COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Mero,*
2021 BCCA 399

Date: 20211025
Docket: CA46205

Between:

Regina

Respondent

And

Robert Michael Mero

Appellant

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Butler
The Honourable Mr. Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated July 4, 2019 (sentence) (*R. v. Mero*, 2019 BCSC 1254, Prince George Docket 43816).

Counsel for the Appellant:	K. Merrigan N.J. Preovolos
Counsel for the Respondent:	E. Laurie
Place and Date of Hearing:	Vancouver, British Columbia September 22, 2021
Place and Date of Judgment:	Vancouver, British Columbia October 25, 2021

Written Reasons by:
The Honourable Mr. Justice Marchand

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Butler

Summary:

The appellant is Indigenous. He was convicted of possession of a loaded restricted firearm and possession for the purpose of trafficking. The possibility of the appellant obtaining a Gladue report was raised, but no information related to the appellant's heritage was provided to the judge. The appellant appeals from the 40-month and eight-month custodial sentences imposed. Both the appellant and the Crown seek to adduce fresh evidence, including a Gladue report. The appellant's position is that the judge failed to consider Gladue. Held: Appeal allowed. The fresh evidence meets the Palmer test and is admitted. Sentencing judges have a statutory duty to consider Gladue factors. Failure to do so is an error in principle and renders a sentence unfit. The Gladue report points to significant challenges faced by the appellant that reduce his moral blameworthiness. In the circumstances, a penitentiary sentence is unfit. Rather, a conditional sentence order of two years less a day on the weapons charge and 12 months probation on the trafficking charge is proportionate and better achieves the sentencing goals of denunciation, deterrence and rehabilitation while meaningfully addressing the overrepresentation of Indigenous people in custody. Moreover, these sentences are in line with sentences imposed for similar offenders convicted of similar crimes in similar circumstances.

Reasons for Judgment of the Honourable Mr. Justice Marchand:

Introduction

[1] Robert Mero is an Indigenous offender. On October 19, 2018, he was convicted of drug trafficking and weapons offences. Although his trial counsel (who was not his counsel on appeal) suggested he might seek an adjournment to obtain a *Gladue* report, the sentencing hearing proceeded without one. During the sentencing hearing, neither Mr. Mero's trial counsel, Crown counsel (who was not Crown counsel on appeal) nor the judge addressed Mr. Mero's Métis heritage, how that may have played a role in his offending or what alternative sentencing processes or sanctions might be appropriate for Mr. Mero as an Indigenous offender.

[2] On July 4, 2019, Mr. Mero was sentenced to concurrent eight-month and 40-month sentences in relation to his drug trafficking and weapons convictions. The judge also made ancillary weapons prohibition and DNA orders. Mr. Mero's conviction appeal was dismissed: *R. v. Mero*, 2020 BCCA 331. He now appeals from sentence.

[3] Mr. Mero submits the judge erred in failing to consider his status as an Indigenous person as required by s. 718.2(e) of the *Criminal Code,* R.S.C. 1985, c. C-46 [*Code*]. Following the onset of the COVID-19 pandemic, he also submits his sentence ought to be reduced to "account for the serious threat COVID-19 poses to him due to his lung disease". He seeks to adduce fresh evidence in the form of a *Gladue* report and a medical report to support his appeal.

[4] The Crown acknowledges the judge erred in principle in failing to consider Mr. Mero's Indigenous status. The Crown submits, however, the judge properly considered information concerning Mr. Mero's difficult personal circumstances. The Crown maintains the judge imposed a fit sentence given the gravity of Mr. Mero's offences and his degree of culpability.

[5] The Crown does not oppose the admission of Mr. Mero's *Gladue* and medical reports as fresh evidence on appeal.

[6] To address concerns raised by Mr. Mero's medical report, the Crown brings its own application to adduce fresh evidence concerning Correction Services Canada ("CSC") health care and COVID-19 protocols. Mr. Mero does not oppose the admission of the Crown's fresh evidence.

Background

[7] On January 8, 2016, the police executed a search warrant at Mr. Mero's residence in Prince George. They located a loaded, restricted firearm (a .38 calibre pistol), ammunition, 23 grams of heroin, "score sheets" and a bullet-proof vest. Mr. Mero was not authorized to possess the firearm. The heroin had a street value of about $5,500.

[8] Following trial, on October 19, 2018, Mr. Mero was convicted of one count of possessing a controlled substance for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 [*CDSA*], and one count of possessing a loaded, prohibited weapon contrary to s. 95(1) of the *Code*. At the request of Mr. Mero's trial counsel, the judge ordered a pre-sentence report ("PSR").

[9] The PSR was completed on December 13, 2018. It detailed Mr. Mero's difficult personal history and current health issues. It did not mention his Métis heritage.

[10] On December 18, 2018, Mr. Mero's case was adjourned to May 21, 2019, for sentencing. On that day, Mr. Mero's trial counsel advised the court of his intention to bring an application to stay the proceedings for an alleged breach of his s. 11(b) *Charter* right to be tried within a reasonable time. Mr. Mero's case was further adjourned to June 26–27, 2019, for the delay application and, depending on the outcome of that application, sentencing.

