PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Scott, 2012 NSPC 6

Date: 20120201
Docket: 2271033, 2271034
Registry: Kentville

Between:

Her Majesty the Queen

v.

Jeremy James Scott

Judge:	The Honourable Judge Alan T. Tufts
Heard:	January 10, 2012, in Kentville, Nova Scotia
Charge:	**s. 5(2) *Controlled Drugs and Substances Act*** **s. 4(1) *Controlled Drugs and Substances Act***
Counsel:	Bill Watts, for the Crown Robert Stewart, Q.C., for the Defence

By the Court:

INTRODUCTION

[1] The accused has pled guilty to one count under s. 5(2) of the *Controlled Drugs and Substances Act* – possession for the purposes of trafficking in cocaine and one count of possession of a controlled substance – a small amount of marijuana - under s. 4(1) of *Controlled Drugs and Substances Act.* It is the first offence which is the primary focus of this sentence proceeding.

[2] The Crown seeks a custodial term of 30 months in a federal institution. Defence argues that a term of imprisonment of less than two years is appropriate and that term should be served in the community under a conditional sentence order. The Crown's submissions included references to recent rulings of our Appeal Court on sentencing for cocaine trafficking offences.

ISSUE

[3] Our Court of Appeal has repeatedly emphasized the objectives of deterrence and denunciation when reviewing sentences for offences involving the trafficking of or possession for the purposes of trafficking in cocaine and has, in many cases, found that terms of federal custody are required. However, those comments and directions from our Appeal Court have arisen in cases where the circumstances of the offence are more serious than those here or the background or circumstances of the offender are much different than this offender. The primary issue in this sentence proceeding is whether a federal term of custody is required in every case which involves cocaine trafficking and if not, when and under what circumstances would a sentence below that threshold be appropriate and could it be served in the community. In short, does this case require the imposition of a federal term of custody?

[4] Sentencing is one of the most difficult tasks for a trial judge. This case is a good example of this. On the one hand, cocaine and other Schedule I drugs can have a devastating effect on our community. In some cases I have seen the effect of drug addiction on members of our community in my experience as a Provincial Court Judge. Our Appeal Court has repeatedly reminded lower courts of that. On

the other hand, this offender appears to have turned his life around, rid himself of his former associates and is now in a long-term and supportive relationship with his spouse, who is expecting their child. Is a federal term of custody a proportionate response to his conduct and his circumstances? Is this the least restrictive sentence that meets the purpose and principles of sentence or can a conditional sentence order meet these purposes and be in accordance with these principles?

FACTS

[5] There was no *viva voce* testimony called in this sentence proceeding. All the evidence was received by submissions. The offender was stopped by police after they received a tip which indicated that the offender had drugs in his possession. It was midday on the day in question. He was stopped in the driveway of his home. He was arrested and searched, as was his vehicle. The police located 30 grams of powdered cocaine, a spoon, scales with a residue of cocaine, a small amount of marihuana and cash in the amount of $ 280.00. Also found were six small empty Ziploc baggies – referred to as “dime bags”. His cellphone was seized and “text messages” were retrieved which were apparently consistent with drug activity. However, there was no evidence about how many such messages there were nor the nature of these messages. This last piece of evidence provides little, if any, assistance in determining precisely what type or level of activity the offender was engaged in. The offender apparently had just purchased the drugs shortly before being arrested. Through his counsel he indicated that he was a significant user of drugs – including cocaine, and that it appears he sold the drugs to underwrite the cost of his own addiction.

[6] During sentencing submissions there was much discussion about characterizing the offender in terms of the *Fifield* categories and where on a continuum within those categories does the offender lie. In my opinion it is clear that the offender is a petty retailer. I will comment on this again, below. The defence argues that he is “at best” a petty retailer. The Crown argues that he is not, principally because of the volume of drugs, which the Crown argues is significant, suggesting that at the time this was one of the largest quantities seized by police in this area, and secondly, that the *Fifield* categories were designed to describe marihuana traffickers and do not apply to Schedule I drugs.

[7] On this latter point, the reference to *Fifield* categories is not necessarily to describe the range of sentencing, but to describe the type or degree of activity of the offender. This was endorsed by our Court of Appeal in *R. v. Knickle, infra*.

[8] The difficulty is trying to determine what type of retailer this offender is. He was unknown to the police before this incident. How much of the drug did he acquire for himself and hence what portion was available for resale? There was no evidence about how much cocaine a regular or occasional user would use. Counsel agreed that cocaine retails for approximately $100.00 per gram – the defence says at most $100.00 per gram. The offender paid $700.00 for the drugs he purchased that day.

[9] There was no evidence indicating whether he was a "pusher" – peddling his drugs within the community, or whether he had a close circle of friends or confidantes that he sold or distributed to, or whether his activity lay somewhere in between those two activities. There was not sufficient evidence to make any inferences regarding the extent of his activity. There was no evidence of any of the aggravating circumstances listed in s. 10(2) (a) (i) – (iv) (b) or (c) of the *Controlled Drugs and Substances Act.*

[10] I accept that the primary purpose of the offender's possession of these drugs was to feed his own habit and that he sold the drugs to offset his costs. Beyond this I cannot, given the lack of evidence, draw any other inferences to describe him in terms of his activities as a trafficker or potential trafficker. Given the burden on the Crown to establish any aggravating features I can only conclude that he was a petty retailer at the lower end of the range.

[11] Having said this, the amount of drugs – 30 grams – and its street value of up to $3,000.00 remains an issue and I will make more reference to this in my analysis below.

THE LAW OF SENTENCING

[12] It is not my purpose to write a treatise on the law of sentencing. The purposes, principles and objectives of sentencing for those convicted of drug offences are set out in s. 10 of the *Controlled Drugs and Substances Act* and s. 718, s. 1718.1 and s. 718.2 of the *Criminal Code*. I need not repeat those sections here.

