SUPREME COURT OF YUKON

Citation: *R v. McDiarmid*, 2015 YKSC 35

Date: 20150714
S.C. No.: 12-01513B
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

MARK LEE McDIARMID

Before The Honourable Madam Justice E.A. Hughes

Appearances:
Jennifer Grandy — Counsel for the Crown
Mark McDiarmid — Appearing on his own behalf

REASONS FOR SENTENCING

[1] HUGHES J. (Oral): On March 2, 2015, the jury found Mr. McDiarmid not guilty of two counts of attempted murder and guilty of one count of mischief, three counts of assault peace officer engaged in the execution of their duties, and one count of possession of a weapon for a purpose dangerous.

[2] In this decision I will first set out some history to the sentencing hearing; second, I will make findings of fact pursuant to s. 724(2) of the *Criminal Code*; third, I will review the purpose and principles of sentencing; fourth, the position of the parties; fifth, Mr. McDiarmid's circumstances, and, lastly, I will deal with the issue of quantum and post-sentence credit.

[3] On March 18th, the sentencing date of July 13th was set and I directed that the pre-sentence report should include a *Gladue* report, having ordered a *Gladue* report after Mr. McDiarmid was found guilty by the jury. In April, Mr. McDiarmid was given a filing deadline of the end of May for any *Charter* application he wished to file on the sentencing. On both of these court dates, a lawyer, Jason Gratl, from Vancouver appeared, although he advised he had not been retained by Mr. McDiarmid. By April 27th and confirmed by a letter dated April 30th, Mr. Gratl advised the Court he was not retained by Mr. McDiarmid. Mr. McDiarmid did not file any *Charter* application by the end of May, nor seek an extension of the deadline.

[4] On June 24, 2015, Mr. McDiarmid advised, during a pre-trial conference on another matter before another judge, that he was going to seek an adjournment of his sentencing scheduled to commence in Dawson City on July 13th. As a result of this, the trial coordinator contacted me, the Crown, and Mr. McDiarmid and all parties were agreeable to speaking to the application on Monday, June 29th.

[5] At the application was Mr. Mark Stevens of the Kwanlin Dün First Nation Community Justice, who advised Mr. McDiarmid he would do a *Gladue* report for him, but Mr. Stevens would need an adjournment to prepare a written report. On June 29th, Mr. Stevens advised the Court that he could do an oral report for July 13th. I denied the application for an adjournment for the following reasons:

1. Mr. McDiarmid was convicted at the beginning of March of 2015. If his sentencing was adjourned, it would have caused it to be put over for many months due to other court commitments I have and Mr. McDiarmid would not be sentenced as soon as practical.

2. The Court could receive the *Gladue* information orally from Mr. Stevens.
3. Mr. McDiarmid's submissions with respect to his pre-sentence custody and his time in custody are well-known to me.
4. Mr. McDiarmid's belief that I needed to await a bail review before I could sentence him makes no sense.
5. Mr. McDiarmid's application for judicial review vis-à-vis the Whitehorse Correctional Centre is not related to this sentencing.
6. Mr. McDiarmid proceeded to trial not wishing counsel. He was able to represent himself in an effective manner. I find his claim that he now needs a lawyer to be a stalling tactic.
7. I am exceedingly concerned Mr. McDiarmid has become institutionalized and does not wish these proceedings to come to an end when I consider that he has only made one application for bail since these charges were laid, and that was in November 2014.

[6] Both before and after the application to adjourn, Mr. McDiarmid has taken many steps to derail or frustrate this sentencing, including:

1. Refusing to meet with a probation officer, as set out in the letter found in Exhibit 3;
2. Refusing to give the authorizations to Mr. Stevens for his report;
3. Attempting to stop Jody Beaumont of the Tr'ondëk Hwëch'in First Nation from testifying yesterday, and then threatening her and the First Nation with a civil lawsuit, and
4. Refusing to leave his cell to come to court yesterday as well as today.

[7] I now turn to the findings of fact.

