NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Chaisson*, 2024 NSCA 11

Date: 20240122
Docket: CAC 517616
Registry: Halifax

Between:

Gabriel George Chaisson

Appellant

v.

His Majesty the King

Respondent

Judge:	The Honourable Justice Cindy A. Bourgeois
Appeal Heard:	November 22, 2023, in Halifax, Nova Scotia
Subject:	Sufficiency of grounds to issue warrant; Abuse of process; Sufficiency of reasons; Fitness of sentence; *Duncan* credit
Statutes Considered:	*Criminal Code of Canada*, s. 487.1; *Controlled Drugs and Substances Act*, s. 11
Cases Considered:	*R. v. Chaisson*, 2021 NSSC 123; *R. v. Chaisson*, 2021 NSSC 197; *R. v. LeBlanc*, 2019 NSSC 192; *R. v. Chaisson*, 2023 NSSC 144; *R. v. Sadikov*, 2014 ONCA 72; *R. v. Araujo*, 2000 SCC 65; *R. v. Morelli*, [2010] 1 S.C.R. 253; *R. v. Liberatore*, 2014 NSCA 109; *R. v. Vu*, 2013 SCC 60; *R. v. Shiers*, 2003 NSCA 138; *R. v. Debot*, [1989] 2 S.C.R. 1140; *R. v. Garofoli*, [1990] 2 S.C.R. 1421; *R. v. Bisson*, [1994] 3 S.C.R. 1097; *R. v. Morris*, 1998 NSCA 229; *R. v. Babos*, 2014 SCC 16; *R. v. G.F.*, 2021 SCC 20; *R. v. Pham*, [2005] O.J. No. 5127; *R. v. Friesen*, 2020 SCC 9; *R. v. Fifield*, [1978] N.S.J. No. 4; *R. v. Marshall*, 2021 ONCA 344; *R. v. Smith*, 2023 ONCA 500; *Waite v. Prince Edward Island (Attorney General)*, 2023 PECA 5; *R. v. Duncan*, 2016 ONCA 754; *R. v. Summers*, 2014 SCC 26

Summary:

The appellant, Gabriel George Chaisson, was arrested on October 9, 2020 following the execution of a search warrant at his home in Goshen, Nova Scotia. The warrant had been obtained the day before pursuant to s. 487.1 of the *Criminal Code* and was premised on there being reasonable grounds to believe illegal firearms would be found in the house.

The police did not find the firearms they were looking for, but located a number of items consistent with drug trafficking, including two chunks of cocaine (31 grams and 102 grams respectively), a plastic bag containing 12 grams of cocaine, digital scales on which traces of cocaine were later detected, $400 in cash, a number of small baggies, and multiple cellphones. As a result of these discoveries, the police then obtained a warrant pursuant to s. 11 of the *Controlled Drugs and Substances Act (CDSA)*.

In two pre-trial applications, the appellant sought to challenge the issuance of the s. 487.1 firearms warrant, and further sought a stay of proceedings alleging police misconduct amounted to an abuse of process. The trial judge dismissed both applications.

After a two day trial, the appellant was convicted of a single count of possession of cocaine for the purpose of trafficking, contrary to s. 5(2) of the *CDSA*. The appellant was subsequently sentenced to a term of 5 years incarceration, less pre-trial remand credit and a further deduction of 62 days for *Duncan* credit.

The appellant now appeals to this Court and challenges both his conviction and sentence.

Issues:

(1) Did the judge err in finding there were reasonable grounds upon which the s. 487.1 firearms warrant could have been issued?

(2) Did the judge err in concluding the conduct of the police officers in seeking the initial warrant did not amount to an abuse of process?

Issues (cont'd):

(3) Were the judge's reasons for conviction sufficient?

(4) Did the judge impose an unfit sentence?

(5) Did the judge err by not awarding additional *Duncan* credit in relation to the appellant's pre-trial custody?

Result:

Leave to appeal sentence granted. Appeal from conviction and sentence dismissed.

The trial judge did not err in concluding there were reasonable and probable grounds for the issuance of the s. 487.1 firearms warrant. Nor did he err in concluding the appellant had failed to demonstrate an abuse of process arising from police misconduct.

The trial judge's reasons for conviction were sufficient in light of the record.

The sentence imposed by the trial judge was not demonstrably unfit, nor did him limiting the *Duncan* credit sought by the appellant give rise to legal error.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 28 pages.

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His Majesty the King

Respondent

Judges:	Bourgeois, Fichaud and Derrick, JJ.A.
Appeal Heard:	November 22, 2023, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Bourgeois, J.A.; Fichaud and Derrick, JJ.A. concurring
Counsel:	Jonathan Hughes, for the appellant Jennifer Lundrigan, for the respondent

Reasons for judgment:

[1] The appellant, Gabriel George Chaisson, was arrested on October 9, 2020 following the execution of a search warrant at his home in Goshen, Nova Scotia. The warrant had been obtained the day before pursuant to s. 487.1 of the *Criminal Code*[1] and was premised on there being reasonable grounds to believe illegal firearms would be found in the house.

[2] The police did not find the firearms they were looking for, but located a number of items consistent with drug trafficking, including two chunks of cocaine (31 grams and 102 grams respectively), a plastic bag containing 12 grams of cocaine, digital scales on which traces of cocaine were later detected, $400 in cash, a number of small baggies, and multiple cellphones. As a result of these discoveries, the police then obtained a warrant pursuant to s. 11 of the *Controlled Drugs and Substances Act* (*CDSA*)[2].

[3] In two pre-trial applications, the appellant sought to challenge the issuance of the s. 487.1 firearms warrant, and further sought a stay of proceedings alleging police misconduct amounted to an abuse of process. Justice Scott C. Norton of the Nova Scotia Supreme Court dismissed both applications.

[4] After a two day trial, the appellant was convicted of a single count of possession of cocaine for the purpose of trafficking, contrary to s. 5(2) of the *CDSA*. The appellant was subsequently sentenced to a term of 5 years incarceration, less pre-trial remand credit and a further deduction of 62 days for *Duncan*[3] credit.

[5] The appellant now appeals to this Court and challenges both his conviction and sentence. He asserts the judge erred in dismissing the two pre-trial applications and that his reasons for conviction were insufficient. With respect to the sentence, the appellant says the imposition of a five year term of incarceration resulted in an unfit sentence and further the *Duncan* credit he received was inadequate.

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[1] R.S.C. 1985, c. C-46.
[2] S.C. 1996, c. 19.
[3] In *R. v. Duncan*, 2016 ONCA 754, the Ontario Court of Appeal indicated that enhanced credit for presentence remand time could be granted where the conditions experienced were unduly harsh and had a negative impact on the offender. The principles governing the granting of *Duncan* credit will be addressed later in this decision.

