C.A.C. No. 132540

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Frenette, 1997 NSCA 92

Chipman, Jones and Freeman, JJ.A.

BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	Marian V.R. Fortune-Stone
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
PETER MARCEL FRENETTE	)	Kevin Burke, Q.C.
	)	for the Respondent
Respondent	)	
	)	
	)	
	)	
	)	Appeal Heard:
	)	April 7, 1997
	)	
	)	
	)	Judgment Delivered:
	)	May 14, 1997

THE COURT: Leave to appeal is granted and the appeal is dismissed as per reasons for judgment of Jones, J.A.; Freeman, J.A., concurring, and Chipman, J.A., dissenting by separate reasons.

JONES, J.A.:

On January 19, 1995, the respondent was charged with unlawfully cultivating cannabis marijuana contrary to s. 6(1) of the **Narcotic Control Act** and with unlawful possession of marijuana for the purpose of trafficking contrary to s. 4(2) of the **Act**. He

entered a plea of guilty to the second count on August 27, 1996 before Mr. Justice Scanlan in the Supreme Court.

As a result of a tip, the police conducted a surveillance of the respondent's home on January 12, 1995. Not content or being unable to obtain a search warrant, the police made an anonymous phone call alerting the occupants of the home that the police were about to conduct a search. Two vehicles subsequently left the premises and were engaged by a police roadblock. One vehicle was stopped and the second eluded the roadblock. A police chase ensued during which four garbage bags containing marijuana were thrown from a vehicle operated by the respondent. He was subsequently arrested when he tried to escape on foot.

The respondent allowed the police to search his house. The basement contained 170 pots for growing marijuana. The room was equipped with lighting fixtures which were illegally installed and a ventilation system. A total of 158 plants were seized having a pound street value estimated at $74,000.00.

The respondent was sentenced on September 20, 1996. An agreed statement of facts was placed before the court. There was no evidence that the cultivation had been an ongoing operation. The respondent has one prior conviction for common assault of long standing and has no prior record relating to drugs.

The respondent is 36 years old and is supporting four young children, two from his present marriage. He is one of ten children and comes from a good family background. He left home at age 20. His education level is GED12. The following extracts are from the presentence report:

> "In 1993 the subject married Trudy Rice. Mrs. Frenette, age 28 is employed on a casual basis as a merchandiser for Hostess Potato Chips. Mr. Frenette described his wife as a very loving, caring, understanding person. She is a great mother and wife and a person who has helped him through hard times. Together the couple have two children Jessica, age 3 and Brittany, age 2. Mr. Frenette said he has a good relationship with his wife and children."

...

> "The subject is presently employed at Polymer International as a material handler in the shrink film department. He said he will be trained to be a film line operator after his vacation is over. He has worked for the company for one year and his supervisors are Fred Conners and Sue Carol.
>
> The writer contacted Fred Conners and Sue Carol of Polymer International who confirmed the subject's employment of one year with the company. They described Mr. Frenette as a good worker whose performance appraisals show he consistently performs above standard. Mr. Frenette is a material handler in the shrink department and he supports five operators. He is able to get along well with co-workers, follows instruction well and takes incitive (sic) in his work. Initially there was a conflict with Mr. Frenette and another employee, however, the two individuals received counselling and the problem was resolved. Ms. Carol indicated there are no problems at present and they intend to employ Mr. Frenette in the future.
>
> The subject was previously employed at Wrecks Unlimited as a counter salesperson for four months; Portrait Experience, as a child photographer for six months, at Hollis Ford, as a car salesman for six months; and at Colchester Residential Services as a counsellor for one year. The subject enjoys his work and in the future would like to move up the corporate ladder at Polymer International."

The present family income is $2,064.00 per month.

The report also states:

> "The subject indicated he benefits from good mental and physical health and he is not taking any prescription drugs. The subject revealed he is a social drinker and user of substances. He claims he was a heavy user of marijuana, however, he recently curtailed his intake. He does not feel he requires treatment, but is willing to participate. In leisure time the subject enjoys making lawn furniture, working on cars and looking after maintenance of his mother-in-law's apartment buildings.
>
> The subject presented in a polite and pleasant manner. He noted his strengths as working on cars and his weakness as marijuana. He said he never buys the drug but has a hard time refusing it if it is offered. He described himself as an easy going, laid back person. The subject has accepted responsibility for his behaviour and stated 'this is the stupidest thing I have ever done. I have children and it's not proper.'

> The accused informed he has a prior criminal record for a common assault for which he received a fine.
>
> The writer spoke to Corporal Don Hoadley, Bible Hill RCMP Detachment, who indicated the subject is not known to the department. He said Mr. Frenette keeps a low profile around town, there are no outstanding charges since this time.
>
> The subject's present problem is his inability to think of the consequences of his actions. He needs to learn to think before he disregards the law. Should community supervision be imposed as a sanction for the offence; an assessment at drug dependency for Mr. Frenette's drug and alcohol usage may be considered.
>
> Should community supervision community service work or restitution be considered as a sanction for the offence the subject is deemed an appropriate candidate and is willing to participate."

The Crown recommended a sentence of between 12 and 18 months incarceration as a fit and proper sentence in this case.

In imposing sentence the trial judge considered the serious nature of the offence both in terms of the maximum penalty and the nature of the operation involved. The trial judge stated:

> "Mr. Frenette, your counsel has pointed out or referred to s. 742 of the **Criminal Code** suggesting a conditional sentence as a possible alternative. The Crown in this case has asked for 12 to 18 months incarceration. I can tell you, Mr. Frenette, in terms of the offence, this was a very substantial amount of narcotics. As I referred earlier, it must be attractive to anybody looking at those kind of figures to say, well maybe I'll try it once and maybe I will not get caught. Because of the seriousness of the offence, when the Court imposes a sentence, it must send a message to everybody who looks at the circumstances of the offence so that they understand it is really not worth it. If others do get caught, they must understand the consequences are just too great.
>
> Defence counsel referred at length to the fact that if I incarcerate you it is going to cost the state a lot of money in terms of keeping you in prison. It is going to cost money in terms of your family and how they are going to be supported. It costs a lot in terms of your prospects down the road in terms of employability or finding a job. Mr. Frenette, I want to point out to you and others that I am satisfied the main consideration in terms of the imposition of a conditional sentence is not the

costs. The money in terms of incarceration is not the bottom line. The money in terms of your job and your family is not the bottom line. When the court imposes a conditional sentence it must feel confident that the conditional sentence will offer the same or better protection to the public as any alternative sentence available within the prescribed limits of the law. The fact that money will be saved by a non-custodial sentence is a secondary consideration.

Each case must be considered based on the particular circumstances. I must assess you as an individual, keeping in mind the circumstances surrounding the offence. I must ask myself, what sentence can I impose that will best protect society. I must consider all possible means to protect society, including the potential for rehabilitation of you so as to ensure you do not do this type of thing down the road.

Mr. Frenette, I am satisfied a fit and proper sentence that will protect the public is to impose a period of imprisonment of 14 months. I note you have no prior convictions for this type of offence. I have already referred to the fact that you do have a good job and that you do have family responsibilities. I also note this is a non-violent offence. I am satisfied that it would be appropriate that you serve your sentence in the community pursuant to the terms of a conditional sentence.

When I impose a conditional sentence in this case, I am cognizant of the fact that s. 742 was implemented by Parliament to mean something. It is not enough to say that in the past the courts have imposed a custodial sentence in a case such as this. The fact that a proper sentence is lengthy does not mean that it cannot be served conditionally, provided it is less than two years. The recent amendments to the **Code** do give the court the option to impose imprisonment, but allow an accused to serve it in the community. If the courts were to simply say that because an accused would have been incarcerated prior to the amendments that same accused should still be incarcerated. That approach would result in the amendments being meaningless. I am satisfied the overriding issue must be whether society can be adequately protected through the imposition of a conditional sentence having regard to the circumstances of the offence and the accused.

Mr. Frenette, a conditional sentence is not intended to give you a break, but rather I must be convinced this is a satisfactory way to protect society. I am not satisfied that incarceration is going to afford any greater protection for society in the circumstances of this case. When you come out you may not have a job to return to. Incarceration would be very difficult for your family and add little to your rehabilitation prospects.

Mr. Frenette, the terms that I am going to impose on you in

> terms of serving your penalty or term of imprisonment in the community are intended to be harsh. The penalty should send a message to you and to others. If you think the terms are harsh when you are dealing with them on a day-to-day basis Mr. Frenette, just remember what the alternatives would be. The alternative would be for me to simply say, yes go to prison, serve your time, deal with the consequences. I am satisfied in this case that you and the community will be better off if you can continue to be productive. Your future in terms of your job prospects will not be destroyed by the imposition of this sentence."

The trial judge imposed a conditional sentence of 14 months imprisonment to be followed by a one year term of probation.

During the period the respondent is required to keep the peace and be of good behaviour, report to a supervisor as directed, remain with the jurisdiction and refrain from the use of alcohol or drugs. During the first four months he was subject to house arrest subject to permissible absences, particularly to continue his employment.

The Crown has applied for leave to appeal the sentence on the ground that the trial judge erred in failing to impose a sentence that adequately reflects the proper principles of sentencing for such offences, particularly general and specific deterrence and protection of the public. The Crown refers to the decisions of this court in **R. v. Butler** (1987), 79 N.S.R. (2d) and **R. v. Ferguson** (1988), 84 N.S.R. (2d) 255 where the court emphasized that the primary element on sentencing for traffickers must be deterrence.

