a different method of analysis in determining an appropriate sentence for Aboriginal offenders. It said Courts must take judicial notice of matters such as the history of colonialism, displacement, community fragmentation and residential schools. We must acknowledge how this past continues to impact many aspects of the lives of Aboriginal peoples, including the disproportionately high level of incarceration. This information provides the context required in order to understand the particular circumstances of the offender being sentenced.

12 In the later decision of *R. v. Ipeelee*, [2012] 1 S.C.R. 433 (S.C.C.), the Supreme Court described the duty imposed on sentencing judges dealing with Aboriginal offenders as follows:

> 59 ... When sentencing an Aboriginal offender, a judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection (*Gladue*, at para. 66). Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people generally, but additional case-specific information will have to come from counsel and from the pre-sentence report (*Gladue*, at paras. 83-84).

13 The Court in *Ipeelee* identified two ways in which *Gladue* information may impact the sentencing outcome. These were described as follows:

> 73 First, **systemic and background factors may bear on the culpability of the offender**, to the extent that they shed light on his or her level of moral blameworthiness. ...
>
> 74 The second set of circumstances - **the types of sanctions which may be appropriate** - **bears** not on the degree of culpability of the offender, but **on the effectiveness of the sentence itself**. As Cory and Iacobucci JJ. point out, at para. 73 of *Gladue*: "What is important to recognize is that, for many if not most aboriginal offenders, the current concepts of sentencing are inappropriate because they have

> frequently not responded to the needs, experiences, and perspectives of aboriginal people or aboriginal communities." As the RCAP indicates, at p. 309, the "crushing failure" of the Canadian criminal justice system *vis-à-vis* Aboriginal peoples is due to "the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice". The *Gladue* principles direct sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community.

14 As the Supreme Court has said, the sentencing of Aboriginal offenders requires a different analysis and approach. This does not necessarily mean that a different outcome will be reached. Ultimately, sentencing must continue to be based upon the particular circumstances of the offender and the offence. **The Court in *Ipeelee* described it as follows:**

> **75 Section 718.2(*e*) does not create a race-based discount on sentencing. The provision does not ask courts to remedy the overrepresentation of Aboriginal people in prisons by artificially reducing incarceration rates.** Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case. This has been, and continues to be, the fundamental duty of a sentencing judge. *Gladue* is entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them. *Gladue* affirms this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process. **Section 718.2(*e*) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples.** Neglecting this duty would not be faithful to the core requirement of the sentencing process.

[My bolding added]

[155] Having said that, let me address the cases put forward by Mr. Steed, none of which could be binding on me, except *R v Phinn*, 2015 NSCA 27:

1. *R v Phinn* - a very experienced trial judge, Her Honour Judge Alanna Murphy, sentenced Mr. Phinn to 72 months for his conviction under

s.94(1) *CC* and a further term of 25 months concurrent in relation to the associated s. 90(1) *CC* offence. The Court of Appeal majority upheld her decision. During a firearms investigation, a vehicle was intercepted. A high-risk traffic takedown took place, after Mr.  Phinn had very recently been seen walking awkwardly towards the car while holding his waistband, after reports of the presence of a firearm. A revolver loaded with the bullets was found under one of the seats. He argued on appeal that the judge erred by sentencing him for the s. 94(1) offence as if he had been convicted of the more serious s. 95 offence (of which he had been acquitted).The difference being that a conviction under s. 95 requires proof that an accused knew the firearm in question was loaded, or ammunition was readily accessible that was capable of being discharged. Justices Saunders and Bourgeois stated that "it was entirely appropriate for Judge Murphy to have initially considered a range of between 4 and 8 years based on the counsel's submissions, less suitable credit for time spent on remand." (para. 69). His previous record included that in 2007 in Hamilton, Ontario, he was sentenced as a youth to eight months in jail and four months of community supervision for a s. 95(1) *CC* offence and on February 26,

2010 he was sentenced as an adult for a s. 95(1) conviction to 3 ½ years by Justice Wright of this Court. Justice Farrar dissented and would have allowed the appeal and imposed a sentence of 36 months (minus remand credit of 19 months) as he concluded "the range of sentences for this type of offences in the circumstances is between 18 months and three years.") (para. 235)

[156] All Justices agreed that, broadly speaking the s.95 offence is more serious than the s. 94 offence. Notably, both have 10-year maximums.

[157] To the extent that *Phinn* can be extrapolated to the circumstances of Mr. Steed in his offences, it suggests a range of sentence for s.95 consistent with the Ontario jurisprudence. It is unclear whether Mr. Phinn is from the ANS community, but if so, there is no basis to believe that was a factor in his sentencing.