[11] The judge heard the parties' delay submissions on the morning of June 26, 2019. The judge indicated he would return with his decision at 2:00 that afternoon. Mr. Mero's trial counsel then informed the judge that Mr. Mero had an upcoming specialist appointment and requested an adjournment to obtain a medical report. Mr. Mero's trial counsel also requested an adjournment to obtain a "very quickie" *Gladue* report. The judge indicated an openness to an adjournment in relation to the medical appointment and said he would hear from Mr. Mero's trial counsel on the *Gladue* issue "at 2:30."

[12] When court reconvened on the afternoon of June 26, 2019, the judge dismissed Mr. Mero's delay application. The judge found significant "exceptional" delay had been caused by the sudden illness of Mr. Mero's previous counsel and further delay was attributable to the lack of availability of Mr. Mero's trial counsel.

[13] The parties then made further submissions concerning Mr. Mero's requested adjournment to obtain a medical report. The judge expressed concern about the passage of time since conviction and noted the PSR contained details regarding Mr. Mero's lung disease. The judge adjourned overnight to allow Mr. Mero's trial counsel to obtain additional information from Mr. Mero concerning his medical condition. There was no further discussion of a *Gladue* report.

[14] On June 27, 2019, the parties made their sentencing submissions and then made further submissions on an adjournment for Mr. Mero to obtain a medical report. Mr. Mero's trial counsel read a brief note he had received from Mr. Mero's specialist indicating that "time in jail would pose a danger to his overall health". Mr. Mero submitted that he needed an adjournment to obtain a "proper" report. Neither party raised Mr. Mero's Indigenous heritage or made any reference to *Gladue*. The judge made no *Gladue*-related inquiries. The judge adjourned proceedings to July 4, 2019.

[15] On July 4, 2019, the judge dismissed Mr. Mero's adjournment application. The judge noted that the PSR had been prepared six months earlier and contained detailed information concerning Mr. Mero's medical condition. The judge was critical of Mr. Mero's trial counsel for failing to present any medical evidence "despite having six months [to do so]." The judge commented that correctional facilities often have sick inmates and those inmates receive appropriate medical care. The judge concluded:

> [Mr. Mero's trial counsel] has shown, effectively since the beginning of this trial, an ability to delay matters on behalf of his client. This [adjournment application] is nothing more, in my view, than a further attempt to delay the inevitable.

[16] The judge then imposed sentence.

Reasons for Sentence

[17] The judge's reasons for sentence were relatively brief.

[18] After summarizing the circumstances, the judge identified the sentencing principles "at play" to be denunciation, deterrence and rehabilitation.

[19] The judge specifically denounced Mr. Mero's involvement in the drug underworld, the associated violence and "the feeding of addiction in the community." The judge endeavoured to send a clear message to Mr. Mero and others "that the courts consider the use of guns and the sale and distribution of drugs as scourges on society."

[20] The judge then noted Mr. Mero was 34 years old with a dated criminal record that made him "akin to a true first-time offender rather than a hardened dangerous criminal." The judge also identified that Mr. Mero had a supportive family, had been free of drugs and alcohol for two years, had a means of dealing with his significant personal debt and had a 50 to 90 per cent loss of lung capacity that "should encourage him towards his recovery from drug dependence." As a result, the judge concluded that Mr. Mero had "a good prospect for rehabilitation."

[21] The judge summarized the positions of the parties. The Crown was seeking a jail sentence of four years comprised of at least three years for the weapons offence and six months to one year for the drug trafficking offence. Mr. Mero suggested a suspended sentence with three years of probation with various conditions identified in the PSR.

[22] The judge then recounted Mr. Mero's personal circumstances, highlighting that "[h]is early life was nothing but tragic." In particular, the judge accepted that Mr. Mero's father was often away at work, leaving Mr. Mero at home with a mother who had significant mental health issues. As a result, Mr. Mero left home at about age 12, "living life by his own wits, which not surprisingly led to his early involvement in drug sales."

[23] Given a ten-year gap in his record, the judge concluded Mr. Mero had been able to legitimately support himself for significant periods of time. The judge accepted Mr. Mero's explanation that he fell back into drug sales at a time when his "ill health led to a loss of employment." While not amounting to "moral justification," the judge also accepted that Mr. Mero's own addiction was a "significant part" of his motivation to sell drugs.

[24] On the drug trafficking offence, after noting Mr. Mero's addiction, his recovery and the relatively modest amount of drugs at issue, the judge accepted the Crown's range of sentence and imposed a custodial sentence of eight months' imprisonment.

[25] Regarding the weapons offence, the judge referred to a number of sentencing authorities identified by the Crown. Relying on *R. v. Holt*, 2015 BCCA 302, the judge concluded that "the starting range for lower-level criminals found to be in possession of loaded restricted firearms is three years." None of the cases relied on by the Crown and cited by the judge involved an Indigenous offender.

[26] In view of the drugs, score sheets, ammunition and bullet-proof vest found in Mr. Mero's home, the judge concluded the gun was associated with some level of criminal activity "above the lowest of low levels." As a result, the judge imposed a custodial sentence of 40 months on the weapons count.

[27] Given his status as essentially a first-time offender, the judge was persuaded it was appropriate to show Mr. Mero a "degree of leniency." Therefore, after finding the offences were part of a single criminal enterprise, the judge determined the sentences would be served concurrently.

