

SUPREME COURT OF YUKON

Citation: *R. v. MacPherson*, 2017 YKSC 19

Date: 20170223
S.C. No. 15-01507
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

MICHAEL THOMAS RYAN RENE MACPHERSON

Before Mr. Justice L.F. Gower

Appearances:

Eric Marcoux and Joanna Phillips
Raymond Dieno

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCE

INTRODUCTION

[1] GOWER J. (Oral): The jury trial of Michael MacPherson for the second-degree murder of Tanner Sinclair on July 15, 2014, was scheduled to commence on February 20, 2017. On February 1, 2017, Mr. MacPherson re-elected trial by judge alone and, with the consent of the Crown, pled guilty to the included offence of manslaughter. The sentencing hearing was held on February 21 and 22, 2017. At the hearing I reserved the right to edit any published version of these reasons. This is the written sentencing decision and it is substantially the same as my oral reasons, except for minor changes to improve readability.

THE OFFENCE OF MANSLAUGHTER

[2] When a person directly causes the death of a human being by means of an unlawful act, he or she commits culpable homicide. Manslaughter is culpable homicide. Every person who commits manslaughter is guilty of an indictable offence and is liable to imprisonment for life. However, there is no minimum sentence. Therefore, the potential range of sentence is extremely broad, starting from a suspended sentence all the way to life imprisonment.

[3] Sentencing for manslaughter is especially difficult because the taking of human life in circumstances amounting to culpable homicide is an extremely tragic matter, and also because manslaughter covers a wide range of cases extending from near mistake or accident to near murder.

[4] A key assessment in manslaughter cases is the moral blameworthiness of the offender. By definition, the intent of the offender must be accepted to have fallen short of the specific intent to kill, but beyond that, the sentencing judge must determine where along the spectrum, from near murder to near accident, the offender's conduct, actions and intentions fall.

[5] Assessing the moral culpability of an offender requires an examination of his intentional risk-taking, the consequential harm that he has caused, and the normative character of his conduct. Other factors relating to this assessment include: the physical nature of the act itself; the choice of weapon; the degree of force; the extent of the victim's injuries; the degree of violence or brutality; and the degree of deliberation involved in the planning of the act.¹

¹ *R. v. Plowman*, 2015 BCCA 423, at para. 40.

[6] Because of the broad range of sentencing options available to a court for punishing the offence of manslaughter, the sentencing precedents in the case law vary widely and it is extremely difficult to attempt to compare facts, circumstances and backgrounds of offenders. In colloquial language, “the sentences are all over the map”.²

CIRCUMSTANCES OF THE OFFENCE

[7] The facts agreed upon between the Crown and the defence are as follows.

1. In October of 2013, Michael MacPherson came to Whitehorse to visit his friends Kory Basaraba and Faye Johns, both of whom he had known for some time. Mr. MacPherson returned to Vancouver Island.
2. In April 2014, Mr. MacPherson returned to Whitehorse in a motorhome, towing a boat. He began to live with Mr. Basaraba and Ms. Johns and their two children at their residence in Copper Ridge. Mr. MacPherson also started a relationship with Tana Tarr.
3. In May 2014, Mr. MacPherson was asked to leave the residence because it was suspected he had started using hard drugs. He then began living in his motorhome at Walmart and later at Pioneer RV Park.
4. Sometime in the spring Mr. MacPherson met Tanner Sinclair, the deceased, through Mr. Basaraba. Mr. MacPherson wanted to buy Mr. Sinclair’s truck and wanted to trade his boat for the truck, however, Mr. Sinclair was not interested in the boat. An acquaintance, Sean O’Donnell, became interested in the boat and a three-way trade was agreed upon wherein, Mr. Sinclair would give Mr. MacPherson the truck, Mr. MacPherson would give Mr. O’Donnell the boat and Mr. O’Donnell

² *R. v. McKay*, 2010 MBQB 56, at para. 32.

would give Mr. Sinclair a sum of cash believed to be between \$15,000 and \$18,000.

5. A short time after this transaction occurred, Mr. MacPherson had some mechanical issues with the truck. Although arrangements were made between Mr. Sinclair and Mr. MacPherson to resolve those issues, there was unresolved tension between them because Mr. MacPherson had not paid for the parts.
6. On July 14, 2014, Mr. Basaraba and Ms. Johns had a BBQ at their residence and invited Mr. MacPherson, Ms. Tarr and Mr. Basaraba's sister, Michelle Evans. However before this occurred Mr. Basaraba's truck broke down and he had transferred all of his tools.³ Once back at home, Mr. Basaraba emptied his belongings into the garage, except for a knife that was left on the patio table in the back yard. This knife was later used by Mr. MacPherson during the fight where Mr. Sinclair was stabbed.
7. Between 8 and 9 p.m., Mr. Basaraba and Mr. MacPherson decided to leave the residence and go to a local pub called the Ridge. Mr. MacPherson dropped Mr. Basaraba off at the Ridge. Mr. Basaraba then called Mr. Sinclair who arrived a short time later and they sat at the bar and consumed several alcoholic drinks. Mr. MacPherson arrived sometime later joining them at the bar.
8. At one point, the three men were outside the Ridge where there was video surveillance.

³ Presumably to his home, although this was not specified in the agreed statement of facts.

