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CANADIAN SENTENCING DIGEST QUANTUM SERVICE Nadin-Davis & Sproule Release No. 8, July 2024
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This release brings you a wealth of new case law digests covering a wide range of offences, with an emphasis on updates to Chapter 4 (Offences Against the Criminal Code). The following are of particular interest and importance:

- **OFFENCES AGAINST THE CRIMINAL CODE—OFFENSIVE WEAPONS—POSSESSION OFFENCES—Possession of Weapon Obtained by Commission of Offence**—The accused, aged 25 at the time of the offences and 28 at sentencing, pleaded guilty to possession of a loaded, prohibited firearm, violating a weapons prohibition order, possessing cocaine for the purpose of trafficking, contrary to the *Controlled Drugs and Substances Act* (CDSA), and violating his release order. The Crown sought a total sentence of five years and three months in the penitentiary. The defence sought 4 years. The accused was under 7-year and 10-year prohibition orders to have no weapons in his possession and on a release order to have no contact with his girlfriend and to have no weapons. He went to his girlfriend's house with a loaded, sawed-off rifle, with fentanyl in his pocket, and with cocaine worth between \$1,500 and \$1,700 on the street, and its packaging materials, in his backpack. This was street-level dealing, but a significant amount. He also had three outstanding warrants for his arrest. There were five children in the house, between the ages of 1 and 16. He got into a fight with his girlfriend and threw things around the house. Police were called. The accused was Indigenous, an Ojibway man from Sagkeeng First Nations.

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- His family had been displaced from each other, their lands, language, and culture for several generations, resulting in family violence, drug and alcohol addiction, premature and violent deaths, which the court noted were severe traumas associated with the legacy of colonialism. The accused told the author of the PSR that he sold drugs to support his own habit and to buy food. He carried the gun and knives for protection while trafficking. The accused might have had fetal alcohol spectrum disorder (FASD) but was never assessed. The court concluded that his offending conduct and circumstances of his life were consistent with such a diagnosis. He was in a Learning Assisted Classroom (LAC) for the majority of his education. He had a youth and adult criminal record. His misuse of alcohol and drugs had been a steady negative influence since his early teens and his offences were usually committed while he was intoxicated. The aggravating factors included the warrants, prohibition and release orders violated by the accused; the offence took place in a domestic context; and five children were present. The mitigating factors included the guilty plea; the accused accepted responsibility for the offences; and had regret. Although the offences were serious the accused's moral culpability was attenuated by "the reality of carrying five generations of trauma". There was some hope for restoration. Thus, a tough sentence must be imposed, with a restorative aspect. Devine Prov. J. relied heavily on his previous decision in *R. v. Harper*, which involved an Indigenous offender who committed serious offences. In assessing the Gladue factors, the court reviewed the worsening issue of overrepresentation of Indigenous people in the justice system, noting that in Manitoba and Saskatchewan, admissions of Indigenous peoples into federal custody reached 75 percent. The court also noted that sentencing judges have the power to influence the treatment of Indigenous offenders in the justice system. Denunciation and deterrence were the primary sentencing objectives. Ipeelee is a blueprint for sentencing Indigenous offenders. The court discussed proportionality generally and within the context of sentencing this young, Indigenous man. The court considered that a restorative sentence was realistic. Amongst other factors including the accused young age, the PSR had indicated he was a suitable candidate for community supervision. While a significant jail sentence was necessary to express the sentencing objectives, reducing the sentence from over 5 years and adding a lengthy probation period would provide the best possibility for the long-term protection and safety of the community. The court adjusted the consecutive sentences to concurrent to allow the accused to serve his sentence in a provincial facility. The court imposed a sentence of 4 years' imprisonment for possession of the loaded gun; one year, concurrent, for violating the gun prohibition; one month, concurrent, for breach of the release order; and 18 months, concurrent, for the trafficking charge under the CDSA. The court also imposed 2 years of probation. The sentence was reduced by the 733 days the accused spent in presentence custody, leaving just under two years for the sentence going forward: *R. v. Mann*, 2023 CarswellMan 450 (Man. P.C.).
- **OFFENCES AGAINST THE CRIMINAL CODE—OFFENSIVE WEAPONS—POSSESSION OFFENCES—Possession of Weapon or Imitation for Purpose Dangerous to Public Peace**—The accused was found guilty after a judge alone trial of nine offences including aggravated assault, numerous firearm offences, and breach of orders. He shot the victim in the face outside a bar where the two and others had been for several hours and where several altercations had occurred during the course of the evening. The victim suffered a massive trauma to his brain with a hemorrhage and fragmented skull. He survived with permanent injuries. The motive for the shooting remained unknown. Later that day the police seized a loaded Taurus PT 709 semi-automatic handgun from the accused's car. Later, the police found cocaine with a street value estimated at \$11,500, cash and drug paraphernalia. The accused was at large on a recognizance and was under a lifetime order prohibiting possession of firearms. The accused was born in South Sudan and had had a dif-