[13] *R. v. Nasogaluak* 2010 SCC 6 is the latest pronouncement of the Supreme Court of Canada commenting on the law of sentencing. It is worth reproducing the Court's description of the principles of sentencing, starting at para. 39:

> **39** ...The objectives and principles of sentencing were recently codified in ss. 718 to 718.2 of the *Criminal Code* to bring greater consistency and clarity to sentencing decisions. Judges are now directed in s. 718 to consider the fundamental purpose of sentencing as that of contributing, along with crime prevention measures, to "respect for the law and the maintenance of a just, peaceful and safe society". This purpose is met by the imposition of "just sanctions" that reflect the usual array of sentencing objectives, as set out in the same provision: denunciation, general and specific deterrence, separation of offenders, rehabilitation, reparation, and a recent addition: the promotion of a sense of responsibility in the offender and acknowledgement of the harm caused to the victim and to the community.
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> **40** The objectives of sentencing are given sharper focus in s. 718.1, which mandates that a sentence be "proportionate to the gravity of the offence and the degree of responsibility of the offender". Thus, whatever weight a judge may wish to accord to the objectives listed above, the resulting sentence *must* respect the fundamental principle of proportionality. Section 718.2 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.
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> **41** It is clear from these provisions that the principle of proportionality is central to the sentencing process (*R. v. Solowan*, 2008 SCC 62, [2008] 3 S.C.R. 309, at para. 12). This emphasis was not borne of the 1996 amendments to the *Code* but, rather, reflects its long history as a guiding principle in sentencing (e.g. *R. v. Wilmott* (1966), 58 D.L.R. (2d) 33 (Ont. C.A.)). It has a constitutional dimension, in that s. 12 of the *Charter* forbids the imposition of a grossly disproportionate sentence that would outrage society's standards of decency. But what does proportionality mean in the context of sentencing?
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> **42** For one, it requires that a sentence not exceed what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence. In this sense, the principle serves a limiting or restraining function. However, the rights-based, protective angle of proportionality is counter-balanced by its alignment with the "just deserts" philosophy of sentencing, which seeks to ensure that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm *they* caused (*R. v. M.* (C.A.), [1996] 1 S.C.R. 500, at para. 81; *Re B.C. Motor Vehicle Act*, [1985] 2

S.C.R. 486, at pp. 533-34, per Wilson J., concurring). Understood in this latter sense, sentencing is a form of judicial and social censure (J. V. Roberts and D. P. Cole, "Introduction to Sentencing and Parole", in Roberts and Cole, eds., Making Sense of Sentencing (1999), 3, at p. 10). Whatever the rationale for proportionality, however, the degree of censure required to express society's condemnation of the offence is always limited by the principle that an offender's sentence must be equivalent to his or her moral culpability, and not greater than it. The two perspectives on proportionality thus converge in a sentence that both speaks out against the offence and punishes the offender no more than is necessary.

43 The language in ss. 718 to 718.2 of the *Code* is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender. The determination of a "fit" sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case (*R. v. Lyons*, [1987] 2 S.C.R. 309; M. (C.A.); *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.)). No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case. The relative importance of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge's discretion to decide on the particular blend of sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines and principles in the Code and in the case law.

44 The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the *Code*. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.

45 The discretion of a sentencing judge is also constrained by statute, not only through the general sentencing principles and objectives enshrined in ss. 718 to 718.2 articulated above but also through the restricted availability of certain sanctions in the *Code*. For instance, s. 732 prohibits a court from ordering that a sentence of imprisonment exceeding 90 days be served intermittently. Similar restrictions exist for sanctions such as discharges (s. 730), fines (s. 734),

> conditional sentences (s. 742.1) and probationary terms (s. 731). Parliament has also seen fit to reduce the scope of available sanctions for certain offences through the enactment of mandatory minimum sentences. A relatively new phenomenon in Canadian law, the minimum sentence is a forceful expression of governmental policy in the area of criminal law. Certain minimum sentences have been successfully challenged under s. 12 of the *Charter* on the basis that they constituted grossly disproportionate punishment in the circumstances of the case (*R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Bill* (1998), 13 C.R. (5th) 125 (B.C.S.C.)), while others have been upheld (*R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90). Absent a declaration of unconstitutionality, minimum sentences must be ordered where so provided in the *Code*. A judge's discretion does not extend so far as to override this clear statement of legislative intent.
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> [emphasis added]

[14] From these above references let me make a few points:

1. The purpose of sentencing is to contribute to the protection of society and respect for the law, but it is not the sole method to achieve these ends. Parliament recognizes that crime prevention measures play a role as well. The responsibility for protecting society does not fall entirely on the sentencing process. It is part of a larger societal effort at crime prevention.

2. The sanctions imposed – fines, probation, imprisonment, whether in the community or in an institution must be “just sanctions,” that is imposed using a measure of proportionality and restraint.

3. There is an array of sentencing objectives – there is not just one sentencing objective. No one objective trumps the others.

4. Proportionality is a fundamental principle, but secondary principles of parity and restraint apply as well.

5. A sentence which falls outside the “regular range” is not necessarily unfit provided in meets the principles and objectives of sentencing.

[15] Finally, while I must be guided by the purpose and principles of sentencing I describe above, sentencing is an individualized exercise and no two cases are identical.

[16] In *R. v. C.A.M.*, [1996] 1 SCR 500, Justice Lamer says, at para. 91,

> …Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. …

DIRECTIONS FROM THE N.S. COURT OF APPEAL

[17] Much of the submissions in this sentence hearing, as in most hearings involving cocaine trafficking, focused on the directions our Appeal Court have given about the sentencing of offenders convicted of cocaine trafficking offences. The Crown argues here, as it has in many other sentencing cases, that *Knickle, infra*, *Conway, infra* and *Butt* , *infra* all stand for the proposition that a federal sentence for cocaine trafficking offences is required.

[18] It is for this reason that a complete review of the Court's treatment of such cases is in order. I start with *R. v. Merlin*, [1984] N.S.J. No. 346, simply because the Court of Appeal in later decisions referred to its holdings over the last 25 years. *Merlin* was decided a little over 25 years ago. There the Court of Appeal considered for the first time a sentence for trafficking in cocaine – see para. 12, and does a complete review of the sentencing decisions for these types of offences across Canada. It recognizes cocaine as a drug more serious than marihuana or hashish, but less serious than heroin – para. 13-14. The Court found that the sentencing should be proportional to the amount of drugs and the money involved. In that case the amount of drugs was 70 grams and the purchase amount was $9,000.00. The offender's sentence was increased by the Court of Appeal to nine months custody. This was before conditional sentence orders were permitted.