9. Mr. Basaraba and Mr. Sinclair returned to the pub. A short time later it was communicated to Ms. Johns that Mr. Sinclair and Mr. Basaraba were returning to Mr. Basaraba's residence.
10. They arrived at the residence where a neighbour who was in her own front yard, observed a male in a black t-shirt and baseball cap (matching the description of Mr. MacPherson) at the residence when two males in a white truck arrived. Mr. Basaraba was recognized as being the resident of the house, the other male was described as being tall in a white t-shirt (matching the description of Mr. Sinclair). The neighbour observed the male, who was thought to be Mr. Sinclair, trying to calm down Mr. MacPherson, although she could not make out what they were saying. Ms. Johns came out of the house and spoke with Mr. MacPherson privately for about 10 seconds. The neighbour then went into her house.
11. Mr. Basaraba, Mr. Sinclair, Ms. Tarr and Ms. Johns went into Mr. Basaraba's residence and proceeded to the living room and kitchen and socialized. Mr. MacPherson was believed to be in the back yard.
12. Around midnight, Mr. Sinclair went into the back yard and was joined by Ms. Johns, Ms. Tarr and Mr. MacPherson. They sat at the patio table and had drinks and cigarettes. By all accounts, everything seemed to be going well until Mr. MacPherson began making comments about the truck that Mr. Sinclair sold him. Mr. Sinclair made a remark to the effect that he should just knock Mr. MacPherson out, to which Mr. MacPherson replied "Just do it".

13. The two stood up and a fight ensued which moved rapidly from the ground level deck to a trampoline approximately 10 feet away. Mr. Johns got up to try and break up the fight yelling at Ms. Tarr to get Mr. Basaraba, who was in the residence. While that occurred, Ms. Johns heard Mr. Sinclair getting stabbed several times, she then heard Mr. Sinclair say “enough” and “he is stabbing me”, as Mr. MacPherson was swinging his arms with what was thought to be a knife in his hand. Ms. Johns never saw a knife, but described the sound of a blade hitting flesh.
14. Later Ms. Johns recalled seeing the empty knife sheath on the back patio table when Mr. MacPherson, Mr. Sinclair, Ms. Tarr and she were having a drink and smoking. She did not recall seeing a knife on the table.
15. Mr. Basaraba came out of the residence and Mr. MacPherson fled the back yard. Ms. Tarr was directed to take [an] infant [apparently present] upstairs which she did. Ms. Tarr went into the master bedroom that overlooked the back yard. Once there she turned around to find Mr. MacPherson in the bedroom closet. She yelled at him to leave.
16. Mr. Basaraba ran across the street to Kathy Donnelly’s residence, an off duty paramedic, asking for help. She and her friend, Claus Rosner, went to Mr. Basaraba’s residence. Mr. Rosner observed a male running away towards Grizzly Place. Ms. Donnelly arrived in the back yard to find Mr. Sinclair on the ground bleeding profusely, while Ms. Johns was on the phone to 911. Royal Canadian Mounted Police and Emergency Medical Services arrived.

17. Mr. Sinclair was transported to the hospital where he later died at approximately 5:36 a.m. on July 15, 2014, after suffering four stab wounds to his torso and back, and one on his left arm.
18. After Mr. MacPherson fled Mr. Basaraba's residence, he went to Ms. Michelle Evans' residence nearby. She let him in and later described him as being incoherent and saying something had happened. She said he was a mess and was not giving any details as to what happened, she said he was wearing a black "Monster" t-shirt (referring to the Monster energy drink).
19. He told her that there had been a fight and that Mr. Sinclair had attacked him and that he thought he had hurt Mr. Sinclair. He also confirmed that an altercation had occurred earlier with Mr. Sinclair at the Ridge. She later told officers that he was incoherent.
20. Mr. MacPherson asked if he could have a shower. She let him, afterwards he asked for another t-shirt and she provided him with one. During this time, Ms. Evans spoke with Ms. Johns, who told her Mr. Sinclair was hurt and there were EMS and RCMP in her back yard. RCMP later found the black Monster t-shirt hidden under her sink. Mr. Sinclair's DNA was later found on it.
21. Ms. Evans then drove Mr. MacPherson to Porter Creek, and dropped him off on Wann Road a short distance from the residence of Shawn Cameron. Mr. Cameron drove him around Whitehorse before he dropped him off at Pioneer RV Park in the early morning hours.

22. Mr. Cameron advised RCMP that Mr. MacPherson looked roughed up but did not notice any scrapes, bruises or fat lips. Mr. Cameron said Mr. MacPherson told him he was in a fight but did not provide any details.
23. After RCMP learned the foregoing, a warrant for Mr. MacPherson's arrest was sought and granted. There were press releases sent out in the Yukon, Alberta and British Columbia RCMP made attempts to locate Mr. MacPherson.
24. The next contact with Mr. MacPherson was on July 17, 2014, when Mr. MacPherson's mother, Jean Proud, disclosed that Mr. MacPherson called her that same evening and told her he did not mean to do it and "I'm not telling you where I am ... It wasn't supposed to happen, I didn't mean it, it was self-defence, he was coming at me, I've been driving for 48 hours, I am provinces and provinces away" and he told her he had considered taking a bottle of methadone and "just ending it".
25. That was the last anyone heard from Mr. MacPherson until July 25, 2014, when Mr. MacPherson turned himself in with his lawyer at the West Shore RCMP detachment in Langford, British Columbia, on Vancouver Island.