2. ***R v Fraser***, 2019 NSSC 368 - Justice Duncan (as he then was) sentenced the 25-year-old ANS/Aboriginal offender (born 1992) who pleaded guilty, to **4 years and 9 months imprisonment** for a s. 95(1) *CC* offence wherein he was found in a taxi with 87 g of crack cocaine and a loaded 9 mm handgun. That was his **third conviction for**

**firearms -related offences in the last five years** (“**at the time of the commission of this offence was subject to 2 prior prohibition orders** made pursuant to s. 109” - para. 70) and he had a serious lengthy criminal record, however **this was his first sentence in a federal penitentiary**. A *Gladue* report was prepared, and Justice Duncan relied upon a number of cases, which were presented to him by Ms. McCarthy as Defence counsel, regarding “the historical and social context for the lived experiences of a Black Canadian” (para. 40). Justice Duncan agreed that “**the Crown’s recommendation for 5 to 6 years was an entirely reasonable one given the cases that have been presented to me.** I really have no authorities that go very much below that in these type of circumstances” (para. 78).

3. ***R v Perry***, 2018 NSSC 16 - Justice Wood (as he then was) sentenced the 35-year-old ANS/Aboriginal offender who pleaded guilty, to ss. 95(1), 91(2), 92(1), and 2 counts of s. 117.01 *CC* all arising June 4, 2014 to **two years less one day (to be served as a conditional sentence order (with nine months house arrest with exceptions) to be followed by 12 months probation.** Mr. Perry had been remanded for 356 days and received a **1:1.5 credit being the equivalent to a**

**sentence of 534 days or nearly 18 months imprisonment. From February 2017 onward he was subject to a recognizance and in the community "the terms of which were very restrictive and included house arrest" (para.71) - thus was under house-arrest for approximately until January 22, 2018 or approximately 11 months**. Justice Wood found he had taken very positive steps regarding his rehabilitation in the last 2 to 3 years before the sentencing date. Both a *Gladue* report and an IRCA were prepared. The circumstances were that on June 4, 2014 Mr. Perry was arrested by police outside his home and at that time advised them that they would find certain things in his apartment including a loaded handgun, which he had purchased for protection, some knives, as well as drugs and drug paraphernalia – inside they did find a loaded .45 calibre Remington handgun with 5 rounds of ammunition in the clip; one push dagger, and approximately 43 g of marijuana.

4. ***R v Holland*,** 2017 NSSC 148 - Justice Wright sentenced the 36-year-old offender (who pleaded guilty) on a true joint recommendation to 5 years imprisonment for (what police found after the executed a search warrant at his apartment) a s. 95(1) *CC* offence - possession of

a 9 mm handgun with ammunition) and 3.5 years concurrent for a s. 5(2) *CDSA* possession of 167 g of cocaine. His criminal record included offences of data back to 2007 – 2009 where he served approximate three years imprisonment in total for: two prior convictions of. 5(2) *CDSA*, in two prior firearm possession convictions under ss. 95(1) and 91(1) *CC*. Thus, he had a five-year gap between his most recent offences and the ones for which he was being sentenced.

5. ***R v Halpenny***, 2018 NSSC 30 - Justice Cacchione sentenced the 57-year-old with a **dated and unrelated criminal record who pleaded guilty** (on the first day of trial) which was the only mitigating factor present, to **30 months imprisonment**. The Crown had sought 4 to 5 years imprisonment. Mr. Halpenny pleaded guilty to offences contrary to: four counts of ss. 95(1); and ss. 91(1) and 91(2) *CC*; on July 30, 2015 a search warrant was executed at his property – of the 15 firearms seized 4 were handguns (two of them had silencers available; three were loaded); the remainder were long guns. The search of the accused's premise is also revealed the presence of a Kevlar vest (body armour); a police traffic vest; a police rain-hat cover; a police duty

> belt, handcuffs, baton, flashlight holder and pepper spray holder. Justice Cacchione noted that "the release conditions were not particularly onerous as the accused was not subject to house arrest or a curfew."[43]

[158] The circumstances in each of *Phinn*, *Fraser*, *Perry*, *Holland* and *Halpenny* can be distinguished from the circumstances of Mr. Steed and his offences, but collectively they nevertheless shine a light which assists me in following a reasoning path and coming to a "just" determination in the specific circumstances of Mr. Steed.