The Crown does not suggest that the sentence of 14 months is inadequate as that was within the range that the Crown had recommended. Whether that was the result of a plea bargain is not clear. The argument really came down to whether conditional sentences are appropriate for drug offences. Counsel for the appellant makes the following submissions in the Crown's factum:

> "The task becomes more challenging when one integrates the primary objective of sentencing in drug cases, general deterrence, into the conditional sentencing alternative. It is submitted that certain offenders who receive a sentence of less than two years and whose presence in the community does not pose an obvious and direct danger, in a narrow sense, to that

> community may still not be entitled to the benefit of a conditional sentence.
>
> While every criminal sanction may have a deterrent effect, the jurisprudence appears to reflect the view that the more the sanction restrains the liberty of the offender, the greater the deterrent effect. In **Shropshire**, supra, Mr. Justice Iacobucci noted, at page 202, the following:
>
> > 'There is a very significant difference between being behind bars and functioning within society while on conditional release. Consequently, I believe that lengthened periods of parole ineligibility could reasonably be expected to deter some persons from reoffending.'
>
> Applying the rationale of **R. v. Shropshire**, supra, a conditional sentence is less onerous than actual incarceration with, thereof, a resulting diminishment of its deterrent effect. **Bill C-41** has not supplanted deterrence as the primary object of sentencing in narcotic cases. A conditional sentence, therefore, that does not give adequate effect to the principle of general deterrence would not be an appropriate sanction and would represent an error in law.
>
> ...
>
> It is respectfully submitted that, absent exceptional circumstances, a custodial sentence not served conditionally in the community will generally be the appropriate sanction for the commercial trafficking in narcotics, even in, so called, soft drugs. There being no exceptional circumstances in the case at bar, the conditional sentence imposed discloses an error in principle and is demonstrably unfit."

The respondent contends that the burden is on the appellant to show that the sentence was clearly inadequate or that the trial judge erred in principle in imposing the sentence. See **R. v. Wheaton** (1969), 1 N.S.R. (2d) 565. Counsel submitted that the trial judge did not err in imposing a sentence which places the appellant under strict conditions for a period of 26 months. The respondent contends that the new provisions of the **Criminal Code** were intended to change the law particularly with respect to the incarceration of offenders who are not a danger to society.

The debate turns on the interpretation of recent amendments to Part XXIII of the **Criminal Code**. The amendments included for the first time principles which Parliament

considered appropriate for the courts to consider in imposing sentences. The following sections are relevant:

> "s. 718 The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, 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 the victims or to the community; and
> >
> > (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.
>
> 718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> > (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing;
> >
> > > (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor, or
> > >
> > > (ii) evidence that the offender, in committing the offence, abused the offender's spouse or child, or,

> (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim shall be deemed to be aggravating circumstances;
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances, and
>
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.
>
> 742.1 Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court
>
> (a) imposes a sentence of imprisonment of less than two years, and
>
> (b) is satisfied that serving the sentence in the community would not endanger the safety of the community,
>
> the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3."

These provisions in s.s. 718 to 718.2 are largely a codification of the principles which had been developed by the courts. Section 718.2 does not contain a specific reference to drug offences. It also states that an individual should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances. Section 742.1 is new.

These provisions have been extensively reviewed by the Ontario Court of Appeal

in **R. v. Pierce** delivered February 26, 1997, [1997], O.J. No. 715 and **R. v. Wismayer** heard February 28, 1997. In **Wismayer**, Rosenberg, J.A. gave the judgment of the Court of Appeal.

He stated at p. 15 of the decision:

> "Thus, s. 742.1 sets out only three express prerequisites before a court may make a conditional sentence order:
>
> 1. the offence is not punishable by a minimum term of imprisonment;
>
> 2. the court must impose a sentence of imprisonment of less than two years; and
>
> 3. the court must be satisfied that serving the sentence in the community would not endanger the safety of the community.
>
> If those prerequisites are met, the court 'may, for the purpose of supervising the offender's behaviour in the community' order that the offender serve the sentence in the community subject to the conditions specified in the conditional sentence order.
>
> As with all other sentence dispositions, except those having a mandatory minimum, the court has a discretion whether or not to make a conditional sentence order. This follows not simply from the inclusion of the word 'may' in s. 742.1 but from the terms of s. 718.3(1) and (2) which explicitly vest in the sentencing judge the discretion to determine the appropriate degree and kind of punishment: see **R. v. M. (C.A.)** (1996), 105 C.C.C. (3d) 327 at 374 (S.C.C.). That discretion must, of course, be exercised judicially and 'subject to the limitations prescribed in the enactment'. To use the words of Finlayson J.A. in **R. v. Pierce, supra** at para. 45 the prerequisites in s. 742.1, especially danger to the community are merely the **sine qua non,** the indispensable conditions, for the exercise of the discretion as to whether or not to impose a conditional sentence. The fact that the conditional sentence is available in a particular case because the conditions prescribed by s. 742.1 are met does not absolutely entitle the offender to a conditional sentence. As with all other available dispositions, it is for the trial judge to determine whether such a disposition is appropriate in the particular circumstances of the case.
>
> As Finlayson J.A. pointed out in **R. v. Pierce**, the sentencing court is brought back to the principles and objectives of sentencing as expressed in the **Criminal Code** and by the

> courts, when it embarks upon a consideration of those circumstances. The principles and objectives of sentencing as they have been developed by the courts and as expressed in the **Criminal Code** are not wholly exhausted once the decision has been made to impose a term of imprisonment of less than two years. Those principles and objectives must also be brought to bear on the decision whether or not to impose a conditional sentence. Having said that, it stands to reason that the fact that Parliament has specifically referred to only one factor, that serving the sentence in the community would not endanger the safety of the community, must mean that this factor is entitled to more weight than certain other factors of more general application."

At p. 20 he stated:

> "There seems little doubt as to the purpose of the conditional sentence regime. Parliament clearly intended, in my view, to encourage courts to reduce reliance upon imprisonment as a response to crime. This is confirmed by comments made by the Minister of Justice to Parliament. The Minister of Justice, in introducing the legislation in the House of Commons on second reading, said the following concerning conditional sentences:
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> > 'Where a court imposes a sentence of imprisonment of less than two years and where the court is satisfied that serving the sentence in the community would not endanger the safety of society as a whole, the court may order that the offender serve the sentence in the community rather than in an institution.
> >
> > Offenders who do not comply with such conditions as may be imposed at that time can be summoned back to court to explain their behaviour, to demonstrate why they should not be incarcerated. If the court is not satisfied with that explanation, it can order the offender to serve the balance of the sentence in custody. This sanction is obviously aimed at offenders who would otherwise be in jail but who could be in the community under tight controls.
> >
> > It seems to me that such an approach would promote the protection of the public by seeking to separate the most serious offenders from the community while providing that less serious offenders can remain among other members of society with effective community based alternatives while still adhering to appropriate conditions. It also means that scarce funds can

> be used for incarcerating and treating the more serious offenders. [Emphasis added.] House of Commons Debates (September 20, 1994), at 5873.'

The conditional sentence is entirely consistent with the sentencing principles set out in s. 718.2(d) and (e). Paragraph (d) is mandatory: the court shall not deprive the offender of liberty if less restrictive sanctions may be appropriate in the circumstances. Paragraph (e) directs the court to consider all available sanctions other than imprisonment that are reasonable in the circumstances for all offenders. In my view, s. 742.1 must be interpreted in light of these principles. They represent a recognition on the part of Parliament that many of the objectives of sentencing can be met without requiring the immediate imprisonment of the offender.

The conditional sentence regime is a rational response to the problem of allocating scarce resources for the administration of justice. In **R. v. Shropshire** (1995), 102 C.C.C. (3d) 193 (S.C.C.), Iacobucci J. dealt with some of the principles underlying the provisions respecting parole ineligibility for murder, [now] s. 745.5. He noted, at p. 202, the statement by Lambert J.A. of the British Columbia Court of Appeal that the period of ineligibility should only be increased to denounce the conduct of the accused if the court concluded that the 'extra denunciation is worth more than $50,000 a year to society [the cost of imprisoning an inmate in a federal penitentiary for a year]'. Iacobucci J. rejected this approach. He considered it entirely inappropriate to require the trial judge to engage in such cost/benefit budgetary analysis and, at p. 202, he adopted the following submission of the Crown:

> The question of how society allocates public resources is for Parliament to determine. By enacting 744 [now s. 745.5], Parliament has determined that some of society's resources will be allocated to imprisoning convicted murders beyond the ten year point. If Parliament determines that the fiscal cost of that incarceration is too high then they can amend s. 744. It is not the task of individual judges carrying out the sentencing process to engage in that kind of budgetary analysis. [Emphasis added.]

The greater cost of imprisoning an offender as compared to supervising the offender in the community is well-known. Parliament has not amended s. 745.5 and courts are still required to consider the need to increase parole ineligibility for certain offenders convicted of serious offences. Parliament has, however, spoken with respect to incarceration at the other

end of the spectrum, offenders sentenced to less than two years. While dangerous offenders are to be incarcerated to protect society, where it is safe to do so, other offenders are to serve their sentences in the community. Moreover, it must be borne in mind that for the most serious offenders the conditional sentence is simply not an available option because the offender will have been sentenced to the penitentiary. For those offenders, the question of serving any portion of the sentence in the community is reserved to the National Parole Board.