[19] In *R. v. Byers*, [1989] N.S.J. No. 168, the Court of Appeal considered the sentence of an offender who sold four grams and later two grams of cocaine to an undercover agent for five hundred dollars. The offender had a long criminal record

and had been sentenced to federal custody previously. He had an ongoing involvement in drug trafficking in the Halifax area. The Court uses strong language in describing cocaine as a dangerous drug and being a highly addictive substance, the Court said the following:

> In my opinion the time has come for this Court to give warning to all those greedy persons who deal in the supply and distribution of the narcotic cocaine that more severe penalties will be imposed even when relatively small amounts of the drug are involved. Nor should the lack of a criminal record stand in the way of a substantial period of imprisonment. No one today can claim to be so naïve as to think that trafficking in cocaine can be conducted without serious damage to our societal structure.

[20] The Court increased the offender's sentence to 18 months for each offence for a total of three years.

[21] In *R. v. Downey*, [1989] N.S.J. No. 368, the Court of Appeal upheld the sentence of 18 months for possession for the purposes of trafficking four and a half grams of cocaine in 18 individually wrapped packages. The case report did not disclosure the offender's age, circumstances or criminal record. The Court referenced the passages in *R. v. Byers* noted above.

[22] In *R. v. Smith*, [1990] N.S.J. No. 30, the Court of Appeal increased the sentence to two years on each count for a total of four years for trafficking for an offender who sold two ounces of cocaine on two separate occasions to an undercover agent. The total value was ten thousand dollars. The offender was 35 years of age. There was no indication of his criminal record.

[23] In *R. v. Huskins*, [1990] N.S.J. No. 46, the Court of Appeal increased the sentence of an offender convicted of trafficking involving four grams of cocaine valued at five thousand dollars to three years in custody. He was 42 years of age and had 29 prior offences. Again the Court described cocaine as a dangerous drug and those involved in selling it must be dealt with severely. The Court comments that it is rare that sentences below federal time should be considered.

[24] In *R. v. Carvery*, [1991] N.S.J. No. 501, the sentence for an offender described as a high level trafficker in cocaine was increased to five years. He was involved in an organized distribution ring of cocaine which processed it into crack form.

[25] In *R. v. Crossan*, [1993] N.S.J. No. 19, the Court increased the sentence of an offender for possession for the purposes of trafficking cocaine to four and a half years. This case involved 116 grams of cocaine and other drugs. The offender was a necessary link in a chain of distribution of narcotics.

[26] In *R. v. Stokes*, [1993] N.S.J. No. 412, again the Court upheld the seven years sentence for an offender who had a lengthy prior drug record for three offences of possession for the purposes of trafficking in cocaine.

[27] In *R. v. Robins* (1993*)*, 121 N.S.R. (2d) 254, the Court of Appeal increased the sentence of an offender convicted of possession for the purposes of trafficking in 23.57 grams of cocaine to 18 months. The Court said at para. 4 there were no exceptional circumstances where cocaine is involved.

[28] In *R. v. Sparks*, [1993] N.S.J. No. 448, the Court of Appeal again increased the sentence of an offender convicted of four offences of trafficking in crack cocaine to 32 months custody. He had an "extreme criminal record". He was 23 years of age.

[29] In *R. v. Clarke*, [1994] N.S.J. No. 474, the Court of Appeal upheld a four and a half year sentence for an offender convicted of possession for the purposes of trafficking in one kilogram of cocaine. He received a consecutive sentence for possession of a powerful semi-automatic handgun.

[30] In *R. v. Downey*, [2000] N.S.J. No. 311, the Court of Appeal upheld a three year sentence for trafficking in cocaine for an offender who had 28 prior offences, including drug offences.

[31] In *R. v. Dawe*, [2002] N.SJ. No. 504, the Court of Appeal upheld a 15 month sentence for possession for the purposes of trafficking in three drugs: cocaine, hashish and marihuana. There were eight one-half gram packages of cocaine, for a total of four grams. The offender had a criminal record. The Court of Appeal described the sentence as lenient in response to the offender's appeal that the sentence should be served in the community.

[32] In *R. v. J. B.M.*, [2003] N.S.J. No. 469, the Court of Appeal upheld a three year sentence for a 20-year-old offender with a record who conspired to bring cocaine into prison.

[33] *R. v. Steeves*, 2007 NSCA 130 is the first in a series of Court of Appeal decisions which are often now referred to in cocaine trafficking sentencings. There the offender was found with 77 grams of cocaine and 100 pills of ecstasy and pled guilty to possession for the purposes of trafficking. The offender was 29 years of age and had a prior unrelated criminal record. The Court of Appeal increased the sentence to two and a half years. The Court referred to some of its earlier decisions I noted above and indicated that trafficking in cocaine, "generally attracts a sentence of two years or more", however the Court pointed out that while a federal sentence is the norm, conditional sentence orders are not precluded. At para. 20 the Court says,

> While time served in a federal penitentiary is the norm, this is not to say that conditional sentences are precluded for trafficking in cocaine. Conditional sentences have been imposed where the judge has determined that exceptional circumstances exist. See, for example *R. v. Cameron*, [2002] N.S.J. No. 163 (S.C.); *R. v. Provo*, [2001] N.S.J. No. 526, 2001 NSSC 189; *R. v. Messervey*, [2004] N.S.J. No. 520 (P.C.) ; and *R. v. Coombs*, [2005] N.S.J. No. 158, 2005 NSSC 90. Circumstances that are sufficiently exceptional as to change a sentence of incarceration for such a serious offence to one that can be served in the community are rare.

[34] I will discuss the examples our Court of Appeal reference in the above quote further in my decision.