[28] The judge noted that Mr. Mero had not provided any authority in support of his submission for a suspended sentence. The judge did not consider Mr. Mero's ill health to be so exceptional as to justify a departure from the usual range of sentence. The judge expressed confidence that Mr. Mero would receive appropriate medical care while incarcerated.

[29] Finally, the judge made ancillary weapons prohibition and DNA orders under ss. 109 and 487.051 of the *Code*.

[30] The judge made no reference to Mr. Mero's Indigenous heritage or *Gladue* factors.

The Fresh Evidence Applications

Legal Principles

[31] Under s. 683(1) of the *Code*, an appeal court may accept certain types of "fresh evidence" where the court considers it would be in the interests of justice to do so.

[32] The leading case on fresh evidence is *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775, 1979 CanLII 8. Proposed fresh evidence must be admissible and meet the following criteria:

1. in spite of due diligence, the evidence could not be adduced at trial;
2. the evidence is relevant;
3. the evidence is credible; and
4. the evidence could be expected to have affected the result.

[33] In criminal cases, the due diligence criterion is often relaxed to avoid a miscarriage of justice: *R. v. Aulakh*, 2012 BCCA 340 at para. 57.

[34] On sentence appeals, there is some flexibility to admit fresh evidence to address events that have occurred between the time of sentencing and the time of the appeal. Appeal courts cannot ignore the human realities of changed circumstances, but also cannot jeopardize the integrity and finality of the criminal process by routinely deciding sentence appeals on the basis of after-the-fact developments. Given the wide variety of possible circumstances that may arise after sentencing, there are no "hard and fast" rules. When considering post-sentencing changes in circumstances, appeal courts must balance competing values to ensure the appeal process is "both responsive to the demands of justice and respectful of the proper limits of appellate review": *R. v. Sipos*, 2014 SCC 47 at paras. 30–31.

Gladue **Report**

[35] The *Gladue* report is dated September 23, 2020. It contains general information about the Métis Nation and identifies the following "*Gladue* factors" that commonly affect Métis people:

- Intergenerational impacts of colonialism and displacement.
- Loss of autonomy due to discriminatory policies (eg. Scrip Policy for Métis, the *Indian Act*).
- Racism and systemic discrimination against Indigenous peoples.
- Legacy of gendered discrimination in *Indian Act* and related policies.

- MMIWG.
- Loss of parenting skills and familial composition.
- Normalization of violence and neglect.
- Substance abuse/Addiction, Mental Health issues.
- Lack of opportunity or isolation of communities.
- Domestic Violence from intimate spousal abuse.
- High rates of unemployment and poverty.
- Low levels of educational attainment.
- Loneliness, Abandonment and Dislocation from culture, community and family.
- 60s Scoop.
- Forced attendance at Indian Residential School of immediate family members.
- The over-representation of Indigenous peoples in the criminal justice systems.
- Institutionalization.

[36] The author of the report indicates that many of these factors are present in Mr. Mero's case.

[37] According to the *Gladue* report, Mr. Mero and his father, Robert Mero Sr., are "card-carrying" citizens of Métis Nation BC. Mr. Mero's mother is non-Indigenous. In his childhood and again more recently, Mr. Mero has maintained a meaningful connection to his Métis community and culture.

[38] Mr. Mero was born and mostly raised in Quesnel. Sadly, his mother suffered from schizophrenia and bipolar disorder. Amongst her delusions was the belief that Mr. Mero was "devil spawn." Mr. Mero's father spent significant time working away from home. Particularly during these times, Mr. Mero's mother neglected and was severely emotionally abusive to him.

[39] Mr. Mero has learning difficulties and ADHD, both of which contributed to struggles at school and conflict with peers. Mr. Mero's father was against his being medicated.

[40] Mr. Mero began using alcohol at age nine, marihuana at age 12, and cocaine and crack cocaine at age 15. He quit school at age 12, left home and eventually ended up living on the streets. Mr. Mero began looking for social connections with people who shared similar life experiences, fell in with an older crowd and began selling drugs. By the time he was 19, he also came into conflict with the law, accumulating a number of convictions and custodial sentences. According to his criminal record and PSR, Mr. Mero accumulated multiple convictions for drug trafficking and administration of justice offences in 2005 and 2006.

[41] Mr. Mero was free of drugs and alcohol for 12 years from his "late teens to early adulthood." During this time, he married and worked in construction. He is a third-year journeymen scaffolder and has experience in welding, dry-walling and carpentry.

[42] At some point, Mr. Mero developed a chronic and serious respiratory condition, "bronchiectasis with mucus plugging." In 2015, he was prescribed an opioid for his lung condition. When that prescription was discontinued, he sought out street drugs and became heavily addicted to heroin. At the time the *Gladue* report was prepared, Mr. Mero had been free of drugs and alcohol for two years. He was on a methadone maintenance program and had reduced his dose over time.

[43] As a result of his lung disease, Mr. Mero is unable to work in construction. Further, relying on information in the medical report, the *Gladue* report writer indicates Mr. Mero is considered "susceptible" and at "very high risk" for COVID-19 which, if contracted, would present a higher risk of mortality than for the average population.

[44] At the time the *Gladue* report was prepared, Mr. Mero and his wife were living with Mr. Mero's father but were about to move into their own place. Mr. Mero was no longer connected to negative associates from his drug-using days. Mr. Mero's two-year-old son was living with one of his sisters in Ministry of Children and Family Development care and his wife was seven months pregnant. In order to obtain increased access to his son, in March 2020, Mr. Mero successfully completed a

Métis healing and parenting program. Mr. Mero was having regular supervised visits and hoped to establish a parenting relationship with his son.

