

R. v. Nguyen

Ontario Judgments

Ontario Superior Court of Justice

N.J. Spies J.

Heard: October 28, 2019.

Judgment: November 1, 2019.

Released: November 14, 2019.

[2019] O.J. No. 5789 | 2019 ONSC 6358

Between Her Majesty the Queen, Crown, and ██████ Nguyen, Defendant

(72 paras.)

Case Summary

Criminal Law — Sentencing — Criminal Code offences — Weapons offences — Possession of prohibited or restricted weapon or ammunition — Other Criminal Code offences — Miscellaneous offences — Particular sanctions — Imprisonment — Prohibition orders — Firearms — DNA sample — Sentencing considerations — Aggravating factors — Mitigating factors — General deterrence — Specific deterrence — Denunciation — Rehabilitation — Time already served — Submissions — Submission by Crown — Submissions by accused and counsel for accused — Previous record — Related — Breach of recognizance — Age of accused — Family background — Accused sentenced to time served plus one day for unlawful possession of firearm and breach of firearms prohibition order --Police found loaded handgun during search of apartment belonging to accused's mother — Accused did not have authorization or license to possess firearm and was subject to five-year firearms prohibition at time of search — Accused was convicted of both charges at trial — Accused was given global sentence of 44 months' imprisonment — Accused was entitled to pre-sentence credit of 1,320 days plus 90 days for time spent in lockdowns, or just over 46 months — Criminal Code, ss. 92, 92(1), 92(3)(b), 95, 95(1), 109, 109(3), 117.01(1), 117.01(3), 487.051(1), 487.051(1)(a), 718, 718.2, 718.2(d), 718.2(e) — Youth Criminal Justice Act, s. 51(1).

Sentencing of the accused for unlawful possession of a firearm and breach of a firearms prohibition order. The police executed a search of an apartment. A police officer found a loaded handgun under a sheet on the couch. The police also found the accused's driver's license, his Ontario health card and other documents belonging to the accused. The accused was not the holder of an authorization or license to possess a firearm and was not the holder of a registration certificate for a firearm. The accused was subject to a five-year firearms prohibition at the time of the search. The accused was convicted at trial. The accused was 23 years old. He lived in the apartment with his mother, who raised him as a single parent. The accused had been in and out of custody for seven years. His previous record included a firearms offence and a drug trafficking offence. He had no employment record. The accused spent 876 days in pre-trial custody, part of which was during a lockdown at the prison. The Crown sought a global

sentence of five years less credit for time already served. The defence said the appropriate sentence was four years and that, with enhanced credit, the accused should be sentenced to time served.

HELD: Accused sentenced to time served plus one day.

While the accused was convicted of possession of a firearm, the Crown did not prove, and it was not contested, that it was not the accused's firearm and he was not keeping the firearm for the purpose of trafficking. He made an unwise decision by allowing a friend to store the firearm in his house without taking any steps to store it carefully and particularly since he was subject to a prohibition order. The accused did not contest the Crown's case. He was still a youthful offender and strongly motivated to avoid all future criminal conduct. The primary sentencing factors were general and specific deterrence and denunciation. However, regard should be had for the potential of rehabilitation. The accused was sentenced to 36 months' imprisonment for unlawful possession of a firearm and eight months consecutive for breach of a prohibition order. The accused was entitled to pre-sentence credit of 1,320 days plus 90 days for the time spent in lockdowns. That was equivalent to just over 46 months. Given that the global sentence was 44 months, the accused was sentenced to time served plus one day. Sentence: Time served plus one day for unlawful possession of a firearm and breach of a prohibition order; lifetime firearms prohibition; DNA order.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 92, s. 92(1), s. 92(3) (b), s. 95, s. 95(1), s. 109, s. 109(3), s. 117.01(1), s. 117.01(3), s. 487.051(1), s. 487.051(1)(a), s. 718, s. 718.2, s. 718.2(d), s. 718.2(e)

Youth Criminal Justice Act, S.C. 2002, c. 1, s. 51(1)

Counsel

Katherine Stewart, for the Crown.

Alana Page, for the Defendant.

REASONS FOR SENTENCE

N.J. SPIES J.

Overview

1 On October 23, 2019, ██████ Nguyen was arraigned on the following two charges:

- * Unlawful possession of a prohibited firearm contrary to s. 92(1) of the *Criminal Code*, (Count 3--first Indictment); and
- * Possession of a firearm while prohibited from doing so by reason of an order made under s. 51(1) of the *Youth Children Justice Act ("YCJA")* contrary to s. 117.01(1) of the *Criminal Code* (Count 1 -- second Indictment).

2 Both the Defence and the Crown wanted to preserve rights of appeal should Mr. Nguyen appeal my

decision to dismiss his *Garofoli* application. As a result, Mr. Nguyen pleaded not guilty to these offences, but he advised that he did not contest the facts as read in by the Crown and he acknowledged that the Crown could prove those facts beyond a reasonable doubt. Given the uncontested facts I convicted Mr. Nguyen of both counts. After that, the remaining counts on the two Indictments before this Court were stayed by the Crown rather than withdrawn.

