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(Winnipeg Centre)
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

HIS MAJESTY THE KING,

- and -

MICHAEL JOSEPH THOMAS FOX

Accused.

) Counsel:
)
) Christian A. Vanderhooft
) Bryton M.P. Moen
) for the Crown
)
)
) Taralee D. Walker
) Andrew J. McKelvey-Gunson
) for the Accused
)
) JUDGMENT DELIVERED:
) November 1, 2022

CHAMPAGNE J.

I. INTRODUCTION

[1] On October 23, 2019, Darcy Rose died a violent and senseless death. On December 10, 2019, Michael Fox was arrested and charged with second-degree murder for killing Mr. Rose. Mr. Fox pled not guilty and his judge-alone trial took place before me in September 2021.

[2] On December 22, 2021, I convicted Mr. Fox of second-degree murder. The matter was adjourned for the preparation of a Pre-Sentence and **Gladue** Report ("PSR"). Mr. Fox appeared for sentencing on June 10, 2022.

[3] The offence of second-degree murder carries a mandatory life sentence. The only issue left to determine is whether the minimum ten-year period of parole ineligibility should be raised.

[4] The Crown submits the period of parole ineligibility should be increased to 16 years. The defence argues the period of parole ineligibility should remain at the ten-year minimum.

[5] The factors I must consider in determining parole ineligibility are set out in s. 745.4 of the *Criminal Code*. They include the character of the offender, the nature of the offence, and the circumstances surrounding its commission. These factors are to be considered in the context of general principles of sentencing.

[6] It is clear that increasing the period of parole ineligibility does not require unusual circumstances (**R. v. Shropshire**, 1995 CanLII 47 (SCC)).

[7] The Crown does not dispute that the principles from **Gladue**, **Ipeelee** and other similar cases apply when determining parole ineligibility for an Indigenous offender.

[8] At the conclusion of the sentencing hearing, I asked the parties if information about systemic racism in the Correctional Service of Canada ("CSC") is relevant and admissible in assessing a fit and appropriate period of parole ineligibility. I raised this question because in May 2022, the Auditor General of

Canada authored a Report for Parliament highlighting concerns about Systemic Barriers in the Correctional Service of Canada (Exhibit S-6, Tab 9 and Exhibit S-7, Tab 1).

[9] In part, the Report identifies that Indigenous and Black offenders tend to receive higher risk assessments. The risk assessment places them in higher security level classifications on admission into custody; they serve longer periods in prison before obtaining parole and are more likely to remain in custody to their warrant expiry date.

[10] The sentencing hearing was adjourned for the parties to consider their positions and provide further materials. The Crown concedes the statistical data contained in the Auditor General's Report is reliable and admissible. However, the Crown states the Report should be given little weight as it does not assist in the determination of an appropriate period of parole ineligibility, it does not provide information for this individual offender and it does not take into account the circumstances of this offence.

[11] Mr. Fox submits the Auditor General Report is relevant, admissible and deserves substantial weight. In addition, Mr. Fox has provided further material to support his position that he is likely to serve a longer period in prison before obtaining parole because he is an Indigenous man.

[12] In January 2022, researchers from The Peter A. Allard School of Law published *The Evolution of Life Sentences for Second-Degree Murder: Parole Ineligibility and Time Spent in Prison* (Exhibit S-7, Tab 2). This article

examines parole ineligibility for offenders convicted of second-degree murder. It has similar findings to that of the Auditor General. Broadly speaking, the research concluded that Indigenous people were significantly more likely not to be released or to be released years after their eligibility date.

[13] Mr. Fox argues that systemic racism in the CSC and the Parole Board of Canada (“Parole Board”) are relevant considerations in determining the appropriate period of parole ineligibility. Counsel submits if the minimum period of parole ineligibility is imposed, statistically, there remains a high likelihood that Mr. Fox will serve a longer period of parole ineligibility simply because he is an Indigenous man.

[14] The Supreme Court of Canada decided *Gladue* in 1999. The Court undertook a detailed statistical analysis and concluded the serious problem of Indigenous overrepresentation in Canadian prisons is well documented.

[15] One of the studies examined noted statistics about crime are often not well understood by the public and are subject to variable interpretation by the experts.

[16] That same study goes on to state:

In the case of the statistics regarding the impact of the criminal justice system on native people the figures are so stark and appalling that the magnitude of the problem can be neither misunderstood nor interpreted away. Native people come into contact with Canada’s correctional system in numbers grossly disproportionate to their representation in the community. More than any other group in Canada, they are subject to the damaging impacts of the criminal justice system’s heaviest sanctions.

(See M. Jackson, “*Locking Up Natives in Canada*” (1988-89), 23:2 *U.B.C. L. Rev.* 215-300).