[6] I would grant leave to appeal sentence, but for the reasons to follow, I am satisfied the appeal in relation to both conviction and sentence should be dismissed.

The Decisions under Appeal

Challenge to the s. 487.1 firearms warrant

[7] The appellant's application to challenge the s. 487.1 firearms warrant was heard on April 12, 2021, with the judge issuing written reasons shortly thereafter (reported as *R. v. Chaisson*, 2021 NSSC 123).

[8] The only witness called on the application was Cst. John Donaldson, who had sworn the Information to Obtain (ITO) on October 8, 2020. Along with other information set out in the ITO, Cst. Donaldson used information from three confidential police sources – A, B and C – to form the basis for his belief there were reasonable and probable grounds illegal firearms would be found in the appellant's home. The Justice of the Peace issued the search warrant on the basis of the information provided by Cst. Donaldson in the ITO.

[9] In attacking the warrant, the appellant alleged Sources A and B had been used as sources to obtain an earlier warrant to search his home in February 2020, but that search had not located the illegal firearms those sources had described. In his submission to the judge, the appellant argued that because their information had not been corroborated by the earlier search, it was improper for their information to be relied upon to obtain the October firearms warrant.

[10] The appellant further submitted that Source C, a new source for the police, was untested and without Sources A and B, had nothing to corroborate their reliability. Additionally, the appellant alleged Cst. Donaldson "willfully held back information from the Justice of the Peace, leaving the drug trade [out], focus[ing] solely on the firearms knowing that that was going to allow them entry into the house to search for drugs that they believe[d]" he was trafficking. In short, the appellant alleged Cst. Donaldson tailored the ITO to obtain a warrant purportedly to search for illegal firearms, when the real objective was to search for drugs.

[11] In his testimony, Cst. Donaldson said he was not aware whether Sources A and B had been used as sources for the earlier ITO in February, 2020 as he had not

been involved in that matter. He further explained how the information provided by all three sources led him to have reasonable and probable grounds to believe illegal firearms would be found in the appellant's home. Although Cst. Donaldson acknowledged the sources had also provided information regarding the appellant's possible involvement in the drug trade, he said the purpose of the ITO and resulting warrant was to address the immediacy of the public safety concerns relating to the appellant's alleged possession of illegal firearms.

[12] In dismissing the application, the judge found the appellant had failed to displace the warrant's presumption of validity. He accepted Cst. Donaldson's evidence he was unaware if Sources A and B had been used in the earlier ITO, and noted there was no evidence before the court to establish they had in fact been used as sources on that occasion. The judge further concluded Cst. Donaldson had not misled the Justice of the Peace, and the genuine intent of the ITO was to respond to concerns of illegal firearms.

[13] The judge ultimately determined there were reasonable and probable grounds to issue the s. 487.1 firearms warrant. More will be said about the judge's reasons later in this decision.

The Abuse of Process Application

[14] The appellant's abuse of process application was heard on June 3, 2021. Cst. Donaldson again testified, as did Cpl. James Jessome. The appellant sought a stay based on alleged police misconduct. The thrust of the submissions were familiar.

[15] The appellant asserted that in seeking the s. 487.1 firearms warrant, the police officers knowingly used incorrect source information and purposefully misled the issuing Justice of the Peace. Further, the appellant said the officers colluded in seeking a firearms warrant when their real objective was to search for drugs.

[16] The judge dismissed the application and released written reasons on June 9, 2021 (reported as *R. v. Chaisson*, 2021 NSSC 197). He accepted the testimony of the officers that they did not knowingly provide false information in the ITO and they believed in the continuing veracity of the sources. The judge further accepted the officers' assertions the purpose of the October ITO was to search for firearms.

The judge rejected the appellant's claim there was police misconduct underlying the issuance of the firearms warrant and consequently found there was no abuse of process.

The Conviction Decision

[17] The appellant's trial was held over two days in March, 2022. The Crown called four police witnesses, and an expert. The appellant called two defence witnesses.

[18] The evidence of the police witnesses included:

- The appellant resided at 21650 Highway 316, Goshen, Nova Scotia. At the time of his arrest on October 9, 2020, he was under conditions to reside at those premises, with the only other permitted occupant being his mother;

- On October 9, 2020 a s. 487.1 firearms warrant was executed at the above-noted residence at approximately 9:45 a.m.;

- Upon arrival, officers knocked at the front door and identified themselves as police and indicated they had a search warrant. There was no response. The door was barricaded with boards, so they employed a battering ram to gain entry to the residence;

- As his colleagues were attempting to enter at the front of the house, Cst. Donaldson, located to the rear, noted the curtains of an upstairs bedroom open, and saw a person running away from the window;

- On entry, an individual identified as Colin Taylor was observed coming from the bathroom, located on the main floor. That was the only bathroom in the house. Mr. Taylor was arrested on an outstanding warrant;

- Upon entering the house, Cst. Jessome immediately used the stairs to access the second floor. He heard noise coming from the attic and followed it to the end of the hallway. He returned to the top of the steps and noted a hatch open in the hallway ceiling. He called out for

whoever was in the attic to present themselves. The appellant presented himself and came down through the hatch in the hallway;

- Cst. Brownoff testified he searched the attic. He entered through a hatch in the hallway, walked through the attic, and exited through a second hatch in the ceiling of a bedroom. Cst. Brownoff described finding two chunks of a white substance, both located approximately halfway between the two hatches. A vacuum sealed plastic bag containing a white substance was also found near the chimney in the attic. A further chunk was found closer to the hatch above the bedroom. The substances found were not hidden, but rather in plain view on top of the attic insulation. Photographs depicting the substances and where they were found were entered as exhibits;

- A digital scale and a plastic bag containing a white substance was found in a dresser in the appellant's bedroom, along with a five dollar bill rolled up in a cylindrical fashion. An identification card for Natasha McNeil was found on the top of the dresser. The plastic bag was subsequently found to contain 12 grams of cocaine;

- At approximately 11:50 a.m., Cst. Donaldson left the appellant's residence and returned to the detachment. He prepared an ITO pursuant to s. 11 of the *CDSA*. A warrant was issued later that afternoon;

- There was no issue raised with the continuity of the evidence seized at the appellant's home. A total of 145 grams of the white material seized tested as being cocaine. The digital scale also tested positive for cocaine residue;

- On cross-examination, police witnesses confirmed that 8 months earlier, in February, 2020, a warranted search of the appellant's home was undertaken. At that time, Daniel Walsh was found and arrested in the bedroom containing the ceiling hatch to the attic and was currently being prosecuted on drug charges.