[45] Mr. Mero was reported to be open to restorative justice options. He hoped to understand more about how intergenerational factors "played a part in his circumstances growing up and manifested in his teen and adult years." He believed that "learning more about Indigenous values … [would] help him to build his self-esteem, re-establish himself as a contributing member of society, re-instate his value system, and provide purpose to live a crime-free lifestyle." He wished to take steps to address "the root cause of his addictions" and his childhood traumas, including through "group support/NA, and trauma counselling."

[46] Though the Métis Nation BC does not offer individual counselling or a restorative justice program, the *Gladue* report writer helpfully identifies a significant number of culturally appropriate substance abuse and trauma treatment programs available in the community, as well as in provincial and federal correctional facilities.

[47] As required by *Palmer*, the information in the *Gladue* report is admissible, relevant, credible and could be expected to have affected the result. While, with due diligence, the report could have been available at the sentencing hearing, I consider that excluding the report on that basis could lead to a miscarriage of justice.

[48] I would admit the *Gladue* report as fresh evidence.

Medical Report

[49] Mr. Mero's very brief medical report is dated August 25, 2020, and was prepared by Dr. Tharwat Fera, a physician and clinical professor in the Respiratory Division of the Department of Medicine at UBC. According to the report, Mr. Mero has been diagnosed with bronchiectasis with mucus plugging. He receives bronchodilator therapy and is on various medications. As a result of his lung disease, Mr. Mero is "susceptible" to and at "very high risk" of COVID-19. If Mr. Mero contracted COVID-19, "his condition will rapidly deteriorate and his mortality is much higher than other people without underlying chronic respiratory conditions".

[50] As required by *Palmer*, the information in the medical report is admissible, relevant, credible and could be expected to have affected the result. While some of the information in the report could have been available at the sentencing hearing, information related to the COVID-19 pandemic, which had not been declared, could not.

[51] In my view, the medical report meets the *Palmer* criteria. I would admit it as fresh evidence.

Crown Fresh Evidence

[52] In response to Mr. Mero's medical report, the Crown seeks to adduce evidence concerning CSC health and COVID-19 protocols, data from inmate COVID-19 testing and data concerning the number of vaccines administered to federal inmates.

[53] In terms of health and COVID-19 protocols, an email from CSC dated September 1, 2021, reports on the robust procedures CSC has in place to prevent the transmission of COVID-19 in correctional institutions and on the wide range of health services available to inmates.

[54] Data from inmate testing indicates that, as of August 31, 2021, there have been a total of 126 cases of COVID-19 at CSC institutions within British Columbia, including 120 cases and one death at the Mission Institution. As of that date, there were no active cases of COVID-19 at CSC institutions in British Columbia.

[55] CSC data to August 29, 2021 also indicates 79.7% of CSC inmates in British Columbia have received at least one dose of the Moderna COVID-19 vaccine and 74.9% of CSC inmates in British Columbia have been fully vaccinated with the Moderna COVID-19 vaccine.

[56] The Crown's fresh evidence addresses the fresh medical evidence adduced by Mr. Mero. In my view, it should be admitted.

Standard of Review

[57] Sentencing is a highly individualized process. Sentencing judges have "front-line" experience, see and hear all the evidence and submissions in person, and are generally familiar with the circumstances and needs of the local community. As a result, sentencing judges have broad discretion to impose a fit sentence. Sentencing decisions are entitled to considerable deference and will only be overturned for good reason: *R. v. Friesen*, 2020 SCC 9 at para. 25; *R. v. Sellars*, 2018 BCCA 195 at para. 22.

[58] An appeal court can intervene to vary a sentence only if the sentence is demonstrably unfit or if the sentencing judge made an error in principle that had an impact on the sentence: *Friesen* at para. 26; *Sellars* at para. 22; *R. v. Lacasse*, 2015 SCC 64 at para. 41.

[59] If a sentence is demonstrably unfit or the sentencing judge made a material error in principle, an appeal court must perform its own sentencing analysis to determine a fit sentence. The appeal court is to do so without deference to the existing sentence, even if that sentence falls within the applicable range. The appeal court must, however, recognize the expertise and advantageous position of the sentencing judge and defer to their findings of fact and identification of aggravating and mitigating circumstances (provided those findings are not affected by an error in principle): *Friesen* at paras. 27–28.

Sentencing Principles

[60] The purpose and principles of sentencing were codified in 1996. In striving to protect society and contribute to respect for the law and the maintenance of a just, peaceful and safe society, s. 718 of the *Code* identifies denunciation, deterrence and rehabilitation, among others, as important sentencing objectives.

[61] Section 718.1 identifies proportionality as the "fundamental principle" of sentencing. According to that section, a fit sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[62] Section 718.2 identifies a number of other important principles. Under s. 718.2(a), a sentence must be increased or reduced to account for any aggravating or mitigating circumstances. Under s. 718.2(b), sentences should be similar for similar offences committed in similar circumstances by similar offenders. Sections 718.2(c), (d) and (e) promote restraint in sentencing.