[35] In *R. v. Knickle*, 2009 NSCA 59, the Nova Scotia Court of Appeal does a review of its prior decisions and reinforces the previous pronouncement that cocaine trafficking is deserving of significant sanctions. In this case the offender was found in possession of 226 grams of cocaine, together with six small bags of 14.3 grams each. The street value was between $23,000.00 and $31,000.00. The offender was in receipt of Workers Compensation Benefits and owned a home valued at $500,000.00 with mortgage payments of $2,000.00 a month. The Court of Appeal confirmed the *Fifield* categories introduced in 1978 by the Court of Appeal in relation to marihuana trafficking cases.

> 17 The judge failed to recognize how this court has consistently categorized drug traffickers, based on the type and amount of drug involved and the level of involvement in the drug business, to assist in placing them within the range. In **R. v. Fifield**, [1978] N.S.J. No. 42, the court described the following general categories of drug traffickers: the young user sharing marijuana with a companion; the petty retailer who is not shown to be involved full-time or in a large-scale commercial distribution; the large-scale retailers and commercial

> wholesalers. Chief Justice MacKeigan noted that the amount of drugs involved helps determine the quality of the act or the probable category of trafficker. The **Fifield** categories have also been applied by this court to cocaine and crack cocaine trafficking cases.

[36] The Court overturned the trial court's imposition of a conditional sentence order and imposed a sentence of three and a half years, pointing out that the Court of Appeal has never approved or endorsed a conditional sentence order for offenses of trafficking in cocaine.

[37] The Court distinguished the several cases of *R. v. Dann*, 2002 NSSC 237; *R. v. Messervey*, [2004] N.S.J. No. 520 (P.C.), *R. v. Coombs*, 2005 NSSC 90 , *R. v. Talbot*, [1999] N.S.J. No. 187 (S.C.) and *R. v. Provo*, 2001 NSSC 189, finding that those cases involved only low-level or petty retailers of small amounts of cocaine. The Court of Appeal placed Mr. Knickle in the "higher retail level" of the *Fifield* categories. The Court repeated that the "principle of deterrence" must be emphasized.

[38] Finally, the Court said at para. 28,

> The range of sentencing for a higher level retailer of cocaine starts at two years...There are no extraordinary or exceptional circumstances in this case that deserve any consideration of the possibility of deviation from the normal range of sentence. [emphasis added]

[39] In *R. v. Conway*, 2009 NSCA 95, the same Court of Appeal panel as in *Knickle* rejected the imposition of a conditional sentence order for trafficking in cocaine. There the offender, age 65, with no record, operated a dial-a-dope operation involving 10 grams of crack cocaine and marihuana. The street value of the drugs was $13,000.00. Once again the Court points out that there were "no exceptional factors apparent here suffice to take this sentence out of the usual range for a mid to high level retailer" [emphasis added]. Finally the Court said that Mr. Conway's operation was sophisticated and planned, it was not short term or impulsive and the quantity of drugs were substantial.

[40] In *R. v. Butt*, 2010 NSCA 56, the Court of Appeal increased the sentence to five years for an offender who acted as a middleman and had facilitated the receipt of two kilograms of cocaine. At para. 13 the Court says,

> …Involvement in the cocaine trade, at any level, attracts substantial penalties (see, for example, **R. v. Conway**, 2009 NSCA 95; **R. v. Knickle**, 2009 NSCA 59; **R. v. Steeves**, 2007 NSCA 130; **R. v. Dawe**, 2002 NSCA 147; **R. v. Robins**, [1993] N.S.J. No. 152 (Q.L.) (C.A.); **R. v. Huskins**, [1990] N.S.J. No. 46 (Q.L.) (C.A.); and **R. v. Smith**, [1990] N.S.J. No. 30 (Q.L.) (C.A.)). It is significant that the CDSA classifies cocaine as one of the drugs for which trafficking can attract a life sentence. [emphasis added]

[41] As I described earlier, both *R. v. Dawe* and *R. v. Robins* involved sentences of less than two years. The Court of Appeal in *Butt* refers to these as "significant penalties."

[42] In *R. v. Aucoin*, 2011 NSCA 64, the Court of appeal upheld the two year federal sentence for a youthful adult offender convicted of possession for the purposes of trafficking in cocaine. The factual context is summarized at para. 40 of the Court of Appeal's decision.

> … There was evidence (1) that the appellant had eight baggies of cocaine, (2) that it was unlikely a user as opposed to a trafficker would purchase that quantity of cocaine bagged in smaller quantities when it is more economical to buy it in a single multi-gram bag, (3) that he had 100 green pills commonly sold as Ecstasy divided into two baggies, (4) that he had $290 or $295 cash in his pocket, separated into money inside and outside his wallet and that traffickers sometimes separate their float from their profit, and (5) that the appellant was in the downtown area of a small town near a university, around midnight, during the busy Apple Blossom Festival where there would be an opportunity to sell cocaine. …

[43] At para. 46 the Court found the sentence imposed was not unfit:

> Considering her reasons, I am not satisfied the judge felt constrained from imposing a conditional sentence and therefore failed to consider and apply the principles of sentencing. She specifically referred to the purpose and principles of sentencing in her reasons. She referred to the need to stress one of those principles, deterrence, when sentencing for trafficking in cocaine. This is not an error. It is in accordance with cases decided by this Court; *R. v. Butt*, 2010 NSCA 56, and *R. v. Knickle*, 2009 NSCA 59. She correctly indicated that she cannot only consider the rehabilitation of Mr. Aucoin to the exclusion of the other principles of sentencing. She considered the mitigating factors. The fact she did not specifically refer to the fact a conditional sentence can also have a deterrent effect in her oral decision in a busy provincial court, does not satisfy me that she failed to consider this. While it may have been better if she had mentioned this, she is not required to deal with every possible aspect of sentencing, especially in the

> situation she was in of the appellant constantly interrupting her while she was giving her sentencing decision.