difficult life. He was a child soldier. He used guns in combat regularly for almost five years, starting when he was eight years old. He described his experiences as terrifying and chaotic. He was in jail and then a refugee camp in Ethiopia before coming to Canada as a refugee at age 15. He had many challenges in adjusting to life in Canada and experienced anti-Black racism. He started drinking heavily at age 17 when he was living on the streets in Calgary. He obtained his grade 12 diploma at age 21 when he moved to Manitoba and paid off his student loan in a year. He worked in construction. He and his girlfriend had two children. He became a self-taught securities trader. He also became a heavy cocaine user and a gambler. He had some success beating these addictions. He moved to Whitehorse for work after he and his girlfriend broke up. Throughout, he experienced racial slurs and loss of employment or denial of jobs which he attributed to racism. The aggravating factors included that the accused shot the victim at close range in the face; the gun was discharged in a public place; the accused committed the offences while subject to a lifetime firearms prohibition; and the accused had a criminal record with relevant convictions. The mitigating factors included the accused's background as a child soldier and challenging circumstances as a teenager, in addition to his subjection to racial discrimination; and the accused had taken many treatment programs and counselling while in prison. The primary sentencing objectives are denunciation and deterrence in the circumstances of firearms offences. Duncan C.J.S.C. considered the important social context (both Canadian and Sudanese) that allowed for an informed assessment of the accused's background and potential for rehabilitation. The judge took judicial notice of the fact that systemic anti-Black racism exists in Canada, including in Whitehorse. He accepted that the accused continued to be affected by anti-Black racism throughout his life, that his experience as a child soldier in Sudan and his inability to obtain counselling for these experiences had affected his life. There is no requirement for the offender to show a direct causal link between the offence and the negative effects of anti-Black racism in order for those circumstances to affect moral blameworthiness. The court noted that the fact that the accused had been able to overcome many of his hardships by becoming educated, gainfully employed, financially stable, and no longer addicted to alcohol or cocaine, demonstrated his motivation, initiative, determination, and intelligence, and thus, his capacity for rehabilitation. The range of sentence for aggravated assault offences in the Yukon is from 16 months to 6 years. The range of sentence for discharge of firearm with intent to wound, often combined with aggravated assault, is from 7 to 10 years. The court chose to impose a sentence for the most serious offence first, the discharge of a firearm with intent to wound, and for the related gun offences the sentences were to be concurrent. The court imposed a total sentence of 10 years' incarceration including: for discharging a firearm with intent to wound 8.5 years; 8 years concurrent for aggravated assault; 1 year concurrent for occupying a vehicle in which the accused knew there was a prohibited firearm; 2 years concurrent for possession of a loaded prohibited firearm without authorization or licence; and 18 months consecutive for possession of cocaine for the purpose of trafficking: *R v. Tuel*, 2023 CarswellYukon 105 (Yuk.S.C.).

- **YOUTH CRIMINAL JUSTICE ACT—SEXUAL OFFENCES, PUBLIC MORALS AND DISORDERLY CONDUCT—OFFENCES TENDING TO CORRUPT MORALS—Child Pornography**—The accused, aged 15, pleaded guilty to an offence involving online child pornography. The accused covertly took photographs of himself and two complainants, aged 7 and 8 years old. The complainants did not know they were being photographed and could not be identified in the photos. The accused later uploaded the pictures to a website that the police were monitoring for pornography. The accused was arrested. The accused was Indigenous, a member of the Samson Cree Nation. The psychological assessment put the accused's IQ in the borderline range. The personality test disclosed no mood disorder, depression, or psychosis. It found the accused to be adventurous, inclined to risk-taking behavior and impulsivity. He had a low self-concept, and was likely inclined to frustration, to experience challenges

with anger regulation, and to use substances to self-medicate. Although FASD was suspected, it was not diagnosed. There may have been domestic violence in the accused's background. Both his parents had passed away and he was being cared for by his grandparents. There was a significant historical connection with colonialism in the accused's ancestry. There were generational effects connected to his ancestors' experiences at residential schools, although they never spoke of it. There was violence, gangs, guns, substance abuse, and criminal activity in the accused's home community for much of his life. The accused described that friends and family members had untimely deaths resulting from violence, suicide, and the usage of drugs and alcohol. The accused's best friend had recently died by suicide. The accused used alcohol occasionally and marijuana regularly, as did his friends. His school attendance was sporadic. The court reviewed the sentencing principles under the *Youth Criminal Justice Act* and the principles in *R. v. Friesen*. The YCJA is predicated on a presumption of reduced moral culpability because of the offender's age. Cognitive impairment can be another factor that reduces moral culpability. Both these factors applied to the accused. The accused's moral culpability was further mitigated as it was clear that he had been substantially affected by the trauma and by poor social and economic conditions in his community. Regarding the seriousness of the offence, the harm done to the victims was on the lower end of the harm spectrum. The court found that the best chance of rehabilitation and reintegration into society was for the accused to connect to his culture and his community, to connect to elders and to local community services sensitive to the specific history of trauma experienced by him and other members of the Samson Cree Nation. Lloyd J. found the Crown's proposed sentence (twenty-four months' probation) to be excessive while the defence's (a twelve-month conditional discharge) was inadequate. The court imposed a sentence of a fourteen months' conditional discharge: *R. v. CS*, 2024 CarswellAlta 140 (Alta. C.J.).

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