3 Mr. Nguyen is now before me for sentencing.

The Facts

Circumstances of the Offences

4 The facts in support of Mr. Nguyen's convictions include the following.

5 In June 2017, Mr. Nguyen lived at [REDACTED] (the "Apartment") with his mother, [REDACTED]. Unit [REDACTED] is a one-bedroom, one-bathroom Apartment, with a separate kitchen area and living room area. The bedroom is where [REDACTED] slept. Mr. Nguyen would sleep on one of the couches in the living room. He primarily kept his belongings in the living room area.

6 On June 4, 2017, Mr. Nguyen was placed under arrest and later that day Toronto Police were granted a search warrant for the Apartment. Prior to the execution of the warrant, [REDACTED] Nguyen returned home from getting groceries. That evening, at approximately 11:16 pm, Toronto Police executed the warrant. No one was inside the Apartment at the time of the execution of the warrant.

7 When the search warrant was executed, Officer Daniel Schippke was tasked with searching the living room area. There were two couches in the living room area, one on the south wall and one on the east wall. The couch on the south wall was covered in a bed sheet, a blanket, and a pillow. Officer Schippke went to lift the bed sheet off of the couch, grabbing the bed sheet from the left side of the couch and pulling it. Officer Schippke heard a loud clunk. As a result of pulling the bedsheet, a handgun had fallen to the floor in front of the couch. There was a bullet in the chamber and the hammer of the firearm was cocked back, meaning that it was ready to fire. Officer Sarah Kenny attended to prove the firearm safe before the handgun was seized.

- a. This handgun was examined by weapons examiner Bruce Finn. The handgun was determined to be a functional .45 calibre semi-automatic handgun with the serial number removed. The barrel length was determined to be 90mm, making the handgun a "prohibited firearm".
- b. The handgun was loaded with eight .45 calibre cartridges of ammunition.

8 Also located within the Apartment was Mr. Nguyen's driver's license, his Ontario health card and other documents belonging to Mr. Nguyen. The bedroom was searched by Officer Darren Worth. Officer Worth located female clothing and identification belonging to [REDACTED] Nguyen.

9 Mr. Nguyen's explanation for the presence of the handgun is that it belonged to a friend of his who slept on the couch the night prior to the execution of the search warrant. This friend asked Mr. Nguyen if he could leave the firearm in the Apartment temporarily (in the location where it was found) and Mr. Nguyen

agreed. Mr. Nguyen was unaware that the firearm was loaded and that the serial number had been defaced. For the purposes of this proceeding, the Crown did not contest this explanation of how the firearm came to be in the Apartment.

10 On June 4, 2017, Mr. Nguyen was not the holder of an authorization or license to possess a firearm and was not the holder of a registration certificate for a firearm.

11 On February 19, 2013, Mr. Nguyen entered into a firearms prohibition under s. 51(1) of the *YCJA*. The duration of this prohibition was five years long and prohibited Mr. Nguyen from possessing any firearm, prohibited weapon, restricted weapon, prohibited device, ammunition, and prohibited ammunition for that period.

Circumstances of Mr. Nguyen

Personal Background Information

12 I received some information about Mr. Nguyen from Ms. Page and Mr. Nguyen addressed this Court after the sentencing submissions were made.

13 Mr. Nguyen is ■ years old. He was born in Canada. His mother came from Vietnam ■ years ago and has always raised Mr. Nguyen as a single parent. He has no information about his father and Ms. Page advised me that he has had no father figure in his life. When Mr. Nguyen addressed me however, I was advised of three persons he considers to be like a grandmother, aunt and uncle who offered to act as sureties, although they are not his biological relatives. They are members of the Vietnamese community who are close to the family. They live in the ■ area of the city.

14 Mr. Nguyen has always lived in the ■ area with his mother in low income Toronto housing. Mr. Nguyen's mother worked at ■ Ms. Page advised that Mr. Nguyen plans to go back and live with his mother on release. Mr. Nguyen advised me that following his mother's release, she moved in with a sister or brother living in Mississauga. Mr. Nguyen plans to live with his mother there upon his release until they can find an Apartment. He and his mother have discussed the matter and they will not move back to ■.

15 Over the last seven or so years, Mr. Nguyen has been in and out of custody as a result of arrests on charges where he has ultimately been found guilty or not guilty. When he has not been in custody, he has attended high school. He has also taken high school credits while in custody. Apart from three months working at a ■ some time ago, Mr. Nguyen has no employment history.

16 Mr. Nguyen has completed 28 high school credits. Ms. Page advised that he has actually finished an additional course, but she could not get proof of this because of lockdowns since late last week. In the five courses that Mr. Nguyen has taken while at the Toronto South Detention Centre ("TSDC"), he has obtained grades in the 80-85% range which demonstrates that he has strong academic ability. Once Mr. Nguyen obtains his last credit, which he plans to do on-line, he wants to work for a time to raise money so he can go to college. He told me he was not sure yet what he wanted to study but he was thinking about marketing.