[44] Finally, two recent decisions of the Nova Scotia Court of Appeal should be noted – *R. v. Jamieson*, 2011 NSCA 122 and *R. v. Calder*, 2012 NSCA 3. In *Jamieson* the offender pled guilty to two offences of possession for the purposes of trafficking in cocaine and ecstasy. The offences involved trafficking in these substances on six occasions. A joint submission of two years federal custody was accepted by the trial judge. The trial judge, however, was unaware that the sentence of two years foreclosed the offender's standing to challenge his deportation. The Court of Appeal found that this "disproportionately severe collateral sanction" justified a small modification of his otherwise "fit sentence", reducing it by two days, resulting in a sentence of less than two years. However at the same time the Court referred to *Knickle* and cautioned that nothing in these reasons should suggest softening of the Court's previous view towards the seriousness of cocaine trafficking. The Court said at para. 38, "…Persons who seek to profit by trafficking in cocaine, or possessing it for the purpose of trafficking, will upon conviction, be virtually guaranteed a prison term in a federal penitentiary." [emphasis added]

[45] Then in *R. v. Calder, supra*, a case decided since this case was argued, the Court of Appeal upheld the 30 month sentence for trafficking and possession for the purposes of trafficking in hydromorphone – a Schedule I drug. In doing so, the court commented at para. 35, "It is important to note the judge did not find that a sentence in excess of two years is always required for a trafficking offence or for a possession for the purpose of trafficking offence. He recognized a conditional sentence for these offences is a possibility: …"

[46] The court emphasized at para. 36 that the range for "this offender and these offences" begin at two years. There the offender, a lawyer, took drugs into a jail.

[47] Before attempting to summarize the directions our appeal court are providing from these decisions let me return briefly to the primary task at hand in this sentencing proceeding.

[48] What I must determine is:

1. Is a federal sentence required for any offence of trafficking or possession for the purposes of trafficking in cocaine? Does the

range begin at two years subject to “exceptional circumstances” or can the range include terms of imprisonment of less than two years? and

2. If a sentence of less than two years is appropriate can it be served in the community and what are the primary factors which determine that analysis?

[49] The question of course must be analyzed in a framework of the purposes, objectives and principles of sentencing I described earlier and as interpreted by the Supreme Court of Canada and by our Court of Appeal, which I now attempt to describe.

[50] What then does our Court of Appeal say about cocaine trafficking? First of all, it is clear that cocaine is a dangerous narcotic and its presence in our province can have devastating effects on peoples’ lives – see *R. v. Robins*, para. 4; *R. v. Butt*, para. 13, and accordingly deterrence is the primary objective – *R. v. Knickle*, para. 26; *R. v. Conway*, para. 12; *R. v. Butt*, para. 14, *R. v. Steeves*, para. 18. All of the jurisprudence reinforces this.

[51] The Court has specifically endorsed the *Fifield* categories for categorizing drug traffickers:

1. The young user having or sharing with a companion;
2. The petty retailer not involved in full-time distribution; and
3. Large-scale retailers and commercial wholesalers.

The amount of drugs helps to determine the appropriate category – see *Knickle*, para. 17.

[52] In *R. v. Dawe, supra* the Court of Appeal, in the context of considering an appeal from an offender who argued the 15 month sentence should be served in the community, said possession for the purpose of trafficking “typically results in sentences of two years or more”. Later in *Steeves* the Court of Appeal, after referring to *Dawe*, said at para. 20:

> While time served in a federal penitentiary is the norm, this is not to say that conditional sentences are precluded for trafficking in cocaine. Conditional sentences have been imposed where the judge has determined that exceptional

> circumstances exist. See, for example *R. v. Cameron*, [2002] N.S.J. No. 163 (S.C.); *R. v. Provo*, [2001] N.S.J. No. 526, 2001 NSSC 189; *R. v. Messervey*, [2004] N.S.J. No. 520 (P.C.); and *R. v. Coombs*, [2005] N.S.J. No. 158, 2005 NSSC 90. Circumstances that are sufficiently exceptional as to change a sentence of incarceration for such a serious offence to one that can be served in the community are rare.

[53] How does one interpret the words “typically” or the word “norm” in this context? Does this mean any offence involving cocaine trafficking requires a federal sentence unless exceptional circumstances can be demonstrated? Does it mean cases which are not the “norm” or “typical” do not necessarily require a federal sentence and “exceptional circumstances” need not be shown? Previously in *Huskins* the Court of Appeal made similar comments suggesting the sentence of less than federal time would be rare – see pg. 5.

[54] In my view this may be two sides of the same coin. Most, if not all, of the cases cited above and those that I will refer to below from trial courts where federal sentences are imposed or reviewed have in varying degrees the presences of different aggravating features, which I will refer to later. A case which has few or no aggravating features beyond the presence of the cocaine itself may be “exceptional” or it may simply mean the case is not the “norm” or “typical In either event, in my view, there are cases involving cocaine trafficking which fall outside the range which starts at two years.

[55] Notwithstanding this, none of the cases reviewed above say directly that a federal sentence is required for every case involving trafficking in cocaine. In some cases the Court of Appeal have approved sentences below the two year threshold for federal sentences, albeit not to be served in the community – see *R. v. Dawe*; *R. v. Robins*; *R. v. Downey*, [1989] N.S.J. No. 368. The last two decided before the conditional sentence regime was enacted.

[56] Specifically, *Knickle* speaks of a range of sentencing for “higher level retailer of cocaine”, that is, between the second and third *Fifield* categories, to start at two years. It does not refer to low-level petty retailers. Further, all the Court of Appeal cases which I reviewed above have various aggravating features present – large amounts of drugs, presence of other drugs or weapons, higher level of activity, presence of crack cocaine or even more dangerous drugs, being part of a larger drug operation or involve offenders who have criminal records, therefore reducing the role of leniency and the effect of the principle of restraint.

[57] I recognize that the Court of Appeal in *Knickle* says that it has never endorsed a conditional sentence order for offences involving cocaine. However, I believe one must view that comment in the context of that case as well as with other earlier Appeal Court cases dealing with cocaine trafficking. Those cases, as I described simply have more aggravating features then other cases, such as the case before me. Indeed other Courts of Appeal have approved conditional sentences for cocaine trafficking – see *R v Kosananouvong* 2002 MBCA 144*; R v Ramous* 2007 MBCA 87*; R v Byrne* 2009 NLCA 3*; R v Brown* (19970 119 C.C.C. (3d) 147 (NLCA*); R v MacKinnon* 2009 PECA *;* see also *R v Murphy* 2011 MBCA 84 which approved a sentence of 18 months below the two year threshold for federal sentences.

