**PROVINCIAL COURT OF NOVA SCOTIA**
**Citation:** *R v. Cleghorn*, 2015 NSPC 54

**Date:** 2015-05-06
**Docket:** 2757005
**Registry:** Dartmouth

**Between:**

Her Majesty the Queen

v.

Mark Cleghorn

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| **Judge:** | The Honourable Judge Theodore K. Tax, |
| **Heard:** | March 12, 2015, in Dartmouth, Nova Scotia |
| **Decision:** | May 6, 2015 |
| **Charge:** | 5(1) CDSA |
| **Counsel:** | Monica McQueen, for the Crown<br>Donald Murray, for the Defendant |

**By the Court:**

**INTRODUCTION**

[1] Mr. Mark Cleghorn is before the court for sentencing after having pled guilty to the charge of trafficking a substance included in schedule I, to wit, 3, 4 methylenedioxyamphetamine ("MDMA") contrary to Section 5(1) of the **Controlled Drugs and Substances Act** (the "**CDSA**"). The offence of trafficking MDMA, which is more commonly known as "ecstasy," occurred on July 7, 2014 at or near Black Avon, Nova Scotia.

[2] The trafficking of a schedule I **CDSA** substance, such as MDMA, is an indictable offence and liable to imprisonment for life under Section 5(3)(a) of the **CDSA**. However, the Crown Attorney and Defence Counsel agree that, since the facts and circumstances of this offence do not involve any of the particular circumstances which are enumerated in paragraphs 5(3)(a)(i) or (ii) of the **CDSA**, Mr. Cleghorn is not subject to a punishment of a minimum term of imprisonment.

[3] The issue for the court to determine is a just and appropriate sentence after taking into account all of the relevant purposes and principles of sentencing,

the particular circumstances of the offence and the particular circumstances of the offender.

**POSITION OF THE PARTIES:**

[4] It is the position of the Crown Attorney that MDMA or "ecstasy" is a schedule I **CDSA** substance, which can have long-term mental and physical effects on its users and since it is in the same schedule as cocaine, the trafficking of MDMA is a very serious criminal offence. Although Mr. Cleghorn trafficked a relatively small amount of MDMA or "ecstasy" in committing the offence, the Crown Attorney submits that Mr. Cleghorn's sentence should be similar to an offender who has trafficked a similar amount of cocaine. Therefore, it is the position of the Crown that Mr. Cleghorn should be sentenced to a term of imprisonment at the upper end of a provincial sentence or the lower end of a federal sentence. The Crown Attorney also seeks an order of forfeiture of $115 as proceeds of crime, the mandatory Section 109 **Criminal Code** firearms prohibition and a DNA order under Section 487.051 of the **Code**.

[5] Defence Counsel acknowledges that, while Mr. Cleghorn may be liable to serve a maximum term of imprisonment of life for this offence and that, as a result of the November, 2012 amendments to Section 742.1(c) of the **Criminal**

**Code**, a Conditional Sentence Order ("CSO") of imprisonment in the community is no longer an available option for the court, he submits that there is still a wide range of sentencing options available. It is the position of the Defence that sentences imposed on similar offenders who have committed similar offences in similar circumstances before the recent amendments to Section 742.1 of the **Code**, can still be utilized to establish an appropriate range of sentence in this case. Therefore, Defence Counsel submits that, given the very positive pre-sentence report and that Mr. Cleghorn was an "accommodator" or "petty retailer" who sold a relatively small amount of ecstasy in committing this offence, the fit and appropriate sentence should either be a lengthy period of probation with restrictive conditions or, at most, a 90 day jail sentence which could be served on an intermittent basis followed by a lengthy period of probation.

**CIRCUMSTANCES OF THE OFFENCE:**

[6] On July 7, 2014, the Evolve Music Festival was being held in an open field located near Black Avon in Antigonish County. The Festival had hired a private security firm for crowd control and near a security checkpoint, one of the security officers observed a transaction take place between Mr. Cleghorn and an unknown male person. The security officer had seen Mr. Cleghorn receive some money from the other person and then Mr. Cleghorn passed something to the other

individual. The security officer called the RCMP and held Mr. Cleghorn and the other individual until the police officers arrived.

[7] Mr. Cleghorn was arrested and in a search incidental to arrest, RCMP officers located 14 dime "baggies" containing a powdered substance, which was initially believed to be cocaine, but was later analyzed and confirmed to be MDMA. Mr. Cleghorn also had 4 capsules in his possession, the contents of which were analyzed and also confirmed to be MDMA. The 2 capsules that were seized from the other individual involved in the transaction were also analyzed and confirmed to contain MDMA.