PURPOSE AND PRINCIPLES OF SENTENCING

[8] The fundamental purpose of sentencing is to protect society and to contribute to respect for the law and the maintenance of a safe and peaceful society by the imposing of just sanctions. Sections 718 to 718.2 of the *Criminal Code*, R.S.C., 1985, c. C-46, (the "*Criminal Code*") set out a number of objectives a judge should bear in mind when approaching the task of sentencing. These objectives include: denunciation of the

unlawful conduct and the harm done to the victims; deterring the offender and others from committing further offences; separating the offender from society by imprisonment, where necessary; assisting in rehabilitating the offender; promoting a sense of responsibility in the offender and acknowledging the harm done to the victims.

[9] It is always fundamental that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[10] Further, a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[11] It also bears mentioning that vengeance is not a consideration in any sentencing hearing.⁴

[12] Finally, a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

POSITIONS OF THE PARTIES

[13] The Crown submits that Mr. MacPherson should be sentenced to a term of imprisonment of between eight and 10 years, less credit for time served. The Crown also seeks a mandatory lifetime prohibition against the possession of firearms and a DNA order.

[14] It is the defence submission that an appropriate sentence would be a term of imprisonment of four years, less credit for time served, as well as credit for the extended period of restrictions on his liberty during his time at the VisionQuest facility.

EXHIBITS

[15] The parties have produced a number of documents, photographs and other items some of which were entered as exhibits at the sentencing hearing. These include:

⁴ *R. v. M.C.K.*, 2015 MBQB 82, at para. 11.

- 1) the agreed statement of facts;
- 2) a summary of Mr. Sinclair's injuries;
- 3) a booklet of photographs of the crime scene;
- 4) two letters from the VisionQuest Recovery Society regarding an alleged breach of recognizance by Mr. MacPherson on January 3, 2017;
- 5) a USB stick depicting a video of encounters between Mr. MacPherson and Mr. Sinclair at the Ridge pub between approximately 10:45 and 11:45 p.m. on July 14, 2014;
- 6) Mr. MacPherson's criminal record;
- 7) the victim impact statements (x 6);
- 8) documents relating to Mr. Sinclair's nomination for a hunting "Outstanding Guide Award";
- 9) letters of reference for Mr. MacPherson (x 16);
- 10) a report from the Triangle Community Resources Inc., R.I.T.E. Program regarding Mr. MacPherson;
- 11) reports from the VisionQuest Recovery Society regarding Mr. MacPherson's progress at that facility (x 2);
- 12) a letter regarding Mr. MacPherson's rental accommodation;
- 13) two letters from probation officers relating to Mr. MacPherson's conduct while on bail;
- 14) two letters regarding Mr. MacPherson's employment;
- 15) a certificate that Mr. MacPherson completed a Workplace Hazardous Materials Information System course on October 3, 2014;

- 16) a certificate that Mr. MacPherson completed a Standard First Aid CPR/AED course by the Canadian Red Cross on October 10, 2014;
- 17) a certificate that Mr. MacPherson completed a parenting after separation program on October 14, 2014;
- 18) a certificate that Mr. MacPherson attended and completed a substance abuse management program from October 25 to November 14, 2014;
- 19) a certificate that Mr. MacPherson completed a two-day janitorial training program on July 29, 2015;
- 20) a certificate that Mr. MacPherson completed a two-day plumbing program on August 27, 2015;
- 21) a certificate that Mr. MacPherson completed an anger management program at the VisionQuest facility over the period from August 20 to October 8, 2015;
- 22) a certificate that Mr. MacPherson completed a life skills program at the VisionQuest facility over the period from October 28 to December 16, 2015;
- 23) a certificate that Mr. MacPherson completed a grief support workshop at the VisionQuest facility on April 18, 2016;
- 24) a certificate that Mr. MacPherson completed a job readiness program on November 10, 2016;
- 25) a certificate that Mr. MacPherson completed a three-day therapeutic workshop entitled “Positive Choices, Positive Voices” on January 26, 2017; and

- 26) a certificate that Mr. MacPherson completed a four-day substance use program on January 29, 2017.

THE VIDEO

[16] The video is from surveillance cameras inside and outside of the Ridge pub in the neighbourhood where Mr. Basaraba's residence is located. The video depicts Mr. MacPherson sitting side-by-side with Mr. Sinclair and Mr. Basaraba at the bar counter of the pub, engaged in conversation. There is no audio recording, only video. There was nothing particularly remarkable about the physical actions of the three men interacting over the course of about 10 minutes. All seemed to be acting in a friendly manner. At one point it seemed as though Mr. Sinclair was gesturing by punching his fists forward into the air and then making elbowing movements, as though he was demonstrating to the others a fighting manoeuvre. However, it did not appear as though this was a hostile gesture.

[17] A later scene in the video shows Mr. MacPherson getting out of a black vehicle, apparently being driven by Ms. Johns, in the parking lot of the pub. As he walks by Mr. Sinclair's truck, Mr. Sinclair is standing at the rear of his truck. Mr. MacPherson makes a backhanded gesture with his right hand, apparently making contact with Mr. Sinclair's chest or stomach area. The overall reaction suggests to me that this was a friendly gesture, much like a pat on the back. However, Mr. Sinclair then apparently calls Mr. MacPherson to come back towards the truck, which he does. The two men then go towards the truck's driver's door, which unfortunately is located between the truck and the camera, such that the two men are out of view for a second or two. Mr. MacPherson is then seen backing away quickly from that area holding his head or

face with one hand. Mr. Sinclair is seen pursuing Mr. MacPherson, at one point with his arms raised towards him. Mr. MacPherson ultimately escapes by getting back into the black truck driven by Ms. Johns, which leaves the scene. Mr. Sinclair then re-enters the pub.