The weight to be attached to the various principles, objectives and factors

Accepting that the various sentencing principles, objectives and factors may all have a bearing upon the decision whether the conditional sentence order should be made does not resolve the question of the weight to be attached to those other considerations. As indicated earlier, Mr. Smith submitted that where general deterrence and particularly denunciation were the paramount considerations it will only be in rare cases that a conditional sentence is appropriate. I will deal with some of these objectives, principles and factors and the weight to be attached to them below.

General deterrence

In my view, the enactment of the conditional sentence regime represents a concession to the view that the general deterrent effect of incarceration has been and continues to be somewhat speculative and that there are other ways to give effect to the objective of general deterrence. The Report of the Canadian Sentencing Commission, 1987 (The Archambault Report) summarized the state of understanding of general deterrence. The Commission's first three conclusions, at pp. 136-37 were as follows:

a) Even if there seems to be little empirical foundation to the deterrent efficacy of legal sanctions, the assertion that the presence of some level of legal sanctions has no deterrent effects whatsoever, has no justification. The weight of the evidence and the exercise of common sense favour the assertion that, taken together, legal sanctions have an overall deterrent effect which is difficult to evaluate precisely.

b) The proper level at which to express strong reservations about the deterrence efficacy of legal sanctions is in their usage to produce particular effects with regard to a specific

> offence. For instance, in a recent report on impaired driving published by the Department of Justice, Donelson asserts that 'law-based, punitive measures alone cannot produce large, sustained reductions in the magnitude of the problem' (Donelson, 1985; 221-222). Similarly, it is extremely doubtful that an exemplary sentence imposed in a particular case can have any perceptible effect in deterring potential offenders.

c) The old principle that it is more the certainty than the severity of punishment which is likely to produce a deterrent effect has not been invalidated by empirical research. In his extensive review of studies on deterrence, Beyleveld (1980; 306) concluded that 'recorded offence rates do not vary inversely with the severity of penalties (usually measured by the length of imprisonment)' and that 'inverse relations between crime and severity (when found) are usually smaller than inverse crime-certainty relations'. [Emphasis added.]

This is not to doubt the theory of general deterrence, or its application to the manner of service of the sentence of imprisonment. Requiring some offenders to serve the sentence in a correctional facility as opposed to the community can reasonably be expected to deter some persons from offending: see **R. v. Shropshire, supra**, at p. 202. However, these conclusions suggest that general deterrence is not a sufficient justification for refusing to impose a conditional sentence. In view of its extremely negative collateral effects, incarceration should be used with great restraint where the justification is general deterrence. These effects have been repeatedly noted with depressing regularity. Some of the comments have been collected by the Sentencing Commission at pp. 42-44 and bear repeating:

> 1969: Ouimet Committee, *Report of the Canadian Committee on Corrections*
>
> One of the serious anomalies in the use of traditional prisons to re-educate people to live in the normal community arises from the development and nature of the prison inmate subculture. This grouping of inmates around their own system of loyalties and values places them in direct conflict with the loyalties and values of the outside community. As a result, instead of reformed citizens society has been receiving from its prisons the human product of

> a form of anti-social organization which supports criminal behaviour (p. 314). [Emphasis added.]
>
> 1973: LeDain Commission, *Final Report of the Commission of Inquiry into the Non-Medical use of Drugs*.
>
> Perhaps the chief objection to imprisonment is that it tends to achieve the opposite of the result which it purports to seek. Instead of curing offenders of criminal inclinations it tends to reinforce them. This results from confining offenders together in a closed society in which a criminal subculture develops (pp. 58-59). [Emphasis added.]
>
> These adverse effects of imprisonment are particularly reflected in the treatment of drug offenders. Our investigations suggest that there is considerable circulation of drugs within penal institutions, that offenders are reinforced in their attachment to the drug culture, and that in many cases they are introduced to certain kinds of drug use by prison contacts. Thus imprisonment does not cut off all contact with drugs or the drug subculture, nor does it cut off contact with individual drug users. Actually it increases exposure to the influence of chronic, harmful drug users p. 59).
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> 1977: Solicitor General of Canada. *A Summary and Analysis of Some Major Inquiries on Corrections - 1938- to 1977*
>
> Growing evidence exists that, as educational centres, our prisons have been most effective in educating less experienced, less hardened offenders to be more difficult and professional criminals, (p. iv). [Emphasis added].

The Sentencing Commission also points out that the other recurring themes in these earlier reports are the overuse of custodial sanctions, the excessive length of sentences of imprisonment; the high cost of incarceration; and the stigmatizing effect of a jail term. These reports emphasize the need to resort to the least drastic alternative in sentencing. The Sentencing Commission concluded that it was only logical to recommend that imprisonment be used with extreme moderation [p. 44]. Parliament has accepted this conclusion in principle through s. 718.2(d) and (e) and the courts are required to give it real effect in practice through liberal resort to the conditional sentence regime."

He continued at p. 28:

> "With respect to denunciation, in my view the respondent's submission reflects the misapprehension that societal denunciation can only be expressed by requiring the offender to serve a sentence of imprisonment in custody. The Supreme Court of Canada has explained that this is not so. In **R. v. M. (C.A.)**, Lamer C.J.C. speaking for the full court reviewed the nature of parole. He pointed out that parole is an alteration of the conditions of sentence, rather than a reduction of sentence and that, even while on parole, the offender is subject to strict limits on his or her freedom. In terms that would apply equally to the conditional sentence, he dealt with deterrence and denunciation, at pp. 359-360:
>
> > [E]ven though the conditions of incarceration are subject to change through a grant of parole to the offender's benefit, the offender's sentence continues in full effect. The offender remains under the strict control of the parole system, and the offender's liberty remains significantly curtailed for the full duration of the offender's numerical or life sentence. The deterrent and denunciatory purposes which animated the original sentence remain in force, notwithstanding the fact that the conditions of sentence have been modified. The goal of specific deterrence is still advanced, since the offender remains supervised to the extent and degree necessary to prevent possible crime, and since the offender remains under the shadow of reincarceration if he or she commits another crime. As well, the goal of denunciation continues to operate, as the offender still carries the societal stigma of being a convicted offender who is serving a criminal sentence.. [Emphasis added.]
>
> The very same considerations apply to the conditional sentence. The offender's liberty remains significantly curtailed for the full duration of the sentence. The offender is under the strict control of the supervisor and remains under the shadow of incarceration through termination or suspension of the conditional sentence order if he or she reoffends. Most importantly, the goal of denunciation continues to operate for the reasons expressed by Chief Justice Lamer.
>
> Rousseau-Houle J.A. was of a similar view in **R. v. Maheu**, a judgment of the Quebec Court of Appeal, delivered February 6, 1997, [1997] A.Q. No. 277. At para, 49, she pointed out that it is wrong to consider a conditional sentence order as a lenient sentence. The offender will serve the total sentence under

conditions that restrict the offender's liberty, often by requiring that the sentence be served as a form of house arrest and by requiring community service. The offender is also under the constant threat of imprisonment should he or she violate the conditions. As Rousseau-Houle J.A. put it, the sentence of imprisonment is suspended like a sword of Damocles over the offender. In some ways the conditional sentence order can be a much heavier sentence than a brief sentence of imprisonment from which the offender will be paroled after one third has been served. Accordingly, I cannot accept that a conditional sentence of imprisonment is unavailable where the paramount consideration is denunciation of the offender's conduct.

Rehabilitation and specific deterrence

The conditional sentence can also have important beneficial effects for the community. Use of the conditional sentence provides the opportunity for rehabilitation through mandatory treatment, reduction in the costs of incarceration, and, where appropriate, the possibility of encouraging the offender to take responsibility for his or her actions through community service or other measures.

The courts should also be very wary of using incarceration as a specific deterrent. The conclusions, admittedly tentative, of the authors of the *Corrections Utilization Study, A Review of the National and International Literature and Recommendations for a National Study on Recidivism* (January, 1977) Canadian Centre for Justice Statistics, suggest that recidivism rates are increased, not decreased, by incarceration [at p. 58]. The authors also note that '[t]he effects of appropriate correctional treatment are augmented when those services are offered in a community as opposed to a custodial setting' [at p. 60]. All of this argues for a greater resort to the conditional sentence order.

The statutory aggravating factors

Section 718.2(a)(i)-(iii) deems certain circumstances, including abuse of a position of trust, to be aggravating circumstances. In my view, undue emphasis ought not to be placed upon the statutory aggravating factors. The opening words of s. 718.2 itself direct the court to take into account any relevant aggravating or mitigating circumstances relating to the offence or the offender. The fact that Parliament has not explicitly set out the well-established mitigating factors does not mean that they are entitled to less weight either in establishing the length of the sentence of imprisonment or the manner in which it should be served, whether in custody, intermittently, or under a conditional sentence order. Otherwise, the determination would be unfairly skewed against some of the very persons

most likely to benefit from a conditional sentence, namely youthful offenders, offenders with physical or mental disability, offenders with little or no prior record, or no prior record of imprisonment. These are all well-established mitigating factors and they cannot be ignored simply because they have not been explicitly set out in s. 718.2 or because the circumstances of the particular offence reflect one or more of the statutory aggravating factors. Moreover, a majority of this court has already held in **R. v. Scidmore, supra** that the mere fact that one or more of the statutory aggravating factors is present does not disentitle the accused to a conditional sentence.