[8] Mr. Cleghorn provided a statement to the police in which he said that he was attending the music Festival and although he had never previously been involved in trafficking CDSA substances, he had done so on this occasion in an effort to make "a couple of quick bucks" to pay outstanding bills. He advised the police that he had purchased a total of 10 grams of MDMA and had sold 3 grams for $115. A total of $395 in cash was located on Mr. Cleghorn at the time of his arrest, however, the Crown Attorney only seeks to forfeit the amount of $115 as "offence related property."

[9] In total, there was approximately 7 ½ grams of powdered MDMA in the 14 dime "baggies." It was pointed out during the sentencing hearing that, MDMA is not usually found in a powdered form, but rather, more frequently it is pressed into pills or a capsule. In the final analysis, counsel agreed that each of the 3 capsules sold by Mr. Cleghorn probably contained about 0.5 grams of MDMA.

**CIRCUMSTANCES OF THE OFFENDER:**

[10] Mr. Cleghorn is presently 24 years old. He was raised in a stable home environment and has a positive relationship with his parents, but moved out of the family residence in September, 2014 to reside with his girlfriend. He graduated from high school in June 2010 and has not sought any additional formal education.

[11] Mr. Cleghorn's girlfriend confirmed their 2 year relationship and that she and Mr. Cleghorn now reside together. She told the probation officer that she was "very surprised" by the offence before the court. She added that Mr. Cleghorn is a "very hard worker, honest and well-liked individual" and has not had any problems with substance abuse. Mr. Cleghorn's father was also "surprised" when he learned about the offence as his son has always been respectful, helpful, and very hard-working. The offender's father added that his son was late maturing, but has

learned a lot from the court process and is confident that he would never involve himself in similar activities in the future.

[12] Since September, 2013, Mr. Cleghorn has been employed on a full-time basis with a masonry firm, working about 50 hours per week. His supervisor provided a very positive work reference indicating that he is a hard-working individual who gets along well with his coworkers. Based upon his hourly wage, Mr. Cleghorn is able to pay for his rent, car payments and other monthly expenses, however, he has no assets and has accrued about $2000 in credit card debt.

[13] In terms of his health and lifestyle, Mr. Cleghorn advised the probation officer that he is in good physical and mental health and does not have any substance abuse issues. He acknowledged having experimented with ecstasy, cocaine and other substances in his early 20's, but since the offence, he has abstained from any illicit drug usage and changed his previous peer group.

[14] Mr. Cleghorn has one prior criminal conviction on March 27, 2012 for a charge of assault causing bodily harm, contrary to Section 267(b) of the **Criminal Code** which occurred on February 5, 2011. The sentence was suspended and Mr. Cleghorn was placed on probation for 24 months, which included a requirement to complete 75 hours of community service.

**ANALYSIS:**

RELEVANT PURPOSES AND PRINCIPLES OF SENTENCING:

[15] The fundamental purpose and principles of sentencing are set out in Sections 718-718.2 of the **Criminal Code**. Parliament has stated that the fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing "just sanctions" which are focused on one or more of the objectives set out in Section 718 of the **Code**. In this case, the Crown Attorney submits that the primary sentencing purposes should focus on denunciation of the unlawful conduct, specific deterrence of Mr. Cleghorn and general deterrence of other like-minded individuals.

[16] Defence Counsel does not take serious issue with those primary sentencing purposes, but submits that the court should also consider a sentence that would best assist in the rehabilitation of the offender and that the offender should only be separated from society, where necessary [Section 718(c) and (d) of the **Criminal Code**]. In that regard, Parliament has also stated in Section 718.2(d) of the **Code** that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances" and in Section 718.2(e) of the **Code** that "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."

[17] Section 718.1 of the **Criminal Code** contains the fundamental principle of sentencing which requires the court to ensure that the sentence is proportionate to the gravity or seriousness of the offence and the offender's degree of responsibility for the offence.

[18] Section 718.2(a) of the **Criminal Code** requires the court that imposes a sentence to take into account the principle that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[19] Finally, I must also be mindful of the principle of parity as stated in Section 718.2 (b) of the **Code** which requires me to consider that the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. The sentencing principle reminds the court to consider a range of sentence for each particular offence and to impose sentences which are similar to the circumstances of the case and the offender, bearing in mind that for each offence and for each offender, there will be some elements that are unique.

[20] In all sentencing decisions, determining a fit and proper sentence is highly contextual and is necessarily an individualized process which depends upon the circumstances of the offence and the particular circumstances of the specific offender. On this point, the Supreme Court of Canada stated, in *R. v. M. (C.A.)* (1996) 1 S.C.R. 500 at paras. 91 and 92, that the determination of a just and appropriate sentence requires the trial judge to do a careful balancing of the societal goals of sentencing against the moral blameworthiness of the offender and the gravity of the offence while at the same time taking into account the victim or victims and the needs of and the current conditions in the community.