[18] The overall impression that I have of the interaction between Mr. Sinclair and Mr. MacPherson in the parking lot is that Mr. Sinclair must have struck Mr. MacPherson in the head area, causing him to back away quickly, while being aggressively pursued by Mr. Sinclair.

[19] The video roughly corresponds with paras. seven through nine of the agreed statement of facts, although the time recorded on the video is roughly between 10:45 and 11:45 p.m., as opposed to between 8 p.m. and 9 p.m.

VICTIM IMPACT STATEMENTS

[20] I have had the benefit of hearing the victim impact statements read in court by various family members of Tanner Sinclair. Each one was heartfelt and deeply moving. I will refer to brief excerpts from each of the statements.

[21] Wendy Sinclair is Tanner Sinclair's mother. She stated, among other things:

- that the last two years and seven months have been like living in a shell;
- that Tanner grew up into a strong, courageous, young man, worked hard, and treated people with respect and kindness;
- that every day for her is a struggle;
- that the loss of a child leaves you empty, but that she goes forward for those left behind; and
- that she has a hole in her heart that will never close.

[22] Whitney Sandulak is Tanner's wife. She spoke about:

- the loss the family has suffered and the continuing pain and heartache that will forever sit heavy on the family's hearts;
- the fact that she was seven months pregnant and that their daughter was two months shy of being three years old when Tanner was killed;
- the emptiness she will always feel and the endless nights of feeling lonely and sad after tucking her girls into bed;
- her older daughter's emotional outbreaks stemming from her father's death and the need for her to attend counselling to cope with her loss.

[23] Lindsay Sinclair is Tanner's sister. She indicated:

- that after the killing she took four months off work often travelling back and forth between Calgary, Whitehorse and Pincher Creek, torn between wondering if she should move to the Yukon to help Whitney or move closer to her parents to support them;
- that her grief has affected her career opportunities; and
- that her conjugal relationship ended a week after the killing; and
- that she is now scared to love anyone else because she fears she could lose them.

[24] Maggie Sandulak is Whitney's mother. She stated that to see and feel the pain that Mr. MacPherson has caused in the eyes and voices of those who love Tanner Sinclair "has changed us all forever".

[25] Ashtyn Sandulak is Whitney Sandulak's niece. She stated:

The pain of his absence is unbearable. Some nights I cannot eat or sleep. I cry for hours wondering when the pain would stop.

[26] Brent Sinclair is Tanner's father. He spoke about:

- his very close relationship with his son over the 27 years of his life;
- his pride in seeing his son grow up to become an amazing young man;
and
- his sorrow that Tanner's two daughters will have to live the remainder of their lives without a father.

CIRCUMSTANCES OF THE OFFENDER

[27] Mr. MacPherson was born in Victoria, British Columbia, and grew up on Vancouver Island. He was 32 years old at the time he committed the manslaughter, and is now 35.

[28] Until he was five years old, Mr. MacPherson lived solely with his mother and his younger brother Matthew. He never knew his biological father.

[29] Lawrence Proud became Mr. MacPherson's stepfather when Mr. MacPherson was five years old.

[30] The family moved to Ontario for a short period and then back to Vancouver Island. It appears there was some instability while Mr. Proud was sorting out his employment logistics and his mother was attempting to establish an extended care home in a different location from where Mr. Proud was working. I am informed there was a bankruptcy involved.

[31] According to his mother, Mr. MacPherson had problems with school, including challenges from an attention deficit hyperactivity disorder. He began marijuana use at

about the age of 13, but his mother did not discover this until Mr. MacPherson was about 15½ years of age. She said that at that time he became difficult to manage and he went to live with his grandparents in Courtney, British Columbia.

[32] Mr. MacPherson was extremely close to his younger brother Matthew, who was only 18 months' his junior. In 2002, when Mr. MacPherson was 21, Matthew died in a horrific car accident in which four people were killed. Matthew was on life support for a period of time, and apparently the family felt it would be best for Mr. MacPherson to make the final decision on whether to discontinue the life-support, given his closeness with Matthew. I am informed that the decision took a significant toll on Mr. MacPherson and precipitated his entry into cocaine use.

[33] From the time that Mr. MacPherson was 21 until he was 23 years of age, he lost 10 friends who all died from alcohol or drug abuse. He himself became addicted to heroin for a period of ten years. At one point, he spent about 12 months with a close friend who inherited \$750,000. He was paid by the friend to take care of him and to do drugs with him. I am informed that at the end of the 12 months all the money had been spent on drugs.

[34] Mr. MacPherson has a criminal record. The offences include: a failure to appear in 2001; an assault with a weapon in 2001; a breach of court process in 2004; an assault with a weapon in 2007; and a breach of conditional sentence order in 2008.

[35] I am informed that the 2001 assault with a weapon arose from Mr. MacPherson's presence at a party where he came to the aid of his younger brother, Matthew, who was being attacked and beaten by two other individuals. Mr. MacPherson struck these

individuals on the head with a bottle. He would have been about 18 or 19 years old at the time.

[36] The assault in 2007 involved Mr. MacPherson being intoxicated at a bar. He made some unwelcome comments to the girlfriend of a patron and was asked to leave. He then smashed a glass beer bottle two times into the face of the male patron, who suffered 96 stitches and the loss of vision in one eye.