[19] The Crown's expert witness, Cpl. David Lane, was qualified by the judge to provide opinion evidence on the indicia of the possession of cocaine for the

purpose of trafficking, as well as the methods used to avoid police detection, trafficking methods, drug trafficking trends, drug distribution chains, drug hierarchy, drug pricing, drug houses and stash houses. Cpl. Lane's evidence included:

- The presence of two by six boards barricading the door is indicative of drug trafficking. He explained it was a method of preventing against theft by rival drug dealers and a method of delaying police entry in order for the occupants to discard product on the premises;

- The quantity of drugs, particularly the 102 grams and 31 grams chunks was not consistent with personal use but with trafficking. This amount of cocaine was consistent with a mid-level retailer;

- The presence of a digital scale was consistent with drug trafficking. Testing showed the presence of cocaine and phenacetin, a known cutting agent, on the scale;

- The presence of 12 grams of cocaine in the bag in the dresser, along with bulk "dime bags" would be consistent with a street level trafficker; and

- The street value of the cocaine found would be, at minimum, $100 per gram.

[20] As noted earlier, the defence called two witnesses. Kara Lee Walsh testified:

- She dated the appellant from March to December, 2019, and identified him as being the owner of the home located at 21650 Highway 316 in Goshen;

- She identified the appellant's bedroom as being on the second floor, immediately to the right at the top of the stairs;

- After the relationship ended, she remained friends with the appellant and would visit his home once or twice a month;

- Her nephew Daniel Walsh had lived at her home, but later lived at the appellant's home - from February 2019 to February 2020;

- When he lived with her, Mr. Walsh tore the paneling and trim off the walls, and pulled out the insulation in the attic. She did not observe Mr. Walsh doing that anywhere else, nor did she observe him storing drugs in those locations;

- She had observed Mr. Walsh trafficking drugs both in her home, and at the appellant's residence.

[21] The defence's second witness, Natasha McNeil, testified:

- She identified the property at 21650 Highway 316, Goshen as being the home of the appellant;

- She resided at the home in 2016 and shared a bedroom with the appellant. She left in 2017;

- After she stopped residing at the appellant's home, she would visit on occasion, but could not recall when; and

- During visits to the home, she had used cocaine.

[22] In submissions, the Crown argued it had established beyond a reasonable doubt that the appellant constructively possessed cocaine for the purpose of trafficking, and a conviction under s. 5(2) of the *CDSA* should follow.

[23] The appellant submitted the Crown had failed to prove he was in constructive possession of the cocaine. In particular, the appellant argued there was reasonable doubt as to whether he knew the cocaine was in the house. He based this assertion on two facts:

1. The identification of Natasha McNeil being found on top of the dresser where the scales and one of the bags of cocaine were found – it could have been hers;

2. Daniel Walsh's presence in the bedroom with the attic hatch in February 2020 – he may have hidden the cocaine in the attic sometime before his arrest unbeknownst to the appellant.

[24] In his reasons for conviction, the judge found the appellant was in constructive possession of the cocaine, and that it was for the purpose of trafficking. The appellant was found guilty of one count pursuant to s. 5(2) of the *CDSA*, and two counts of breaching the conditions of a release order, contrary to s. 145(5)(a) of the *Criminal Code*.

The Sentencing Hearing

[25] The sentencing hearing was held on May 5, 2023. The appellant brought an application for enhanced *Duncan* credit due to the unduly harsh effect of institutional COVID-19 protocols during his remand. He provided evidence in support of the application by way of affidavit and *viva voce* testimony. In response, the Crown called Michelle Bonvie, Registered Nurse and Clinical Operations Supervisor at the Northeast Nova Scotia Correctional Facility.

[26] Through this evidence it was established the appellant had broken a tooth while incarcerated and had made a request on November 2, 2022 for dental treatment. Ms. Bonvie testified the appellant was immediately placed on a waitlist to see a dentist. However, appointments were delayed due to the dentist who served the institution being unavailable for three months. At the time of the sentencing hearing, the appellant had yet to be seen for his broken tooth.

[27] Counsel were able to reach some agreements in terms of sentencing. The terms of a forfeiture order were consented to. More significantly, it was agreed the appellant was entitled to *Summers*[4] remand credit of 3 years and 268 days (1363 days). Further, both counsel cited the same case authorities to the judge in terms of range of sentence, notably *R. v. LeBlanc*, 2019 NSSC 192.

[28] The Crown submitted the appellant fell between a petty retailer and a mid-level trafficker. Noting his two prior convictions for cocaine trafficking, the Crown argued an appropriate range for sentence was 6 to 8 years. With respect to the *Duncan* credit, the Crown argued most of the appellant's complaints were due to the protective measures put in place as a response to the COVID-19 pandemic,

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[4] *R. v. Summers*, 2014 SCC 26.

and mirrored the types of restrictions placed on all Nova Scotians during that timeframe. In short, the agreed remand credit of 1363 days adequately responded to the institutional restrictions placed on the appellant. The Crown did acknowledge, however, the delay in obtaining dental care was concerning, and left that consideration to the judge.

[29] The appellant argued he should be considered a "small-level retailer", and submitted the sentence range, as per *LeBlanc*, was 2 to 6 years. He argued his two previous trafficking convictions were dated, should not be given consideration, and that a sentence of 40 months was appropriate.

[30] As for enhanced *Duncan* credit, the appellant submitted he had been under harsh restrictions for the entirety of the 31 months he spent on remand, and requested a further credit of 16 months (on the basis of 0.5 day per day on remand) against his sentence.

The Sentencing Decision

[31] In his sentencing decision (reported as *R. v. Chaisson*, 2023 NSSC 144), the judge noted he had accepted the expert evidence of Cpl. Lane that the volume of cocaine seized from the appellant's home was more consistent with a mid-level dealer, while the presence of digital scales and "dime bags" were more consistent with street level trafficking. The judge concluded a fit and proper sentence for the s. 5(2) offence was five years or 1825 days, with two 30 day concurrent sentences imposed for the two breach offences to be served concurrently with the five year sentence.

[32] The judge declined to grant *Duncan* credit for the entirety of the appellant's time in remand. He did, however, give the appellant an enhanced credit of 62 days due to the "unreasonable and unacceptable" delay in obtaining appropriate dental care.

[33] In summary, the judge sentenced the appellant to a term of 1825 days (5 years), less remand credit of 1363 days and a further *Duncan* credit of 62 days. This resulted in a go-forward sentence of 400 days (1 year, 35 days). The judge's ancillary orders have not been appealed.