17 Mr. Nguyen last criminal convictions were in September and October 2013, when he was convicted on two separate occasions for trafficking small amounts of cocaine to an undercover officer. The amount sold on the first occasion was worth \$250 and on the second \$230. I agree with Ms. Page that this was equivalent to street level dealing.

Criminal Record

18 Mr. Nguyen's criminal record is as follows:

Youth Record

- (a) April 14, 2012 -- Fail to comply with recognizance, obstruct peace officer and possession of a Schedule II substance -- 18 months' probation on each charge concurrent;
- (b) February 19, 2013 -- Possession of a firearm knowing its possession is unauthorized (s. 92(1)), fail to comply with disposition, possession of a Schedule II substance. Sentenced to six months plus two months under supervision in the community and 12 months' probation and mandatory prohibition order on each charge concurrent. There is a note that on review this was varied to six months plus three months of supervision in the community. 127 days is noted as presentence custody which was presumably given as a credit but that is not clear.

Adult Record

- (a) Mr. Nguyen was convicted of trafficking of cocaine on September 10, 2013 and October 30, 2013. He was sentenced on the same day for both offences to 176 days pretrial custody credited as 230 days plus 90 days open custody (which is like a halfway home) followed by 45 days community supervision followed by 12 months' probation with conditions. I presume Mr. Nguyen complied with these conditions and there is a no conviction for any breach.

Information from Mr. Nguyen

19 At the conclusion of the sentencing submissions, Mr. Nguyen elected to address me. In addition to what I have already set out, Mr. Nguyen advised me that he took full responsibility for all his decisions. He advised me that in past years he has always been arrested on his own but that these offences have had a big impact on him because his mother was also arrested. As a result, he has felt embarrassment and humiliation from family, friends and members of the community. Mr. Nguyen told me that this had "changed his perspective" a lot - this has been the longest time he has been in custody.

20 When I asked Mr. Nguyen about family support beyond his mother, he mentioned his non-biological grandmother, aunt and uncle but advised that they had not really been in the picture as much as his mother. Given they were prepared to be sureties however, it is clear that they will offer some support to Mr. Nguyen upon his release.

21 Mr. Nguyen acknowledged that while living in the [REDACTED] area he felt a lot of peer pressure and

there were a lot of bad influences. While he has been in custody Mr. Nguyen advised me that he is going to change this in the future - he has concluded that he should stay as far away from the [REDACTED] area as he can.

Enhanced Credit

22 Ms. Page provided a statement of the lockdowns at the TSDC and it was agreed that these lockdowns were specific to Mr. Nguyen. I accepted this as the confusion I found in the TSDC records that were in the same form, that I noted in *R. v. Lu*, 2019 ONSC 5933 at para. 38, was cleared up by counsel at the conclusion of my giving reasons in that matter. Even though these records refer to various units, I accept that those units are specific to Mr. Nguyen. Accordingly, I accept that Mr. Lu's unit was subject to a lockdown for a total of 224 days from June 5, 2017 to October 24, 2019. Since that time to the date of the sentencing hearing there have been a further three days of lockdowns bringing the total to 227 days.

23 Mr. Nguyen did not file an affidavit in support of his claim for enhanced pre-sentence credit given conditions while he has been in custody. However, Ms. Stewart did not take any issue with the facts that I was advised of and so I accept what Ms. Page stated for the purpose of considering whether or not Mr. Nguyen should receive an enhanced credit.

24 Ms. Page advised that to the date of the hearing Mr. Nguyen has spent 876 days in pretrial custody. She submitted that to this point the number of lockdowns represents about 25% of the time that Mr. Nguyen has been incarcerated.

25 Ms. Page advised that on a normal day at the TSDC, inmates are out of their cells from 8:00 a.m. -- 1:00 p.m. when there is a one-hour lockdown and then they are out of their cells again from 2:00 p.m. -- 9:45 p.m.; about 13 hours. During that time, they take their meals outside their cells, can participate in programs, shower, see visitors, make phone calls and get fresh air.

26 The notes to the TSDC record state that full lockdown means that all units at TSDC were impacted by a lockdown whereas a partial lockdown means that only some units were impacted by a lockdown. These notes however also state that the times indicated on the lockdown summary are times the lockdown commenced and give as an example a "Partial 1100-1355", which indicates when the lockdown started and ended. This is clearly another meaning of "partial". Ms. Page submitted that a partial lockdown is one that starts later in the day at 2:00, 4:00 or 6:00 p.m. but that is not consistent with the record as some were noted to have started as early as 8:00 a.m. and are still shown as a partial lockdown.