**AGGRAVATING AND MITIGATING CIRCUMSTANCES:**

[21] As indicated previously, Section 718.2(a) of the **Criminal Code** requires the court to take into account relevant mitigating and aggravating circumstances which relate to the offence or the offender. In this case, I find that the aggravating circumstances which should increase the sentence are as follows:

1. Although none of the statutory aggravating factors listed in sub-Section 10(2) of the **CDSA** were present for this "designated offence," the music festival was being held in an open field, which was a very public place and there were many young people in attendance;

2. Mr. Cleghorn's stated intention in selling the MDMA was a profit motive and the powdered MDMA and capsules which were found on him by police officers, are consistent with an intention to make more than one or 2 sales of the MDMA to accommodate requests of friends.

[22] I find that the mitigating circumstances which should reduce the sentence in this case are as follows:

1. Mr. Cleghorn indicated an intention to enter an early guilty plea and did so by arranging to have the charge transferred from Antigonish County to Dartmouth, at an early date;

2. Mr. Cleghorn has accepted full responsibility for the offence;

3. Mr. Cleghorn is a relatively youthful offender who has only one prior conviction for an unrelated offence;

4. The collateral sources contacted by the probation officer confirmed that Mr. Cleghorn is a hard-working and reliable individual both at home as well as at work.

5. Mr. Cleghorn has very positive support from his family as well as his girlfriend and has separated himself from his previous peer group.

PARITY PRINCIPLE - Sentencing Precedents

[23] As I mentioned previously, the parity principle set out in Section 718.2(b) of the **Criminal Code** requires me to consider that Mr. Cleghorn's sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. However, given the fact that there will usually be unique circumstances either involving the commission of the offence or relating to the offender, a review of sentencing precedents is useful to establish a general range of sentence for those "similar" circumstances.

[24] In this case, I find that locating similar sentencing precedents to establish an appropriate range of sentence is complicated by the following facts:

a. In most of the cases that were cited by counsel and other cases that I reviewed, the offender was sentenced for trafficking or possession for the purpose of trafficking one or more schedule I **CDSA** substances, such as cocaine as well as for the trafficking of MDMA or "ecstasy;"

b. Sentencing decisions for the offence of trafficking or possession for the purpose of trafficking MDMA or "ecstasy" which had occurred prior to November 6, 2012, were based on

the fact that MDMA or "ecstasy" was then listed as a schedule III **CDSA** substance. As of November 6, 2012, the schedules of the **CDSA** were amended and MDMA or "ecstasy" became a schedule I substance and therefore, subject to a different sentencing regime, which included a maximum of life imprisonment and, in certain circumstances, a minimum term of imprisonment;

c. The amendment to the schedule I of the **CDSA** effective November 6, 2012, also meant that trafficking in MDMA or "ecstasy" became an indictable offence under Section 5(1) of the **CDSA** and was then subject to the maximum penalty of imprisonment for life. Prior to that date, the offence of trafficking of a **CDSA** schedule III substance could have been prosecuted by indictment or by way of summary conviction.

d. As of November 20, 2012, there was also an amendment to Section 742.1(c) of the **Criminal Code**, which excluded the possibility of ordering a CSO of imprisonment in the community for offences prosecuted by indictment for which the maximum term of imprisonment was 14 years or life. As a

> result of that legislative amendment by which MDMA or "ecstasy" became a **CDSA** schedule I substance, a CSO of imprisonment in the community was no longer one of the "available" options for the court to consider in this case.

[25] During their submissions, both the Crown Attorney and Defence Counsel commented upon the impact of the amendments to the CSO provisions found in Section 742.1 of the **Criminal Code** as well as the amendments to the **CDSA** by which MDMA or "ecstasy" became a **CDSA** schedule I substance, which were made in November 2012. As a result of those legislative amendments, both counsel agree that the imposition of a CSO of imprisonment in the community is not an "available" sentencing option in this case.

[26] Furthermore, in view of those legislative amendments, I find that sentences imposed for the offence of trafficking in MDMA or "ecstasy" which occurred prior to November, 2012 will provide some assistance in establishing a just and appropriate range of sentence for the purposes of the parity principle, however, it is important to remember that when those sentences were imposed, a CSO of imprisonment in the community was an available sentencing option.