Issues

[34] In his Amended Notice of Appeal the appellant sets out the following grounds of appeal:

1. The Learned Trial Judge erred in law in his review of the issuance of the Warrant to Search, and in the subsequent assessment of the abuse of process application;

2. The Learned Trial Judge failed to give adequate reasons for his decision to convict the Appellant;

3. The Learned Trial Judge imposed a sentence that was manifestly unfit.

[35] After considering the arguments advanced on appeal and the record, I would reframe the issues to be determined as follows:

1. Did the judge err in finding there were reasonable grounds upon which the s. 487.1 firearms warrant could have been issued?

2. Did the judge err in concluding the conduct of the police officers in seeking the initial warrant did not amount to an abuse of process?

3. Were the judge's reasons for conviction sufficient?

4. Did the judge impose an unfit sentence?

5. Did the judge err by not awarding additional *Duncan* credit in relation to the appellant's pre-trial custody?

[36] I will address the relevant standard of review for each of the above issues as part of the analysis to follow.

Analysis

ISSUE 1: Did the judge err in finding there were reasonable grounds upon which the s. 487.1 firearms warrant could have been issued?

[37] There is no dispute with respect to the legal principles applicable to the first issue raised on appeal. I note:

- Warrant review begins from a premise of presumed validity. Thus the onus of demonstrating invalidity falls on the party who asserts it (*R. v. Sadikov*, 2014 ONCA 72 at para. 83);

- In reviewing the sufficiency of a warrant application "the test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued" (*R. v. Araujo*, 2000 SCC 65 at para. 54). See also *R. v. Morelli*, 2010 SCC 8; *R. v. Liberatore*, 2014 NSCA 109;

- An authorizing justice determines whether to issue a warrant on the evidence contained in "the ITO as a whole, approaching the assessment on a common sense, practical, non-technical basis. The justice [. . .] [is] entitled to draw reasonable inferences from the contents of the ITO" (Sadikov at para. 82). "[T]he informant need not underline the obvious" (*R. v. Vu*, 2013 SCC 60 at para. 16; citing *R. v. Shiers*, 2003 NSCA 138 at para. 13);

- The sufficiency of grounds is based on "reasonable probability", not proof beyond a reasonable doubt, or a *prima facie* case (*R. v. Debot*, [1989] 2 S.C.R. 1140, 1989 CarswellOnt 111 at para. 54);

- The reliability of the information contained in the ITO is assessed by recourse to the totality of the circumstances, including its degree of detail, the informer's source of knowledge and indicia such as the informer's past reliability and confirmation from other sources (*R. v. Garofoli*, [1990] 2 S.C.R. 1421, 1990 CarswellOnt 119 at paras. 82-85);

- Where erroneous information has been provided in the ITO, the warrant is not automatically invalidated. Errors in the ITO, whether inadvertent or fraudulent, are only factors to be considered in deciding whether to set aside the warrant, although such deception will be viewed seriously, and not condoned by the court (*R. v. Bisson*, [1994] 3 S.C.R. 1097; *R. v. Morris*, 1998 NSCA 229);

- In assessing the reliability of the information contained in the ITO from confidential sources, the three *Debot* factors, namely was the source information (1) compelling; (2) credible, and (3) corroborated, should be considered. The assessment considers the totality of the circumstances and, in particular, weaknesses in one area may be compensated by strengths in the others; and

- Absent an error of law, a misapprehension of evidence, or a failure to consider relevant evidence, an appellate court owes deference to a reviewing judge's disposition and will decline to interfere (*Sadikov* at para. 89).

[38] On appeal, the appellant acknowledges the arguments now being advanced are more precise than those made to the judge. He says the judge, in his role as gatekeeper, had the obligation to consider the entirety of the circumstances before him notwithstanding the vagueness of the arguments advanced. The appellant says the judge failed to undertake a broad review of whether the grounds for the warrant were sufficient, and notes "obvious" concerns regarding the facial and substantive support offered. He says this Court must intervene.

[39] I would decline to do so. It was the appellant who carried the burden to demonstrate the presumed validity of the warrant was vitiated. In his reasons, the judge correctly set out the principles guiding his review. He considered the evidence before him, and made factual and legal determinations that responded to the arguments advanced by the appellant.

[40] The judge determined the warrant could have been issued based on the entirety of the ITO. This reflected a correct application of the law. The appellant has failed to demonstrate the judge erred in principle or that he misapprehended the evidence presented to him on the application. Given the standard of review, this Court ought not to intervene.

[41] I would dismiss this ground of appeal.

ISSUE 2: Did the judge err in concluding the conduct of the police officers in seeking the initial warrant did not amount to an abuse of process?

[42] There is no uncertainty as to the legal principles engaged in this ground of appeal. In *R. v. Babos*, 2014 SCC 16, Justice Moldaver set out the following:

- A stay of proceedings can arise from an abuse of process, but only in the "clearest of cases" (para. 31);

- An abuse of process falls into two categories: (1) where state conduct compromises trial fairness (the "main category") and (2) where state conduct does not impact trial fairness but risks undermining the integrity of the judicial process (the "residual category") (para. 31);

- The test to determine whether a stay of proceedings is warranted is the same for both categories, and consists of three requirements:

  (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome";

  (2) There must be no alternative remedy capable of addressing the prejudice; and

  (3) Where there is still uncertainty over whether a stay is warranted after the first two steps, the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (para. 32); and

- When considering an alleged abuse of process falling in the residual category, the first requirement looks to whether the state has engaged in conduct that is offensive to societal notions of fair play and decency (para. 35).

[43] In the present case, the appellant says the alleged abuse of process is not one that impacted on the fairness of his trial, but rather is of a residual nature. As he did in the court below, he says the abuse of process had its genesis in two instances of police misconduct:

1. Cst. Donaldson relying on information he knew to be inaccurate in swearing the ITO; and

2. Cst. Donaldson and Cpl. Jessome colluding to purposefully mislead the issuing Justice of the Peace by applying for a s. 487.1 firearms warrant when the real objective was to search the appellant's home for illegal drugs.

[44] The appellant argues the evidence of the police officers lacked credibility and their misconduct was obvious in the circumstances before the court. He further submits the judge failed to undertake the three step analysis set out in *Babos*, rather, he improperly terminated his analysis after considering only the first. The appellant says if the judge had undertaken the full analysis as required, he would have concluded a stay of proceedings was the only appropriate outcome.

[45] In his reasons, the judge identified the correct legal principles and noted the appellant's reliance on the residual category of abuse of process. The judge considered the testimony of the officers, found them both to be credible and accepted their evidence. In particular, the judge found:

- When Cst. Donaldson swore the s. 487.1 firearms ITO, he believed the source information contained therein to be reliable and accurate;

- Cst. Donaldson's purpose in swearing the ITO was to gain entry to the appellant's home to search for illegal firearms, and

- There was no collusion between Cst. Donaldson and Cpl. Jessome.