[37] The 2008 breach of conditional sentence order was apparently for a minor infraction, as it only resulted in a suspension of his conditional sentence for a period of one day. Further, Mr. MacPherson had no issues complying with the 12-month conditional sentence order imposed in 2001, the four month probation period imposed in 2004, or the two years less a day conditional sentence imposed in 2007, with the exception of the one minor breach which I just mentioned.

[38] Mr. MacPherson's employment history has been sporadic, although he did work for a period of 18 months as a plumber's helper. He also completed a heavy equipment operator's course in Saskatchewan and was employed briefly as a heavy equipment operator in Fort McMurray, Alberta.

[39] I am informed that Mr. MacPherson knew Mr. Basaraba and Ms. Johns for several years in the Victoria area. Apparently, Mr. Basaraba was also a drug addict, but came to Whitehorse to turn himself around. Mr. MacPherson then decided to follow suit in 2014, which was the reason for driving up with his RV and boat. He was hoping to get clean and sober and to obtain employment as a heavy equipment operator.

[40] Upon arriving in Whitehorse and taking up residence with Mr. Basaraba and Ms. Johns, I am informed that Mr. MacPherson started to drink heavily because he was compensating from his withdrawal from drugs.

[41] He worked briefly with Mr. Basaraba doing some painting. He began a relationship with Ms. Tarr. Eventually, his relationship with Mr. Basaraba began to sour, as indicated in the agreed statement of facts.

[42] Since Mr. MacPherson's arrest and release on the manslaughter offence, he has formed a new relationship with Kirsten Collins, whom he met in the lower mainland of British Columbia. Ms. Collins has an eight-year-old daughter. She has provided a letter of reference describing Mr. MacPherson as a happy, loving and compassionate gentleman and a decent, hard-working and trustworthy person. She says that he has strong family values and has taken on a huge role as a father figure for her daughter.

[43] A report from the VisionQuest Recovery Society dated June 21, 2016, indicates that Mr. MacPherson has taken the facility's anger management and life skills programs both at an introductory and an advanced level. The report further notes that Mr. MacPherson has taken a grief support program and a relapse prevention program. Further, he is noted to have been continuing to work at his 12-step Alcoholics Anonymous program. He spent 50 hours doing volunteer work for people in the community. Mr. MacPherson is further noted to have worked for five months in the kitchen as the lead cook and kitchen manager. This is referred to as a position of trust and there were no reported problems with Mr. MacPherson's stewardship of the kitchen. He is described as having deepened his spiritual life. The report further describes

Mr. MacPherson as a responsible, hard-working and pro-social individual who is a “man of his word”.

[44] Reports from his probation officer indicate that there were no negative incidents whatsoever during his attendance at the VisionQuest facility, only “positive feedback”.

[45] The allegation of the breach of Mr. MacPherson’s recognizance comes directly from the VisionQuest facility. It indicates that on January 3, 2017, Mr. MacPherson was asked if he had been using and admitted that he was using “everything”, including methamphetamine and fentanyl specifically. It is alleged that he was administered a drug test which was positive for opiates, cocaine, amphetamine and methamphetamine. Upon emptying his pockets, he produced three bags and a small bottle full of what was believed to be clean urine. Two of the three bags contained crushed up pills and the third bag contained a rock of fentanyl. Mr. MacPherson has yet to respond to these allegations.

[46] Mr. MacPherson apologized to the family of Tanner Sinclair at the close of the defence submissions and I observed him to be sobbing for several minutes at the counsel table afterwards. I accept that he is genuinely remorseful. There is also evidence in one of the reference letters that he deeply regrets the offence he has committed. Finally, the guilty plea itself is also evidence of remorse.⁵

CASE LAW

[47] I have been provided with a total of 26 case authorities from the Crown and the defence. As I noted earlier, the actual sentences imposed for the offence of manslaughter in differing circumstances vary widely. I do not propose to refer to every case.

⁵ *R. v. Peters*, 2014 BCSC 1009, at para. 30.

[48] In general, I find that most of the cases provided by defence counsel are distinguishable on their facts from the case involving Mr. MacPherson.

[49] *R. v. D.E.C.*, [1995] B.C.J. No. 1074 (S.C.), is a case involving a 46-year-old battered spouse who killed her husband after he subjected her and her daughter to abuse and violence. The Crown and defence agreed that jail was not called for. It is not similar enough to bear serious consideration.

[50] *R. v. Nielsen*, October 31, 2012, British Columbia Supreme Court, Kamloops 90155-3, is also a spousal manslaughter involving an Aboriginal woman who was a first offender.

[51] *R. v. McNabb*, 2014 MBPC 10, similarly involved an Aboriginal first offender with significant *Gladue* factors.⁶ Further, the deceased suffered only a 2 cm wound to her left arm, but unfortunately succumbed due to inadequate first-aid by the family members initially attending to her.

[52] *R. v. Huth*, 2014 BCSC 570, did not involve a weapon at all, but rather a single punch which caused the death of the victim when he fell backwards on his head. Further, the offender had no criminal record, was an accomplished athlete and had a history of gainful employment.

[53] *R. v. Andrew*, 2008 BCCA 141, involves a 23-year-old Aboriginal offender (i.e. almost 10 years younger than Mr. MacPherson at the time of the offence) with fetal alcohol syndrome issues and a minor criminal record with no violence.

[54] *R. v. Marchand*, 2014 BCSC 2554, also did not involve a weapon, but rather a single punch to the head. Further, the offender was Aboriginal and the Crown was only seeking four to six years.