[27] One such example which was mentioned by the Crown Attorney, is *R. v. Bedford*, 2000 NSCA100 where the court dismissed a sentence appeal by the Crown of a 12 month CSO followed by 2 years of probation for trafficking 2 pills of "ecstasy" or MDMA, which was, at that time, a schedule III **CDSA** substance. Based on the brief facts outlined in the decision, there is a factual similarity to the present case as Mr. Bedford had sold 2 pills of ecstasy to an individual during a "rave." However, the facts in *Bedford* were somewhat unique as the offender had refused to sell additional ecstasy pills to that individual, but the purchaser obtained 2 more pills from another seller. Tragically, the purchaser died a short time later. Since the court did not mention the circumstances of the offender, it is difficult to determine if there were other similarities between Mr. Bedford and Mr. Cleghorn.

[28] In *R. v. Bercier*, 2004 MBCA 51, the accused appealed his sentence of 15 months of imprisonment followed by 2 years of probation for the possession of marijuana, cocaine and 91 tablets of ecstasy for the purpose of trafficking. The accused had been in pre-trial custody for 6 months prior to sentencing, and as a result, the effective sentence of imprisonment was 28 months. The focus of the accused's appeal was that the sentence imposed for the 91 tablets of ecstasy was harsh and excessive, since ecstasy was a **CDSA** schedule III substance with lower maximum penalties than the schedule I substance [cocaine], and the sentencing

judge should have taken that difference into account. The accused was 20 years old, he had prior convictions for failure to comply with court orders, but no prior drug convictions. The pre-sentence report was found to be "discouraging" and the probation officer believed that the accused was a high risk to re-offend.

[29] The Manitoba Court of Appeal dismissed Mr. Bercier's sentence appeal and noted at para. 42 that the distinction between the maximum sentences imposed by Parliament for schedule III substances and for schedule I substances "does not necessarily render a sentence for trafficking in ecstasy inappropriate simply because it could be an appropriate sentence for trafficking in heroin or cocaine in certain circumstances." In a case of trafficking in ecstasy, Hamilton J.A. stated that a significant factor must always be the dangers associated with the drug and those dangers are not minimized because ecstasy has not been proven to be addictive. The court concluded that, while the sentence was at the high end of the range that was appropriate in the circumstances, it was entitled to deference as the trial judge had made no errors in principle, was rightly concerned with the dangers of ecstasy and was sending a strong message of specific and general deterrence that trafficking in ecstasy will result in serious consequences for the offender.

[30] The Crown Attorney also referred to *R v. Steeves*, 2007 NSCA 130, which involved an offender who had pled guilty to 2 charges of possession for the

purpose of trafficking 100 pills of ecstasy and 14 grams of powdered cocaine and 63 grams of crack cocaine, both contrary to Section 5(2) of the **CDSA**. The sentencing judge had ordered a period of incarceration of 2 years less one day to be served in the community, followed by 12 months of probation. The offender was 29 years old and in a common-law relationship with 2 small children. Mr. Steeves had a rare neurological disorder which caused weakness in his limbs, and as a result, he was not able to work and was on a disability pension. The offender had a recent conviction for a drinking and driving offence and about 10 years earlier, he had been sentenced to 6 months in prison for a mischief charge, a theft charge and a failure to appear charge.

[31] On a Crown appeal, our Court of Appeal reviewed its decision in *Bedford* and the Manitoba Court of Appeal decision in *Bercier* (at para. 22) and held that the sentencing judge had failed to consider deterrence as the primary sentencing consideration for such offences, that the amount of 2 substances being trafficked was "substantial," the judge had failed to consider the range of sentences for those offences and he had erred in principle by failing to follow the proper approach for the imposition of a conditional sentence as described in *R. v. Proulx,* [2000] 1 S.C.R. 61. The court concluded that the amounts possessed by Mr. Steeves took him out of the lower categories of drug traffickers described in *R. v. Fifield,* [1978]

N.S.J. no. 42 [CA] and that his trafficking of that substantial amount of cocaine and ecstasy would have had devastating effects in the community. Since the Court of Appeal concluded that a penitentiary term was the appropriate sanction, a CSO was not available. The court set aside the conditional sentence and imposed term of imprisonment of 30 months commencing on the date of the original sentence, less the time already served under the terms of the CSO.

[32] Defence Counsel referred the court to *R. v. Carbert*, 2001 ABPC 61, which involved the accused selling 4 pills of MDMA or "ecstasy" to a purchaser under somewhat unusual circumstances. There, a police officer, an agent and a third-party went to a house where the accused just happened to be located. The third-party was known to the accused and after some discussions between the accused, the agent and the third-party, the accused sold 4 pills of MDMA for $100. As part of the background facts, it was accepted that the accused had sold the 4 pills after being informed that the third-party had a drug problem and needed to take the pills to stop him from being sick. The agreed facts were that the accused had purchased the MDMA for his own use at a party to be held later that evening and that he made no profit from selling the 4 pills, since they were sold for the same price as he had paid to acquire them.