[46] The appellant's arguments before this Court amount to asking for the judge's credibility assessment to be set aside, and for different factual conclusions to be reached. As has been stated on many occasions, that is not the role of this Court. It was the prerogative of the judge to assess the credibility of the police witnesses. He believed their evidence, which he was entitled to do, and on that basis he

concluded there was no misconduct, let alone misconduct that would reflect negatively on the integrity of the justice system. The appellant has demonstrated no error in principle that would justify us interfering with that conclusion.

[47] Having found there was no misconduct, the judge was not obligated to undertake the three-part *Babos* analysis as alleged by the appellant.

[48] I would dismiss this ground of appeal.

ISSUE 3: Were the judge's reasons for conviction sufficient?

[49] In *R. v. G.F.*, 2021 SCC 20, Justice Karakatsanis re-affirmed the principles relating to the sufficiency of reasons:

> [69] This Court has repeatedly and consistently emphasized the importance of a functional and contextual reading of a trial judge's reasons when those reasons are alleged to be insufficient: *Sheppard*, at paras. 28-33 and 53; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at para. 19; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 101; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 25; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 15; *R. v. Laboucan*, 2010 SCC 12, [2010] 1 S.C.R. 397, at para. 16; *R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 639, at paras. 10, 15 and 19; *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at para. 15; *R. v. Chung*, 2020 SCC 8, at paras. 13 and 33. Appellate courts must not finely parse the trial judge's reasons in a search for error: *Chung*, at paras. 13 and 33. Their task is much narrower: they must assess whether the reasons, read in context and as a whole, in light of the live issues at trial, explain what the trial judge decided and why they decided that way in a manner that permits effective appellate review. As McLachlin C.J. put it in *R.E.M.*, "The foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded": para. 17. And as Charron J. stated in *Dinardo*, "the inquiry into the sufficiency of the reasons should be directed at whether the reasons respond to the case's live issues": para. 31.
>
> [70] This Court has also emphasized the importance of reviewing the record when assessing the sufficiency of a trial judge's reasons. This is because "bad reasons" are not an independent ground of appeal. If the trial reasons do not explain the "what" and the "why", but the answers to those questions are clear in the record, there will be no error: *R.E.M.*, at paras. 38-40; *Sheppard*, at paras. 46 and 55.

> [71] The reasons must be both factually sufficient and legally sufficient. Factual sufficiency is concerned with what the trial judge decided and why: *Sheppard*, at para. 55. Factual sufficiency is ordinarily a very low bar, especially with the ability to review the record. Even if the trial judge expresses themselves poorly, an appellate court that understands the "what" and the "why" from the record may explain the factual basis of the finding to the aggrieved party: para. 52. It will be a very rare case where neither the aggrieved party nor the appellate court can understand the factual basis of the trial judge's findings: paras. 50 and 52.
>
> . . .
>
> [74] Legal sufficiency requires that the aggrieved party be able to meaningfully exercise their right of appeal: *Sheppard*, at paras. 64-66. Lawyers must be able to discern the viability of an appeal and appellate courts must be able to determine whether an error has occurred: paras. 46 and 55. Legal sufficiency is highly context specific and must be assessed in light of the live issues at trial. A trial judge is under no obligation to expound on features of criminal law that are not controversial in the case before them. This stems from the presumption of correct application — the presumption that "the trial judge understands the basic principles of criminal law at issue in the trial": *R.E.M.*, at para. 45. As stated in *R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664, "Trial judges are presumed to know the law with which they work day in and day out": see also *Sheppard*, at para. 54. A functional and contextual reading must keep this presumption in mind. Trial judges are busy. They are not required to demonstrate their knowledge of basic criminal law principles.
>
> [75] Conversely, legal sufficiency may require more where the trial judge is called upon to settle a controversial point of law. In those cases, cursory reasons may obscure potential legal errors and not permit an appellate court to follow the trial judge's chain of reasoning: *Sheppard*, at para. 40, citing *R. v. McMaster*, [1996] 1 S.C.R. 740, at paras. 25-27. While trial judges do not need to provide detailed maps for well-trod paths, more is required when they are called upon to chart new territory. However, if the legal basis of the decision can nonetheless be discerned from the record, in the context of the live issues at trial, then the reasons will be legally sufficient.

[50] Since the appellant's conviction was dependent on him being found to be in constructive possession of the cocaine, it is helpful to set out the legal principles relating thereto. These principles were canvassed in *R. v. Pham*, [2005] O.J. No. 5127, aff'd 2006 SCC 26, where the majority noted:

> 15 In order to constitute constructive possession, which is sometimes referred to as attributed possession**, there must be knowledge which extends beyond mere quiescent knowledge and discloses some measure of control over the**

> **item to be possessed**. See R. v. Caldwell (1972), 7 C.C.C. (2d) 285 (Alta S.C. (A.D.); R. v. Grey (1996), 28 O.R. (3d) 417 (C.A.).
>
> 16 In order to constitute joint possession pursuant to s. 4(3)(b) of the Code there must be knowledge, consent, and a measure of control on the part of the person deemed to be in possession. See R. v. Terrence, [1983] 1 S.C.R. 357 (SCC); R. v. Williams (1998), 40 O.R. (3d) 301 (C.A.); R. v. Barreau, [1991] B.C.J. No. 3878, 19 W.A.C. 290 (BCCA) and R. v. Chambers, [1985], 20 C.C.C. (3d) 440 (ON CA).
>
> 17 The element of knowledge is dealt with by Watt J. in the case of R. v. Sparling, [1988] O.J. No. 107 (H.C.J.) at p. 6 (QL):
>
>> There is no direct evidence of the applicant's knowledge of the presence of narcotics in the residence. It is not essential that there be such evidence for as with any other issue of fact in a criminal proceeding, it may be established by circumstantial evidence. In combination, the finding of narcotics in plain view in the common areas of the residence, the presence of a scale in a bedroom apparently occupied by the applicant and; the applicants apparent occupation of the premises may serve to found an inference of the requisite knowledge.
>
> The Court of Appeal decision in R. v. Sparling, [1988] O.J. No. 1877, 31 O.A.C. 244 (C.A.) upheld the above passage as being sufficient evidence to infer knowledge.
>
> 18 The onus is on the Crown to prove beyond a reasonable doubt, all of the essential elements of the offence of possession. This can be accomplished by direct evidence or may be inferred from circumstantial evidence. In R. v. Chambers, supra, at 448 C.C.C., [page 407], Martin J.A. noted that **the court may draw "appropriate inferences from evidence that a prohibited drug is found in a room under the control of an accused and where there is also evidence from which an inference may properly be drawn that the accused was aware of the presence of the drug".**
>
> (Emphasis added)