[63] Without restricting the generality of the *Code* provisions on sentencing, s. 10(1) of the *CDSA* provides:

> … the fundamental purpose of any sentence for an offence under [Part I of the *CDSA*] is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community.

[64] Section 10(2)(b) of the *CDSA* provides that the court must consider a previous conviction for a designated substance offence, such as possession for the purpose of trafficking, to be an aggravating factor.

***Gladue* Principles**

[65] Given Mr. Mero's Métis heritage, s. 718.2(e) of the *Code* has special importance in the circumstances of this case. It provides:

> [A]ll 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.

[66] In *R. v. Gladue*, [1999] 1 S.C.R. 688, 1999 CanLII 679, and *R. v. Ipeelee*, 2012 SCC 13, the Supreme Court of Canada makes clear that s. 718.2(e) is a remedial provision that was and is intended to deal with the crisis of over-representation of Indigenous offenders in the Canadian criminal justice system. Sadly, the statistics are much worse today than they were in 1996. Specifically, in the debates of Parliament cited in *Gladue* at para. 47, the national Indigenous prison population in November 1994 was reported to be 10.6%. According to publicly

available information from the Government of Canada, in January 2020, the Indigenous population in Federal correctional facilities surpassed 30%[1].

[67] The crisis described by the Supreme Court of Canada has been driven by the alienation, poverty, substance abuse, lower educational attainment, lower rates of employment, and prejudice experienced by Indigenous people in Canada. Sentencing judges are to take judicial notice of how Canada's colonial history and destructive assimilationist policies have translated into these terrible outcomes: *Gladue* at para. 83; *Ipeelee* at para. 60. This history does not excuse or justify criminal conduct. Rather, it provides context for sentencing judges' consideration of case-specific information within the sentencing exercise: *Ipeelee* at para. 83.

[68] While the over-representation of Indigenous people in Canada's prison population is tied to broad societal issues, the Court in *Gladue* and *Ipeelee* recognized that culturally attuned sentencing for Indigenous offenders has a role to play in addressing the problem: *Gladue* at para. 65; *Ipeelee* at paras. 64–70.

[69] Indigenous offenders are different from other offenders because, in the words of the Supreme Court of Canada, they "are victims of systemic and direct discrimination": *Gladue* at para. 68. As a result, and to help address the crisis of over-representation, *Gladue* changed the way Indigenous offenders are sentenced, though not necessarily the result. In sentencing an Indigenous offender, a sentencing judge must consider two factors:

1. The unique systemic or background factors that may have played a part in bringing the particular offender before the courts; and
2. The types of sentencing procedures and sanctions that may be appropriate in the circumstances.

See *Gladue* at para. 66.

[1] Canada, Office of the Correctional Investigator, News Release, "Indigenous People in Federal Custody Surpasses 30%: Correctional Investigator Issues Statement and Challenge" (21 January 2020), online: *Government of Canada* <www.oci-bec.gc.ca/cnt/comm/press/press20200121-eng.aspx>.

[70] According to *Gladue* and *Ipeelee*, a sentencing court must take a holistic approach to imposing a fit sentence. Such an approach must take into account all of the surrounding circumstances, and display sensitivity and understanding to the "difficulties aboriginal people have faced with both the criminal justice system and society at large": *Gladue* at para. 81; *Ipeelee* at paras. 59–60 and 75.

[71] A fit sentence is one that is proportionate and appropriately balances the seriousness of the offence with the moral blameworthiness of the offender: *Ipeelee* at para. 37. A fit sentence is not determined by comparing the sentence of a particular Indigenous offender to a hypothetical non-Indigenous offender "because there is only one offender standing before the court": *Ipeelee* at para. 86.

[72] In striking the appropriate balance, it is not necessary to establish a direct causal link between systemic and background factors and the offence at issue. How the complex interplay of historical factors impacted a particular Indigenous offender may be difficult or impossible to establish. Nevertheless, the specific systemic or background factors at play are critically important. They may help the court assess the moral blameworthiness of the offender or identify appropriate sentencing objectives: *Ipeelee* at paras. 81–83.

[73] While restorative sentences may be more appropriate for Indigenous offenders, an application of *Gladue* principles will not necessarily lead to a reduced sentence. There is no automatic heritage-based discount. Generally, the more serious or violent the crime, the more likely it will be, as a practical matter, that the terms of imprisonment will be the same for an Indigenous and a non-Indigenous offender: *Gladue* at para. 33; *R. v. Wells*, 2000 SCC 10 at paras. 42–44; *Ipeelee* at paras. 84–85.

[74] That said, no offence is so serious that it negates the need for a sentencing judge to consider s. 718.2(e) of the *Code* and *Gladue* principles. In fact, sentencing judges have a duty to do so and a failure to do so constitutes an error in principle. In *Ipeelee* at para. 87, the Court explained:

> [87] The sentencing judge has a statutory duty, imposed by s. 718.2(*e*) of the *Criminal Code*, to consider the unique circumstances of Aboriginal offenders. Failure to apply *Gladue* in any case involving an Aboriginal offender runs afoul of this statutory obligation. As these reasons have explained, such a failure would also result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality. *Therefore, application of the Gladue principles is required in every case involving an Aboriginal offender*, including breach of an LTSO, *and a failure to do so constitutes an error justifying appellate intervention.*
>
> [Emphasis added.]