[8] Section 724(2) of the *Criminal Code* requires me to make findings of fact after a jury verdict. My findings are these:

[9] On October 19, 2011, Sgt. Wallace was told by a civilian member of the RCMP that she saw Mr. McDiarmid's truck drive by the detachment. In the early afternoon, Sgt. Wallace went looking for Mr. McDiarmid because there was a warrant for the arrest of Mr. McDiarmid. Mr. McDiarmid's surety had surrendered him on the charges that were alleged to have taken place in August 2010 and March 2011. Mr. McDiarmid knew his surety had done this and knew what to expect, as his first surety had surrendered him, he was taken into custody and then re-released.

[10] Sgt. Wallace found Mr. McDiarmid unloading wood at Ms. Dillman's (phonetic) house. Sgt. Wallace approached Mr. McDiarmid and asked him to come with him to deal with the warrant, but Mr. McDiarmid replied, "No, stay away from me." Mr. McDiarmid came upset, got into his vehicle and drove away.

[11] Sgt. Wallace decided he would drive up to Mr. McDiarmid's mother's house to look for him. There he saw Mr. McDiarmid parked in front of his mother's house unloading firewood. Sgt. Wallace parked his vehicle about two pickup truck lengths behind Mr. McDiarmid's vehicle, got out of his truck and walked towards Mr. McDiarmid. Sgt. Wallace told Mr. McDiarmid he needed to talk to him about the outstanding matter and Mr. McDiarmid needed to come to the detachment to sort out matters. Mr. McDiarmid replied, "I'm tired of dealing with you guys." Mr. McDiarmid reached into the back of his truck and came out of it holding a sledgehammer in his hands and began to come towards Sgt. Wallace. Sgt. Wallace quickly got back into his police car and tried to back it up when he saw Mr. McDiarmid go into the back of his truck. However,

Mr. McDiarmid came up to the police vehicle before Sgt. Wallace could back away and swung the sledgehammer at the front left headlight, the front hood area, and, lastly, at the windshield directly in front of Sgt. Wallace. Mr. McDiarmid smashed out the front headlight and the front windshield in front of Sgt. Wallace and dented the front hood area.

[12] The following day, October 20, 2011, Sgt. Wallace, Cst. McIntyre, Cst. Marentette, Cst. Nielsen, Cpl. Morin, and Aux. Cst. Murtagh met and made a plan to arrest Mr. McDiarmid. The arrest ended up taking place at the intersection of the Dempster Highway with the North Fork Road in the evening. The sun had set some time earlier.

[13] Mr. McDiarmid's truck ran over a spike belt placed on the North Fork Road. Mr. McDiarmid continued driving to the intersection of the Dempster Highway with the North Fork Road and turned right, with two marked police vehicles following him. Cst. Marentette and Cst. Nielsen were in the first vehicle; Sgt. Wallace and Cst. McIntyre were in the second police vehicle.

[14] Cst. Nielsen and Cst. Marentette saw Mr. McDiarmid's vehicle come to a quick stop, about 20 metres past the intersection. Cst. Nielsen, who was driving the police vehicle, stopped approximately 10 metres behind Mr. McDiarmid's truck. As soon as the police vehicle was put into park, Mr. McDiarmid threw a glass jar containing a mixture of gasoline with a wick at the windshield of the police vehicle. It hit the windshield, shattering the glass, and making a loud sound, which the officers could not see or identify. The two officers jumped out of their vehicle, crouched down beside it and then saw Mr. McDiarmid running towards them from the driver's side of his truck,

holding a splitting maul above his head. Cst. Nielsen yelled at Mr. McDiarmid, "Stop. Stop," but Mr. McDiarmid continued to run towards the officers with the splitting maul raised above his head. When Mr. McDiarmid was near the hood area of the police vehicle, the police officers fired their service revolvers at Mr. McDiarmid. Mr. McDiarmid fell to the ground with the splitting maul as he was struck by three bullets.

[15] All the officers were in the lawful execution of their duties on October 19th and 20th, attempting to execute a warrant for the arrest of Mr. McDiarmid, which Mr. McDiarmid knew was outstanding. In addition, Mr. McDiarmid knew all of the officers and knew they were members of the RCMP in Dawson.