[51] I turn now to the judge's reasons for conviction, and in particular his reasons for determining the appellant was in possession of the cocaine. After referring to the above legal principles, the judge noted:

> [65] In the present case, the drugs were found in the attic of the house and in the dresser drawer in Mr. Chaisson's bedroom. The evidence establishes that this

> was Mr. Chaisson's house. He had encounters with the police at this location since 2012. Kara Lee Walsh identified the house as belonging to Mr. Chaisson. At the time of the search, Mr. Chaisson was under a Release Order from the Court dated March 24, 2020, signed by him, requiring him to reside at 21650 Hwy 316, Goshen, Nova Scotia.
>
> [66] There is no evidence that there was anyone else residing at the premises at the time of the search.
>
> [67] The largest amount of cocaine was found in the attic, a conspicuous location. The RCMP announced their presence and used a ram to gain access through the barricaded front door. Shortly after gaining access they found Mr. Chaisson in the attic which could only be accessed by ceiling hatches. There was no ladder present below either hatch, requiring an athletic act to access the attic. When RCMP Cpl. Jessome first arrived at the top of the stairs, he heard someone in the attic at the far end of the attic from the hallway hatch where Mr. Chaisson presented himself. This evidence, together with the bag of cocaine in the dresser drawer of Mr. Chaisson's bedroom, and a small digital scale containing traces of cocaine, satisfy me that the Crown has proved beyond a reasonable doubt that Mr. Chaisson had constructive possession of the cocaine seized.
>
> [68] The fact that identification for a former girlfriend, Ms. McNeil, was found on the dresser, does not raise a reasonable doubt that the dresser, located in Mr. Chaisson's bedroom, was not in Mr. Chaisson's possession or control.

[52] The appellant says the judge's reasons are insufficient because they failed to address his defence of a third-party suspect. In particular, the appellant says "[g]iven that evidence was elicited that would call into question both the knowledge and control the Appellant may have exercised over the cocaine in both locations [the dresser drawer and the attic], more was required".

[53] The appellant highlights various aspects of the evidence which he asserts the judge should have addressed in his reasons, as it supported the defence of a third-party suspect. Before considering whether the judge's failure to reference certain evidence in his reasons gives rise to an error justifying appellate intervention, I am compelled to outline how, in the arguments before this Court, the appellant has misstated the nature of the evidence elicited at trial. I will confine my observations to the purported evidence the appellant says supported a third-party defence.

[54] Firstly, in support of his argument that the cocaine in the attic may have belonged to Daniel Walsh, the appellant says "while one of the pieces of cocaine

found in the attic was about "half way" between the hatches, the majority of it was found in close proximity to the attic hatch from the bedroom" where he was arrested in February, 2020.[5] A review of the trial transcript does not support the appellant's characterization of the evidence. Cst. Brownoff testified the two largest chunks of cocaine were found about half-way between the hatches. Further, a vacuum sealed bag with additional chunks was found within a few feet of the chimney in the attic. The bedroom hatch was on the other side of the chimney. Cst. Brownoff testified that none of the cocaine found was within "arms reach" of the bedroom hatch. Clearly, the majority of the cocaine was <u>not</u> found in close proximity to the bedroom hatch.

[55] Secondly, the nature of the cocaine found in the attic was different than what was found in the appellant's dresser. It was "off the brick", and had yet to be processed. The appellant argued "[n]o evidence of any cutting agent was found in the home", and this supported the cocaine in the attic was not his. This again misstates the evidence elicited at trial. As demonstrated in Cst. Lane's evidence and supported by the Certificate of Analysis, the presence of a cutting agent was found on the digital scales located in the appellant's bedroom.

[56] Thirdly, the appellant further argues in his factum:

> 42. The significance of the location of the cocaine in the attic was amplified by the testimony of Kara Walsh, cousin to Daniel Walsh who had been arrested there previously. Ms. Walsh testified that she knew Mr. Walsh to have trafficked in controlled substances and had hidden them in the walls and attic of her house on previous occasions. . . .

[57] As was outlined earlier, Ms. Walsh testified she had observed her nephew trafficking drugs. However, there was no admissible evidence adduced at trial that he had hidden drugs within the walls and attic of her home. The best her evidence established was Mr. Walsh had at some time, when residing with her, removed panelling, trim and insulation from the walls of her home. The appellant has gilded the lily in relation to her evidence.

[58] Finally, with respect to the evidence relating to the cocaine found in the bedroom dresser, the appellant, attempting to distance himself from it, argues "no identification for Mr. Chaisson, or other items seeming to belong to Mr. Chaisson

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[5] The theory was that the cocaine in the attic had been deposited by Mr. Walsh via the bedroom hatch at some point prior to his arrest in February 2020.

were found in that dresser." A review of the trial record demonstrates the above assertion is not established on the evidence. I observe:

- Cst. Rossignol identified photographs she took showing the dresser in the appellant's bedroom. It was located immediately adjacent to his bed, and the top was covered with numerous items. One photo showed the dresser with the bottom drawer open. Cst. Rossignol identified the digital scale as well as a plastic bag containing a white powder in the drawer. The picture demonstrates the drawer contained a number of other items. The extent of Cst. Rossignol's evidence relevant to the possible ownership of the contents of the dresser was as follows:

> Mr. Hughes: Um, do you recall taking a photograph of a Nova Scotia Driver's License on the top of that dresser?
>
> A: I think I took more pictures, yeah.
>
> Mr. Hughes: You did take more pictures, but what I'm going to suggest to you is the Nova Scotia Driver's license that you took the photograph of on the top of that dresser, was for one Natasha MacNeil, does that refresh your memory?
>
> A: Yes
>
> Mr. Hughes: Okay. And to the best of your knowledge that was a fairly current, ah, identification card?
>
> A: I think so.

- Cst. Donaldson was asked about the dresser in the appellant's bedroom. The extent of his testimony is as follows:

> Mr. Hughes: Okay. And you said that you participated in, in, I guess, searching his master bedroom area, were you aware of any, ah, ID belonging to either Natasha MacNeil or Natasha Hensbee found in that room?
>
> A: I do believe there was two different ID's with those names on it, I think.

> Mr. Hughes: Okay. And those were found in the dresser that the cocaine was found in?
>
> A: Ah, they were on top.
>
> Mr. Hughes: Okay. But the same piece of furniture?
>
> A: Yeah.
>
> Mr. Hughes: Okay. To the best of your knowledge was any identification pertaining to Mr. Chaisson found in that, ah, dresser?
>
> A: I can't say.
>
> Mr. Hughes: Okay.
>
> A: I'm not, I'm not sure.