[58] In *R. v. Butt* at para. 13 quoted above, the Court of Appeal simply refers to "substantial penalties" to be imposed for those involved in the cocaine trade "at any level". It is not a reference to a federal sentence, in my opinion. In fact the Court of Appeal cites as examples cases where the Court of Appeal approved sentences of less than two years – see *R. v. Dawe, supra* and *R. v. Robins, supra*.

[59] Finally, in *Jamieson*, in my opinion, the Court is simply reconfirming its prior view expressed in *Steeves, Knickle, Conway* and *Butt* and nothing in that case, in my opinion, is necessarily added by the Court's comment at para. 38. In *R. v. Calder, supra* the Court's comment that the trial judge did not find a sentence of over two years is always required for offences involving cocaine trafficking, in my opinion, confirms that there are cases involving cocaine trafficking or possession for the purposes cocaine trafficking, which do not require a two year sentence. In my opinion, while a term of imprisonment is generally called for in cocaine trafficking cases a federal sentence is not always required for every offence.

NOVA SCOTIA TRIAL COURT DECISIONS

[60] I now propose to canvas briefly some of the trial court decisions to determine what factors courts use to determine the appropriate length of sentence. But before doing so let me comment briefly about "starting points" and sentencing ranges which start at a particular sentence, usually a term of custody. *R. v. Arcand* 2010 ABCA 363 discusses at length the subject of starting points. The Alberta Court of Appeal makes the point that clarity in describing the circumstances of the offence is necessary to determine a starting point sentence. What are the

circumstances of the offence which trigger a particular starting point? Particular cases can then be measured against those defined circumstances to determine if the case at hand should be above or below the starting point.

[61] This should be distinguished from sentencing ranges for particular crimes with particular features which start at a particular level and move upward. In my opinion this is what *R. v. Knickle* represents, i.e., for a "higher level retailer of cocaine" the sentence should start at two years in a penitentiary. If the circumstances of the offence fall within this category, barring exceptional circumstances, the offence would move up from that starting point depending on the seriousness of the offence. With this in mind I propose to review some of the trial court decisions referenced by our Appeal Court. I propose to briefly reference them but not describe them in detail simply to highlight the distinguishing aspects.

[62] In *R. v. Cameron, supra, R. v. Provo, supra,* and *R. v. Coombs, supra,* the Nova Scotia Supreme Court imposed conditional sentence orders for offenders where cocaine trafficking or possession for the purpose of trafficking in cocaine was involved. In *Messervey, supra* the Provincial Court imposed a similar sentence. All of these cases were mentioned in *R. v. Steeves, supra,* as being exceptional. *Messervey*, *Talbot* and *Coombs* were also distinguished in *R. v. Knickle, supra*. In *R. v. Talbot, supra,* a small amount of drugs was involved, albeit cocaine, and the offender had no record. In *Provo* the offender was aged 28, had 16 prior offences and was involved with crack cocaine.

[63] In *Cameron* the offender was again involved with crack cocaine and sold drugs for a friend to support his drug habit and not for profit. His record was not drug-related or violent. In *Messervey* the offender was 21 years of age and had no record. He had been on strict house arrest conditions for two and a half years.

[64] In *R. v. Coombs, supra,* the offender trafficked in 50 grams of crack cocaine to an undercover agent. He was also subject to two and a half years of strict release conditions and had an unrelated criminal record. In *R. v. Sudsbury*, [2002] N.S.J. No. 137, the offender had very poor health and incarceration may have aggravated his depression. The Nova Scotia Supreme Court imposed a conditional sentence order for trafficking in cocaine.

[65] Other trial court decisions where penitentiary terms were imposed had various aggravating features or the absence of any mitigating features. In *R. v.*

Gray, [2001] N.S.J. No. 553, the offender had off-and-on for one year trafficked in crack cocaine. In *R. v. Tokic*, [2002] N.S.J. No. 80, the 37-year-old offender made four sales of cocaine where the total amount of 10 grams involved at $700.00. In *R. v. Dann*, 2002 NSSC 237 the offender with a prior drug record was involved in $25-30,000.00 worth of cocaine. In *R. v. David* , 2004 NSSC 241, 50 grams of crack cocaine valued at $3200.00 was involved. The offender was a mid-level "go between". In *R. v. Clarke*, 2005 NSSC 247, a 36-year-old offender was a "high-level trafficker". In *R. v. Boliver*, [2005] N.S.J. No. 325 (S.C.) crack cocaine was involved. In *R. v. Lively*, 2006 NSSC 274, the offence involved 15 grams of crack cocaine and the offender had a record of drug offences. In *R. v. Bonin*, [2008] N.S.J. No. 208 (S.C.), the offender managed a drug trafficking network involved with crack cocaine.

[66] In *R. v. MacIntosh*, 2009 NSSC 67, the offence involved 84 grams of cocaine, having a street value of $6,700-$8,400.00. The offender was 41 years of age and had a significant record. In *R. v. Francis* [Coady, J. NSSC, unreported], the offender, a cab driver, sold two stones of crack cocaine for profit to a stranger. A conditional sentence order was rejected in favour of a federal sentence. In *R. v. Banfield*, 2011 NSSC 56, 125 grams of cocaine was involved in an offence committed by a 26-year-old offender with a previous record.

[67] In a very recent case, *R. v. Marriott*, 2012 NSSC 16, a case specifically argued by the defence here, the 62-year-old offender was found with 28 grams of cocaine powder – 11.26 grams distributed into 16 individual bags. Justice Wright described the amount of drugs as, "the small quantity" and described the offender as a "petty retailer". He described his "lengthy criminal record" as an aggravating factor.[1] The offender was sentenced to two years in federal custody. The defence here argues that Mr. Scott's offence and his own circumstances are much different than those of Mr. Marriott, and as such a lower sentence is justified here.