[16] In determining what is a fit sentence for Mr. McDiarmid, I must consider the purpose and principles of sentencing set out in the *Criminal Code* and the decisions of the Supreme Court of Canada, the Yukon Court of Appeal, and other appellate courts that have interpreted the sentencing principles and decisions of courts respecting the sentencing range for the offences in question. In addition, I must consider Mr. McDiarmid's personal circumstances and the aggravating and mitigating circumstances in this case.

[17] Section 718 of the *Criminal Code* defines the purpose and objectives of sentencing. It states:

> The fundamental purpose of sentencing is to contribute ... to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;

> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[18] The fundamental principle of sentencing is that a sentencing must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[19] I must also consider s. 718.02, which provides that when I impose a sentence for assault peace officer while engaged in the execution of duty, I shall give primary consideration to the objectives of deterrence and denunciation, and s. 718.2, which sets out other sentencing principles, including consideration of the aggravating and mitigating factors, the principle of parity, and the principle that I must pay particular attention to the circumstances of Aboriginal offenders, because Mr. McDiarmid is an Aboriginal offender. In this case, the primary objective of the sentence I impose must be to denounce the unlawful conduct and to deter this offender, Mr. McDiarmid, and others from committing like offences.

[20] The position of the Crown is that a global sentence in the range of four years would be a fit sentence. The Crown submits Mr. McDiarmid is entitled to an enhanced pre-sentence credit but submits it should be at a rate of 1.25:1.

[21] Mr. McDiarmid's statements and letters filed raise these issues with respect to considering what a fit sentence is. What credit should his time in custody attract? He

suggests he is entitled to 1.5:1. In addition, Mr. McDiarmid relies, it appears, on the *Charter* and suggests s. 24(1) should be invoked and with his situation, he should then be credited at a rate of 3:1 for his pre-sentence custody.

[22] This last argument appears to be similar to that in *R. v. Hammerstrom*, 2014 BCSC 1201, at para. 37 where the Court said:

> Mr. Hammerstrom applied for relief pursuant to section 24(1) of the *Charter*, seeking enhanced credit for his pre-trial detention at a rate higher than 1.5:1. In argument, he sought credit at the rate of 3:1. He argued that his pre-trial detention conditions constituted a violation of ss. 7, 9 and/or 12 of the *Charter*, such that he should have relief pursuant to s. 24(1).

[23] I note that in reviewing the various authorities in regards to Mr. McDiarmid's position, that *R. v. Chambers*, 2014 YKCA 13, held that s. 719(3.1) is constitutional vis-à-vis Aboriginal offenders.

[24] In addition, Mr. McDiarmid relies, I suggest, on *R. v. Nasogaluak*, 2010 SCC 6, that being that the RCMP used excessive force in their arrest of him by shooting him and, therefore, this police misconduct should be a relevant factor in determining a fit sentence.

[25] I turn then to the circumstances of Mr. McDiarmid, including the *Gladue* information provided by Jody Beaumont, who works for the Tr'ondëk Hwëch'in First Nation.

[26] I begin with dealing with the *Gladue* issue and note that the British Columbia Court of Appeal, in a decision by the name of *R. v. Paul*, 2014 BCCA 81, considered *R. v. Gladue* and *R. v. Ipeelee* in the context of a case where it appears no *Gladue* report was before the sentencing judge, or at least there was a new one that was filed

on appeal. The Court summarized the principles of *Gladue* and *Ipeelee* vis-à-vis the issue before them and said this, at paras. 5 through 8:

> Mr. Paul contends that the judge failed to give adequate consideration to his circumstances as an aboriginal person and misapplied *R. v. Gladue* ... by focusing wrongly, on the seriousness of the offences, and thus erred by failing to ... consider the requirements of s. 718.2(e). The result, he says, is an unfit sentence that we should correct. His submission relies heavily upon *R. v. Ipeelee* ... decided several years after the imposition of this sentence
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> In *Gladue* the Supreme Court ... [considered] the requirement implicit in s. 718.2(e) that the judge receive sufficient information to allow for discharge of the judge's obligation, saying in summary, at para. 93:
>
> > Let us see if a general summary can be made of what has been discussed in these reasons.