27 Where there is a full lockdown an inmate has no access to showers, programs, phone calls or visits and has his meals in his cell where there is a toilet. These full lockdowns can last for days. The longest that Mr. Nguyen has endured was five days. Ms. Page advised that during the time of a partial lockdown an inmate has limited access to showers and could miss programs or scheduled visits.

28 When I asked Ms. Page about the particular harm suffered by Mr. Nguyen by these lockdowns, Ms. Page acknowledged there were no special adverse circumstances suffered by Mr. Nguyen and that he did not have any medical ailments while in jail nor was he ever triple bunked. She submitted that Mr. Nguyen was not able to attend programs, the lockdowns were humiliating, and he was stuck in a cell and eating in "his bathroom". She also advised that Mr. Nguyen has had to start a five-week course called

"Forgiveness" three times already because lockdowns interrupt the progress of the course and they have to start again. However, Mr. Nguyen is sometimes allowed to act as a cleaner as part of a work program and as a result even when there is a lockdown, he may be permitted to take a shower.

29 Ms. Stewart agreed that we should not go down the "rabbit hole" with respect to the calculation of the number of hours on lockdown, but she submitted there were a handful of very minor lockdowns and that 74 lockdowns took place at 6:00 p.m. or later. This meant a lockdown of only four hours versus as many as 13 hours. Ms. Stewart submitted I should take this into account in calculating the credit.

Legal Parameters

30 The maximum sentence for a second offence of possession of a firearm is 10 years and the minimum is one year imprisonment pursuant to s. 92(3)(b) of the *Criminal Code*. The maximum sentence for possession of a firearm, while prohibited, is also 10 years pursuant to s. 117.01(3) of the *Criminal Code*. There is no minimum.

Positions of Crown and Defence

31 Ms. Stewart submitted that the appropriate global sentence in this case is a five-year sentence minus any pre-sentence credit for both convictions. She submitted that if Mr. Nguyen's first conviction for possession of a firearm had not been as a youth, she would have been requesting a higher global sentence. Ms. Stewart also seeks a mandatory DNA order pursuant to s. 487.051(1) of the *Criminal Code* on the firearm conviction, which is a primary designated offence, a lifetime weapons prohibition pursuant to s. 109 of the *Criminal Code* and forfeiture of the firearm. There is no issue that these ancillary orders should be made.

32 Ms. Page's position is that the sentence requested by the Crown is too high and that a global sentence in the range of four years is appropriate. After pre-sentence credit which, as explained below, she asserts represents 3.9 years, it is Ms. Page's position that I should sentence Mr. Nguyen to time served.

33 Neither counsel suggested probation and when I raised this, given that I may have jurisdiction to impose probation should the sentence I impose after any pre-sentence custody credit result in a reformatory sentence, Ms. Page readily conceded that this would be appropriate since it could be of assistance to Mr. Nguyen and he has no history of breaching probation terms.

Sentencing Case Law for the Possession of a Firearm Offence

34 The only law provided to me by counsel was reference to my recent decision in *Lu, supra*. In that case I reviewed the law with respect to sentencing an offender for a first s. 95 *Criminal Code* offence; namely possession of a loaded firearm. I concluded in that case that for a first s. 95 offence, the appropriate range of sentence is from a maximum reformatory term to three years.

35 I asked counsel for cases that deal with the appropriate range of sentence for someone who has previously been found guilty of possession of a handgun. Ms. Stewart provided the case of *R. v. Graham*, 2018 ONSC 6817, a decision of Justice Code. In that decision Justice Code referred to the decision of Justice MacDonnell in *R. v. Hector*, 2014 ONSC 1970 where MacDonnell J. analyzed the

effect of the 2013 post-mandatory minimum sentence cases in the case of s. 95 recidivists. Justice Code found at para. 39 that Justice MacDonnell had "implicitly held that the cases indicate an appropriate total range of six to nine years for s. 95 recidivists who breach s. 109 orders". In *Hector* Justice MacDonnell imposed a total sentence of six years (five years for the s. 95 offence and one-year consecutive for the s. 117.01 breach). Justice Code noted however, that 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 around in public in association with unlawful activity (at para. 40).

36 Ms. Stewart fairly advised that she did not originally advise me of the *Hector* decision because Mr. Nguyen's first firearm conviction was as a youth. What occurred to me while I was deliberating, which was not discussed with counsel, is the other significant distinguishing factor from the cases that I reviewed in *Lu* and the *Hector* decision is that the offenders in those cases were convicted of a s. 95 offence - possession of a loaded firearm. Although the firearm in this case was loaded, and ready to fire, the Crown does not contest Mr. Nguyen's position that he was not aware of this. That is why he was convicted of a s. 92 offence, not a s. 95 offence.

37 In the circumstances, rather than delay sentencing, I asked that my law clerk provide me with recent decisions dealing with sentencing for s. 92 convictions. She provided the cases that I refer to below although many of them deal with s. 95 sentencing as well, where the s. 92 offence is given a concurrent sentence and also circumstances where the loaded firearm is used to commit another crime. Nevertheless, I found the cases of some assistance as they demonstrated a broad range in sentences, and in particular a much lower range than the submission of Ms. Stewart would suggest. The cases that I reviewed that include sentencing for s. 92(1) offences are as follows.