[68] Finally, in *R. v. Dunbar*, 2008 NSPC 57, my colleague Judge Derrick considered the sentence of an offender addicted to drugs who had a lengthy criminal record, including for drugs, and who had a prior conditional sentence

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[1] See *R. v. Naugle*, 2011 NSCA 33 at para. 47 where Justice Beveridge says, "His criminal record did not operate as a direct aggravating factor dictating a more severe sentence. However, as with any accused, a previous related record may well lead to an increase in severity of sentence, by type or length."

order terminated. A conditional sentence order was apparently not sought in that case. Judge Derrick reminds us that sentencing is an individual process and that the "cookie-cutter" approach has long been rejected. She classified that offender as a "petty retailer", which in that case involved 5.5 grams of cocaine. Judge Derrick dealt specifically with the issue of drug addiction of the particular offender and the greed/profit motivation. She makes specific reference to Justice Lamer's comments in *R. v. Smith*, [1987] 1 S.C.R. 1045 that the harshest treatment is deserving of those who are "cold-blooded non-users" motivated by greed. She sentenced Mr. Dunbar to a 16 month custodial term.

[69] Other trial courts from across Canada have approved conditional sentences for offences involving cocaine trafficking or possession for purpose of trafficking in cocaine – see *R. v. Conyers* [2010] A.J. No. 940; *R. v. Rebello* 2010 ONCJ 43; *R. v. Carter* 2005 NLTD 108; *R. v. Klyne* [2003] S.J. No. 404 (P.C.); *R. v. Bouchard* 2009 ONCJ 264; referring to *R. v. Walcott* [2009] O.J. No. 320, *R. v. Richards* [2007] O.J. No. 3209 and *R. v. Mundle* [2003] O.J. No. 4392 which also support conditional sentences; and *R. v. Imoro* 2011 ONSC 1445.

[70] The above cases all show, in my opinion, that the presence, in varying degrees, of aggravating features determines the length and type of sentence. The examples above and the Appeal Court decisions I reviewed show what type of features lead particularly to a federal sentence and demonstrate that where those aggravating features are not present that a sentence of less than two years can be fit and in some cases appropriately served in the community.

ANALYSIS

[71] Let me then return to the purposes, objectives and principles of sentencing I reviewed at the outset and apply them to this case using the guidelines of our Court of Appeal, as I have interpreted them, and the examples from other trial courts. Clearly the public must be protected and the law respected. This is the purpose of sentencing. For sentencing involving cocaine trafficking the primary objective must be deterrence and denunciation. Other objectives may apply as well in particular cases. Finally, the fundamental principle when determining a "just" sanction is proportionality. Other principles of parity and restraint play a secondary, but important, role in crafting a sentence.

[72] This case, like most cases, turns on those features or circumstances of the offence particularly, but also of the offender, to gauge the gravity of the offence and the degree of responsibility of the offender.

[73] Let me start with the gravity of the offence. The *Fifield* categories help to measure this. As I explained above, I agree with the defence that the offender here is a petty retailer. I accept he had a drug addiction problem and that he purchased these drugs to feed his own habit and that any further sales were to underwrite his own costs. He was not a "greedy" non-user selling for profit. It appears he was involved in a lifestyle of drug use.

[74] In *Fifield* the Court of Appeal suggested the level or category of traffickers can be inferred from the amount of drugs found. The Crown points to the amount here – 30 grams – as aggravating. In *Marriott* the same amount was described as "small". I agree that the amount here was not insignificant. It is clearly larger than many cases I have reviewed above but much less than many more serious cases. The difficulty I have is determining how much of this drug was for the offender's own use and how much was available for resale or distribution. Clearly some was – he pled guilty and admitted to such. However, there was no evidence, and indeed no submissions made by the Crown, which allows me to make any inference about the significance of this amount of powdered cocaine relative to its use. There was no expert evidence indicating what a casual or regular user would consume and over what time. The cases, see *Merlin* – make some references to usage, but the various references are dependent on the type of addict involved. While I accept the offender possessed these drugs for further sale, it is simply not clear how much or how many sales could be made. This is important because it would give some indication of the level of activity involved with this offender. There were only six small bags found. No score sheets or contact lists were referenced. The text messages were not described and gave me no indication of what level of activity or involvement in drugs this offender was involved.

[75] I emphasize this because it is the amount of drugs which is the key aggravating feature beyond the type of drug. It is the amount of drug and the small bags and possibly the scales which forms the basis of drawing any inferences about this offender's drug involvement. The cash found was explained as being that left over from the money used to purchase the drugs found. It is an aggravating circumstance if he is to be moved up on the *Fifield* scale of categories. To do this the Crown must satisfy me beyond a reasonable doubt. As I indicated above I am not satisfied that the offender here is beyond a petty retailer at the lower level.

[76] Further, the offender was unknown to the police prior to this event – there was no evidence of any other drug activity or association in a larger drug operation. He was not a functionary in a drug network. The drugs, while serious, were not crack cocaine – a much more addictive and dangerous drug. None of the aggravating features listed in s. 10 of the *Controlled Drugs and Substances Act* were present. There were no weapons found.

[77] Beyond the quantity of the drugs on which I commented above, none of the other aggravating features which were found in the appeal court and trial court decisions I reviewed above were present here.

[78] In particular, in *Aucoin*, a case from this area, the offender was found in the downtown area of a small town during a busy festival time. He had a hundred pills commonly sold as ecstasy along with the cocaine distributed in eight individual bags and two amounts of cash separated in his pocket. This is more suggestive of an offender peddling these drugs on the evening he was apprehended. These same features are not present here.

[79] Mr. Scott was the subject of a pre-sentence report. He was 23 years of age at the time the offence was committed. He is now 24 years of age. In my opinion he is a youthful offender. He presented in court as much younger than his chronological age. In the pre-sentence report there is a reference made by the investigating officer with the Street Crime Enforcement Unit about concerns raised about the offender in the community subsequent to this offence. These comments became the subject of submissions made at the beginning of the sentence hearing. The Court adjourned to allow the Crown to further justify those comments. The Crown was unable to do that and consequently these comments have been excised from the pre-sentence report. They were contained in the first paragraph on page six of the report, the last sentence of that paragraph.