Discussion

[75] In this case, there is a lot the judge did right. In particular, based on the information he had before him, he:

- identified the seriousness of the offence and the sentencing objectives requiring greatest emphasis;
- took into account how Mr. Mero's difficult personal circumstances reduced his moral blameworthiness;
- made a supported finding that Mr. Mero's prospects for recovery were good;
- identified and imposed sentences within the usual sentencing ranges for the offences at issue;
- justifiably concluded that the circumstances surrounding Mr. Mero's unauthorized possession of a loaded restricted firearm warranted a significant sentence in the lower end of the range identified by this Court in *Holt*;
- based on his considerable experience, justifiably concluded that Mr. Mero would receive appropriate medical care within federal correctional facilities such that a departure from the usual range would not be warranted; and
- made appropriate ancillary orders.

[76] Turning to *Gladue* issues, although the judge had been made aware Mr. Mero had Indigenous heritage, he was not provided, and did not seek, the information he needed to meaningfully address *Gladue*. Without an understanding of the full context of the case before him, the judge was not in a position to properly analyze

Mr. Mero's moral culpability, determine which sentencing objectives to actualize, consider alternative sentencing procedures or sanctions, or determine a fit sentence.

[77] Once *Gladue* was raised, the judge had an important statutory duty to consider and apply s. 718.2(e) of the *Code*, regardless of counsel's shortcomings. As noted in *Ipeelee*, the judge's failure to do so was an error in principle justifying the intervention of this Court.

[78] In these circumstances, this Court must consider sentencing afresh.

[79] I start the exercise of determining a fit sentence by acknowledging the seriousness of Mr. Mero's offences.

[80] In *R. v. Kachuol*, 2017 BCCA 292, Justice Dickson explained the seriousness of s. 95(1) offences:

> [25] In recent years, Canadian courts have become increasingly concerned by the proliferation of handguns, gun violence and the dire consequences for our society. Guns are inherently, often lethally, dangerous, all the more so when they are possessed for an illicit purpose. As a result, their possession and use is highly regulated and, if unlawful, criminalized to ensure public safety, express society's condemnation and punish offenders. To the extent possible, courts strive to achieve these goals when imposing sentences for firearms-related offences by prioritizing deterrence and denunciation, following customary sentencing ranges in all but exceptional cases and fully accounting for aggravating factors where they exist.
>
> [26] As Madam Justice Smith recognised in *Guha* at para. 30, when an offender possesses a firearm, particularly a handgun, for an illicit purpose, that purpose can only be to threaten or inflict serious bodily harm or death, if and when considered necessary. Common sense and human experience suggest no other reasonable explanation or lesser risk posed by possession of this sort. As Crown counsel aptly put it, most unlawful possession of loaded firearms represents nothing short of "tragedy in gestation". By criminalizing such conduct via s. 95(1), the law intervenes before someone is actually harmed or some other crime actually committed. By imposing severe exemplary sentences for possession *simpliciter*, courts support and advance the goals of this intervention.

[81] Though in the context of a dial-a-dope trafficking operation in cocaine, in *R. v. Aguilera Jimenez*, 2020 YKCA 5, Dickson J.A. succinctly described the terrible toll drug trafficking takes on individuals and the community:

> [49] Cocaine is a highly addictive drug that inflicts untold misery on users, those in their orbit and society generally. It destroys lives, tears families apart and damages communities. For all of these reasons, trafficking in cocaine is considered a serious offence which should attract significant consequences. …

[82] The same can be said of trafficking in heroin.

[83] As found by the trial judge, Mr. Mero's offences were not low-level offences. They were serious and deserving of commensurate punishment to send a clear message to Mr. Mero and others that the unlawful possession of loaded restricted firearms and trafficking in narcotics will not be tolerated in our society.

[84] I now turn to consider Mr. Mero's moral blameworthiness. In doing so, I am informed by the specific systemic and background factors identified in the *Gladue* report that appear to have played a part in bringing Mr. Mero before the courts.

[85] As noted by the trial judge, Mr. Mero's childhood was tragic. Mr. Mero faced many challenges. He had learning difficulties and ADHD. His father did not allow him to receive medication, which might have alleviated some of his difficulties. His non-Indigenous mother was severely mentally ill. While his father appears to have been a stable parent, he was not able to insulate Mr. Mero from his mother's neglect and emotional abuse. In these circumstances, it is relatively easy to understand why Mr. Mero left home, why he began misusing substances and how he became involved in criminal activity, all at a very young age.

[86] To his credit, Mr. Mero appears to have taken important lessons from the custodial sentences he received in 2005 and 2006. The judge found that he was able to turn his life around for a significant period of time until he developed lung disease. Unfortunately, he was prescribed then denied opioids, turned to illegal street drugs to self-medicate, and became addicted to heroin.

[87] The judge also accepted that Mr. Mero returned to selling drugs when he lost his employment due to his lung disease. While the judge correctly concluded

Mr. Mero's health and addiction struggles did not excuse or justify his criminal activities, they certainly reduced his moral blameworthiness.