[159] Let me next briefly examine the following statements of Chief Judge Williams in *Anderson*:

> 88 Clearly, as a responsive modern society, we must identify and address root causes of offending, if we hope to reduce crime. *Sadly, sentences that solely or primarily emphasize deterrence and denunciation have not made our communities safer places to in which to live. Punishment does not change behaviour when the actions are rooted in marginalization, discrimination and poverty.* Incarceration is to be a last resort; restraint must be exercised, where appropriate. Having said that, offenders who pose a real risk to public safety must be separated from society.
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> …
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> 91 Deterrence assumes that offenders weigh the pros and cons of a certain course of action and make rational choices. It also assumes that people can freely choose their actions and behaviours — as opposed to their offending being driven by socio-economic

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[43] Justice Cacchione noted that "there was also a condition that he have no direct or indirect contact or communication with Jimmy Melvin Junior and Jimmy Melvin Senior, both of whom are notorious and violent crime figures in this city."

factors such as poverty, limited education, mental health and addiction issues and systemic discrimination and marginalization.

92 Those of us who work in the Criminal Justice System know only too well that many times there is a causal connection between socio-economic factors and crime. *Deterrence and denunciation do not address these factors.* Our prisons and our jails are full of these marginalized individuals, for whom there are few resources to address the root causes of their offending. And the costs associated with incarceration — both human and fiscal — are substantial. It costs well over $100,000 per year per inmate in many prisons and jails, leaving little for Afrocentric planning and reintegration, for example.

93 Accountability demands that the offender take responsibility for their crime and is actively involved in a course of action to *right the wrong* and become a productive member of society. Accountability is difficult — some would say more difficult that serving a jail term. It requires a willingness to be supervised and supported to address one's shortcomings and be held accountable for reparation of harm and for their own rehabilitation. This takes much hard work and dedication.

*94 Regardless of the sentence imposed on Mr. Anderson, it will likely do little to deter others in similar circumstances. The socio-economic forces at play are so powerful and are firmly entrenched in systemic racism and marginalization.*

95 *So, should the justice system continue to emphasize deterrence and denunciation by imposing stricter sentences on all offenses involving the possession of handguns or should it, on a case by case basis, employ a restorative yet denunciatory community option for those who are ready to make the necessary change?* Harkening back to the words of Mr. Wright: Do I impose a period of incarceration that I know will not achieve the purpose and principles of sentencing or do I take a calculated risk management approach and create the opportunity for meaningful change?[44]

[My italicization added]

[44] As I understand Chief Judge Williams' comments, she is saying that Mr. Anderson will be specifically deterred, and was positioned well for rehabilitation by the sentence she imposed, and that those objectives of sentencing, should not be undermined by a greater emphasis on general deterrence (i.e. imposing a period of imprisonment in a federal penitentiary on Mr. Anderson ) which is concerned with deterring *others* who might consider or be inclined to committing such offences.

[160] Similar reasoning is put forward in support of Mr. Steed, a repeat s. 95 *CC* offender, urging the court to impose a four- year sentence.[45]

[161] Respectfully, I do not agree with the reasoning that for serious firearms offences committed by offenders of the ANS community, deterrence and denunciation should be so significantly supplanted in favour of rehabilitative principles.

[162] Firstly, while there may be "rare and exceptional cases", the exception should not make the rule.

[163] Since judges must impose individualized sentences in relation to the one offender before them for sentencing, such analysis by judges in other cases could easily result in them seeing those offenders as also falling within the exceptional case category, with the consequence that the "exceptional" will become all too common.

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[45] Statistics publicly available suggest: " [Adult] African Nova Scotians make up about 2 percent of the Nova Scotian population, but represented 11 percent and 10 percent of admissions to remand and sentenced custody, respectively (Figure 11). African Nova Scotians were over-represented both in admissions to remand and in admissions to sentenced custody in 2017- 18." - In a footnote we find: "The incarceration rate for adults is calculated as the total average daily count figure divided by the size of the adult population and standardized per 100,000 population. The provincial incarceration rate is an indicator of the proportion of Nova Scotia residents, in a given year, who are in custody (sentenced custody, remand, "other status") in provincial institutions. It excludes federal institutions, but includes federally sentenced offenders in provincial institutions." Source: Policy, Planning & Research, NS Department of Justice. Statistics Canada, 2016 Census Profile – Nova Scotia [Province] and Canada.

[164] On the other hand, it is plausibly arguable that, if there is a great prevalence of these crimes, sentences are presently not sufficiently deterrent – perhaps a substantial increase in sentences would dissuade many.[46]

[165] Secondly, we are not only concerned with offenders who are charged, and then convicted and sentenced for serious firearms offences (for whom we seek to create sentences that are specifically deterrent to them).

[166] General deterrence targets the behaviour of those who are presently committing these offences *and* those who might be inclined to commit firearms offences. It attempts to encourage positive behaviour among the much greater number of the young male ANS community, who presently do not engage in serious criminality. Surely, the numbers of young ANS males who resort to firearms and criminality are a small subset of the entire ANS community.