[33] In *Carbert*, the court ordered a 9 month CSO of imprisonment in the community, based upon the fact that the accused had entered an early guilty plea, had no prior criminal record, he was a relatively youthful first-time adult offender, there was no evidence that he was involved in any kind of commercial trafficking, he was gainfully employed and had previously been of good character. The court also noted that the transaction was not done for profit, but rather to help a friend who was a drug addict and was in need of the MDMA to "bring him down."

[34] With respect to other cases which dealt with similar offenders who have committed similar offences in similar circumstances, the court also reviewed *R. v. Corpuz*, 2014 ABQB 290. In that case, the accused entered an early guilty plea to the trafficking of 2 pills of ecstasy to an undercover police officer during a Rave Music Festival on April 28, 2012 [before MDMA became a **CDSA** schedule I substance]. The 2 ecstasy pills had been sold for $40, and when the accused was arrested a short time later, during a search incidental to arrest, police officers found another 22 pills of ecstasy on him and $714 in cash. The Rave Music Festival was largely attended by young persons, which the court regarded as an aggravating factor. The accused was 31 years old at the time of the sentencing and had been under restrictive release conditions without incident for approximately 2 years. He had no prior criminal record. The accused had graduated from high school and

after that, he was able to maintain full-time employment. Generally speaking, the pre-sentence report was regarded as being positive. Based upon the range of sentences reviewed by the court for similar offenders who had committed similar offences in similar circumstances, the offender was sentenced to a 18 month CSO, as that was still an available sentencing option at that time.

[35] Finally, in *R. v. Kaasa*, 2008 ABPC 146 (CanLii), the accused had sold 2 ecstasy pills to an undercover police officer for $40. Shortly thereafter, he was arrested and during a search incidental to arrest, a further 21 ecstasy pills with a street value of $420 and $70 in cash were located in his possession. The accused was 27 years old and he had a prior criminal record for property offences and several failures to comply with court orders. He had abused illicit street drugs since his early teens and had surrounded himself with individuals who were immersed in the drug subculture. The accused had completed grade 11, but left school to work full time, had strong family support and recently started a new common-law relationship, changed his peer group and had abstained from the use of illicit drugs for about 18 months. Although the pre-sentence report was generally positive, the court concluded that due to the prior convictions for breaching court orders, he was a risk to re-offend in the community, and concluded that a CSO would not be consistent with the principles of denunciation and deterrence. The offender was

sentenced to 6 months in prison for the possession of the MDMA for the purpose of trafficking.

**The nature and Effect of MDMA or Ecstasy:**

[36] During her submissions, the Crown Attorney referred to the fact that MDMA is usually found in pills or capsules rather than in a powder form. It was also noted, that MDMA is now listed as a **CDSA** schedule I substance, similar to cocaine, and she referred to the nature and effects of MDMA or "ecstasy" through a reference to a report dated September 21, 2001 by pharmacologist Dr. H. Kalant entitled "The Pharmacology and Toxicology of Ecstasy (MDMA) and Related Drugs" which was mentioned in *R. v. Lau*, 2003 SKPC 92 at para. 7. Defence Counsel also noted that the same report was reviewed by the sentencing judge in the *Carbert* case, *supra* at para. 9 and in that case, the actual report by Dr. Harold Kalant was filed as an exhibit by consent of the Crown and Defence.

[37] Our Court of Appeal in *Steeves*, *supra*, at para. 22, has cited, with approval, the comments of Hamilton JA in the Manitoba Court of Appeal case of *Bercier*, which described ecstasy as a "dangerous drug that can be toxic and cause long-term central nervous disorders." Justice Hamilton's description of ecstasy was based largely upon the pharmacological report of Dr. Harold Kalant, which had

been introduced as expert evidence by the Crown at the sentencing hearing. Dr. Kalant's report on the nature and effect of MDMA or ecstasy was summarized by Hamilton J.A. in *Bercier*, *supra*, paras 32 to 37, as follows:

> (a) It is a drug frequently used by young people at large crowded dance parties called "raves" and is used to postpone fatigue and allow the user to dance for hours and have feelings of euphoria;
>
> (b) It's most consistent physiological effect is the induction of hypothermia [the elevation of the core body temperature] that can lead to heat stroke, and in some reported cases, death. This effect is exacerbated in the rave setting;
>
> (c) Ecstasy is referred to as a "designer drug" because it is a combination of synthetic substances to create a "blend of amphetamine-like and mescaline-like effects;"
>
> (d) Ecstasy can be produced by those who have working knowledge of organic chemistry and is usually sold in a tablet form. Because it can be produced so easily, one of the dangers is that the actual composition of ecstasy tablets can vary greatly and the user cannot know what is being consumed;