⁶ *R. v. Gladue*, [1999] 1 S.C.R. 688.

[55] *R. v. Whitehead*, 2014 NSSC 439, similarly involved no weapons, but only a single blow with a fist which caused the victim's death when he fell backwards to the ground. The Crown was only seeking three to four years in jail and the offender only had a brief and unrelated criminal record.

[56] *R. v. McGoran*, 2004 BCSC 1737, is a case where the offender struck the victim with a stick once on the back of the head without much force, but on a particularly vulnerable spot, such that death ensued. The offender was also only 18, had no prior criminal record and cooperated with the police from the outset.

[57] *R. v. Engebretsen*, 2015 BCSC 1752, is a case involving a 56-year-old offender with no prior history of violence, such that the court treated him effectively as a first offender. His blood alcohol level at the time of the offence was 3.7 times above the legal limit. The Crown was only seeking four to six years in jail.

[58] *R. v. Brisson*, 2009 BCSC 1606, involved a 19-year-old offender with no prior criminal record. The court concluded that his actions were out of character and that rehabilitation was a major consideration.

[59] *R. v. Brar*, 2011 BCSC 875, similarly involves a youthful 20-year-old offender with no prior criminal record. Further, there was no evidence to indicate that the offender, within a group of others, was the person who stabbed the deceased.

[60] *R. v. Peters*, 2014 BCSC 1009, involves a 50-year-old Aboriginal offender who was a residential school survivor with significant *Gladue* factors. Further, the Crown was only seeking a period of six years in jail.

[61] *R. v. Ansari*, 2009 BCCA 381, is another case with a relatively youthful offender, described as being in his early 20s at the time of the offence. He had also completed two years of law school while on bail.

[62] *R. v. J.J.R.*, 2012 BCPC 143, is a case where the offender was sentenced in Provincial Court. The offender and the victim were strangers. The offender was on probation at the time for assault and mischief and had a number of personality disorders. Finally, there was only a single stab wound to the chest.

[63] Of the cases provided by the Crown, none are directly on point either, but a few have some similarities to Mr. MacPherson's case.

[64] *R. v. Enright*, 2017 ABQB 10, is a recent 2017 case involving a 29-year-old offender, much closer in age to Mr. MacPherson who was 32 at the time of his offence. He entered a plea of guilty to manslaughter. The offender also used a knife as a weapon and stabbed the victim three times in the chest. Like Mr. Sinclair, the victim was unarmed. Further, the offender had a criminal record including three assaults, two in 2014 and one in 2015 for which he received six months in jail. In addition, the offender had started using marijuana when he was 12 years old and acknowledged that he was addicted to drugs.

[65] Unlike Mr. MacPherson's case, the victim had invited the offender into his home in an attempt to help him with his personal problems and the offender abused that trust. Further, after the stabbing, the offender left the premises, locked the door and left the victim for dead. He then disposed of the knife. The offender was also on bail at the time of the offence on a charge of domestic violence and had failed to appear in court.

Finally, the Crown was seeking a jail term of 14 years, while the defence was asking for 7½ to 10 years. The court imposed a sentence of 10 years in jail.

[66] *R. v. M.C.K.*, 2015 MBQB 82, is another relatively recent 2015 case from the Manitoba Court of Queen’s Bench which has some similarities to Mr. MacPherson’s case. It involves a 28-year-old offender who stabbed the victim three times at a house party. The victim had provoked the offender. The victim’s family was deeply impacted by the victim’s death. The court found that the offender had not deliberately armed himself to engage in the fight with the victim. The offender was profoundly remorseful. The Crown was seeking 10 years in jail and the defence was asking for a sentence between four and six years.

[67] Some dissimilarities in *M.C.K.*, cited above, are: that the offender had an intellectual impairment; had been physically and sexually abused; and was in and out of various foster homes for most of his life. He had also attempted suicide by hanging, which resulted in further brain damage as well as physical damage. The offender’s criminal record was dated and unrelated. He also immediately admitted his responsibility for the crime and was fully cooperative with the police. The court sentenced the offender to seven years in jail.⁷

[68] *R. v. Gillies*, [1998] B.C.J. No. 1153, is a 1998 case from the Court of Appeal for British Columbia, which also sits as the Court of Appeal of Yukon, and is therefore a very persuasive authority. In that case, Chief Justice McEachern stated:

11 ... While the Criminal Code prescribes a range of from suspended sentence to life, four to six years has been the usual range for most manslaughter cases for as long as I can remember.

⁷ After credit for five years and four months’ time served, the court was also able to impose a three-year probation period.

12 There are, of course, other cases where sentences of eight to ten years or more have been given. In most of those cases, however there were other factors that made the offence much more serious. Cases were cited where there was torture, long records of violent offences, violence against the spouse, woman or child, and killing in the course of a robbery.