[167] Thirdly, how can one conclude that one "knows" that a period of incarceration will *not* achieve, at least in sufficient measure if not completely, the

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[46] Regarding the imposition of maximum sentences, the Supreme Court of Canada stated in *R v LM* 2008 SCC 31: "In *R. v. Cheddesingh*, [2004] 1 S.C.R. 433, 2004 SCC 16, *the Court acknowledged the exceptional nature of the maximum sentence, but firmly rejected the argument that it must be reserved for the worst crimes committed in the worst circumstances.* Instead, all the relevant factors provided for in the *Criminal Code* must be considered on a case-by-case basis, and if the circumstances warrant imposing the maximum sentence, the judge must impose it and must, in so doing, avoid drawing comparisons with hypothetical cases." – [My italics added]

purpose and principles of sentencing (which include denunciation, specific and general deterrence, and rehabilitation of an offender)? Proving a negative can be very challenging.[47]

[168] While I agree that in some cases specific and general deterrence may not be as effective as we hope they will, courts are also *obligated*, when sentencing offenders who commit violent *or* dangerous (such as the "truly criminal conduct" unlawful simple possession of firearms) offences, to consider the remaining objectives cited in s.718 *CC* [purpose and principles of sentencing]-namely:

1. "to separate offenders from society, where necessary;
2. to assist in rehabilitating offenders;
3. to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims or to the community."

**What is an appropriate sentence for Mr. Steed?**

[169] As Justice Wood (as he then was) stated in *Perry*:

"Applicable Principles

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[47] I in no way wish to diminish the seriousness of the present level of criminality and violence perpetrated by members of, and the effects on those within, the ANS community. I accept Ms. Hodgson's statement that: "ANS people continue to suffer from historical traumas that have plagued Black communities since forced migration. These traumas include but do not exhaust; segregation, inaccessibility of resources, systemic racism within institutions such as education, justice and health, incarceration rates, racial profiling and violence(beef) within the Black community." However, courts have limited mandates and tools that are ill-suited to address the underlying issues. On the other hand, addressing these issues is the responsibility of government.

57 The general purpose of sentencing is found in s. 718 of the *Code*, which states:

Purpose and Principles of Sentencing

*Purpose*

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

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

58 The sentencing exercise involves a balancing of the objectives set out in this section.

59 Section 718.1 of the *Code* requires that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender. Section 718.2 identifies specific sentencing principles which must be considered, including the following:

1. The sentence should be increased or reduced to account for any relevant, aggravating or mitigating circumstances relating to the offence or the offender.
2. The sentence should be similar to sentences imposed on similar offenders for similar offences, committed in similar circumstances.
3. An offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances.
4. All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders with particular attention to the circumstances of Aboriginal offenders.

60 Where an offender is being sentenced for multiple offences the court must consider whether any terms of imprisonment are to be served consecutively. In some circumstances the *Code* makes consecutive sentences mandatory (see for example s. 85(4)). In the absence of such a direction in the *Code*, the question will be resolved by a determination of whether there is a sufficiently close connection among the offences to make concurrent sentences appropriate. If the offences arise out of a single event or transaction, concurrent as opposed to consecutive offences would typically be imposed. For example in *Phinn*, *supra*, the accused was convicted of two firearms offences arising out of a loaded

> revolver being found in a car. The sentences were to be served concurrently.
> In *Holland*, *supra*, the accused was convicted of possession of cocaine for the purpose of trafficking and possession of a prohibited or restricted firearm with ammunition as a result of a search of his apartment. The sentences were concurrent."

[170] Focusing just on his firearms-related offences, we see that Mr. Steed, as a youth, committed a robbery on June 28, 2011 for which he received a s. 51 *YCJA* two-year firearms prohibition order on July 29, 2011.

[171] On February 7, 2013, as a youth, Mr. Steed was unlawfully in possession of several rifles when police came to his home as a result of a mental health crisis he was experiencing. He was sentenced on May 14, 2013 for offences contrary to sections 95(1) and 117.01 *CC* (firearms/weapons prohibition order) and received a 5-year s. 51 *YCJA* firearms prohibition order.

[172] On June 8, 2015 as a result of a search of his residential premises police located a .22 calibre firearm. He was convicted of offences contrary to ss. 86(2) (careless use, handling or storage of a firearm) and 117.01 *CC* (firearms/weapons prohibition order) and on June 24, 2016 received a sentence of deemed time served (in custody for 356 days which was deemed to be equivalent to a 572 day sentence of imprisonment); and a lifetime s. 109 *CC* prohibition order.[48]

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[48] In January 2017, he was advised by police that there was a generalized threat upon his life.