- a) *R. v. Elie*, 2015 ONSC 300, Goldstein J. - second offence for s. 92; also charged with s. 95 for having a loaded handgun brought on a TTC bus; for s. 92 sentenced to two years concurrent to s. 95 count. With credit for two years and three months, that is the equivalent of a sentence of four years and three months"; breach of prohibition order was six months consecutive;
- b) *R. v. Oppong*, 2017 ONSC 6684, Goldstein J. - two accused -- a case of kidnapping, gang violence with a weapon -- first s. 92(1) offence, both were sentenced three years as part of a nine-year sentence; one year consecutive for breach of weapon's prohibition order;
- c) *R. v. Bush*, 2017 ONSC 7627, Beaudon J. - one year (along with life sentence) for first s. 92(1) conviction;
- d) *R. v. Wetelainen*, 2019 ONSC 869, Fregeau J. - s. 92(1) -- two months [seems like it is a first offence]; and
- e) *R. v. Claros*, 2019 ONCA 626, Paciocco J.A. - ONCA upheld OCJ's sentence of 2 years for s. 92 but this was part of a global sentence that was reduced, (did not comment on whether it is first or second offence).

Cases from other provinces (in each case it seems to be a first offence):

- a) *R. v. Lafleur*, 2018 BCSC 1454; s. 92(1) - one year for possession of two handguns;

- b) *R. v. Learning*, 2017 BCSC 1594; s. 92(1) -- four convictions of s. 92(1) -- three years concurrent on each; and
- c) *R. v. Perry*, 2018 NSSC 16, s. (92(1) - one year for possession of one handgun.

Sentencing Case Law for the Breach of Prohibition Offence

38 In *R. v. Ellis*, 2013 ONSC 3092 at para. 30, affirmed, 2016 ONCA 598, Campbell J. found that the weight of authority strongly suggests that, as a general rule, a consecutive sentence ought to be imposed for a breach of a weapons prohibition order. He found that in the absence of a consecutive sentence, a defendant would effectively receive no greater punishment as a result of his or her clear violation of a previous court order. The intentional violation of an unequivocal court order requires some effective additional sanction. Offenders must understand that court orders governing their conduct must be followed or there will be real consequences for their violation.

39 In *R. v. Claros*, 2019 ONCA 626 at para. 55, the court held that the fact that two offences relating to the breach of a prohibition order occurred in close succession, or even at the same time, is not a basis for imposing concurrent sentences. The principle that such offences should be served consecutively is intended to ensure that disregard of firearm prohibition orders, imposed in the interest of public safety, does not go unpunished. This principle also recognizes the fact that the breach of a prohibition order is different behaviour than the associate offences, engaging different social interests [citations omitted]. As a result, the court substituted a one year consecutive sentence for the two year concurrent sentence imposed by the trial judge.

40 In *R. v. Carrol*, 2014 ONSC 2063, at para. 30, Molloy J. held that breaching one prohibition order will typically warrant a one-year sentence.

Principles of Sentencing

41 The fundamental purpose of sentencing, as set out in s. 718 of the *Criminal Code*, is to ensure respect for the law and the maintenance of a just, peaceful and safe society. The imposition of just sanctions requires me to consider the sentencing objectives referred to in that section, which the sentence I impose should attempt to achieve. These are denunciation, deterrence (both specific and general), separation of offenders from society when necessary, rehabilitation, reparation for harm done and the promotion of a sense of responsibility in offenders and acknowledgment of the harm which criminal activity brings to our community. In addition, in imposing a sentence I must consider the principle of proportionality and the applicable aggravating and mitigating circumstances relating to the offences as set out in s. 718.2 of the *Criminal Code*.

42 With respect to firearm offence, there are ample statements of this court and our Court of Appeal about danger of handguns and the need to emphasize the sentencing goals of denunciation and deterrence. As Code J. observed at para. 49 in *Nur, supra* sentences increase and decrease as societal and judicial knowledge and attitudes about certain offences change: "[R]ecent events, especially in Toronto, have brought home the dangers posed by the possession of loaded handguns and the courts have responded by imposing more severe sentences" at para. 50. That sentiment has only become stronger in light of the increase in gun violence in the city of Toronto.

Analysis

What is a fit sentence for the possession of a firearm conviction?

43 The most serious offence that Mr. Nguyen was convicted of is possession of a prohibited firearm, contrary to s. 92(1) of the *Criminal Code*. It must be emphasized that although the firearm was loaded and the serial number had been removed, Mr. Nguyen was not convicted of a s. 95 offence. As Ms. Page submitted, the Crown has not proven, and it is not contested that this was not Mr. Nguyen's firearm and he was not keeping this firearm for the purpose of trafficking. He made a very unwise decision by allowing a friend to store the firearm in his house, particularly without taking any steps to store it carefully and particularly since he was subject to a prohibition order.