(e) Ecstasy can be toxic and slow to leave the system and has been known to cause liver damage, serious irregularities of heart rhythm, elevated blood pressure, swelling of the brain leading to convulsions and long-term central nervous system effects such as depression, paranoia and panic disorders;

(f) There is no conclusive evidence that ecstasy is addictive;

(g) In addition, expert evidence tendered during the appeal hearing by a senior police officer confirmed that ecstasy is not connected with other crimes that are often committed to obtain funds to fuel addictions, such as robbery and break and enters.

**THE JUST AND APPROPRIATE SANCTION:**

[38] In *R. v. Nasogaluak,* 2010 SCC 6 [CanLii] at para. 40, the Supreme Court of Canada pointed out that the objectives and principles of sentencing have been codified in Sections 718 to 718.2 of the **Criminal Code** to bring greater consistency and clarity in sentencing decisions. The Court added that whatever weight a judge may wish to accord to the sentencing objectives set out in Section 718, the resulting sentence must respect the fundamental principle of proportionality [Section 718.1 of the **Code**]. In addition, the Court noted that

Section 718.2 of the **Code** provides a non-exhaustive list of secondary sentencing principles, including the consideration of aggravating and mitigating circumstances, the principles of parity and totality and the instruction to consider all available sanctions other than imprisonment that are reasonable in the circumstances, with particular attention paid to the circumstances of aboriginal offenders.

[39] However, the Supreme Court of Canada clearly stated in *Nasogaluak, supra*, at paras. 41 and 42 that the principle of proportionality is central to the sentencing process. That principle requires that the sentence not exceed what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence. In that sense, the principle serves a limiting or restraining function. Since the court observed that sentencing is also a form of judicial and social censure, the application of the principle of proportionality by the sentencing judge speaks out against the offence and punishes the offender, but no more than is necessary.

[40] Moreover, in *Nasogaluak, supra*, at paras. 43-44, the Supreme Court of Canada observed that Sections 718 to 718.2 of the **Code** are sufficiently general to ensure that sentencing judges have a broad discretion in an individualized process, subject to some specific statutory rules, to craft a "fit" sentence that is tailored to the nature of the offence and the circumstances of the offender. However, the wide

discretion of sentencing judges is fettered, in part, by similar cases which have established, in some circumstances, general ranges of sentences for particular offences, to promote greater consistency between sentencing decisions in accordance with the parity principle [Section 718.2(b) **Code**]. But, the Supreme Court of Canada added that while the sentencing judge should pay heed to those ranges, they are guidelines rather than hard and fast rules. In the final analysis, the sentencing judge must have regard to all of the circumstances of the offence and the offender and to the needs of the community in which the offence occurred.

[41] In this case, it was acknowledged by the Crown Attorney that the quantity of MDMA or "ecstasy" which was in Mr. Cleghorn's possession would place him at the lower end of offenders who are involved in the drug subculture. Given the quantity of MDMA or "ecstasy" trafficked by Mr. Cleghorn and the amount of powdered MDMA in his possession as well as the lack of any other indicators of a more sophisticated trafficking operation, I find that Mr. Cleghorn was either an opportunistic accommodator of "friends" who were also attending the Evolve Music Festival or a petty retailer, according to the criteria for classifying drug traffickers established in *R. v. Fifield,* [1978] N.S.J. No. 42 (CA) at para. 10.

[42] In addition to the general assessment for classifying the offender by the level of trafficking that he or she was conducting, I note, from sentencing precedents,

that the classification of an offender is also affected by the quantity and type(s) of controlled drugs and other substances that were trafficked or possessed for that purpose. The categories of drug traffickers mentioned in *Fifield*, *supra*, namely, the isolated accommodator of a friend, the petty retailer, the large retailer or small wholesaler, or the big time operator, were established by the court to illustrate the nature and quality of the trafficking or possession for the purpose of trafficking. From this, I conclude that the court was, in reality, looking at various factors which ought to be considered in assessing the moral blameworthiness and degree of the responsibility of the offender and their impact on the proportionality and parity principles found in Section 718.1 and 718.2 of the **Criminal Code**. In terms of the quantity and types of controlled drugs and other substances possessed by Mr. Cleghorn, I find that he was certainly at the lower end of the continuum of drug traffickers and that the facts of this case established that he had a relatively small amount of MDMA for trafficking, and that he did not have any other **CDSA** substances in his possession for the purposes of trafficking.