The importance of the factor of endangering the community

For the reasons set out above and as explained in **R. v. Pierce**, the trial judge has a discretion whether or not to make a conditional sentence order even where the minimal statutory pre-requisites in s. 742.1 have been established by the offender. The trial judge is required to consider the various objectives and principles of sentencing not only in setting the length of the sentence but also in determining the manner of its service. This approach is consistent with the view of Finlayson J.A. in **R. v. Pierce**, at para. 46 that the court must avoid a 'rigid two-step process' and consider only the question of danger to the community when deciding whether to impose the conditional sentence order. Finlayson J.A. wrote as follows:

> The approach should be global and avoid compartmentalization. The length of a sentence served in the community should not necessarily be the same length as that served in custody. Ultimately, the duty of trial judges is to impose a fit sentence. In arriving at that final judgment they should take into consideration all the guidelines in the *Code* including those which urge the fresh approach to serving conventional sentence in the community. A fit sentence should be responsive to all the sentencing guidelines in the *Code*, and where possible reflect the new sentencing direction set by parliament with s. 742.1. [Emphasis added.]

The new sentencing direction set by Parliament with s. 742.1 requires that the courts give these provisions a large and liberal construction and wherever possible the court should resort to the community sentence option. In my view, the most effective way to implement Parliament's purpose is to recognize that, while the other principles and objectives of sentencing must be taken into account, the principal consideration in imposing a conditional sentence must be danger to the community. I will consider the meaning of

danger to the community below.

Parliament's goal of reducing the prison population of non-violent offenders and increased use of community sanctions will be frustrated if the courts refuse to use the conditional sentence order for offences that normally attract a jail sentence and resort to the conditional sentence only for offences that previously would have attracted non-custodial dispositions.

A number of trial judges have correctly observed that if the courts continue to apply the same principle that virtually all offenders must be incarcerated for certain offences for reasons of general deterrence or denunciation then the new provisions will be rendered meaningless: see **R. v. Frenette** (1996), 154 N.S.R. (2d) 81 (N.S.S.C.) and **R. v. K.R.G., supra**. In particular, I agree with the following comments of Mercer J. in **R. v. L.F.W.**, a judgment of the Newfoundland Supreme Court, delivered December 16, 1996, [1996] N.J. No. 330 at para. 34:

> 'It is correct that appellate jurisprudence had established that for certain offences, including sexual offences involving children and serious drug offences, incarceration was to be the norm. It is a principle of statutory interpretation that Parliament is presumed to legislate with knowledge of the existing state of the law. Parliament did not exclude certain offences from s. 742.1, nor did it impose more rigorous standards in respect of certain offences before a conditional sentence could be considered. I therefore reject the contention that for certain offences incarceration must continue to be the norm and conditional sentences can only be granted in exceptional circumstances.' [Emphasis added.]

The danger of reserving the conditional sentence only for cases where a sentence of imprisonment would not otherwise have been imposed was discussed in England when the suspended sentence was introduced. The suspended sentence in England seems to be somewhat similar to the conditional sentence. The trial judge imposes a sentence of imprisonment but suspends its operation for a specified period. The entire sentence can be reactivated if the accused reoffends since, unlike the conditional sentence scheme, the accused receives no credit for the period spent in the community. In the alternative, the court may substitute a lesser term, extend the operational period of the suspended sentence, or make no order. See the discussion in Jack Gemmell, 'The New Conditional Sentencing Regime' (1996), 39 C.L.Q. 334 at 341-46.

The Court of Appeal (Criminal Division) in England cautioned against using the suspended sentence as an additional alternative to imprisonment in cases where imprisonment was not called for in any event. In **R. v. O'Keefe** (1968), 53 Cr. App. R. 91 Parker L.C.J. held as follows, at p. 94:

> 'This Court has found many instances where suspended sentences are being given as what one might call a 'soft option,' when the court is not quite certain what to do; and in particular they have come across many cases when suspended sentences have been given when the proper order was a probation order.
>
> This Court would like to say as emphatically as they can that suspended sentences should not be given when, but for the power to give a suspended sentence, a probation order was the proper order to make. After all, a suspended sentence is a sentence of imprisonment. Further, whether the sentence comes into effect or not, it ranks as a conviction, unlike the case where a probation order is made, or a conditional discharge is given.
>
> Therefore, it seems to the Court that before one gets to a suspended sentence at all, a court must go through the process of eliminating other possible courses such as absolute discharge, conditional discharge, probation order, fine, and then say to itself: this is a case for imprisonment, and the final question, it being a case for imprisonment: is immediate imprisonment required, or can I give a suspended sentence?' [Emphasis added.]

I entirely agree with those comments. In my view, they are consistent with the wording of the **Criminal Code**. Consideration of a conditional sentence arises because the court has decided to impose a sentence of imprisonment of less than two years. This means that the court has already rejected all of the alternatives to imprisonment as directed by s. 718.2(d) and (e). This was the approach taken by this court in **R. v. Scidmore** and by the Manitoba Court of Appeal in **R. v. Arsiuta** a judgment delivered February 20, 1997, [1997] M.J. No. 89 (although in the latter case the Court also held that the only criterion to be applied in determining the question of conditional sentence is whether it would put the community at risk). Care must be taken not to impose a conditional sentence if imprisonment would be inappropriate and not to unduly lengthen the conditional sentence in an attempt to enhance its deterrent or denunciatory effect. Thus, while a rigid two stage

process is to be avoided, the primary consideration in determining whether the conditional sentence should be imposed must be the express statutory factor of danger to the community.

In **R. v. Pierce, supra**, Finlayson J.A. set out at some length the competing positions of the accused and the Crown as to the meaning of the phrase in para. (b) of s. 742.1, 'is satisfied that serving the sentence in the community would not endanger the safety of the community'. In summary, the accused argued for a narrow definition focused essentially on the danger to person or property should the accused reoffend during the period of the conditional sentence. The Crown argued for a much broader interpretation including elements of denunciation and especially general deterrence. Finlayson J.A. described the Crown's position in these terms, at para. 44:

> 'The position of the Crown was that the trial judge was obliged to consider the larger considerations of whether the particular offence calls for a custodial term to achieve the codified objectives of specific and general deterrence. Further, it is the Crown's position that the court should be concerned about the perception of the public as to whether the community is being protected by a sentence that does not adequately reflect its denunciation of the conduct of the offender nor act as a deterrent to the offender and other like-minded persons.'

As I understand his reasons, having rejected the accused's principal position in that case of a rigid two step procedure in which danger to the community is the only consideration once a reformatory term has been found to be appropriate, Finlayson J.A. agreed with the accused's view that danger to the community in s. 742.1(b) was to be read in the narrow sense. I take that from this portion of his reasons, at para. 45:

> 'A resolution of this difference of opinion as to the meaning of community safety might at first blush appear to be central to the development of a methodology for imposing conditional sentences. However, if the narrower interpretation of community safety is simply regarded as the *sin qua non* to the exercise of a discretion to permit the sentence to be served in the community, I have little difficulty with it. In the final analysis, the discretion must be exercised in accordance with recognized sentencing principles. This takes us back to the concerns of specific and general deterrence expressed by the Crown including s. 718.2. [Emphasis added.]

> Since the court is required to take into consideration all of the various factors, principles and objectives in sentencing, in any event, in deciding whether to impose a conditional sentence, it is entirely appropriate to give s. 742.1(b) the narrower and, in my view, normal meaning, which focuses on the risk that this particular offender represents to the community. Such an interpretation is consistent with the obvious purpose of the legislation, with those statutory guidelines in s. 718.2 that specifically deal with the use of incarceration, namely para. (d) and (e), and the principle of restraint implicit in s. 718(c), which recognizes the separation of offenders as a legitimate objective of sentencing 'where necessary'.
>
> To summarize, s. 742.1 and the companion provisions are designed to give effect to the important principle of restraint in the use of incarceration and should be given a suitably large and liberal construction. Having decided to impose a sentence of less than two years, the trial judge must take into account all of the relevant principles, objectives and factors of sentencing in determining whether or not to impose a conditional sentence of imprisonment. The principal factor, however, should be whether permitting the offender to serve the sentence in the community under a conditional sentence order would endanger the safety of the community because of the risk that the offender will re-offend."

I agree with that reasoning. In my view they deal appropriately with the submissions of the Crown in this case respecting the interpretation of these provisions of the **Code**. Essentially these factors were considered by the trial judge in this case. If in considering these provisions of the **Code** one is lead to the conclusion that 14 months imprisonment is an adequate sentence for this offence, then I see no reason why those same considerations particularly having regard to the respondent's background, cannot support a conditional sentence. The alternative on the Crown's submission is a term of imprisonment for 14 months with eligibility for parole in five months or less. Somehow the deterrent effect of that conclusion eludes me. I am not impressed with the argument that conditional sentences will result in the imposition of longer terms. That is not the present experience and these new provisions are being widely used across Canada. As of the end of January, 1997 there have been over 1,391 orders in Ontario and as of February 7, 1997, there have been 800 in Alberta. I am satisfied that the courts will continue to use these

provisions where appropriate with the result that the number of trials will diminish and fewer jail terms will be imposed. I do not find it useful to suggest that s. 742.1 of the **Code** should be restricted in the case of certain offences. Apart from the provisions of the **Code**, Parliament has imposed no such restrictions. The ultimate decision will depend on the circumstances in each particular case and a wide measure of discretion must be left to trial judges in deciding whether a conditional sentence should be imposed.

The Crown argued that circumstances of arrest in this case constituted an aggravating circumstance. Counsel did not point out that the police provoked the chain of events by failing to obtain a search warrant.