44 Ms. Page admitted that where the handgun was found and the fact that it was ready to fire was a dangerous situation, but she submitted that it was not as dangerous as someone walking down the street or driving down the street with a loaded firearm in their possession. I agree. Ms. Page agreed that the firearm was not stored safely but submitted that there is no evidence as to whether or not Mr. Nguyen's mother was in the Apartment when the firearm was there. In other words, she was submitting that it was possible that Mr. Nguyen allowed his friend to leave the firearm in the Apartment while Ms. Nguyen was out of the Apartment and that she only returned with her groceries once the officers had secured the Apartment. I agree that the evidence is unclear but, in my view, where the firearm was left, it was a danger to anyone in the Apartment.

45 Ms. Page submitted that from the time of Mr. Nguyen's last convictions for trafficking in 2013 to the time that Mr. Nguyen was arrested on these charges on June 4, 2017 was almost four years where there has been no criminal activity. However, as Ms. Stewart pointed out, Mr. Nguyen has been in custody for periods of time during this four-year period. He was incarcerated following the 2013 trafficking convictions until sometime in 2014. After seven months following his release, Mr. Nguyen was arrested again in April 2015. Then he spent 20 months in custody. He was found not guilty of those charges and released on December 22, 2016. He was out of custody for about six months and then arrested on the charges before this Court. I agree with Ms. Stewart that there was not that much of the gap given that Mr. Nguyen spent a lot of time in custody. As she said, the "cycle keeps repeating".

46 Ms. Page asks that in sentencing Mr. Nguyen that I take into account the fact that Mr. Nguyen has not been able to speak to his mother for some 29 months. Ms. Page advised that the strongest deterrent for Mr. Nguyen is the fact that he saw the impact on his mother on her being arrested and strip searched. She, as a single mother, raised him from birth and has the strongest impact on him. Based on what Mr. Nguyen said to me I accept this submission. I find that this is important as a factor in my conclusion that Mr. Nguyen's prospects for rehabilitation are good.

47 In my view the following mitigating factors are relevant to sentence in this case:

- a) Mr. Nguyen decided not to contest the Crown's case on the two charges that I found him guilty of. I appreciate that it was not an early decision to do so and not contest the Crown's case and it came only after the *Charter* motions were decided and in particular, I ruled that Mr. Nguyen's *Garofoli* application be dismissed. However, when it came it was effectively

the same as a guilty plea, making it clear that Mr. Nguyen accepts responsibility for his actions. Mr. Nguyen also expressed this and some remorse when he addressed me although I think that was more because of the impact on his mother than the impact that a loaded firearm could have had, had it fallen into the wrong hands or more likely had it discharged when it accidentally fell to the floor;

- b) Mr. Nguyen is still a relatively youthful offender and so the prospect of rehabilitation is important;
- c) I accept that Mr. Nguyen is strongly motivated now to avoid future criminal conduct, not only because he has now been incarcerated for such a long period of time but also because he has seen the impact of his conduct on his mother who was also charged. I accept that he intends to continue moving his life forward in a positive manner after his release and he has plans to do so which include staying away from the Parkdale area;
- d) Although Mr. Nguyen has no siblings and does not have any contact with his father, he has a close relationship with his mother, and he plans to continue to live with her. In addition, he has support from the persons who offered to be sureties and no doubt his mother's sister and brother, assuming they can forgive him for the jeopardy he put his mother in; and
- e) As already stated, the usual aggravating factor of the firearm being loaded is not present in this case in terms of sentencing Mr. Nguyen.

48 Ms. Stewart submitted that there are a number of aggravating features in this case and I agree that they are as follows:

- (a) At a minimum, Mr. Nguyen exercised poor judgment when he made a deliberate decision to allow the firearm to be stored in his Apartment, which in effect put him in possession of this firearm as "his gun";
- (b) Although the Crown does not dispute Mr. Nguyen's explanation for why the firearm was in his Apartment, he was a prior gun offender not an innocent person with no experience. He was under a firearm prohibition order and would know what he should and should not do;
- (c) There is no doubt that a loaded firearm is a deadly weapon and yet Mr. Nguyen took no apparent care in where it was kept given the evidence we do have of what happened when the bedsheet was pulled. The storage of the firearm was absolutely not safe. Given the state it was in and where it was kept, in my view it is clear that it could have discharged when it fell to the floor. In doing so he put his mother at risk of injury and breached her trust by allowing this firearm to remain in the Apartment;
- (d) Mr. Nguyen candidly admitted that lighter sentences that have been imposed on him in the past did not deter him from further criminal behaviour. It seems only now that his mother was also impacted, and he has been in custody for a long time that he has decided to change his ways;
- (e) In particular, it is clear that the prior sentence Mr. Nguyen obtained for possession of a firearm as a youth did not deter him for taking possession of his friend's firearm.