- No other witness gave evidence regarding the ownership of the multitude of items on the dresser adjacent to the appellant's bed, nor the contents of the dresser.

[59] I return now to the judge's reasons. Having reviewed the entirety of the record, I am satisfied the judge's reasons sufficiently demonstrate why he found the appellant to be in constructive possession of the cocaine. The appellant says there was evidence suggesting the cocaine may have been placed in the dresser and attic by others, giving rise to a reasonable doubt he had constructive possession of it. He says the judge was obligated to explain in his reasons why this evidence did not give rise to a reasonable doubt.

[60] As with most determinations courts must make, context is important. This is not a situation where the drugs were found in a location regularly frequented by others, or over which the appellant had a tenuous degree of control. In such circumstances, the presence of third parties and their potential opportunity to have deposited drugs could raise a doubt about the defendant's knowledge of and control over the drugs – the essential elements for a finding of constructive possession.

[61] Here, the drugs were found in the appellant's home, over which he exercised exclusive control.[6] To find the appellant possessed the cocaine, the judge had to be satisfied beyond a reasonable doubt he had knowledge of the cocaine and had control over it on October 9, 2020.

[62] The appellant was convicted because cocaine was found in the bottom drawer of his dresser. It was within feet of his bed. He had control over the dresser and its contents. The judge said the existence of a former girlfriend's identification on top of that dresser did not raise a reasonable doubt regarding the appellant's knowledge or control of the cocaine in that location. In light of the law and evidence, nothing more needed to be said.

[63] Did the appellant have knowledge and control over the cocaine in the attic? If the judge was satisfied beyond a reasonable doubt the appellant knew the cocaine was in the attic of his house, then who put it there, and when, was immaterial. There was ample evidence the appellant knew the cocaine was in the attic:

- When police were attempting to gain entry to the house, an individual was seen running from an upstairs window. The appellant was the only person found upstairs;

- The appellant was found in the attic, and noises were heard indicating he was traversing the attic space;

- The cocaine was found, in plain view, in the attic.

[64] The Daniel Walsh third-party suspect evidence plainly failed to raise a reasonable doubt in light of the evidence indicating the appellant knew there was cocaine in the attic. The judge was not obligated to explain more than he did why he was satisfied beyond a reasonable doubt of the appellant's constructive possession.

[65] I would dismiss this ground of appeal.

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[6] There was evidence that the appellant's mother resided with him, however, there was no suggestion that the cocaine belonged to her.

ISSUE 4: Did the judge impose an unfit sentence?

[66] The principles governing this Court's review of a lower court's sentencing decision are well established. These were recently set out in *R. v. Friesen*, 2020 SCC 9 as follows:

> [25] Appellate courts must generally defer to sentencing judges' decisions. The sentencing judge sees and hears all the evidence and the submissions in person (*Lacasse*, at para. 48; *R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 46). The sentencing judge has regular front-line experience and usually has experience with the particular circumstances and needs of the community where the crime was committed (*Lacasse*, at para. 48; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 91). Finally, to avoid delay and the misuse of judicial resources, an appellate court should only substitute its own decision for a sentencing judge's for good reason (*Lacasse*, at para. 48; *R. v. Ramage*, 2010 ONCA 488, 257 C.C.C. (3d) 261, at para. 70).
>
> [26] As this Court confirmed in *Lacasse*, an appellate court can only intervene to vary a sentence if (1) the sentence is demonstrably unfit (para. 41), or (2) the sentencing judge made an error in principle that had an impact on the sentence (para. 44). Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. The weighing or balancing of factors can form an error in principle "[o]nly if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably" (*R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, cited in *Lacasse*, at para. 49). Not every error in principle is material: an appellate court can only intervene if it is apparent from the trial judge's reasons that the error had an impact on the sentence (*Lacasse*, at para. 44). If an error in principle had no impact on the sentence, that is the end of the error in principle analysis and appellate intervention is justified only if the sentence is demonstrably unfit.

[67] On appeal, the appellant says the judge imposed a demonstrably unfit sentence, inconsistent with established sentencing ranges and which arose due to him erroneously "conflating what the ranges of dealers were in the established case law, with the opinion of Cpl. Lane" that the appellant was a mid-level dealer based on other circumstantial criteria. The appellant says the judge ought to have found him to be a "low level dealer" as described in *LeBlanc*, and placed within a sentencing range of 18 to 30 months. He asks this Court to set aside the five year sentence imposed by the judge and replace it with a term of 40 months, less credit.

[68] Although the appellant's requested 40 months minus credit was also suggested to the judge, how he arrived at that as an appropriate sentence was argued much differently in the court below. There, the appellant acknowledged a sentence in the range of 2 to 6 years was appropriate but given the time gap between the present offence and his prior convictions, a proper sentence would be 40 months.

[69] Having reviewed the record, and considered the submissions of the parties, I am satisfied the appellant has failed to establish the judge's reasons demonstrate an error in principle. I am further satisfied the sentence of 5 years in the circumstances of this case does not give rise to a demonstrably unfit sentence. In reaching this conclusion, I note:

- In *R. v. Fifield*, [1978] 25 N.S.R. (2d) 407, this Court described the general categories of drug traffickers "as the isolated accommodator of a friend, the petty retailer, the large retailer or small wholesaler, or the big-time operator";

- There was evidence, accepted by the judge, that would place the appellant beyond the category of a petty retailer and firmly within the third *Fifield* category. A sentence of 5 years would fall within the range of sentences for offenders in this category;
- The nature of the drug here, cocaine, is one which attracts a significant term of incarceration given the well-known negative societal impacts of its distribution; and

- The appellant has two previous convictions for trafficking in cocaine which are statutorily aggravating in terms of crafting a fit sentence[7].

[70] Given the deference afforded to sentencing judges, the absence of an error in principle, and the appellant's failure to demonstrate the sentence imposed is unfit, I would dismiss this ground of appeal.

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[7] Section 10(1)(b) of the CDSA provides that a previous conviction under s. 5(2) must be considered on sentencing as an aggravating factor.

ISSUE 5: Did the judge err by not awarding additional Duncan credit in relation to the appellant's pre-trial custody?