[17] The overrepresentation of Indigenous offenders in the criminal justice system was stark and appalling in 1999. In this era of reconciliation, one thing is clear that the passage of time has failed to address the overrepresentation of Indigenous peoples in custody.

[18] The Crown has provided statistical information produced by the Department of Justice Canada for 2017/2018. The report is entitled JustFacts – Indigenous overrepresentation in the criminal justice system and was published in 2019. It is found in Exhibit S-6, Tab 7. In part, the statistical data in the report confirms Indigenous men, Indigenous youth and Indigenous women are overrepresented in custody and the numbers continue to increase.

[19] I suspect it would be difficult to find any stakeholder in the criminal justice system who would quarrel with these findings. The sad reality is that the rate of overrepresentation of Indigenous people in custody continues to rise. The justice system must do better. The Auditor General's Report highlights systemic barriers in the CSC and Parole Board and calls on those stakeholders and Parliament to address the concerns.

[20] Mr. Fox has invited me to acknowledge systemic racism in the administration of the CSC and Parole Board and to address the problem by factoring it into my analysis for determining his parole ineligibility.

[21] I agree with Mr. Fox. The systemic racism identified by the Auditor General is a serious problem and must be addressed. However, after careful consideration,

I have concluded a sentencing judge is poorly placed to address those concerns. I say that for a few reasons.

[22] First, sentencing is a complex process tailored to the individual before the court. A judge has the difficult task of assessing the circumstances of the offence, the background of the offender and the application of all principles of sentencing in arriving at a fit and proper sentence. When sentencing an Indigenous offender, the judge must consider the unique systemic or background factors that may have played a part in bringing the individual before the court. It is difficult, if not impossible, to know at the time of sentencing if the individual before the court will be subject to systemic issues that affect the serving of their sentence.

[23] Second, sentence management by the CSC and decisions of the Parole Board are not enumerated factors in s. 745.4 of the *Code* and they are seldom, if ever, considered in general principles of sentencing. This is for good reason. The work of the CSC and Parole Board is some of the most difficult and challenging work in the justice system. Their work and decision-making is distinct and separate from the court. Decisions made by the CSC must always consider the safety and security of the inmates, employees and the institution. Sentencing plans are developed and implemented with a view to providing the inmate with the tools necessary for release into the community. The Parole Board is required to assess risk, impose reasonable conditions and supervise individuals to address safety concerns in the community. It is expected the work and decisions of these justice

system stakeholders will be carried out free of systemic racism. Unfortunately, that does not always happen and there are serious concerns.

[24] However, any attempt to address systemic issues plaguing the CSC and Parole Board at the sentencing stage is fraught with difficulty, bound to fail and can perhaps create other serious problems. I say this because a sentencing judge does not possess the information necessary to make meaningful decisions about systemic issues affecting these justice system stakeholders.

[25] Further, and most importantly, there already exists a robust process to address the serious concern of systemic racism identified by the Auditor General. There are passionate and knowledgeable advocates who practice in the area of prison law. The CSC and Parole Board have rules, regulations and policies that guide their decision-making. There are many opportunities to review decisions made by the CSC and the Parole Board built into their administrative structure.

[26] Defence counsel provided the case of *Twins v. Canada (Attorney General)*, 2016 FC 537. This case is an example of the judicial framework available to address the concerns of systemic racism identified by the Auditor General. Ms. Twins is an Indigenous woman convicted of second-degree murder. She was released on day parole after serving 35 years in prison. The Parole Board revoked her day parole. She appealed that decision to the Appeal Division of the Parole Board. The decision to revoke the day parole was upheld. Ms. Twins sought judicial review of the appeal decision in Federal Court. Ms. Twins argued that the decision to revoke her day parole was unreasonable because the Parole Board and

the Appeal Division failed to take into account principles derived from *Gladue* and other related jurisprudence. The Federal Court agreed with that position, concluding it was an unreasonable decision.

[27] The point I make is simple. The procedure employed by Ms. Twins demonstrates a measure of judicial oversight for decisions of the Parole Board that allow for a fully-informed judge to consider systemic issues in a meaningful way for the specific individual before the court. In my view, this is the appropriate and best way to address these issues.

[28] I now turn to the factors I am required to consider to determine the appropriate period of parole ineligibility.

II. NATURE AND CIRCUMSTANCES OF THE OFFENCE

[29] Michael Fox has been entrenched in a criminal lifestyle for many years. On January 19, 2016, he was convicted of aggravated assault and other offences resulting in a prison sentence. On March 22, 2019, he was released on parole. Eight days later, he breached his parole and was unlawfully at large. He remained unlawfully at large until his arrest on November 30, 2019. It is clear he quickly returned to his criminal lifestyle while in the community.