This was a serious offence and was regarded by the trial judge as such. This is apparent from the total period of supervision of some 26 months under strict conditions. In **R. v. Wheatley** C.A.C. 133184 Matthews, J.A. in delivering the judgment of this court in a case of possession for the purpose of trafficking stated at p. 7:

> "A conditional sentence is punitive. It is a sentence of imprisonment to be served in the community for the full term with conditions as set by a sentencing judge which significantly restrict the liberty of the offender. In appropriate circumstances it is to be imposed as an alternative to the other sentencing procedures, but only if the court is satisfied that serving a sentence in the community will not endanger the safety of the community. With respect to those who may hold a contrary opinion, it should not be considered a 'soft' penalty."

I am satisfied that the trial judge considered all of the appropriate principles in imposing sentence in this case and that he committed no error. I would grant leave to appeal and dismiss the appeal.

Jones, J.A.

Concurred in:

Freeman, J.A.

CHIPMAN, J.A.: (Dissenting)

This is an application by the Crown for leave to appeal and, if granted, an appeal from a conditional sentence of 14 months imposed on the respondent in Supreme Court by Scanlan, J. pursuant to s. 742.1 of the **Criminal Code** for possession of cannabis marihuana for the purpose of trafficking.

The respondent pled guilty at his trial and an agreed statement of facts detailing the circumstances of the offence was tendered to the trial judge:

> **FACTS:**
>
> As a result of a Crime Stoppers anonymous tip on December 28, 1994, that Peter Frenette was growing hydroponically in his basement, the RCMP conducted surveillance on January 12, 1995 at Mr. Frenette's residence at approximately 19:17 hours.
>
> At 19:24 hours, Cpl. Hoadley of the Truro RCMP placed a call to 893-8438 (Frenette's phone number), a female answered the phone, Hoadley advised "the cops got a warrant for your house and are coming right away, get your stuff out." At the same time, Csts. Beaver and Roche observed a male subject open the garage door and proceed up the road on a ski doo and then return. A second male came from the residence and hollered to the first that his wife wanted him. At 19:30 hours all subjects were inside the residence and the lights were turned out.

At approximately 19:58 hours, Csts. Beaver and Roche advised that two vehicles were departing the residence, one from the driveway and one from inside the garage. The vehicles headed north on Wilson Mountain Road. Cpl. Hoadley and Sgt. Brown were parked at the end of Wilson Mountain Road at the intersection of Salmon River Road and could see two vehicles coming to them. Cpl. Hoadley pulled the police vehicle diagonally across the road with a fire ball light on the dash board activated. The first vehicle, a 1986 mustang stopped. Sgt. Brown exited the police vehicle and hollered "police" and for them to stop and they did so. The second vehicle, a blue 1985 Nissan, Nova Scotia license 22Y 261, registered owner Trudi Marie Frenette, 99 Wilson Mountain Road, Murray Siding, Nova Scotia proceeded by the front of the police truck and accelerated in a deliberate attempt to get away. The accused, Peter Marcel Frenette, was observed to be the driver. Also numerous large dark coloured garbage bags could be observed inside the vehicle.

Cpl. Hoadley continued after Frenette who turned right on Salmon River Road and headed east. Mr. Frenette then led police on a 6.6 kilometre chase onto the Salmon River Road and the Old Salmon River Road at which time Mr. Frenette threw four garbage bags of marijuana from his vehicle onto Salmon River Road. These were recovered by Sgt. Brown at approximately 20:20 hours. The chase culminated when Mr. Frenette proceeded down a dead end lane, Crowe Lane, obviously thinking he had lost the police. When police crested a blind hill in the lane, Frenette was observed to be standing at the rear of his vehicle throwing out garbage bags of marijuana. Four garbage bags of marijuana were located a short distance from the vehicle where Frenette was observed throwing them. A further two garbage bags of marijuana were recovered from the trunk of Frenette's vehicle. Upon observing the police vehicle, Mr. Frenette fled on foot whereupon he was pursued and captured in a small wooded area approximately 200 yards from his vehicle. At approximately 20:04 hours, Frenette was arrested for s. 4(2) *Narcotic Control Act*, read his *Charter* rights and police warning. Mr. Frenette replied that he wished to use the phone and advised he could do so as soon as they got to the office whereupon he replied "okay".

Sgt. Brown patrolled Salmon River Road and seized four plastic garbage bags from the road which Frenette had pushed from his vehicle. Sgt. Brown spoke with Peter Marcel Frenette and Frenette subsequently signed a *Charter* Consent Waiver to search his residence. Sgt. Brown then departed to search Frenette's residence.

At 20:45 hours, Sgt. Brown and Cst. Caughey attended at the Frenette residence and were met by Mr. Frenette's wife, Trudi Marie Frenette. Csts. Roche and Beaver assisted in the

search after Trudi Marie Frenette had been presented with the Consent to search and read same. A search of the residence was conducted in the basement digging up approximately one-half of the basement with a special "Grow Room". This room contained 170 pots of soil which had recently been disturbed. The walls of the room were lined with white plastic reflective paper. There were twelve large light shields, eleven of these contained 1,000 watt high pressure sodium light bulbs. All of these lights were connected to a timer set at 12 hours light and 12 hours darkness indicating three stage growth. The plants were in their final stage and very close to harvest. There is a ventilation system, venting outside to discharge the extra humidity and exchange air. Also, there was a water sprayer and humidity gauge. All this was being powered by illegal hook up to Nova Scotia Power. The scene was photographed by Cpl. Ed Gillis of Bible Hill, Identification Section. All exhibits at the scene were seized by Sgt. Brown.

At 20:50 hours, Cpl. Hoadley and Mr. Frenette departed the scene, travelled to 99 Wilson Mountain Road and spoke to Sgt. Brown and departed to the Bible Hill Detachment.

At 20:21 hours, Mr. Frenette was placed in an interview room and allowed to use the phone. At 21:45 hours he advised that he had talked to his lawyer and subsequently refused to provide them a statement. At 24:00 hours, Mr. Frenette was released to be summonsed to Court. At 00:30 hours, January 13, 1995, six bags of marijuana were seized at the scene by Cpl. Hoadley to be turned over to Sgt. Brown.

DESCRIPTION OF CONTRABAND SEIZED:

A total of 158 marihuana plants were seized, the following calculations were made based on his experience and expertise:

- Each of the 158 plants would produce a minimum of three ounces of flowering tops, (colas) or "bud".

- 158 plants would therefore produce a minimum yield of 474 ounces of smokable material, not including leaves or stems (shake). (158 x 3 oz. per plant)

- 474 ounces equates to 29.62 pounds of high grade cannabis marihuana. (474 x 16 oz. per pound)

- 474 ounces equates to 13,272 grams. (474 x 28 grams per oz.)

VALUE OF ITEMS SEIZED:

STREET PRICES FOR MARIHUANA: (Buds or flowering tops)

- gram $10.00 to $20.00
- ounce $250.00 to $300.00
- pounds $2500.00 to $3500.00

PROFIT POTENTIAL:

- GRAM LEVEL: 13,272 x $10.00 = $132,720 per crop
  13,272 x $20.00 = $265,400 per crop

- OUNCE LEVEL: 474 x $250.00 = $118,500 per crop
  474 x $300.00 = $142,200 per crop

- POUND LEVEL: 29.6 x $2500.00 = $ 74,000 per crop
  29.6 x $3500.00 = $103,600 per crop

Following representation by counsel for the appellant and the respondent, the trial judge reviewed the presentence report and the circumstances of the offence and the offender. He expressed, on two occasions, concern that the respondent was minimizing the seriousness of the offence in that his use of marihuana had not been stopped but only curtailed. The trial judge observed that it was a positive fact that the respondent entered a guilty plea. Other positive circumstances were that the respondent was 36 years of age, married and supporting children. He was working and was highly regarded by his employer. The trial judge referred to the negative effect that incarceration would have on the respondent and his family.

The trial judge concluded that a fit and proper sentence that would protect the public was a period of imprisonment of 14 months. He then referred to the court's power to impose a conditional sentence pursuant to s. 742.2 of the **Criminal Code**. He noted that he was satisfied that the overriding issue must be whether society could be adequately protected through the imposition of a conditional sentence having regard to the circumstances of the respondent and the offence that he committed. He thereupon imposed the following minimum conditions as required by s. 742.3:

(a) keep the peace and be of good behaviour;

(b) appear before the court when required to do so by the court;

(c) report to a supervisor

(i) within two working days, or such longer period as the court directs, after the making of the conditional sentence order, and

(ii) thereafter, when required by the supervisor and in the manner directed by the supervisor;

(d) remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the supervisor; and

(e) notify the court or the supervisor in advance of any change of name or address, and promptly notify the court or the supervisor of any change of employment or occupation.

In addition, the respondent was to abstain from the consumption of alcohol or other intoxicating drugs during the period of imprisonment. The respondent was also to abstain from the consumption of non-prescription drugs during that period and during a one year period of probation to follow. Moreover, during the first four months of the period of imprisonment, he was to be under house arrest except to see his supervisor, go to work or court, or for medical attention.

At the outset, I would observe that the Crown's application raises substantial issues which involve the interpretation and application of amendments to Part XXIII of the **Criminal Code** as a result of the passage by Parliament on September 3, 1996 of Bill C-41. I would grant leave to appeal.