[71] The opportunity for enhanced credit beyond a 1.5:1 basis as a result of particularly harsh pre-sentence incarceration was recognized by the Ontario Court of Appeal in *Duncan*. There, an additional credit was not granted, but the following comments from the Court provided the foundation for such applications:

> [6] On our reading of the trial judge's reasons, we agree with counsel. The trial judge effectively held that any credit or consideration in relation to presentence incarceration was capped at the 1.5 limit. We agree with counsel that in the appropriate circumstances, particularly harsh presentence incarceration conditions can provide mitigation apart from and beyond the 1.5 credit referred to in s. 719(3.1). **In considering whether any enhanced credit should be given, the court will consider both the conditions of the presentence incarceration and the impact of those conditions on the accused. In this case, there was evidence that the appellant served a considerable part of his presentence incarceration in "lockdown" conditions due to staffing issues in the correctional institution. There was, however, no evidence of any adverse effect on the appellant flowing from the locked down conditions**. Indeed, some of the material filed on sentencing indicates that the appellant made positive rehabilitative steps during his presentence incarceration.
>
> [7] While the pattern of "lockdowns" endured by the appellant is worrisome, without further evidence as to the effect of those conditions, we cannot say that the appellant suffered particularly harsh treatment entitling him to additional mitigation beyond the 1.5 credit. Consequently, although we agree that the trial judge misinterpreted the relevant provision, we would not reduce the sentence to reflect any added mitigation for the conditions of presentence incarceration.
>
> (Emphasis added)

[72] In *R. v. Marshall*, 2021 ONCA 344, Justice Doherty provided direction, and warning, on the use of *Duncan* credit:

> [50] Before I move to *Marshall #2*, I propose to make some observations about the calculation of the "*Duncan*" credit. A "*Duncan*" credit is given on account of particularly difficult and punitive presentence custody conditions. It must be borne in mind the 1.5:1 "*Summers*" credit already takes into account the difficult and restrictive circumstances offenders often encounter during pretrial custody: *Summers*, at paras. 28-29. The "*Duncan*" credit addresses exceptionally punitive conditions which go well beyond the normal restrictions associated with pretrial custody. The very restrictive conditions in the jails and the health risks

> brought on by COVID-19 are a good example of the kind of circumstance that may give rise to a "*Duncan*" credit: *R. v. Morgan*, 2020 ONCA 279.
>
> [51] It is also important to appreciate and maintain the clear distinction between the "*Summers*" credit and the "*Duncan*" credit. The "*Summers*" credit is a deduction from what the trial judge determines to be the appropriate sentence for the offence. The "*Summers*" credit is calculated to identify and deduct from the appropriate sentence the amount of the sentence the accused has effectively served by virtue of the pretrial incarceration. The "*Summers*" credit is statutorily capped at 1.5:1. It is wrong to think of the "*Summers*" credit as a mitigating factor. It would be equally wrong to deny or limit the "*Summers*" credit because of some aggravating factor, such as the seriousness of the offence: *R. v. Colt*, 2015 BCCA 190.
>
> [52] The "*Duncan*" credit is not a deduction from the otherwise appropriate sentence, but is one of the factors to be taken into account in determining the appropriate sentence. Particularly punitive pretrial incarceration conditions can be a mitigating factor to be taken into account with the other mitigating and aggravating factors in arriving at the appropriate sentence from which the "*Summers*" credit will be deducted. Because the "*Duncan*" credit is one of the mitigating factors to be taken into account, it cannot justify the imposition of a sentence which is inappropriate, having regard to all of the relevant mitigating or aggravating factors.
>
> [53] Often times, a specific number of days or months are given as "*Duncan*" credit. While this quantification is not necessarily inappropriate, it may skew the calculation of the ultimate sentence. By quantifying the "*Duncan*" credit, only one of presumably several relevant factors, there is a risk the "*Duncan*" credit will be improperly treated as a deduction from the appropriate sentence in the same way as the "*Summers*" credit. If treated in that way, the "*Duncan*" credit can take on an unwarranted significance in fixing the ultimate sentence imposed: *R. v. J.B.* (2004), 187 O.A.C. 307 (C.A.). Arguably, that is what happened in this case, where on the trial judge's calculations, the "*Duncan*" credit devoured three-quarters of what the trial judge had deemed to be the appropriate sentence but for pretrial custody.

[73] In *R. v. Smith*, 2023 ONCA 500, Fairburn, A.C.J.O. recently explained:

> [37] *Marshall* added an important nuance to the *Duncan* framework. While it does not amount to an error to deduct a specific number of days or months as *Duncan* credit, it is preferable if sentencing judges simply address any *Duncan*-type concerns as a type of mitigating factor when determining the fit global sentence. Therefore, the *Duncan* credit should not be approached as a "deduction from the otherwise appropriate sentence", but as a factor to be taken into account

> when determining the fit sentence in all of the circumstances: *Marshall*, at para. 52.

[74] The appellant argues the judge erred in principle by not granting *Duncan* credit for the entirety of his pre-sentence custody. He says the judge should have recognized the harsh institutional conditions identified in a number of recent *habeas corpus* decisions of the Supreme Court of Nova Scotia. In his factum, the appellant explains:

> 64. Given the judicial acceptance of the severity of conditions in custody, it was an error in principle not to grant the Appellant the mitigation on sentence as requested. As such, this Court ought to intervene and sentence the Appellant afresh. As at his sentencing, the Appellant states that 40 months, less 16 months mitigation for the harsh conditions in custody is a fit and appropriate sentence. Given the amount of remand credit amassed by the Appellant, this would put him in a time-served position.

[75] I am satisfied that the judge did not err in principle as alleged. In so concluding, I note:

- In considering the appropriateness of a *Duncan* credit, it is not only the nature of the harsh conditions that is relevant, but also the impact on the individual claiming it;

- Due to the individualized impact assessment engaged in a *Duncan* analysis, the judge was not obligated to consider the findings of other judges about the institutional circumstances identified in other decisions. His obligation was to consider whether this individual had adduced evidence that he had experienced undue hardship and the personal impacts of it. The judge did exactly what he was required to do;

- Although the medical records demonstrate the appellant contracted COVID-19 once during his presentence remand, his biggest concern was that he was unable to have in person visits with his elderly mother due to the protocols in place;

- As recognized by the judge, visits with family members were curtailed for all Nova Scotians during the same time frame. This is not an unduly harsh condition in the circumstances when compared to

similar restrictions imposed on the general public. A similar conclusion was reached in *Waite v. R.*, 2023 PECA 5 at para. 34;

- The appellant did not establish the restrictions he experienced should not be included in the *Summers* credit of 1.5 days for each day on remand he had already received. Nor did he show he was unduly impacted beyond his unresolved broken tooth; and

- Most significantly, the appellant's approach to the application of *Duncan* credit is exactly what has been warned about in subsequent decisions of the Ontario Court of Appeal. In my view, granting the appellant's request would serve to inappropriately "devour" what was otherwise a fit sentence.

[76] I would dismiss this ground of appeal.

Conclusions

[77] Although I would grant leave to appeal sentence, for the reasons set out above, I would dismiss the appeal in its entirety.

Bourgeois, J.A.

Concurred in:

Fichaud, J.A.

Derrick, J.A.