[30] On October 23, 2019, Mr. Fox was with Bryan Malo travelling around the city visiting individuals who owed Mr. Malo money related to criminal activity. The purpose of the visits was to inform the various individuals that their debt was now transferred and owed to Mr. Fox.

[31] Mr. Fox and Mr. Malo visited the motor home of Erik Petersen to inform him that his debt was owed to Mr. Fox. Another individual, Jordan Felde, was present in the motorhome. Mr. Felde and Mr. Malo had a brief dispute that resulted in Mr. Malo punching Mr. Felde and throwing him out of the motorhome.

[32] Mr. Felde left the area upset and angry. He returned a short time later with Darcy Rose. Mr. Rose was armed with a sawed-off shotgun. Mr. Malo was outside in the back lane when he observed Mr. Felde and Mr. Rose approaching the motorhome. Mr. Malo called out a warning to Mr. Fox who was still in the motorhome. Mr. Fox armed himself with a knife and stepped out into the alley.

[33] Mr. Rose pointed the firearm at Mr. Malo. Mr. Fox moved forward and placed himself between Mr. Rose and Mr. Malo. Mr. Fox challenged Rose to "do something". Mr. Rose leveled the firearm at Mr. Fox then stated, "oh shit" and ran away.

[34] Mr. Fox chased Mr. Rose down the alley for approximately 65 metres. He caught up to Mr. Rose and lunged at him with the knife. He stabbed Mr. Rose in the back with significant force, piercing bone and plunging the blade of the knife seven inches into his body. Mr. Rose managed to continue on a short distance to his sister's apartment block where he collapsed and died in his sister's arms.

[35] The next day, Mr. Fox heard Mr. Rose had died and he knew he was responsible. He commented to Mr. Malo words to the effect that the knife was hard to pull out.

[36] At trial, I rejected Mr. Fox's position that his actions were in self-defence or that they were in response to provocation. I concluded Mr. Fox was intent on punishing Mr. Rose when he chased him down the alley and stabbed him in the back. He meant to cause serious bodily harm that he knew was likely to cause death and was reckless whether death ensued or not.

III. CHARACTER OF THE OFFENDER

[37] Michael Fox is 33 years old. He is an Indigenous man impacted by colonization and the residential school system. He has treaty status with Norway House First Nation but has little connection to his heritage or culture.

[38] His maternal grandmother is a residential school survivor. She suffered serious sexual and physical abuse. That trauma contributed to serious alcohol problems as an adult. She abused her own children including Valerie, Mr. Fox's mother. Valerie recalls her and her siblings being "sold for bottles" at drinking parties. Valerie believes suffering sexual abuse led to her substance abuse problems and failings as a parent.

[39] Joseph Flett is Mr. Fox's father. He and Valerie share a number of children. Their relationship was marred by alcohol and violence. The children witnessed the abuse. Mr. Fox recalls little of his father as he was absent from the home. Mr. Fox and his siblings were apprehended and became permanent wards of Child and Family Services when he was six or seven years old.

[40] He moved around numerous foster placements until he and his younger brother were placed with a family outside of Winnipeg. He remained there until he was 16 years old when he ran away to find his sister Sherry, living in Winnipeg.

[41] He moved in with Sherry and her spouse, who was the leader of a gang. Mr. Fox became involved with the Gangsta Crips. His life quickly turned to one of serious drug use, gang involvement and criminal activity. He has embraced this lifestyle for his entire adult life. He admits he has "spent more time in than out" of custody.

[42] As an adult, Mr. Fox has reconnected with his mother and father. His family is aware of his high-risk, criminal lifestyle. Mr. Fox shares that he has been addicted to heroin and fentanyl and at times, the drugs have overtaken every aspect of his life. His sister noted he almost died from drug use. Several times, he was "brought back" by administration of Narcan. His mother has stated, "jail saved him from the streets".

[43] Mr. Fox has a 13-year-old son. He is on good terms with the boy's mother but believes it is better and easier not to have contact with her or his son when he is in custody.

[44] Mr. Fox is in a relationship with a woman whom he met through mutual friends. Unfortunately, she has her own serious addiction issues and is currently serving a prison sentence in Saskatchewan. The two communicate primarily by mail, are supportive of one another and hope to some day reunite in the community.

[45] Mr. Fox has spent much of his adult life incarcerated. To his credit, he does participate in programming and managed to obtain his Grade 12 diploma while serving a sentence in Stony Mountain Institution. He has minimal employment experience. For brief periods, he is a good worker but his employment opportunities end because of drug addiction and gang activity. It appears he is unable to put his criminal lifestyle behind him, as the vast majority of his companions are gang members or drug users.

IV. DISCUSSION

[46] Sentencing is very much an individualistic exercise. Every sentence must be proportionate to the gravity of the offence and the degree of the responsibility of the offender. Proportionality also applies to increasing parole ineligibility. Aggravating and mitigating factors will inform the decision to increase parole ineligibility (*R. v. Schuff*, 2021 MBCA 54).