[69] The Court of Appeal for British Columbia in *R. v. Aburto*, 2009 BCCA 446, subsequently held in 2009 that the ranges referred to in *Gillies* “are no more than suggestions”. Nevertheless, that same Court of Appeal has also implicitly approved of *Gillies* as offering “guidance”, while not being “prescriptive”.⁸

ANALYSIS

[70] There is no doubt that Tanner Sinclair is remembered by his family, friends and peers as a good man, and his loss is felt profoundly. However, the value of the life of a human being is not measured in years behind bars. This was made clear by Macaulay J. in *R. v. Huth*, mentioned above, at para. 14, where he said:

In considering a just and fit sentence, I remind myself that criminal offences resulting in the loss of a life are among the most serious possible. It is for that reason that the maximum penalty is life imprisonment although, in very rare circumstances, the penalty for manslaughter might not include any imprisonment. It follows from all of the above that it would be wrong for anyone to expect that the application of the purpose and principles of sentencing to the circumstances here somehow reflects a translation of the value of a life lost into some equivalent years of imprisonment for the offender. That is not a goal of sentencing. As another judge stated: "No sentence will ever breathe life into the deceased person, nor restore him or her to his or her family and/or friends" (*R. v. Costa*, [1996] O.J. No. 299 (Ontario General Division), at para.42).

[71] Similarly, the Manitoba Court of Appeal in *R. v. Cascisa*, 2001 MBCA 168, stated:

⁸ *R. v. Ansari*, 2009 BCCA 381, at para. 42.

3 The premature death of a promising young man is always a tragedy. This is especially so where alcohol and testosterone combined to form a lethal cocktail and death resulted from a drunken fistfight. No punishment will bring this young man back or heal his family's grief. Nor should that be the purpose of a criminal sentence imposed by a court of law. The task of the sentencing judge is set out carefully in the Criminal Code. He is to match such principles of sentencing as denunciation, general and specific deterrence, protection of the community, and rehabilitation of the offender with the unique facts of the case in front of him.

[72] In *R. v. Mintert*, 57 B.C.A.C. 232, at para. 20, Mr. Justice Cumming quoted with approval the following remarks of the trial judge in that case:

A review of the British Columbia Court of Appeal cases since 1990 dealing with the sentencing in manslaughter cases provides sentences from a suspended sentence to life imprisonment. The lower range involves a near accidental death and very special circumstances where the moral culpability of the offender is at the lowest.

In my opinion the next range involves sentences where the culpability of the offender is such that the principle of general deterrence warrants a sentence of one to seven years.

The next range involves sentences resulting in incarceration for six to twelve years where the need is to remove the offender from the community to meet risk that the offender presents after careful consideration of all the circumstances and the need for general deterrence; and the maximum sentence I've already discussed.

[73] In *Enright*, which I referred to earlier, the court at para. 42, referred in turn to an earlier decision from the Alberta Court of Appeal in *R. v. Laberge*, (1995) 165 A.R. 375, as follows:

42 In *R. v. Laberge* the Court of Appeal identified three broad groups of unlawful acts which must be assessed objectively and subjectively:

- * Those which are likely to put the victim at risk of, or cause, bodily injury.

- * Those which are likely to put the victim at risk of, or cause, serious bodily injury.
- * Those which are likely to put the victim at risk of, or cause, life-threatening injuries.

[74] The court in *Enright* then went on to conclude that the facts in that case fell within the third “life-threatening” category because of the nature of the stab wounds and their depths:

43 Viewed objectively, wounds to the chest with depths of approximately 13-21 cm, and a wound to the abdomen 17 cm deep, are likely to cause life-threatening injuries.

44 The number, placement, and depth of the stab wounds are such that subjectively, I conclude that Mr. Enright knew of, or was willfully blind to, the risk of inflicting life-threatening injuries. This is fortified by his statements afterwards to a number of people that he had killed Mr. Flitton.

45 The analysis “must be placed in the context of the other factors influencing [Mr. Enright's] moral culpability” (*R v Laberge*, para. 17) to ensure that the sentence imposed fits the degree of moral fault for the harm done.

46 In assessing moral blameworthiness I place this offence far closer to near-murder than near-accident. Defence agrees that the offence is in the third and highest category of unlawful act manslaughter.

[75] In Mr. MacPherson’s case, defence counsel vehemently argues that the facts did not fall within any particular category, and that all the circumstances should be taken into account in balancing those which are aggravating against those which are mitigating.

[76] In particular, defence counsel suggests that I should give significant weight to the fact that Mr. Sinclair was the apparent aggressor in the interaction between him and Mr. MacPherson in the pub parking lot. He suggested that the reasonable inference to

be drawn is that they were continuing to argue about the truck which Mr. MacPherson had purchased from Mr. Sinclair through the three-way trade referred to in the agreed statement of facts. Counsel further submitted that Mr. MacPherson left that scene in Ms. John's truck because he did not want to pursue the argument with Mr. Sinclair, and that this was a reasonable course of action for him to have taken. Counsel says that Mr. MacPherson then returned to the Basaraba's residence, where he had resided earlier in 2014. When Mr. Sinclair returned to the Basaraba residence from the pub, counsel submits that it was not reasonable to expect Mr. MacPherson to leave the residence in order to avoid any further unpleasantness with Mr. Sinclair. Ultimately, when the group were sitting around the patio table, and the argument about the truck came up again, counsel submits that it was not unreasonable for Mr. MacPherson to defend himself when Mr. Sinclair said that he should just knock him out. Defence counsel argued that Mr. Sinclair was a strong and fit man from his experience as an outdoor hunting guide. Counsel further argued that the use of the knife by Mr. MacPherson was opportunistic. There is no clear evidence about where, when or how the knife came into Mr. MacPherson's hands, but says counsel, it is clear that he did not have the knife on his person when the fight began. In other words, he should not be accused of bringing a knife to a fistfight. Rather, Mr. MacPherson was responding as effectively as he could to defend himself. Having said that, he does acknowledge that he went too far in that regard.