On this appeal, the Crown submits that the trial judge erred by imposing a conditional sentence pursuant to s. 742.1 of the **Code**. The Crown does not take issue with the period of 14 months as the period of incarceration. The Crown's position before the trial judge was that an appropriate sentence was 12 to 18 months. The heart of the Crown's case in this Court is that the period of 14 months imposed by the trial judge should have

been a sentence of incarceration and not a sentence to be served in the community.

In deciding this appeal, this Court is confronted with the task of applying the principles of sentencing, and selecting the sentencing options available, which have now been altered by the amendments to the **Criminal Code** resulting from the passage of Bill C-41. This is a task which is confronting trial judges on a daily basis across the country. We must approach it from the perspective of an appeal court. Decisions of trial and appeal courts dealing with the new sentencing regime are being produced constantly, and already there are a number of cases to which we can look for guidance. This Court has, in a short space of time, heard three appeals by the Crown from conditional sentences. See **R. v. Wheatley**, C.A.C. 133184, **R. v. Parker**, C.A.C. No. 133174.

At the outset, I would agree with my colleague Matthews, J.A. when he stated in **The Queen v. Wheatley**, supra, at p. 8 that the standard of appellate review respecting an appeal from sentence set out by the Supreme Court of Canada in **R. v. Shropshire**, [1995] 4 S.C.R. 227 has not been affected by the recent amendments. The standard referred to in **Shropshire, supra**, is the application of a test of reasonableness of the sentence under review. The Court of Appeal's role in sentencing was further discussed by the Supreme Court of Canada in **R. v. M. (C.A.)**, [1996] 105 C.C.C. (3d) 327. Once again, the Supreme Court of Canada emphasized the wide discretion vested in the sentencing judge. Lamer, C.J.C. speaking for the court said at p. 364:

> In my view, within the broad statutory maximum and minimum penalties defined for particular offences under the *Code*, trial judges enjoy a wide ambit of discretion under s. 717 in selecting a "just and appropriate" fixed-term sentence which adequately promotes the traditional goals of sentencing, subject only to the fundamental principle that the global sentence imposed reflect the overall culpability of the offender and the circumstances of the offence. . .
>
> At p. 374, Lamer C.J.C. said:
>
> Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to

> vary a sentence imposed at trial if the sentence is demonstrably unfit. ...
>
> This deferential standard of review has profound functional justifications. As Iacobucci J. explained in *Shropshire*, at para. 46, where the sentencing judge has had the benefit of presiding over the trial of the offender, he or she will have had the comparative advantage of having seen and heard the witnesses to the crime. But in the absence of a full trial, where the offender has pleaded guilty to an offence and the sentencing judge has only enjoyed the benefit of oral and written sentencing submissions (as was the case in both *Shropshire* and this instance), the argument in favour of deference remains compelling. A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of both the Crown and the offender. A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly.

These cases, to my mind, have not supplanted, but rather supplemented the basic principles of appellate review stated by this Court in **R. v. Cormier** (1974), 9 N.S.R. (2d) 687 where Macdonald, J.A. referred to s. 614(1) (now s. 687(1)) of the **Code** at p. 694 and said in the oft quoted passage:

> Thus it will be seen that this Court is required to consider the "fitness" of the sentence imposed, but this does not mean that a sentence is to be deemed improper merely because the members of this Court feel that they themselves would have imposed a different one; apart from misdirection or non-direction on the proper principles a sentence should be varied only if the Court is satisfied that it is clearly excessive or inadequate in relation to the offence proven or to the record of the accused.

The amendments arising out of Bill C-41 implement substantial reforms

respecting sentencing. An express statement of the purpose and principles of sentencing is found is ss. 718, 718.1 and 718.2. A new sanction was introduced, known as the conditional sentence which is provided for in s. 742.1.

The guidelines contained in ss. 718 to 718.2 and the provisions for conditional sentencing contained in s. 742.1 are set out in the reasons of Jones, J.A.

In **R. v. Pierce**, unreported, (1997), O.J. No. 715 (Ont. C.A.), Finlayson, J.A. rejected a suggestion that there should be a process in sentencing under the new conditional sentencing regime, which first consists of application of the guidelines, and then calls for the determination whether, without reference to the guidelines, there should be a conditional sentence. Finlayson, J.A. observed that conditional sentences may only be ordered where the offence is not punishable by a minimum term of imprisonment, where the sentence imposed is for imprisonment of less than two years, and where the court is satisfied that the safety of the community would not be endangered. These are preconditions to the exercise of the discretion. The court must also, in determining whether a conditional sentence is fit, consider the general principles of sentencing and the guidelines. He said:

> . . . it is difficult to accept that the elaborate sentencing guidelines which Parliament chose to introduce at the same time as section 742.1 were only intended to be used within the framework of that section to determine the length of the sentence. Surely these sentencing guidelines also address whether a conditional sentence should be imposed. That is why I have difficulty with the appellant's two stage approach. Once the first stage of his analysis has been completed, the sentencing guidelines set out in section 718.2 would become exhausted . . .

This approach was also followed by the Ontario Court of Appeal in **R. v. Wismayer**, unreported, February 28,1997.

Since the preparation of these reasons, my attention has been brought to the amendment on April 8, 1997, of s. 742.1(b) so that it now reads:

. . .

> (b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2.

Thus, the guidelines are to be brought to bear in determining not only the length of a sentence, but whether it should be conditional.

The only issue before us is whether the sentence imposed on the respondent of a term of 14 months should be a conditional one. In addressing this, we must keep in mind the standard of appellate review, the preconditions set out in s. 742.1 and the principles of sentencing, including the guidelines.

First, I will briefly address the preconditions. The respondent met the first two respecting the term of the sentence. That relating to the safety of the community requires comment.

In considering endangerment of the safety of the community, I am of the opinion that the offender carries the burden of satisfying the court that a conditional sentence would not endanger the community.

As Vancise, J.A. says in **Bill C-41 and Beyond** (p. 13):

> However the wording of the section, coupled with the general principle that a person seeking relief has the obligation of proving it, would lead one to conclude that the onus is on the accused to satisfy the sentencing judge that the safety of the public would not be endangered.

In **Wismayer, supra**, the Ontario Court of Appeal also took the view that the burden of satisfying the preconditions rested upon the offender.

In **Pierce, supra**, Finlayson, J.A. speaking for the Ontario Court of Appeal said, with respect to the precondition respecting safety of the community, at para 37 **et seq.**

> With respect to the matter under appeal, the Crown submits that an order permitting the appellant to serve her sentence in the community would endanger the safety of the community. The Crown was prepared to concede that the imposition of a conditional sentence for this offender would not endanger the safety of the community in the sense that the appellant is unlikely to re-offend. However, the Crown submits

> that allowing the appellant to serve a conditional sentence for the offence which she has committed would endanger the safety of the community having regard to the fundamental principle of sentencing that a sentence must be proportionate to the gravity of the offence.
>
> My approach is closer to that of the Crown than the appellant . . .
>
> Nor can it be said that the focus is entirely on the likelihood of the appellant re-offending. Major criminal frauds and offences involving commercial or professional breaches of trust will usually involve offenders who pose little or no further risk to the safety of the public . . .

In **Wismayer, supra**, the Ontario Court of Appeal took the view that the concept of danger to the community is more narrowly defined, so as to focus upon the risk the particular offender poses to the community if the sentence is to served there. This, the court said, is the principal factor to be weighed when considering a conditional sentence. I do not, for the purposes of this judgment, need to express an opinion on this latter point.

After the three conditions have been meet, consideration of general deterrence and denunciation, along with the other statutory guidelines govern the court in the exercise of the discretion whether or not there should be a conditional sentence. On reflection, I have concluded that as long as these considerations are entertained at this stage, it would be an unnecessary step to entertain them, as well, at the precondition stage. Endangerment to the community should be considered with regard to the risk the offender poses if allowed to serve the sentence there.

I emphasize that the fact that the accused meets the three preconditions does not mean that a conditional sentence must follow. Parliament has said that the court <u>may</u> impose the conditional sentence. In exercising the discretion, the principles of sentencing, including the guidelines, are brought into play.

I have already set out the guidelines. I do not propose to discuss all of them, but I wish to make a few comments on those most relevant in this appeal.

Section 718 states the purpose of sentencing and lists six objectives. These

are not consistent with one another. A balancing exercise is necessary.

Section 718.1 requires that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Section 718.2 requires that a court shall take into consideration five listed principles. What is mandatory is not that they govern in a particular case but that they be taken into consideration. Each subsection is expressed not in mandatory but in hortatory terms. Again, the principles are not entirely consistent with one another, which once more emphasizes the importance of a balanced approach.

In the balancing of the various principles and objectives set out in the guidelines, the weight to be attached to each depends on the circumstances of each case.

A key provision in the guidelines which particularly commands our attention is s. 718.2(a). It refers to "any relevant aggravating or mitigating circumstances relating to the offence or the offender". Three specific categories are then named which are deemed to be aggravating circumstances, but it is very important to keep in mind that the drafter of the legislation prefaced these with the word "without limiting the generality of the foregoing".

Among the general principles of sentencing, it is well established that deterrence is the primary element in dealing with drug traffickers.