[173] On March 27, 2019 he committed the present offences: contrary to ss. 95(1), 94(1), 91(2), 108(1)(b) and 3 counts in violation of a firearms/weapons prohibition order - s. 117.01 *CC*. (he has been in custody since March 27, 2019 - which pursuant to s. 719(3.1), which counsel agree, as do I, is applicable here.)

[174] In summary: as a youth he breached a firearms prohibition order by having **three rifles** in his possession on or about **February 7, 2013 (ss. 95(1) and 117.01)**; as an adult he breached a firearms prohibition order by having a **.22 calibre firearm** in his possession on **June 8, 2015 (ss. 86(2) and 117.01)**; as an adult on **March 27, 2019**, he breached a firearms/weapons prohibition order by having **a loaded 8 mm handgun, with an illegal overcapacity magazine (20 rounds), a speed-loader, and a Taser in his possession (ss. 95(1), 117.01 x 3; s.94(1), 108(1)(b)).**

[175] His history with the unlawful possession of firearms, and breaches of firearms/weapons prohibition orders spans convictions on three different dates during a six-year interval, when he was 17 to 23 years old. It is noteworthy that this is his **third** time breaching a firearms/weapons prohibition order. As an adult, it is his **first** time in violation of section 95 (1) *CC*.

[176] Using the "similar offences, similar circumstances and similar offenders" prism, I conclude that the range of sentence in Nova Scotia should be 3-7 years, subject to the effects of mitigating and aggravating factors. The jurisprudence supports adding a one-year consecutive period of imprisonment for breach of the firearm/weapons prohibition order.

[177] The Crown and Defence largely agree on the aggravating and mitigating factors, but differ as to the weight I should attach to them.[49]

[178] His youth, and potential for rehabilitation are significant mitigating factors.[50]

[179] In *R v Simmonds*, 2021 NSSC 54, while sentencing a male ANS offender for a s. 5(2) *CDSA* offence, Justice Arnold stated:

> [42] Justice LeBel also discussed how to identify systemic biases that can adversely impact on a racialized offender, in particular when considering s.718.2(e) of the *Criminal Code* (which mandates particular attention be paid to the circumstances of an Aboriginal offender). He explained:
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> > [66] *First, sentencing judges can endeavour to reduce crime rates in Aboriginal communities by imposing sentences that effectively deter criminality and rehabilitate offenders.* These are codified objectives of sentencing. *To the extent that current sentencing practices do not further these objectives, those practices must change so as to meet the needs of Aboriginal offenders and their communities. As*

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[49] Gun violence remains particularly prevalent in the Halifax Regional Municipality. The prevalence of a crime, when viewed through the lens of "the purpose and principles of sentencing", generally requires sentencing judges to consider the imposition of more deterrent sentences.

[50] His guilty plea, while mitigating as it did dispense with the necessity of proof beyond a reasonable doubt at a trial, must also be seen in light of the *voir dire* decision to admit the damning evidence of the various illegal and dangerous weaponry and ammunition found in the Dodge Challenger at the time that he was operating the Dodge Challenger.

*Professors Rudin and Roach ask, "[if an innovative] sentence can serve to actually assist a person in taking responsibility for his or her actions and lead to a reduction in the probability of subsequent re-offending, why should such a sentence be precluded just because other people who commit the same offence go to jail?"* (J. Rudin and K. Roach, "Broken Promises: A Response to Stenning and Roberts' 'Empty Promises'" (2002), 65 *Sask. L. Rev.* 3, at p. 20).

[67] Second, judges can ensure that systemic factors do not lead inadvertently to discrimination in sentencing. Professor Quigley aptly describes how this occurs:

> Socioeconomic factors such as employment status, level of education, family situation, etc., appear on the surface as neutral criteria. They are considered as such by the legal system. Yet they can conceal an extremely strong bias in the sentencing process. Convicted persons with steady employment and stability in their lives, or at least prospects of the same, are much less likely to be sent to jail for offences that are borderline imprisonment offences. *The unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail. This is systemic discrimination.*
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> (T. Quigley, "Some Issues in Sentencing of Aboriginal Offenders", in R. Gosse, J. Y. Henderson and R. Carter, eds., *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (1994), 269, at pp. 275-76)

*Sentencing judges, as front-line workers in the criminal justice system, are in the best position to re-evaluate these criteria to ensure that they are not contributing to ongoing systemic racial discrimination.*

[My italicization added]

[180] I agree that these general themes identified as relevant in relation to the sentencing of Aboriginal offenders, in proper cases, are capable of application to the case of the young male members of the ANS community.[51]

[51] These comments bear similarity to those of Chief Judge Williams in *Anderson* at paras. 94-5.

[181] As I have noted earlier, I am not satisfied that "current sentencing practices" do not further the codified objectives of sentencing.