49 Ms. Stewart submitted that this case cries out for denunciation and that an aggravating factor was the flagrant breach by Mr. Nguyen of the prohibition order which is a simple order to comply with. Clearly, I

must consider as primary factors the principles of general and specific deterrence and denunciation. However, that does not mean that I should not have regard for the potential of rehabilitation. It is also an important factor to be considered particularly in this case as Mr. Nguyen is still a youthful offender. I should exercise restraint as legislated in ss. 718.2 (d) and (e) of the *Criminal Code* and although incarceration is necessary, the term should be as short as possible and tailored to the individual circumstances of Mr. Nguyen.

50 An important issue that I would have had to decide if this was a s. 95 case would be whether or not Mr. Nguyen's possession of a loaded prohibited firearm in this case ought to be considered as fitting within the "true crime" range of sentencing. In my view the "true crime", as it relates to appropriate sentencing ranges, requires more than simple possession of a loaded firearm. In this case although Mr. Nguyen was technically in possession of this firearm, since he did not consider it to belong to him there is no evidence before me that Mr. Nguyen had the firearm in his possession as a "tool" of any criminal trade.

51 In my view, the cases referred to by counsel are not of much assistance because they deal with s. 95 offences. The cases that I have referred to, that consider the applicable section that Mr. Nguyen was convicted of, namely s. 95(1), for the most part suggest that the Crown's proposed sentence is too high.

52 Considering the sentencing principles I must apply and all of the aggravating and mitigating factors, I have identified and given my conclusion that Mr. Nguyen's prospects for rehabilitation are good, a sentence of 36 months is appropriate for the possession of a firearm conviction.

What is a fit sentence for the breach of prohibition order conviction?

53 This is Mr. Nguyen's first offence for breach of a prohibition order. The sentence I impose should clearly be consecutive to Mr. Nguyen's other sentence, as that is the only way to bring home to Mr. Nguyen the severity of this conduct.

54 In my view an appropriate sentence for this conviction would ordinarily be one year. However, given that the was not a firearm that Mr. Nguyen had personally acquired, in my view eight months is a fit sentence in this case.

The Global Sentence

55 For these reasons the global sentence I will impose on Mr. Nguyen is 44 months. In coming to this conclusion, I have considered both the totality of the sentence and the fact that it is a considerable jump up from the longest sentence ever imposed on Mr. Nguyen before. This however is a function of the seriousness of these convictions, particularly the conviction for possession of a firearm.

Claim for Credits for Pre-Sentence Custody

The Summers Credit

56 In *R. v. Summers*, [2014] 1 SCR 575, the Supreme Court of Canada found at paras. 68-71, that because every day served in pre-trial custody does not count towards parole eligibility, the loss of early release, taken alone, will generally be a sufficient basis to award credit at the rate of 1.5 to 1, even if the

conditions of detention are not particularly harsh, and parole is unlikely. Ms. Stewart concedes that Mr. Nguyen is entitled to the *Summers* credit; an enhanced credit at 1.5:1 for every day served before he is sentenced. He was incarcerated for 876 days from June 4, 2017 to October 28, 2019; the date of the sentencing hearing and an additional four days to today's date for a total of 880 days. Applying the ratio of 1.5:1, this results in a pre-sentence credit of 1,320 days.

Conditions of Custody

57 In addition, Ms. Page asks for further .5 credit for the 227 days of lockdowns which results in 114 days for a total of 1428 days credit. This in turn represents 3.9 years.

58 Ms. Stewart submits that I should not give Mr. Nguyen a *Duncan* credit because he has not suffered any exceptional hardship with respect to the lockdowns. Save for having to eat meals in his cell, and staying in his cell, there was no other impact. Any compromise of his privacy by virtue of the fact that the toilet was in the cell would have been the case in any event. Ms. Stewart also submitted the fact that Mr. Nguyen was able to complete some credits and participate in work programs makes it clear that he was not adversely impacted by the lockdowns.

59 Ms. Stewart submitted in the alternative that the enhanced credit claimed of the 114 days should be reduced to somewhere between 60-90 days.

60 The jurisdiction to award an enhanced credit in these circumstances was set out by the Court of Appeal in *R. v. Duncan*, 2016 ONCA 754, where the court held that an offender may be given credit for time spent in custody in excess of 1.5 days per day served, given the conditions under which the offender was held in custody. The court held, at para. 6, that:

... particularly harsh presentence incarceration conditions can provide mitigation apart from and beyond the 1.5 credit referred to in s. 719(3.1). In considering whether any enhanced credit should be given, the court will consider both the conditions of the presentence incarceration and the impact of those conditions on the accused. [Emphasis added]

61 In *Duncan*, there were a number of lockdowns due to staffing issues, but there was no evidence regarding the adverse effect these lockdowns had on the particular offender. In fact, Mr. Duncan took positive steps towards his rehabilitation while he was in pre-sentence custody. As such, he was not granted any enhanced credit beyond 1.5:1 because of the absence of evidence regarding how this situation impacted him.