I agree with the Ontario Court of Appeal in **Wismayer, supra**, that the purpose of Bill C-41 is to encourage courts to rely on methods of dealing with offenders other than incarceration. The new conditional sentence option is one of these. Judges have always wondered just how beneficial incarceration or indeed any sentence disposition is in the prevention of crime. However, in placing too much emphasis on paragraph 718.2(d) and (e) (considering them mandatory), in concluding that the legislation reflects a view that incarceration is a questionable means of giving effect to general deterrence, and in concluding that general deterrence is not a sufficient justification for refusing to impose a

conditional sentence, one is lead to the position that incarceration will seldom be employed in the imposition of a sentence under two years. There is a danger that courts will be led to start with a presumption against incarceration as an option for sentences under two years. I do not think that this was Parliament's intention. The risk in this approach is that Crowns may ask for, and courts may impose, sentences in excess of two years as a simple alternative to wrestling with how to overcome the presumption. This would not only be contrary to Parliament's intention, but might largely defeat the objective of reducing reliance on incarceration by imposing longer sentences where they were not justified.

I agree with the statement by the Ontario Court of Appeal in **Wismayer, supra**, that each case will be determined on its own merits. I agree that the objective of general deterrence can be achieved through the imposition of a conditional sentence. This, together with the previously established principles of sentencing, should be kept in mind in determining whether or not a sentence should be conditional.

In short, the approach is one of balance. As counsel for the Crown said to us respecting this new regime, "Parliament in adopting Bill C-41 did not intend to throw the baby out with the bath water". That said, the purpose of this legislation is to get courts to look for means other than incarceration to deal with offenders. However, I cannot accept that Parliament intended that incarceration is to be hereafter presumed not to be an option in sentencing for periods of less than two years.

The circumstances in **Wismayer, supra**, in **Wheatley, supra**, and in **Parker, supra**, present excellent examples of appropriate application of the conditional sentencing option.

In **R. v. Wallace**, unreported, (1996), O.J. No. 4697, Hill, J. of the Ontario Court of Justice General Division imposed a sentence of 16 months imprisonment, following a conviction for unlawfully importing marihuana. The quantity involved was a total of 6.3 pounds or 2.875 kilograms. Hill, J. reviewed the circumstances of the offence and

the offender, noting that he was mature, had a previous record, and had committed offences while on judicial interim release. On the plus side, he was a small cog in the operation; the narcotic was not of the "hard" type; the accused had made every attempt to hold gainful employment and had no previous narcotic related convictions.

In determining whether the sentence should be conditional, Hill, J. addressed the issue of deterrence in the case of drug offenders:

> I am inclined to the view that the use of the terminology "would not endanger the safety of the community" as used in section 742.1(b) of the **Code**, includes both the notion of risk of the offender himself or herself and, endangerment of the community in the broader sense of dilution of the general deterrence principle to the point of eliminating any deterrent warning to like-minded individuals considering commission of the offence in question.
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> He continued, para 29:
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> On either the narrower or the broader perspective of endangerment, I am of the view that Mr. Wallace is not an appropriate candidate for service of his sentence within the community.
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> And at para 31 he said:
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> In my view, the objective of curtailing illicit narcotic importation, a matter critical to a safe society, in the absence of exceptional circumstances, would be eviscerated by a conditional sentence order for such a serious crime. While narcotic importing is not statutorily excluded from the conditional sentence regime, that disposition would not, as a general rule, be fit in this instance of criminality in the absence of some unique or exceptional circumstances such as a minute quantity of a narcotic imported, considerable pretrial custody or other factors referable to unique circumstances of the individual offender.

Another panel of the Ontario Court of Appeal addressed the question of a conditional sentence or drug trafficking in **The Queen v. Van Tam Ly, et al.**, [1997] O.J. No. 686 (Q.L.) February 18, 1997. The accused were convicted on a single charge of possession of heroin for the purpose of trafficking. They were sentenced to two years less a day. Having dismissed the conviction appeal, the Ontario Court of Appeal said at the conclusion of the judgment:

> It was also argued that consideration should be given to section 742.1 of the **Criminal Code** which provides for the serving of sentences within the community rather than in prison. In my view, that section will be looked to only rarely in cases of drug trafficking. Counsel for the Crown argued that because section 742.1 came into effect after the sentencing in this case, it was not applicable to these appellants. Assuming without deciding that this section does apply to the appellants nothing qualifies either of them to be one of those rare cases.

In **R. v. Acinar**, unreported, British Columbia Supreme Court, Vancouver Registry No. CC920617, Opal, J. in rejecting a request for a conditional sentence made this comment:

> However, in any sentence a court must consider the minimum and maximum sentences as prescribed by law for the particular offence for which an accused is being sentenced.

The maximum sentence for the offence to which the respondent here pled guilty is life imprisonment.

In **R. v. Shirley**, Ontario Court Provincial Division, October 31, 1996, unreported, Shamai, J. of the Court considered a conditional sentence in the case of an accused convicted of trafficking in crack cocaine. There were a number of transactions with an undercover officer, that in issue involving an amount of $200.00. At p. 7 of the decision, Shamai, J. said:

> I tend to agree with the Crown that this is not the type of offence which has no implications as to safety. It is not that, if I were to impose a conditional sentence, I would fear that you were going to go around committing violent acts yourself. I have no evidence of that. It is also not the case, in my view that in addressing general deterrence this Court prevents crime. However to the extent that the Court addresses the significance of the crime in the community I think that it is important to say, with respect to this type of activity, that it is a safety issue. People do come into dangerous situations.
>
> . . .
>
> As a result, sir, I regretfully reject the position of your lawyer that a conditional sentence is appropriate in this case. At the same time, sir, I do take into account the factors which I have outlined in your favour. It is an early plea. You are certainly relieving the system of the requirement of proving a lengthy

> series of transactions against you by your admission. Your admission itself is something that we take into account as something to your credit.

Gemmell in **The New Conditional Sentencing Regime** (1997), 39 Crim. L.Q. 334 at p. 338 said:

> The principles of general and specific deterrence, retribution and denunciation -- all of which figured heavily in the original decision of imprisonment -- undoubtedly will factor into the decision whether to release on a conditional sentence. Should they receive the same weight the second time round? For some categories of offences, such as drug trafficking, theft from an employer or child sexual abuse, where these principles of general deterrence, retribution and denunciation are said to mandate jail except in exceptional circumstances, a conditional sentence would subvert the message that a jail sentence is believed to convey. Conversely, a categorical denial of conditional sentences for these types of offences would only serve to maintain the status quo of a high rate of incarceration for Canada. The principles of retribution (in the sense of "just sanctions") and denunciation, which use sentencing as a public and official expression of moral blameworthiness and social condemnation, are a particularly poor fit with the notion of an immediate conditional release: anything less than the most severe type of sanction we have would seem not to be commensurate with the heinous nature of the crime.

This is a case involving a major drug offender. It is appropriate, as this Court has done in the past, to look at the nature of the activities carried on by the offender. The facts are not in dispute. They portray an offender who gave very careful consideration to his unlawful project. The "Grow Room" in his basement was an elaborate operation which must have taken a great deal of time to design and erect. There was sophisticated equipment and an illegal power hookup designed, no doubt, not only for the purpose of reducing overhead, but to avoid the risk of detection. The operation was a major one, involving the growth of a substantial crop.

In all, what the respondent was doing gives rise to the inference that it was a comparatively long term unlawful plan executed by an experienced person. It is easy to draw the inference that if he had not offended before, he associated with and learned from those who had.

The operation was elaborate. The profit potential ranged from a minimum of $74,000 to $265,400 per crop. This would be tax free income.

This operation would produce product to supply a large number of petty retailers such as **Wheatley**, whose conditional sentence has been upheld by this Court. There can be no mistake about it. The respondent was a major player in the drug trade.

The presence of another vehicle involved in the attempt to empty the respondent's house of incriminating evidence suggests one or more accomplices in the operation.

In **Wismayer, supra**, the court did recognize that large scale well-planned fraud by persons in positions of trust would seem to be an offence for which general deterrence as the principal objective should be reserved. To this I would add a large scale well-planned drug operation such as that with which we are dealing here.

The respondent's conduct following his attempted apprehension by the police warrants comment. He led the police on a 6.6 kilometre chase over rural highways in this province, throwing incriminating material from his vehicle as he did so. This is conduct exposing the respondent, the police and members of the public to grave risk of injury or death.

The respondent did not cooperate with the police authorities. Not only did he engage in the vehicular chase with the police, but he attempted to escape on foot when his vehicle was cornered. The trial judge commended him for pleading guilty, but this is far outweighed by the aggravating circumstances of the case.

We have an offender who has shown the utmost disrespect for the law by engaging in a planned operation the only outcome of which, if successful, (apart from profit to himself), would be the harm to the health and safety of countless members of the community through continued addiction and secondary crime spawned by the drug trade.

The respondent himself was a heavy user of marihuana. Understandably,

the trial judge was disturbed by the fact that the respondent had only reduced his use by the time of sentencing. It was at this point that the respondent was asking the court to impose a sentencing regime that leaned in favour of rehabilitation and reformation and away from deterrence and the denunciation of unlawful conduct.

An additional aggravating factor is that the operation was conducted in the respondent's home, obviously in or close to the presence of his wife and children. The Agreed Statement of Facts indicates participation of the wife in the attempt to remove the evidence. A moment's reflection makes clear that the execution of the respondent's well planned scheme put his wife in an impossible position. There was the very high risk, indeed the probability, that she would be inexorably lead into criminal activity. From her perspective, the only other option would be to leave the marital home. I note that the probation officer was unsuccessful in locating her at the telephone number provided by the respondent.

The respondent was neither a youthful offender nor a first offender, having had a prior conviction for assault.