[182] On the other hand, it is accurate to say that there is an aspect of systemic discrimination at work here, arising from Mr. Steed's status as an ANS community member and the complex factors that have disadvantaged him.

[183] His dysfunctional start in life, and the normalization of criminality during his formative years, understandably led to his own adoption of patterns of behaviour that flowed easily from those influences around him.

[184] The IRCA has given voice to his potential for rehabilitation.

[185] He remains a relatively young man capable of rehabilitation. During his lengthy period of pre-sentence incarceration, it appears he has (as one would "expect" - although speaking of an offender on bail, per Saunders JA at para. 37, in *R v Chase*, 2019 NSCA 36) conducted himself in an incident-free manner. Correctional Services staff have noticed, spoken of, and testified to, his positive behaviour over the last two years he has spent in custody. His history suggests that *only* if he can dis-associate himself from the negative influences that have thus far driven his conduct in the community, will he realistically be able to rehabilitate himself. This raises the concern about whether he *still* needs to be separated from

society in the interest of the protection of society. At this point, it is reasonable for him to be released in the near future – to not do so may very well undermine his rehabilitative potential.

[186] Mr. Steed has argued that the IRCA and PSR are a basis for the court to exercise restraint in sentencing him, and that his ANS status and circumstances allow the court to view these factors as mitigating, when considering "the degree of responsibility of the offender".

[187] Although in relation to Aboriginal offenders, he endorses an application of the court's comments in *R v Ipeelee*, [2012] 1 SCR 433 at paras 73-5 that there are two ways in which such information may impact a sentencing outcome:

> "first, systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness… [and secondly] the types of sanctions which may be appropriate – bears not on the degree of culpability of the offender, but on the effectiveness of the sentence itself…
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> …
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> Section 718.2(*e*) does not create a race-based discount on sentencing. The provision does not ask courts to remedy the over-representation of Aboriginal people in prisons by artificially reducing incarceration rates. Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case. …"[52]

[52] Cited by Wood, J., as he then was, in the case of an ANS/Aboriginal offender: *R v Perry*, 2018 NSSC 16.

[188] Bearing in mind the guidance from the Supreme Court of Canada at paragraphs 73 – 75 in *Ipeelee*, which I find can be transposed to sentencings of young male members of the ANS community who commit serious crimes - such as Mr. Steed - I have therefore also factored that mitigating aspect into my sentencing conclusion in his case.[53]

[189] I conclude that a proper and fit sentence is as follows:

1. s. 95(1) - 3 years
2. s. 117.01 x 3 - 12 months consecutive on each count (but concurrent to each other) – i.e. 12 months consecutive
3. s. 94(1) - 3 years concurrent
4. s. 91(2) x 2 - 2 years concurrent (i.e. 2 years on each count concurrent)[54]

[53] I note that Mr. Steed's present offences involved simple possession of the firearm and weaponry, un-associated with other crime; his previous firearms -related offences included his handling thereof during a mental health crisis inside his own home (at 17 years of age), and simple possession of the .22 calibre firearm on his residence premises (at 19 years of age). Except for the robbery convictions on June 28, 2011(at 15 years of age), his criminal record reflects either non-violent or low-grade of violence offences. He has only one prior s. 95(1) offence which arose when he was a *youth* – February 7, 2013. I also bear in mind that the 5-year minimum mandatory sentence for a recidivist s. 95 offender was struck down in *Charles*. Thus, the Supreme Court of Canada contemplated reasonable hypotheticals for which the 5-year minimum would be grossly disproportionate. This is his first s. 95(1) offence as an adult.

[54] Although the s. 91(2) *CC* sentences could be ordered to be consecutively served, here the s. 117.01 *CC* (and 94) offences capture the substance of those s. 91(2) offences, and they are therefore properly ordered to be served concurrently in this case – see for example, *R v Lin*, 2020 ONCA 768 at paras. 29-30 per Nordheimer, JA.

5. s. 108(1)(b) *CC*- 18 months concurrent

[190] Total sentence is 4 years imprisonment.

[191] He is entitled to a pre-sentence remand credit for the 701 days he has been in custody since March 27, 2019.

[192] I am satisfied that pursuant to s. 719 (3.1) CC the credit should be on a 1 day served is equivalent to a 1.5-day sentence for *the first* 350 days x 1.5 = 525 days.

[193] Mr. Steed has argued that he should have an even greater or enhanced credit for that time he spent in custody under "harsh conditions", largely occasioned by the presence of Covid 19 in Nova Scotia since mid-March 2020 -namely, the reduction in programming available, liberty (within the correctional centres where he was housed – including less outdoor time; less mingling among inmates; less contact with family and friends etc.), and the occasions of "lockdowns" etc.; and a significant assault that caused serous injury to his eye, some symptoms of which are ongoing.