[80] In my opinion the pre-sentence report is largely positive. It shows that Mr. Scott graduated from high school in 2005. He is currently employed. He was described by his employer as a good worker. It said since this matter arose he has had a positive change in attitude. He has had a history of drug issues and has struggled in the past in maintaining his good standing in the methadone program. However, he has been drug-free since the matter arose and his acceptance with drug addiction services has been confirmed by Peter Kiefl, a clinical therapist with

that service. His spouse is now expecting a child, which appears to have had a positive impact on him.

[81] Finally, the writer attributed much of Mr. Scott's drug issues to his choice of associates. To his credit Mr. Scott appears to recognize this and has indicated to the Court that he is prepared to agree to disassociate himself with those named individuals.

[82] Mr. Scott has no prior criminal convictions. He has pled guilty. He has made positive changes in his life. On his own initiative he enrolled in substance abuse counselling. He has a supportive family and spouse both of who were in Court with him. He is at the low end of the petty retailer category. The drugs were not crack cocaine, the more serious form of cocaine. The amount of drugs is concerning but it is not clear how that determines his categorization as a drug trafficker. No weapons were found. Only a small amount of marihuana was found and no other so-called "hard" drugs were present. He is a youthful offender.

[83] In my opinion, for the reasons I detailed above, the range of sentencing for this offender, for this offence in these particular circumstances includes a term of imprisonment of less than two years.

[84] Given this conclusion, can such a term be served in the community? As our Court of Appeal has repeatedly said the objectives of deterrence and denunciation need to be emphasized. The dangerous and deadly nature of this drug speaks to the gravity of the offence and the need for a proportionally responding sentence. Justice Bateman said, "a substantial penalty" is required. Can a conditional sentence order meet these objectives and is it a proportional sentence for <u>this</u> offender's conduct?

[85] First of all, a conditional sentence order is not, in my opinion, a lenient sentence for <u>some</u> offences. It is; of course, more lenient than a term of custody in either a provincial jail or federal prison, but then that is not the issue. The fact of the matter is that a conditional sentence order is a real and significant limitation on or loss of a person's liberty. An offender serving a conditional sentence can be jailed for breaches of any condition proven only on the balance of probabilities for part or all of his remaining community-based imprisonment. In some ways it can be more restrictive than parole, which a federal inmate can secure after serving part of his sentence. The real difference is requiring Mr. Scott to be placed behind bars with other offenders for a period of time.

[86] In *R. v. Proulx*, [2000] 1 S.C.R. 61, Chief Justice Lamer found that a conditional sentence order can, in some instances, satisfy the objectives of denunciation and deterrence. Tailored properly a conditional sentence order can be very restrictive and punitive in nature.

[87] In my opinion a conditional sentence order can be a substantial penalty and a proportional response to an offence of possession for the purpose of trafficking in cocaine.

[88] Is Mr. Scott a candidate for such a sentence? Here there is no issue that Mr. Scott's presence in the community presents any risk to its safety. There is no minimum sentence mandated for this offence. In my opinion a conditional sentence order for Mr. Scott meets the fundamental principles and purposes of sentencing. As I explained it meets the principle of proportionality. As well it recognizes a real need for rehabilitation, which is a viable objective for Mr. Scott. It is not inconsistent with other cases which I reviewed above for similar offences in similar circumstances.

[89] As I indicated above, Mr. Scott is a youthful first offender. As such the Court should be careful to explore other dispositions short of a custodial sentence, and in particular one served in an institution. See *R. v. Biron*, [1991] 65 C.C.C. (3d) 221 and *R. v. Quesnel and Smith*, [1984] 14 C.C.C. (3d) 254 (Ont. C.A.). Sentences for youthful offenders should be directed towards rehabilitation and reformation – see *R. v. Bratzer* 2001 NSCA 166 at para. 40. In my opinion, sending Mr. Scott to a federal penitentiary is not required to fulfill the purpose and principles and objectives of sentencing. A conditional sentence order can with sufficiently strict conditions, in my opinion, serve those objectives. Clearly, if Mr. Scott fails to abide by any of the restrictive conditions I intend to impose he will find himself back before the Court and serving part or all of the remaining portion in an institution. A conditional sentence can be in this instance a "substantial penalty" and meet both deterrent and denunciatory objectives.

[90] Finally, I believe where rehabilitation is a real and achievable objective, as I believe it is in this case, that the words of Abella, J.A. (as she was then) speaking for the Ontario Court of Appeal are worth noting in *R. v. Kerr* [2001] O.J. No. 5085 (CA) at para. 17 – a case involving trafficking in heroin:

> There is no doubt that this is a very serious offence. But the appellant's personal circumstances, the small quantity of drugs involved, and particularly Dr. Jollymore's evidence of the appellant's progress, which he feels incarceration would negate, argue for a conditional sentence with strict terms. There is, of course, no guarantee that the appellant's progress will continue indefinitely, but there is also a real risk, on the evidence, that incarceration will prematurely end it. Although the seriousness of the offence is clearly relevant, to under-emphasize rehabilitation in this case would, on the other hand, send the unwarranted signal that courts will sacrifice evidence of considerable rehabilitative progress on the altar of general deterrence. [Emphasis added]

[91] In my opinion a sentence of imprisonment of two years less one day served in the community under a conditional sentence order followed by one year of probation is a fit and proper sentence. I now propose to set out the terms and conditions of the conditional sentence and probation orders. The conditional sentence order will include nine months of strict house arrest with limited exceptions followed by nine months of curfew, again with certain exceptions. It will also include an obligation to pay a charitable contribution of $500.00 as reparations to the community.

[92] The mandatory firearms prohibition order under s.109 of the *Criminal Code* is made as well the forfeiture order which the Crown seeks.

[93] For the s.4 (1) *CDSA* offence there will be a fine of $150.00, together with victim fine surcharge.

[94] I will now detail the conditions for both orders mentioned above.

[The Court then sets out in detail the various conditions of the conditional sentence and probationary orders]

A. Tufts, J.P.C.