[88] Turning more directly to Mr. Mero's Métis heritage, the *Gladue* report writer did not attempt to draw specific and direct links between Mr. Mero's heritage and his criminal activity. Nor was that required. However, it is not difficult to infer that Mr. Mero faced some additional challenges throughout his life as an Indigenous person in Canada. Consistent with the experience of a disproportionate number of Indigenous people in Canada, Mr. Mero's childhood was traumatic, he was unable to complete school, his life was marred by addictions, and he came into conflict with the law. In short, there is an evidentiary basis to conclude that Mr. Mero's Métis heritage reduces his moral blameworthiness below the level the judge discerned based on incomplete information.

[89] Mr. Mero's heritage also plays a central role in the remaining part of the exercise—the identification of sentencing objectives and the consideration of alternative sentencing procedures or sanctions.

[90] Given the seriousness of Mr. Mero's weapons offence, denunciation and deterrence have a significant role to play in determining a fit sentence. At the same time, given Mr. Mero's significant steps toward rehabilitation, and how the overrepresentation of Indigenous people in the criminal justice system continues to worsen, the circumstances also require that significant attention be paid to the sentencing objectives of rehabilitation and restoration.

[91] In these circumstances, what is a fit sentence?

[92] The Supreme Court of Canada has repeatedly made clear that sentencing ranges provide guidance but are not binding: *Lacasse* at paras. 57–60; *Friesen* at para. 37. In appropriate cases, a departure from an established range, one way or the other, will be justified. Sometimes, this may involve the sentencing court searching for "exceptional circumstances" to satisfy the court an offender has truly turned their life around: *R. v. Voong*, 2015 BCCA 285 at para. 59.

[93] In my view, taking a holistic view of all of the circumstances of Mr. Mero's case requires a departure from the usual sentencing ranges identified by the judge.

[94] The judge justifiably concluded Mr. Mero is akin to a first-time offender rather than a hardened criminal. While not an excuse or justification, he returned to crime when his lung disease led to a relapse into addiction and a loss of employment.

[95] Mr. Mero has never acknowledged responsibility for his offences, but he appears to have turned his life around. His actions speak louder than words.

[96] Despite his severe lung disease and financial pressures, he has not returned to supporting himself through criminal activity. In fact, he has dissociated himself from his previous criminal associations and has been on bail for five years without incident.

[97] Impressively, Mr. Mero has been free of drugs and alcohol for several years. For someone with his traumatic background and history of addictions, achieving this has required considerable personal commitment.

[98] Mr. Mero has also taken positive steps to be in a position to parent his children. If he can provide them with the stability he did not have in his own childhood, their chances of coming into conflict with the law will be reduced.

[99] What stands out for me is that Mr. Mero has objectively made major, positive and long-lasting changes in his life despite the extra hurdles and burdens he has faced, generally and as an Indigenous person in Canada.

[100] With regard to Mr. Mero's weapons offence, in all of the circumstances, I am unable to conclude that I should suspend the passing of sentence and place Mr. Mero on probation. That type of sentence would simply not send a strong enough message of denunciation and deterrence. Rather, in my view, a custodial sentence in the provincial range would be the most fit sentence.

[101] Having rejected a penitentiary term and probation measures as inappropriate, I turn to consider whether a conditional sentence order ("CSO") would be appropriate: *R. v. Proulx*, 2000 SCC 5 at para. 77.

[102] Since offences under s. 95(1) of the *Code* are no longer subject to a mandatory minimum sentence, a CSO is an available sentencing option: *R. v. Nur*, 2015 SCC 15 at para. 119. In my view, properly structured, it is also the appropriate sentencing option.

[103] CSOs are custodial sentences served in the community. In keeping with the objectives of s. 718.2(e) and *Gladue*, CSOs were introduced to address the problem of over-incarceration in Canada by reducing reliance on incarceration as a sanction and increasing the use of restorative justice principles: *Proulx* at paras. 21–22; *Gladue* at paras. 39–44.

[104] As noted in *Proulx* at para. 22, CSOs have both punitive and rehabilitative aspects. There are no presumptions for or against the use of a CSO in relation to any specific offence. CSOs need not be of the same duration as the sentence of incarceration that would otherwise have been imposed. All that is required is that the CSO is a fit sentence: *Proulx* at paras. 58–61 and 104.

[105] As required by s. 742.1(a) of the *Code*, I am of the view that the service of a CSO in the community would not endanger the safety of the community. The last five years have demonstrated Mr. Mero is capable of complying with court-imposed restrictions and living a substance- and crime-free life.

[106] As required by s. 742.1(a) of the *Code*, I am also of the view that the service of a CSO in the community would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2 of the *Code*.

[107] The restrictive terms of a CSO will adequately address denunciation and deterrence.

[108] The sentence is in line with sentences imposed on similarly situated offenders convicted of similar crimes in similar circumstances. For example, in *Sellars*, an Indigenous offender was convicted of offences contrary to ss. 95(1), 94(1) and 86(1) of the *Code*. Mr. Sellars had developed serious substance abuse problems at a young age, which escalated due to his gang involvement and traumatic personal losses. However, Mr. Sellars turned his life around by completing an alcohol treatment plan, quitting his abuse of substances, and leaving the gang. He completed several industry-training certificates, obtained employment and continued working until his conviction. This Court held that Mr. Sellars' moral culpability was diminished due to *Gladue* factors and recognized the exceptional rehabilitative steps he had undertaken. This Court imposed a CSO of two years less a day.