[194] I am satisfied that the credit should reflect on a one day served is equivalent to a two-day sentence for *the following* 351 days x 2 = 702 days.[55]

[195] So calculated, that potential credit in total is 1227 days or I will say 41 months. I will credit Mr. Steed with having served the equivalent of 3 years and 5 months in custody.

[196] When this credit is deducted from the four-year sentence, it leaves an effective sentence of 7 months to be served by Mr. Steed. Since that effective sentence is less than two years, s. 731(1)(b) CC permits a period of probation to follow.

[197] I impose two years' probation thereafter, which in addition to the statutory conditions (s. 732.1 CC) will include those shown contained in the attached Appendix "B".

[198] I also grant the following ancillary orders:

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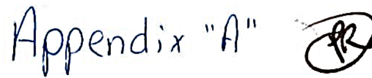
[55] Ms. Dominix his CMO, has recounted to Ms. Hodgson and Ms. Keeler (PSR author) his experience at the Central Nova Scotia Correctional Facility ("Burnside"). He displayed very positive behaviour while there. The PSR and IRCA references his positive efforts at rehabilitation as also confirmed by Laura Langille, Clinical Social Worker at Burnside. Superintendent Adam Smith, CNSCF testified about the conditions during Mr. Steed's being in custody there, as did Mr. Steed. I find no conflict in their evidence – but Mr. Steed's deserves more weight as it expresses, *inter alia*, the effects that Covid 19 and the assault had upon him personally. He has endured significantly more difficult conditions of incarceration when all is tolled.

1. s. 491 *CC* forfeiture order of all the weapons, ammunition, and firearm seized by police

2. s. 109(3) lifetime prohibition order in relation to all the offences committed by Mr. Steed except those under sections 108 and 117.01 *CC*

3. Regarding the victim surcharge, Mr. Steed has no present ability to pay, and has dependents, consequently I find it would be an undue hardship for him to pay - therefore I exempt him under s. 737(4) CC.

Rosinski, J.




**IN THE SUPREME COURT OF NOVA SCOTIA**

BETWEEN:

CRH 490969

**HER MAJESTY THE QUEEN**

-and-

**JAVON STEED**

ORDER

**BEFORE THE HONOURABLE JUSTICE PETER ROSINSKI:**

**WHEREAS** on September 18, 2020 Javon Steed pled guilty to various offences in the Supreme Court of Nova Scotia;

**AND WHEREAS** Javon Steed has applied to this court for an order that would require the preparation of a cultural assessment report regarding his African Nova Scotian background and concerning cultural and racial factors which are suggested to be systemic in nature, but may also have individual impacts on him;

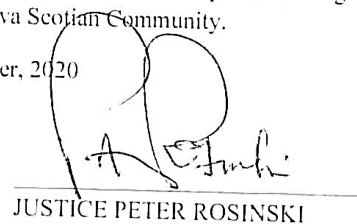
**AND WHEREAS** the Court was satisfied that it is appropriate to order the requested cultural assessment report;

**NOW THEREFORE IT IS ORDERED:**

The Province of Nova Scotia will be responsible to effect the timely investigation of the circumstances of, and creation of a cultural assessment report regarding, Javon Steed which report shall be filed with the Court (copies to be simultaneously provided to counsel herein) as soon as practicable;

Such cultural assessment report will examine the role played by Mr. Javon Steed's cultural and racial background with respect to the criminal offence herein, by a qualified individual, having specialized knowledge education experience in the completion of such reports relating to systemic and background factors affecting the African Nova Scotian Community.

DATED at Halifax, Nova Scotia, this 18th day of September, 2020



JUSTICE PETER ROSINSKI

Appendix "B" (PR) 1 of 4

Re- CRH # 490969 Halifax-Recommendations (**which are accepted by the Court and made part of the conditions of the Probation Order**) regarding Javon Dominick Steed-DOB January 22, 1996-sentencing in Nova Scotia Supreme Court February 26, 2021 (taken from an Impact of Race and Cultural Assessment report authored by Natalie Hodgson and supervised by Robert Wright, dated December 15, 2020).

What services or resources should be made available to Javon Steed to support his rehabilitation and reintegration given his unique history and status as an ANS?

Javon Steed has a number of needs that will require access to specific services whether he is incarcerated for a time or serves his sentence in the community. All of the supports and resources offered to him should be informed by his cultural position.