[43] With respect to the nature and effect of MDMA or ecstasy which was very well described in cases such as *Bercier*, *supra*, I find that, while MDMA is now a **CDSA** schedule I substance, there does not appear to be same type of conclusive evidence that it has the same corrosive effect on the community as cocaine. It is

evident from the research reports, which have been accepted by courts of appeal and other trial courts, that MDMA is not addictive like cocaine, and presumably because of that fact, the expert evidence in *Bercier* indicated that it is not connected with other crimes such as thefts, robberies or break and enters that are often committed to obtain funds to fuel addictions. As a result of the foregoing, while I accept the fact that MDMA or "ecstasy", as a **CDSA** schedule I substance, is a "dangerous drug" which may cause long-term central nervous system disorders or in certain circumstances, death, I find that imposing a sentence upon Mr. Cleghorn that would be similar to an offender who had trafficked a similar amount of cocaine might unintentionally result in the application of a "cookie-cutter" approach to this sentencing.

[44] Once again, as mentioned in *Fifield*, *supra*, at para. 11, sentencing must be flexible and requires an individual appraisal of the rehabilitative and deterrent aspects of each case, and as such, the categorization of the drug trafficker or the particular schedule of the **CDSA** substance alone, should not result in a so-called "cookie-cutter approach" by the court.

[45] In this case, the Crown Attorney has submitted that the appropriate sentence in all the circumstances of this case is to impose a sentence of a penitentiary term, or close to it, upon Mr. Cleghorn because MDMA or "ecstasy" is in the same

**CDSA** schedule as cocaine. It is therefore the position of the Crown that the offender should receive a sentence similar to an accommodator or petty retailer who has trafficked in cocaine.

[46] However, when I consider: (1) the relatively small amount of MDMA or "ecstasy" that Mr. Cleghorn trafficked or had in his possession for the purpose of trafficking, as an accommodator or petty retailer; (2) the sentences imposed for similar offenders who committed similar offences involving the trafficking of MDMA; and (3) there are relatively few aggravating circumstances and that there are several mitigating circumstances present, I find that a sentence in the area of a federal term of imprisonment would be unduly harsh and long and not in keeping with Mr. Cleghorn's prospects for rehabilitation.

[47] At the other end of the spectrum, Defence Counsel has submitted that, given the relatively small amount of MDMA that was sold by Mr. Cleghorn and the positive nature of the pre-sentence report, the court should consider suspending his sentence and placing him on probation for a lengthy period of time.

[48] After having considered the sentencing submissions of Defence Counsel, I find that suspending sentence and placing Mr. Cleghorn on probation for a lengthy period of time would not reflect the clear direction of our Court of Appeal, stated

on several occasions, that where an offender is found guilty of trafficking "dangerous drugs" for profit, the court's primary consideration in sentencing should address specific and general deterrence as well as denunciation of the unlawful conduct.

[49] Furthermore, I find that suspending sentence and placing Mr. Cleghorn on probation would not take sufficient account of the proportionality principle set out in Section 718.1 of the **Criminal Code**. In this case, the facts established that Mr. Cleghorn trafficked a **CDSA** schedule I substance, which has been determined to be "dangerous drug" in a very public place (the Evolve Music Festival) for his own profit. In those circumstances, I find that his degree of responsibility is quite high and that Parliament has also made it clear that the gravity of that offence is very high, since he is subject to a maximum penalty of imprisonment for life.

[50] In view of the foregoing, I find that neither a sentence of a federal term of imprisonment, nor suspending sentence and ordering a lengthy term of probation are the just and appropriate sanctions to be ordered in this case. Furthermore, given the fact that a CSO of imprisonment in the community is no longer an available sentencing option in the circumstances of this case, I find that a sentence of

imprisonment is the just and appropriate sanction in all the circumstances of this offence and the particular circumstances of the offender.

[51] Having come to those conclusions, the final issue to determine is the nature of that just and appropriate sanction in all the circumstances of this case. In order to determine the just and appropriate sanction for a youthful, first-time offender or an offender who is being ordered to serve a first sentence of imprisonment, I am reminded that the sentencing judge should consider the principle of restraint that a first sentence of imprisonment should be as short as possible and tailored to the individual circumstances of the accused, rather than solely for the purpose of general deterrence: see *R v. Priest*, 1996 CanLii 1381 (ONCA).

[52] Based upon the parity principle, similar offenders who committed similar offences in similar circumstances had been sentenced to terms of 6 to 12 months of imprisonment to be served under the terms of a CSO of imprisonment in the community. However, as I indicated previously and as both counsel acknowledged during their submissions, as a result of the legislative amendments in November, 2012, a CSO of imprisonment in the community is no longer an available option for this offence, even if I was to find that it was the most appropriate option in all the circumstances of the case.