Then:

> Section 718.2(e) directs sentencing judges to undertake the sentencing of aboriginal offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider:
>
> > (A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
> >
> > (B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.
>
> In order to undertake these considerations the trial judge will require information pertaining to the accused. Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing. In the usual course of events, additional case-specific information will come from counsel and from a pre-sentence report which takes into account the factors set out in #6, which in turn may come from representations of the relevant aboriginal community which will usually be that of the

> offender. The offender may waive the gathering of that information.

[27] The Court continued at para. 7 and said:

> After *Gladue*, special reports were sometimes prepared for the sentencing hearing discussing the systemic and background factors referred to in point 7 as matters a judge may take judicial notice of, and discussing the matters that are referred to in point 6. Such reports have come to be known as *Gladue* Reports. They are, as recognized in *Ipeelee*, ... "a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders". However, such reports have not been invariable, and until *Ipeelee* judges were often left to gather the necessary appreciation of the circumstances of the aboriginal offender by taking notice of the systemic and background factors described in *Gladue*, from evidence adduced as to the circumstances of the offender including as to his or her local aboriginal environment, and from submissions. On my understanding of *Gladue*, this lack of a specific report did not demonstrate error – what was required was sufficient information that the judge could adequately consider to give, in the words of s. 718.2(e) "particular attention to the circumstances of the aboriginal offender".
>
> In *Ipeelee* the Supreme Court of Canada revisited the means by which judges could demonstrably obtain the information said in *Gladue* to be essential to consideration of s. 718.2(e). *Ipeelee* refers to *Gladue* Reports favourably and at para. 60 reiterates the central instruction in *Gladue*, saying "[b]ringing such information to the attention of the judge in a comprehensive and timely way … is indispensable to a judge in fulfilling his duties under s. 718.2(e) of the *Criminal Code*".

[28] Had Mr. McDiarmid met with the probation officer when she went to meet him, the Court would have had more fulsome *Gladue* information. Further, had Mr. McDiarmid provided Mr. Stevens with the necessary authorizations, the Court could have had an oral *Gladue* report. Accused persons, to my mind, are not entitled to highjack the court process, as Mr. McDiarmid has attempted to do, as set out earlier, but based on the evidence of Jody Beaumont, a pre-sentence report, Mr. McDiarmid's

evidence and statements throughout the course of the trial, I believe I have sufficient information to proceed on the sentencing with regards to the *Gladue* factors.

[29] Then, going to Mr. McDiarmid's circumstances.

[30] Mr. McDiarmid is 36 years old. At the time of these offences he was 32. Mr. McDiarmid is of Aboriginal descent. He is a member of the Tr'ondëk Hwëch'in First Nation and has lived the majority of his life in Dawson.

[31] The Tr'ondëk Hwëch'in First Nation was severely and negatively impacted by the Gold Rush, the federal government's changes to hunting and trapping laws, and, lastly, by the residential schools. Ms. Beaumont describes the community as now coming back to life, although it has a long ways to go. The fact Mr. McDiarmid was not at birth a member of the Tr'ondëk Hwëch'in First Nation is not an issue as far as the Tr'ondëk Hwëch'in First Nation is concerned, according to Ms. Beaumont, and the community does have programs that could assist Mr. McDiarmid's rehabilitation should he wish to avail himself of them.

[32] Unlike many cases trial judges see, alcohol and drugs were not a factor in the commission of these offences nor does it appear, from the pre-sentence report, a factor in Mr. McDiarmid's life for a number of years prior to these offences. Mr. McDiarmid, I note, has made complaints respecting inaccuracies in the pre-sentence report. I note he has never pointed out a specific inaccuracy. Justice Gower made no mention of inaccuracies in his sentencing decision for which the pre-sentence report was prepared. The report to my mind is very thorough and on the whole is favourable and positive to Mr. McDiarmid.

[33] Mr. McDiarmid's criminal record is limited. The offence dates for his convictions predate these offences, although his convictions occurred after these offences.

[34] Mr. McDiarmid appears to be an intelligent individual and prior to these offences an industrious man to whom work was important. Mr. McDiarmid may well suffer from mental health issues, in light of the information contained in the pre-sentence report, Dr. Lohrasbe's report, a psychological report, as well as his behaviour before the Court over the past couple of weeks. Mr. McDiarmid is an individual who believes the laws and/or rules do not apply to him.