62 The Ontario Court of Appeal re-affirmed the general position that evidence must be introduced as to how lockdowns have a particularly harsh impact on the offender in question in *R. v. Henry* [2016] O.J. No. 5897 (C.A.) at para. 9. There, the court held that the sentencing judge did not err in declining to give enhanced credit beyond the normal 1.5:1 ratio. There was an absence of any evidence as to an adverse effect on Mr. Henry, flowing from the lockdowns.

63 In this case I have some evidence of an adverse impact on Mr. Nguyen in terms of interference with programing notwithstanding that he was able to obtain five high school credits while in custody. I agree as well that there is an adverse impact of being forced to have meals in a cell, or as Ms. Page put it, on your bathroom. Furthermore, there was no doubt an impact on Mr. Nguyen's ability to have visitors. His

mother could not have contact with him because of the no contact order, but the person that he regarded as his grandmother did visit him and her visits were very likely impacted because of the sheer number of lockdowns. As Justice O'Marra noted at para. 22 in *R. v. J.B.*, 2016 ONSC 939, (S.C.J.):

The fact that an inmate has experienced lockdowns certainly does not lead automatically to any additional mitigation of their ultimate sentence. However, a prolonged lockdown that is unrelated to the misconduct of the accused before the court may constitute harsh conditions that merit some mitigation of sentence. A lockdown is not the norm within the institution and it should not be viewed as such. When a lockdown occurs, the inmate is cut off from contact with the outside world, including family, friends and counsel. [Emphasis added]

64 I also agree with the views of Justice Goldstein in *R. v. Jama*, [2018] O.J. No. 1130 (S.C.J.), at paras. 20-21 in regard to lockdowns at TSDC:

... We should have real concerns about conditions at the Toronto South. We should also have real concerns on behalf of a very young man incarcerated for a lengthy period of time who chooses to remain in Toronto to be closer to his family. Furthermore, we should not simply normalize unacceptable conditions in a jail. It must be remembered that people like Mr. Jama enjoy the presumption of innocence -- or at least he did until he pleaded guilty. But even after pleading guilty he remains a human being who retains every single right that other human beings in our society retain, except the right to be at liberty outside the institution. Lockdowns arising from staff shortages, and even those arising from security reasons, should not be seen as just the price to be paid by those in custody.[Emphasis added]

65 I agree with Ms. Stewart that Mr. Nguyen should not receive a full credit for the 74 lockdowns that took place at 6:00 p.m. or later; which meant the lockdown was only four hours or less versus as many as 13 hours. In my decision of *R. v. Kabanga-Muanza*, 2018 ONSC 1161, at para. 112, I stated that I would not meticulously scrutinize the lockdown records to determine the length of the lockdowns in terms of hours, but I did reduce the number by 33% to reflect the fact that all of the lockdowns were not for a full day. In my view it would be appropriate to reduce 74 partial lockdowns by two thirds which would bring the total number of lockdowns to 227 minus 50 days equals 177 days.

66 I agree with Ms. Stewart that because there is no evidence that Mr. Nguyen suffered a particularly harsh impact as a result of the lockdowns that he should not receive a full .5 per day credit for these days in lockdown. However, given the evidence I do have of the adverse impact on him, as I have set out, and given my agreement with the views of Goldstein J. in *Jama, supra*, I find he is entitled to some further discount. In my view a further credit of 90 days is reasonable.

Total Pre-Sentence Custody Credit

67 For these reasons the total pre-sentence credit that Mr. Nguyen is entitled to is 1,320 days plus 90 days for a total of 1,410 days which is equivalent to just over 46 months. Given my decision that his global sentence should be 44 months Mr. Nguyen will be sentenced to time served plus one day.

68 In the circumstances, since Mr. Nguyen has more than served his sentence, I will not impose a term of probation.

Final Disposition

69 With respect to your conviction for possession of a prohibited firearm, contrary to s. 92(1) of the *Criminal Code*; Count 3 in the first Indictment I sentence you to 36 months in custody.

70 With respect to your conviction for possession of a firearm, namely a handgun, while prohibited from doing so by reason of an order made under s. 51(1) of the *Youth Children Justice Act ("YCJA")* contrary to s. 117.01(1) of the *Criminal Code* (Count 1 -- second Indictment) I sentence you to eight months in custody to run consecutively to your sentence on Count 3 in the first Indictment.

71 As a result, your total sentence is 44 months. After giving you credit for pre-sentence custody of 46 months, to be applied to your global sentence, I sentence you to time served plus one day. The Indictment however will reflect the sentences imposed on each count and the pre-sentence credit.

72 There will also be a mandatory weapons prohibition order pursuant to s. 109(3) of the *Criminal Code* for life and an order pursuant to s. 487.051(1)(a) authorizing the taking of a DNA sample. The firearm will be forfeited to the Crown.

N.J. SPIES J.