I offer the following specific recommendations:

- Javon Steed would benefit from **continued counselling**. Specifically, a Black counsellor. Javon Steed has been demonstrating that he responds well to counselling. He seems to be aware that it is helping change him. This progress would only be heighted if he were able to access the services of an African Nova Scotian, African Canadian, or Black counsellor who can also identify with his lived experiences. A counsellor that is experienced with **trauma-informed treatment and specifically understands how Javon Steed's trauma has affected him given his race and culture.**

- It is recommended that Javon Steed **participates in a Black Men's Wealthness group**. The Nova Scotia Brotherhood offers programs such as this in the community. Due to covid restrictions, it is unclear what their group supports look like. It is likely online or restricted at present.

- Javon Steed would benefit from a Music Therapy group. He really enjoyed the day he participated in the Rap program at Central Nova Scotia Correctional Facility. He found it therapeutic. This could be embedded within the Black Men's Wealthness group.

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(PR)

- Javon Steed has had limited opportunities to have strong, pro-social mentors in his life. He could benefit from having a relationship with **a mentor or model. Preferably a man. A man from the ANS community. 902 ManUp or IMOVe** would be a service that may be helpful to him if he were in the community.

- Javon Steed demonstrates determination to be successful in the community. His 5-year plan is well thought out and attainable. But it lacks concrete steps and challenges. **Working with a career counsellor would offer assistance to his plan's achievement.** A career counsellor **with knowledge of employment resources for people of African descent. Opportunities for funding, sponsorship and other services through Black organizations such as Black Business Initiative (BBI).**

**1- Additional conditions of probation**:

i) You must report **in person** to a Probation Officer at the Dartmouth, Nova Scotia offices within 5 days from the date of expiration of your sentence of imprisonment, and thereafter, as and when directed to do so, by your Probation Officer;

ii) you must remain within the Province of Nova Scotia unless you receive written permission to leave the Province from your Probation Officer, in advance of any travel;

iii) Within 5- days from the date of expiration of your sentence of imprisonment, you must have arranged for an ongoing fixed- address residence, where you will reside;

iv) you must advise your Probation Officer in writing of the address of that fixed-address residence no later than 5 days after you begin to live there; you must live there until you have a new fixed-address residence, and in that case you must advise your Probation Officer in writing within five days of leaving your prior residence, of the address of your next fixed-address residence;

v) Within 30 days after your sentence of imprisonment is served and you begin living in the community, you must in writing advise your Probation Officer of a telephone number where you can be reliably reached on short notice (and if you have regular access to, or occasional use of, any mobile telephone, you must immediately advise your probation officer of those telephone numbers, and you must immediately advise your probation officer if you begin to have

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regular access to, or occasional use of, any mobile telephone(s) with different telephone number(s));

vi) you must abide by a curfew from 11 PM until 6 AM the following day, 7 days a week with the following exceptions:

-When dealing with a medical emergency or medical appointment involving you, a member of your household, or any children in your custody or care;

-With the prior written approval of your Probation Officer;

-When attending Afrocentric therapy interventions or any other treatment or counselling programs which your Probation Officer knows about in advance;

-When attending literacy and education interventions, including any reading assessment which your Probation Officer knows about in advance;

-When receiving mentorship which your Probation Officer knows about in advance;

-When you are performing community service in the African Nova Scotian community which your Probation Officer knows about in advance, all travel to and from the destination by a direct route;

-When at regularly scheduled employment, which your Probation Officer knows about in advance, all travel to and from the destination by a direct route;

vii) You will come to the entrance of your fixed-address residence should police officer(s) or your Probation Officer attend to ensure you are following your curfew;

viii) You are to perform 150 hours of community service in the African Nova Scotian community, arranged with your Probation Officer and to be completed by June 30, 2022;

ix) As directed by your Probation Officer, you are to attend Afrocentric therapy interventions or other counselling or treatment, preferably from an African Nova Scotian practitioner to address the significant trauma in your life;

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PR
Feb 26/21.

x) As directed by your Probation Officer, you are to attend literacy and education interventions with an Afrocentric focus as well as a reading assessment;

xi) As directed by your Probation Officer, you are to seek out, and actively be engaged in the process of, mentorship with 902 Man Up, and/or IMOVe

xii) As directed by your Probation Officer, you are to attend and fully participate in any other assessment, treatment and counselling;

xiii) you must not possess, take or consume, any controlled substance as defined in the *Controlled Drugs and Substances Act*, except in accordance with a physician's prescription for you, or a legal authorization;

xiv) you are not to own, possess, or have on your person, anything that is defined as a "weapon" in section 2 of the Criminal Code of Canada;

xv) you are directed to return and report back to this Court on August 26, 2021 at 10:30 AM. I direct that Correctional Services provide a written update to me on your progress, which shall be provided in writing to the Court and Mr. Steed by no later than 12 noon August 15, 2021.

The court strongly recommends that Mr. Steed be supervised by an African Nova Scotian Probation Officer.