[35] The pre-sentence report fully sets out his background from childhood and on. It is fair to say that he faced challenges as a young person, including his father's death at a young age, and what appears to be bullying in school. He also would have faced the issues of having his family and his community impacted by the Gold Rush, the changes to the hunting and trapping laws, and the residential schools.

[36] I then turn to a few background facts respecting Mr. McDiarmid vis-à-vis this sentencing proceeding.

[37] Mr. McDiarmid has been in custody since the offence date on the matters before me. The Crown calculates this to be three years, eight months, and, as of today, 25 days. Of that time, time must be deducted for the time Mr. McDiarmid served for his other sentences. Ms. Grandy calculates the balance remaining as of yesterday to be three years, five months, four days.

[38] The report from the Whitehorse Correctional Centre indicates Mr. McDiarmid has been in segregation for portions of his time awaiting trial. Some of that time is composed of administrative sentences; the other part is as a result of Mr. McDiarmid's

request to be put in segregation, a period of some eight months. From the information provided by the Crown yesterday, some of Mr. McDiarmid's voluntary separate confinement time could not be considered as onerous, as one would expect hearing the term: "He is in segregation."

[39] Mr. McDiarmid has demonstrated during the trial that he knows how to issue subpoenas for individuals he believes may have evidence he believes helpful to his case, yet he has issued no subpoenas in regards to this sentencing.

[40] I then turn to look at the mitigating and aggravating factors.

[41] The mitigating factors are these:

1. Mr. McDiarmid was a contributing member of society prior to 2010.
2. Mr. McDiarmid continues to have the support of his family, that being his mother and sister, as well as friends. For example, his mother was present almost every day, if not every day, at his trial in Dawson City and assisted him in obtaining information, taking necessary steps, et cetera in the trial process. Also present on a regular basis for the trial was a gentleman by the name of Art Christiansen, a friend of Mr. McDiarmid's, and, it appears from Mr. McDiarmid's evidence, a mentor to him.

[42] The aggravating factors I see are these:

1. Mr. McDiarmid knew the RCMP had a warrant for his arrest but did not think the law applied to him.
2. Mr. McDiarmid accepts no responsibility for his actions.
3. Mr. McDiarmid's escalating violence. I look at the facts as set out in Justice Gower's decision for the March 2011 offences, which was a driving

offence but using his vehicle in a violent way in respect of the RCMP. I then look at the violence used on October 19th and 20th, these offences, as well as the threats made by Mr. McDiarmid over the past two weeks.

4. From Mr. McDiarmid's behaviour at present, there is no prospect for rehabilitation.

[43] I then turn to the issue of quantum of sentence.

[44] The most serious of the offences for which Mr. McDiarmid was convicted are the three s. 270.01 offences, one on October 19th and the other two on October 20th. Section 270.01 and s. 718.02 were proclaimed October 2, 2009, thus, are relatively new to the *Criminal Code*. I agree with Scherman J. in *R. v. Russel*, 2015 SKQB 97, where he said this, at paras. 9 and 16, and I quote:

> It is clear that the intention of Parliament in making these amendments to the *Criminal Code* was to direct the seriousness with which assaults on police officers and the commission of crimes involving the use of firearms are to be viewed and treated. Arguably the intent of Parliament was to increase the level of penalties for individuals convicted of such crimes beyond what had theretofore been imposed.
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> Under s. 270 of the *Criminal Code*, the maximum penalty for assaulting a peace officer is five years of imprisonment. The 2009 amendment creating s. 270.01 provides that where the assault on the police officer involves the use of a weapon or causes bodily harm, the maximum penalty is 10 years of imprisonment. The intent of Parliament is clear. The additional factor of using a weapon in the assault is viewed as an aggravating factor and Parliament intended that offenders who assaulted police officers with a weapon would be subject to a higher sentence range. The purpose of creating this new offence was to deter such actions and provide some additional level of protection to the police.