[53] Therefore, in order to determine the appropriate range of imprisonment for Mr. Cleghorn which, of course, cannot involve the imposition of a CSO of imprisonment in the community, I find that it is important to take into account, in making that determination, the comments of Chief Justice Lamer in *R. v. Proulx,* 2000 SCC 5 (CanLii) at para. 102, that incarceration will usually provide more denunciation than a conditional sentence. However, Lamer CJC also pointed out that a conditional sentence can still provide a significant amount of denunciation, particularly "when onerous conditions are imposed and the duration of the conditional sentence is extended beyond the duration of the jail sentence that would ordinarily have been imposed in the circumstances."

[54] In ordering a CSO of imprisonment in the community, the sentencing judge must reject a probationary sentence as well as a penitentiary term as being inappropriate sentencing options, consider any statutory prerequisites and then determine if a CSO would be consistent with the fundamental purpose and principles of sentencing.

[55] In determining the length of a CSO and the impact of similar cases where a jail sentence was imposed by the court or the situation where jail sentence is imposed instead of a CSO, the Chief Justice clearly pointed out in *Proulx*, *supra*, at para. 104, that the literal interpretation of Section 742.1 of the **Code** that a

conditional sentence must be of equivalent duration to a jail term that would otherwise have been imposed "should be eschewed." With that concept in mind, I find that it is of particular importance to note the additional comments of Lamer CJC in *Proulx*, *supra*, at para. 104, that "(T)his approach does not require that there be any equivalence between the duration of the conditional sentence and the jail term that would otherwise have been imposed." I find that those comments are instructive when determining the just and appropriate range of sentence based upon sentencing precedents which imposed a CSO, in a case such as this, where a CSO of imprisonment is no longer an available sentencing option.

[56] After having considered the proportionality and the parity principles, the principle of restraint for a first sentence of imprisonment, the impact of the range of sentence where CSO's of imprisonment in the community have been typically ordered for offenders who had committed similar offences under similar circumstances when MDMA or "ecstasy" was a **CDSA** schedule III substance, and the aggravating and mitigating factors, I find that the just and appropriate sanction in all the circumstances of this offence and this particular offender is to order Mr. Cleghorn to serve a sentence of 90 days of imprisonment on an intermittent basis, and also starting from today, Mr. Cleghorn will be subject to the terms and conditions of a probation order for a period of 30 months.

[57] The terms and conditions of a probation order shall be as follows:

1. keep the peace and be of good behavior;

2. appear before the court as and when required to do so by the court;

3. notify the court or probation officer, in advance, of any change of name, address, employment or occupation;

And in addition:

4. report to the probation officer at 277 Pleasant Street, Dartmouth, Nova Scotia, today and thereafter, as directed by your probation officer;

5. not to possess, take or consume a controlled substance as defined in the Controlled Drugs and Substances Act, except in accordance with a physician's prescription for you or a legal authorization;

6. complete 150 hours of community service work as directed by your probation officer on or before the termination of this probation order;

7. not to have in your possession any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition or explosive substance;

8. not to be on or within the premises where the Evolve Music Festival will be held in 2015 or a subsequent year, while under the terms of this probation order;

9. attend for substance abuse assessment and counseling as directed by your probation officer;

10. attend for assessment, counseling and programming generally as directed by your probation officer; and

11. participate in and cooperate with any assessment, counseling or programming that may be directed by your probation officer;

[58] In addition to the foregoing orders, I am granting the order requested by the Crown Attorney pursuant to section 16 of the **CDSA** with respect to the sum of $115 which is sought to be forfeited by the Crown as offence-related property.

[59] I also prepared to sign and hereby order the mandatory Section 109 **Criminal Code** firearms prohibition which prohibits Mr. Cleghorn from possessing any firearm, other than a prohibited firearm or restricted firearm and any crossbow, restricted weapon, ammunition and explosive substance during a period that begins today and ends not earlier than 10 years after his release from imprisonment; and also prohibits him from possessing any prohibited firearm,

restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life.

[60] Furthermore, I am also signing an order under Section 487.051 of the **Criminal Code** which will require Mr. Cleghorn to provide a sample of his DNA to the authorities in accordance with the terms and conditions that are contained in the form of order prescribed by that section.

[61] Finally, with respect to the imposition of a surcharge for victims pursuant to Section 737 of the **Criminal Code**, since this case involved an offence which was punishable by indictment, the victim surcharge shall be $200. I will ask counsel to indicate how much time Mr. Cleghorn would require to make that payment.

Theodore K. Tax, JPC