[77] I agree that there is no evidence that Mr. MacPherson had possession of the knife when the fight initially began and that his use of the knife must therefore be seen to be opportunistic and impulsive rather than planned and deliberate.

[78] The Crown argued that the guilty plea should be given diminished weight because it was entered “on the eve of trial”. However, the Crown also concedes that there were discussions about whether this case could be resolved by a plea to manslaughter an unspecified number of months prior to February 1, 2017, when the plea was entered. The importance of a guilty plea as a mitigating factor was emphasized in *R. v. Peters*, which I referred to earlier:

30 In *R. v. Hoang*, Court File No. CRIMJ(F) 5252/01 (Ont. S.C.J.) (27 March 2002) Hill, J. was of the view that a guilty plea was a major mitigating factor. He wrote at para. 110:

110 The guilty plea on the part of each accused, although not tendered until two years after arrest, is nevertheless a substantial mitigating factor. In *Regina v. Holder*, (1998), 21 C.R. (5th) 277 (Ont. S.C.J.) at 281-2, I observed:

A plea of guilt is generally acknowledged to be a mitigating factor in sentencing (citations omitted).

The effect of a guilty plea in setting the appropriate sentence will vary with the circumstances of each case...A plea of guilt, a confession of wrongdoing, may evidence remorse and public acceptance of responsibility for the criminal wrong-doing... In these circumstances, the prospects for rehabilitation are enhanced. (citations omitted)

An early guilty plea is deserving of considerable weight in sentencing disposition (citations omitted).

A plea of guilt results in a saving of public cost and expense...Even in those instances where a guilty plea is simply a recognition of the inevitable, the plea brings finality, spares judicial resources, and reduces the trauma and inconvenience to victims and witnesses...Indeed, a plea of guilt, entered

during a trial itself, may be deserving of mitigation of sentence (citations omitted)

[79] By my count, Mr. MacPherson spent 292 days in custody between his arrest on July 25, 2014, and his release on bail May 13, 2015. Counsel agree that he should be given credit for that time at the rate of 1.5 to 1. That results in credit of 438 days.

[80] Since his arrest on January 11, 2017, until today, he has been in custody for a further period of 44 days. However, because this most recent time in custody was due to an alleged breach of recognizance, I will only credit him at 1.0 to 1 for each day in custody.

[81] Therefore, Mr. MacPherson is entitled to a total credit of 482 days in custody as time served (438 + 44).

[82] I will not specifically credit him for his time spent at the VisionQuest facility between May 15, 2015, and January 10, 2017, which I reckon to be a total of 609 days, or almost 1.7 years. However, as Mr. MacPherson's record at that facility was virtually spotless until the alleged breach on January 3, 2017, I am prepared to give him significant credit for his accomplishments there as a mitigating factor.

[83] To summarize, the aggravating circumstances in this case are:

- the use of the knife as a weapon;
- that this killing was committed in the context of a needless argument related to repairs to a truck;
- the fact that the deceased was stabbed five times, with two blows to the chest area and two blows to the back; one of the stab wounds on the left chest was approximately 14 to 16 cm deep and the stab wound on the left flank was estimated to be approximately eight to 10 cm deep; the two stab

wounds on the left upper back were estimated to be between six and 10 cm deep;

- that Mr. Sinclair was unarmed and vulnerable to the stabbing;
- that Mr. MacPherson has a related criminal record with two incidents of significant violence;
- that Mr. MacPherson left the scene of the crime and was on the run for 10 days; and
- the fact that Mr. Sinclair's death has had a devastating impact upon his family.

[84] The mitigating circumstances in this case are:

- the fact that Mr. MacPherson has entered a guilty plea;
- that Mr. MacPherson has demonstrated genuine remorse;
- that while Mr. MacPherson is clearly not a youthful offender, he is still a relatively young man with a positive future ahead of him;
- the fact that there was some provocation by Mr. Sinclair in apparently striking Mr. MacPherson in the pub parking lot, and later while around the patio table, saying to Mr. MacPherson that he should just knock him out;
- that Mr. MacPherson's use of the knife was impulsive and opportunistic;
- that Mr. MacPherson has demonstrated a genuine intention to pursue his recovery from addiction and to remain clean and sober, notwithstanding his apparent slip in relation to his alleged breach of recognizance;

- that the offences of violence on his criminal record are rather dated, with the most recent being about 6½ years ago, and the other offence being over 15 years ago; and
- the fact that Mr. MacPherson turned himself into custody on July 25, 2014, in the presence of his lawyer.

[85] Taking all of the circumstances into account in attempting to assess Mr. MacPherson's moral blameworthiness, I am of the view that this killing falls somewhere about two-thirds along the spectrum from almost accident to almost murder. Cases in the middle of the spectrum are generally disposed of with sentences in the four-to-six year range. However, given the fact that Mr. MacPherson stabbed Mr. Sinclair four times in the torso, each quite deeply, objectively there was a significant risk that he would cause life-threatening injuries, whether he was aware of that risk or not at the time. In the circumstances, I conclude that the sentence should be seven years in jail, subject to credit for time served of 482 days.

[86] I also impose a lifetime prohibition against the possession of any firearms, ammunition or explosives by Mr. MacPherson pursuant to s. 109 of the *Criminal Code*.

[87] Finally, I order that Mr. MacPherson provide a sample of his bodily substance suitable for DNA analysis, as requested by the Crown.

[88] The victim surcharge is payable forthwith.