[45] In *R. v. McArthur*, 2004 182 C.C.C. (3d) 230, Ontario Court of Appeal, the Ontario Court of Appeal said this, at para. 49, with respect to deterrence and denunciation and offences where the victims are police officers:

> ... the maintenance of a just, peaceful, and safe society is the fundamental purpose of sentencing. Police officers play a unique and crucial role in promoting and preserving a just, peaceful and safe society. We rely on the police to put themselves in harm's way to protect the community from the criminal element. At the same time, we rely on the police to act with restraint in the execution of their duties and to avoid the use of [any] force, much less deadly force, unless clearly necessary. Violent attacks upon police officers who are doing their duty are attacks on the rule of law and on the safety and well-being of the community as a whole. Sentences imposed for those attacks must reflect the vulnerability of the police officers, society's dependence on the police, and society's determination to avoid a policing mentality which invites easy resort to violence in the execution of the policing function.

Although the facts in *McArthur* were more serious than those before me, I find the principle set out at para. 49 to be applicable here.

[46] In another *McArthur* decision, this one from the Saskatchewan Court of Appeal, 2010 SKCA 90, the Court said this, at para. 5:

> ... Assaults on peace officers are to be denounced and deterred, for their tasks are difficult enough without being subjected to abusive behaviour of the kind exhibited by the respondent. In this case, the assaults and related threats against the officers were of a serious nature and warrant a custodial sentence of two years less the remand [time]. Moreover, a two year sentence is proportionate to the sentences imposed in *R. v. Herman* ... and *R. v. Doucette* ...

[47] The facts in *Russel* were these:

> [1] ...The circumstances were that when Mr. Russel's vehicle was stopped by the police, he pointed a loaded rifle at Constable Sean Strang at point blank range and said, "Don't move, I am going to shoot you."

> [2] Mr. Russel was quite impaired at the time and but for the superbly executed reaction of Constable Strang in redirecting the muzzle of the rifle and disarming Mr. Russel, the consequences could have been tragic. The trigger was not pulled, the rifle did not accidently discharge and no one was injured.

Justice Scherman sentenced Mr. Russel to 28 months for that offence, finding that Mr. Russel was remorseful, he had no history of violence, there was no animus on his part towards the police, and he was quite intoxicated at the time.

[48] Other cases provided by the Crown that provide guidance are *R. v. Ponticorvo*, 2009 ABCA 117, and *R. v. Ben*, 2012 SKPC 52. I note the latter case, *Ben*, provides less assistance than the other two. Based on *Ponticorvo* and *Russel*, it appears the range for an offence pursuant to s. 270.01 is in the range of 28 to 30 months. I should say as well, though, that neither *Ponticorvo* nor *Russel* were Aboriginal offenders. And I note what the Supreme Court of Canada has said about the parity principle and s. 718.2(e) in *Ipeelee* at paras. 78 and 79.

[49] Here we have three s. 270.01 offences over two days involving three police officers as well as the mischief and possession of a weapon for purpose dangerous offence. In terms of proportionality, Mr. McDiarmid's moral culpability is at the highest level, although the acts themselves are not at the most serious end of the range.

[50] I must also take into account in sentencing the principle of totality. Therefore, in sentencing Mr. McDiarmid, I sentence him as follows: In regards to Count 2, the count involving Sgt. Wallace, 18 months; Count 5, the count involving Cst. Nielsen, 22 months consecutive; Count 6, the count involving Cst. Marentette, 22 months – it is consecutive to the Sgt. Wallace count but concurrent to the Cst. Nielsen count; Count 1, the

mischief, one month concurrent; Count 7, possession of a weapon for a purpose dangerous, two months concurrent. The total sentence then is 40 months.

[51] I must then now turn to look at Mr. McDiarmid's pre-sentence custody and the relevant provisions of the *Criminal Code* are ss. 719(3) and (3.1).

[52] In *R. v. Summers*, 2014 SCC 26, the Court interpreted these provisions and held as follows:

> [57] ...The amendments clearly impose a *cap* on the rate at which [pre-sentence] credit can be awarded, at 1.5:1. ...

[53] The Court went on, at para. 70, to say this:

> In determining credit for pre-sentence custody, judges may credit at most 1.5 days for every day served where circumstances warrant. While there is now a statutory maximum, the analytical approach endorsed in *Wust* otherwise remains unchanged. Judges should continue to assign credit on the basis of the quantitative rationale, to account for lost eligibility for early release and parole during pre-sentence custody, and the qualitative rationale, to account for the relative harshness of the conditions in [the] detention [centre].