[109] Allowing Mr. Mero to serve his sentence in the community will enhance public safety by supporting his rehabilitation, is consistent with the instruction in the *Code* to impose the least restrictive penalty appropriate to the circumstances, and will give full effect to the spirit of *Gladue* and *Ipeelee.* It will also have the positive ancillary benefit of helping to stabilize his family and, hopefully, break the cycle of poverty, addiction and crime that has affected him and afflicts so many Indigenous families in Canada.

[110] I turn next to Mr. Mero's trafficking offence.

[111] Ordinarily, Mr. Mero's drug trafficking conviction would warrant a custodial sentence. Without minimizing the seriousness of his offence, the following factors lead me to conclude that a suspended sentence would be a fit and appropriate sentence in all of the circumstances of this case:

- Mr. Mero's reduced level of moral blameworthiness;
- Mr. Mero's success in turning his life around;
- the fact that Mr. Mero has already spent five years on bail, including five months with highly restrictive conditions; and

- the pressing need to meaningfully address the worsening crisis of overrepresentation of Indigenous people in jails across Canada.

[112] Community-based sentences have the added benefit of eliminating the additional psychological burden Mr. Mero would have suffered if required to serve a custodial sentence in a correctional facility while suffering from severe lung disease in the midst of the COVID-19 pandemic. Though the steps CSC has taken to address the pandemic are commendable, Mr. Mero would have nevertheless experienced significant additional stress from having greater restrictions on his activities in order to minimize his risk of contracting the virus and not having control over his environment.

Sentence

[113] On the weapons count, I would impose a CSO for a term of two years less one day. While bound by the CSO, Mr. Mero:

- Must keep the peace and be of good behaviour.
- Must appear before the court when required to do so by the court.
- Must notify the court or his conditional sentence supervisor in advance of any change of name or address and promptly notify the court or his conditional sentence supervisor of any change in employment or occupation.
- Must remain in British Columbia unless he has prior written permission from the court or his conditional sentence supervisor to leave the province.
- Must report by telephone to a conditional sentence supervisor in Prince George within two business days of the release of these reasons for judgment. If the office is closed, he must continue calling daily during regular business hours until he has spoken to a supervisor and received further direction to report. After that, he must report as directed by his conditional sentence supervisor.
- Must live at an address approved by his conditional sentence supervisor and provide his supervisor with his telephone number. He must not change his

address or telephone number without prior written permission from his supervisor.

- For the first 12 months of his sentence, must obey house arrest by being inside his residence, or on its lot, 24 hours a day, every day.
- For the remainder of his sentence, must obey a curfew by being inside his residence, or on its lot, between 7:00 p.m. and 7:00 a.m. every day.
- Must present himself immediately at the door of his residence or answer the telephone when any peace officer or conditional sentence supervisor attends or calls to check on him during the house arrest or curfew hours.
- May be away from his residence during the house arrest or curfew hours with the prior written permission of his conditional sentence supervisor. Such permission is to be given only for employment or other compelling reasons. He must carry the permission, which can be in electronic format, with him when he is outside his residence.
- May also be away from his residence during the house arrest or curfew hours while at, going directly to, or returning directly from a healthcare facility because of a medical emergency. If asked, he must provide his conditional sentence supervisor with proof of his attendance at the facility.
- Must not possess or consume alcohol, drugs or any other intoxicating substance, except with a medical prescription.
- Must attend, participate in and complete any intake, assessment, counselling or education program as directed by his conditional sentence supervisor. This may include but is not limited to counselling or programming for (a) alcohol or drug addiction; or (b) trauma recovery.
- Must not possess, directly or indirectly, any weapon as defined by the *Criminal Code*, including:
    - firearms and ammunition;

- cross-bows, prohibited or restricted weapons or devices, or explosive substances;
- anything used, designed to be used, or intended for use in causing death or injury to any person, or to threaten or intimidate any person;
- any imitation of all of the above, including any compressed air guns or BB/pellet guns; or
- any related authorizations, licenses and registration certificates, and must not apply for any of these.

[114] On the trafficking count, I would suspend the passing of sentence and place Mr. Mero on probation for 12 months. As required by s. 732.2(1)(c) of the *Code*, the probation order will come into force at the expiration of the CSO. While bound by the probation order, Mr. Mero:

- Must keep the peace and be of good behaviour.
- Must appear before the court when required to do so by the court.
- Must notify the court or his probation officer in advance of any change of name or address and promptly notify the court or his probation officer of any change in employment or occupation.
- Must report by telephone to a probation officer in Prince George within two business days of the completion of his CSO. If the office is closed, he must continue calling daily during regular business hours until he has spoken to an officer and received further direction to report. After that, he must report as directed by his officer.
- When first reporting to his probation officer, must provide them with the address where he lives and his telephone number. He must not change his address or telephone number without prior written permission from his officer.
- Must attend, participate in and complete any intake, assessment, counselling or education program as directed by his probation order. This may include, but is

not limited to, counselling or programming for (a) alcohol or drug addiction; or (b) trauma recovery.

[115] My hope is that in supervising Mr. Mero in the community, his Community Corrections officer will have access to the *Gladue* report and assist Mr. Mero in accessing the culturally appropriate counselling and supports identified in the report.

[116] I would not interfere with the ancillary orders made by the judge.

[117] With thanks to counsel, I would allow the appeal and vary the sentences on the terms I have outlined.

"The Honourable Mr. Justice Marchand"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Butler"