It is fitting to take time to review what this Court has said about the drug trade in recent years. It has clearly and consistently mandated jail terms in cases involving trafficking in narcotics, absent exceptional or unusual circumstances. It has emphasized that general deterrence is the primary or paramount factor to be considered in dealing with such offenders. See **R. v. Butler** (1987), 79 N.S.R. (2d) 92; **R. v. Sheehan** (1990), 95 N.S.R. (2d) 288; **R. v. Byers** (1989), 90 N.S.R. (2d) 263; **R. McAdam** (1987), 78 N.S.R. (2d) 78; **R. v. Harnett** (1991), 108 N.S.R. (2d) 111; **R. v. Ferguson** (1988), 84 N.S.R. (2d) 255.

In particular, since the decision in **R. v. Fifield** (1978), 25 N.S.R. (2d) 407, there has been a recognition of the extent of a trafficker's operation in considering the severity of the sentence. In **Fifield, supra**, MacKeigan, C.J.N.S. said at p. 410:

> In the various categories one cannot find or expect to find any uniformity of sentence. The cases above are merely random samples to illustrate the apparent categories. Certainly sentences are not, and should not be, closely proportionate in their length to the quantity of marihuana involved. The quantity is important in helping show the quality of the act or the probable category of trafficker - - the isolated accommodator of a friend, the petty retailer, the large retailer or small wholesaler, or the big-time operator. The categories respectively have broad and overlapping ranges of sentence into which the individual offender must be appropriately placed, depending on his age, background, criminal record, and all surrounding circumstances.
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> In **Ferguson, supra**, Jones, J.A. said at p. 256:
>
> This court has repeatedly emphasized the need for deterrence in the case of drug traffickers. Persons who become involved in trafficking do so deliberately with full knowledge of the consequences. The general range of sentence, even for minor traffickers, has been between six and twelve months imprisonment. The primary element on sentencing for traffickers must be deterrence.

In a paper, **Bill C-41 and Beyond**, delivered at the Criminal Law Procedure and Sentencing Seminar, March 19 - 21, 1997, in Halifax, Vancise, J.A. of the Saskatchewan Court of Appeal, in making a case for avoiding incarceration wherever possible by use of the conditional sentence, said at p. 2:

> . . . Nobody seriously questions that persons who traffic in large quantities of drugs or who engage in commercial drug operations should not [sic] be incarcerated. The devastating social effects caused by drugs and the immense profit derived from such operations clearly mandate that a prison term be imposed for those people who engage in such activities. But what about the consumer? Should we treat him or her in the same way? In my opinion, we should be seeking alternatives, constructive alternatives, to imprisonment.

It is abundantly clear from the facts that the respondent was close to, if not in the range of a big time operator. True, he fell short of the kind of operation that involves massive transshipment by sea and land such as was seen in **Howell v. The Queen** (1996), 146 N.S.R. (2d) 1. Nevertheless, he was in the next category down, making possible the operation of a number of petty traffickers of the category of **Wheatley**.

The sentencing guidelines clearly recognize deterrence and denunciation as objectives in the process. The sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. In determining its severity, account must be taken of aggravating circumstance.

Engaging in the drug trade as a major player calls for denunciation, deterrence and proportionality of sentence. The three specific categories of conduct deemed by Parliament to be aggravating circumstances are not exhaustive, and do not lessen the significance of other aggravating circumstances.

When he reached the second stage of the process - whether or not to impose a conditional sentence - the trial judge stated that he was satisfied that the overriding issue must be whether society can be adequately protected through the imposition of a conditional sentence. He said he must:

> Consider all possible means to protect society, including the potential for rehabilitation.

The trial judge noted that this was "a non violent offence".

The trial judge's reasoning appears from the following passage in his decision:

> Mr. Frenette, a conditional sentence is not intended to give you a break, but rather I must be convinced this is a satisfactory way to protect society. I am not satisfied that incarceration is going to afford any greater protection for society in the circumstances of this case. When you come out you may not have a job to return to. Incarceration would be very difficult for your family and add little to your rehabilitation prospects.

With respect, I am of the view that the trial judge did not apply the correct test - that is whether he was satisfied that serving the sentence in the community would not endanger its safety. Indeed, in stating that he was not satisfied that incarceration would afford greater protection in the circumstances, it appears that he was putting the onus on the Crown with respect to this precondition. In applying the test, he erred in considering

matters personal to the respondent - his job and his family.

Moreover, the trial judge erred in reaching what it best can be said is his implied conclusion that the respondent did not pose a risk to the community.

The probation officer noted in the presentence report that the respondent was still using marihuana. He did not purchase it but, "had a hard time refusing it if offered". He said his weakness was marihuana. If his desire is this strong and he is not doing any buying, the respondent is either dependant on the generosity of friends or ready to cultivate again. The former alternative is apt to fade away in the absence of reciprocal generosity. Thus, we see the strongest pressures upon the respondent to reoffend.

Will the respondent be expected to abide by the prohibition imposed in his sentence against the use of drugs? It is not reasonable to expect that he would have much respect or fear for his supervisor. He has already showed disrespect for authority by fleeing the orders of the police to stop. No satisfactory evidence of this disrespect for authority and public safety was ever offered. If the offence itself was "non violent", the flight thereafter cannot be so characterized.

The trial judge has overlooked significant information in the material before him that leads to the conclusion that the respondent is at high risk of reoffending.

The respondent has one prior conviction for assault. The circumstances surrounding the commission of the offence indicate a high level of disrespect for the rule of law and authority. The respondent has a weakness for marihuana. He is in the community with a minimum level of supervision and not bound by any requirement to attend a treatment program.

The Crown has satisfied me that the trial judge erred in finding that the respondent did not pose a threat to the safety of the community.

Moreover, in applying the guidelines and general principles of sentencing the trial judge erred.

First, in his failure to specifically address the respondent's actions and in the sentence which he arrived at, the trial judge, in my view, has given insufficient weight to the actions of the respondent in leading the police in a dangerous chase in order to escape arrest. The respondent is a person capable of resorting to desperate measures to protect himself in his illegal activities.

Second, the trial judge has totally overlooked the importance of general deterrence. He did not address it in his reasons and he did not address it in the result. The conditions of the sentence were not onerous.

I have already addressed the issue of general deterrence in sentencing those involved in the drug trade. It is a fair inference that such persons and those who would join them, will take a good measure of comfort from the disposition arrived at by the trial judge in this case. This disposition is of no deterrent value in discouraging recruitment in the trade. To support this disposition would be to revoke the approach consistently taken by this Court with respect to drug trafficking. Parliament did not, in introducing the option of conditional sentencing intend such a result.

In **Shropshire, supra**, Iacobucci, J. said at p. 203:

> . . . The jurisprudence of this court is clear that deterrence is a well-established objective of sentencing policy. In *R. v. Lyons* (1987), 37 C.C.C. (3d) 1 at p. 22, 44 D.L.R. (4th) 193 at p. 214, [1987] 2 S.C.R. 309, La Forest J. held:
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> > In a rational system of sentencing, the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime and the circumstances of the offender. No one would suggest that any of these functional considerations should be excluded from the legitimate purview of legislative or judicial decisions regarding sentencing.

Therefore, in conducting the examination of the circumstances of each case and in weighing the factors, one cannot overlook what can be said in the respondent's

favour. This was the first time he has been caught in the drug trade. His previous record is not lengthy. He is a family man who, now deprived of income from the drug trade, is depended upon for their support. He has a job. He earns $1,764 monthly. He had problems with another employee which required both of them to receive counselling. To incarcerate him removes him as a useful member of the community and creates the risk that he might not get his job upon his release. The probation officer notes in the presentence report that should community supervision be considered, the respondent is deemed an appropriate candidate. He also notes the respondent's inability to think of the consequences of his actions. These factors have given me much concern. Ordinarily they would weigh heavily in the balance in favour of a conditional sentence. Having regard, however, to the consideration of the other factors, they ought not in my view to prevail.

In summary, the trial judge erred in failing to adequately consider the factors of proportionality, general deterrence, safety of the community and consideration of the offence and the offender. The manner in which the sentence is to be served is excessively lenient. Apart from a mere four months of house arrest and an order to abstain from alcohol and drugs, the respondent is subject to the minimum controls set by Parliament for a conditional sentence. It is disturbing that in the face of the respondent's continued use of marihuana and the probation officer's statement that an assessment "at drug dependency" may be considered, no provision was made in the sentence for counselling or treatment.

I observe in passing that here the trial judge did not enjoy the advantage of having seen and heard the witnesses to the crime. His advantage over this Court is therefore not as great as if he had.

I have concluded that this is one of those cases where the conditional sentence cannot be imposed. I reach this conclusion on what I consider a balanced application of all relevant principles. In particular, the fundamental principle of proportionality stated in s. 718.1 leaves no other option. On the other hand, the factors favouring the respondent dictate to my mind that a sentence in excess of two years would have been excessive. The term of 14 months selected by the trial judge was appropriate. His error in my respectful view was in employing the option of ordering that it be served conditionally.

I would substitute for the remainder of the term of 14 months yet to be served by the respondent a term of incarceration, to be followed by probation on the same terms as set by the trial judge.

Chipman, J.A

C.A.C.No. 132540

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

HER MAJESTY THE QUEEN	)	REASONS FOR
	)	JUDGMENT BY:
Appellant	)	JONES, J.A.
	)	

- and -	)	CHIPMAN, J.A.
	)	(Dissenting)
PETER MARCEL FRENETTE	)	
	)	
Respondent	)	