[54] The Court went on also to hold that:

> [71] 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. Of course, a lower rate may be appropriate when [the] detention was a result of the offender's bad conduct, or the offender is likely to obtain neither early release nor parole. ...

[55] In Mr. McDiarmid's case, he was not detained under any of the exceptions in ss. 3.1 and, therefore, he is eligible to be credited for his pre-sentence custody at a rate up 1.5:1. I agree with the reasoning in the *Hammerstrom* decision at para. 45 and find that *R. v. Summers* does not permit any enhanced credit for Mr. McDiarmid's pre-sentence custody over 1.5:1.

[56] However, there are other ways of considering either enhanced pre-trial custody or looking at reductions in sentence. One of those is the considerations of *Nasogaluak*, 2010 SCC 6, and considering whether it has any application to this case. At paras. 32 and 34, the Court said as follows:

> ... police officers do not have an unlimited power to inflict harm on a person in the course of their duties. While, at times, the police may have to resort to force in order to complete an arrest or prevent an offender from escaping police custody, the allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness. Courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences.

The Court continued, saying:

> Section 25(1) [of the *Criminal Code*] essentially provides that a police officer is justified in using force to effect a lawful arrest, provided that he or she acted on reasonable and probable grounds and used only as much force as was necessary in the circumstances. That is not the end of the matter. Section 25(3) also prohibits a police officer from using a greater degree of force, i.e. that which is intended or likely to cause death or grievous bodily harm, unless he or she believes that it is necessary to protect him- or herself, or another person under his or her protection, from death or grievous bodily harm. The officer's belief must be objectively reasonable. ...

[57] On the facts before me, I find Cst. Nielsen and Cst. Marentette were justified in using the force they did to effect the lawful arrest of Mr. McDiarmid. Both officers fired their service revolvers, believing it was necessary to protect each other and their own person from grievous bodily harm, and their beliefs were objectively reasonable. Based on then this finding, I not need consider *Nasogaluak* any further.

[58] That leaves s. 24(1) of the *Charter* and what *Nasogaluak* said at para. 64. There the Court, near the very end of its decision, said this:

> ... I do not foreclose, but do not need to address in this case, the possibility that, in some exceptional cases, sentence reduction outside statutory limits, under s. 24(1) of the *Charter*, may be the sole effective remedy for some particularly egregious form of misconduct by state agents in relation to the offence and to the offender. In that case, the validity of the law would not be at stake, the sole concern being the specific conduct of those state agents.

[59] Here the conduct of the state that Mr. McDiarmid relies upon is his time at the Whitehorse Correctional Centre. I do not see, on the materials Mr. McDiarmid has provided, that his case would fall within such an exception as set out in *Nasogaluak* and, therefore, I do not accede to his submissions.

[60] I am then left with s. 719(3.1) and the 1.5:1 credit for pre-sentence custody. Based on Mr. McDiarmid's loss of earned remission and the amount of time Mr. McDiarmid has spent in segregation, whether requested or not, I am going to credit Mr. McDiarmid with 1.5:1 for his pre-sentence custody. If my math is right, Mr. McDiarmid's time on remand is three years, five months, which equates to 41 months. Applying the 1.5 to the 41 months is the equivalent of 61-and-a-half months. Therefore, Mr. McDiarmid has served the sentence I have imposed here today and he is left with 21.5 months of unused pre-sentence custody based on my calculation.

[61] I make the following ancillary orders: The weapons prohibition under s. 109; the DNA order, and the forfeiture order.

[62] Ms. Grandy, I believe that concludes then all the matters.

[63] MS. GRANDY: Yes. Just to -- I apologize if I missed it, the 109 order is for 10 years?

[64] THE COURT: Yes.

[65] MS. GRANDY: Thank you.

[66] THE COURT: Because it is the first one.

[67] THE CLERK: Which counts does it apply to?

[68] THE COURT: The s. 270.01 offences.

[69] THE CLERK: Thank you.

[70] THE COURT: And the DNA is with regards to the s. 270.01 offences as well.

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HUGHES J.