[47] Mr. Fox did not plan on killing Mr. Rose. The circumstances of this offence took place quickly and in response to an act of aggression by the victim. The offence involved one stab wound; there was no brutal or gratuitous violence. The act alone would not justify an increase in the period of parole ineligibility.

[48] I am keenly aware of the *Gladue* factors of the offender. They are discussed further in the PSR. It is apparent that Michael Fox and his family have been affected by the intergenerational impact of colonization and the residential school legacy. There is a history with substance abuse, family dysfunction, violence, disconnection from Indigenous culture and conflict with the law. These

factors have played a significant role in shaping the man he is today and help me understand and assess his moral culpability. There are no other mitigating factors.

[49] Defence counsel have asked that I consider the impact of the COVID pandemic on institutions as a factor in determining the period of parole ineligibility. I acknowledge the impact of the virus has been a factor in considering the appropriate length of sentence while in the midst of the pandemic. As time marches on, society and correctional institutions have adapted and learned to live with the virus.

[50] Institutions have eased restrictions. For example, I note that Mr. Fox has been offered opportunities to participate in programming while being held in Brandon Correctional Centre. At the height of the pandemic, those opportunities were non-existent. Without further evidence about ongoing restrictions, I decline to factor it into my decision.

[51] The victim impact is described in a letter marked Exhibit S-3. Darcy Rose had a loving and close family. The impact of his death has been profound. He was a son, brother, uncle and loving father to his daughter. Many friends and extended family miss him. His sister Carla and her family are forever haunted by the night of his death as he laid dying in her arms. Her anger towards the offender is palpable.

[52] The serious aggravating factors are reflected in the character of Mr. Fox.

[53] Michael Fox has demonstrated little insight and no remorse for killing Darcy Rose. When asked, he stated, "[I]t was a shitty outcome for all involved." His

moral culpability for this offence is high. Mr. Fox does not suffer from any mental illness or cognitive deficits. The author of the PSR notes he has demonstrated self-awareness, intellectual insight into his decision-making and the ability to recognize connections between the decisions he has made and his current lifestyle.

[54] He has a lengthy criminal record that includes crimes of violence. After spending the equivalent of 44 months in pre-trial custody, he was convicted of break, enter and commit robbery on September 3, 2010. He was sentenced to a further 40 months in prison. On November 22, 2012, he was given statutory release. On April 23, 2013, he violated his parole and was returned to prison.

[55] As previously stated, he was convicted of aggravated assault and other offences on January 19, 2016. He was sent to prison for three and one-half years. He was paroled on March 22, 2019, and was unlawfully at large as of March 30, 2019.

[56] He violated all conditions of parole designed to protect the community and offer opportunities for rehabilitation. He had a residency requirement that he fled. He was to abstain from alcohol and drugs and attend treatment for substance abuse. He was not to associate with individuals like Mr. Malo who were involved in criminal activity.

[57] While unlawfully at large, he killed Darcy Rose on October 23, 2019. Taking another man's life had little impact on Mr. Fox. He continued his anti-social and criminal lifestyle. Two weeks after killing Rose, he was involved in another act of

violence and has been convicted for the offence of assault with a weapon that took place on November 6, 2019, while he was still unlawfully at large.

[58] He was arrested on November 30, 2019. He was sent back to Stony Mountain Institution. His parole officer noted that he participated in programming while in Stony Mountain but has made no real progress in changing his behaviour, nor does he demonstrate motivation to do so. The parole officer goes on to say Mr. Fox is motivated by financial gain, the drug subculture and loyalty to gang goals irrespective of the potential serious harm to others.

[59] After completing his prison sentence, Mr. Fox was moved to the Brandon Correctional Center on March 17, 2020. He was noted to have good behaviour and he was polite. Rather than participate in programming, he focused his attention on disclosure materials for his court case. In Brandon corrections, he is known as a gang member with a leadership role and he is housed on a range with other Gangsta Crips gang members.

[60] By all accounts, including his family, it is clear that Mr. Fox is committed to the gang and drug subculture. As previously stated, Mr. Fox is deeply entrenched in a criminal lifestyle. He is assessed as a very high risk to re-offend and his prospects of rehabilitation at this time are poor or non-existent. He has demonstrated that he is a violent and dangerous man and specific deterrence is of paramount consideration for the protection of the public.

[61] After careful consideration of all of the circumstances, I find the appropriate period of parole ineligibility is 15 years.

[62] There is also a lifetime weapons prohibition pursuant to s. 109 of the *Code* and an order under s. 487.051 that he provide a bodily sample suitable for DNA analysis and registration on the national data bank.

_____J.