PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v Kleykens*, 2019 NSPC 28

Date: 2019-07-09
Docket: 8032066, 8032070, 8032072
Registry: Pictou

Between:

Her Majesty the Queen

v.

Michael Dean Kleykens

SENTENCING DECISION

Judge:	The Honourable Judge Del W. Atwood
Heard:	2019: 23 April, 7 June in Pictou, Nova Scotia
Oral decision rendered:	2019: 9 July
Written decision released:	2019: 7 August
Charges:	Subsection 5(2), *Controlled Drugs and Substances Act*
Counsel:	Bronwyn Duffy for the Public Prosecution Service of Canada Stanley W MacDonald QC for Michael Dean Kleykens

By the Court:

Synopsis

[1] Michael Dean Kleykens elected trial in this court where required and pleaded guilty to the following indictable counts:

- Possession of cannabis marihuana, a Schedule II substance, in excess of three kilograms, for the purpose of trafficking (PPT), contrary to § 5(2) of the *Controlled Drugs and Substances Act* (*CDSA*), case 8032066;
- Possession of cannabis resin, a Schedule II substance, not in excess of three kilograms, for the purpose of trafficking (PPT), contrary to § 5(2) of the *CDSA*, case 8032070—although indictable, the charge is within the absolute jurisdiction of the Provincial Court: ¶ 5(3)(a.1) *CDSA* and ¶ 553(c)(xi) of the *Criminal Code of Canada*;
- Possession of cocaine, a Schedule I substance, for the purpose of trafficking (PPT), contrary to § 5(2) of the *CDSA*, case 8032072.

[2] The prosecution seeks a total penalty of two years in a federal penitentiary; defence counsel seeks a suspended sentence, or, alternatively, a 90-day intermittent prison term with probation.

[3] For the reasons that follow, I sentence Mr Kleykens to a 90-day term of imprisonment, to be served intermittently. I also impose a three-year term of probation, to commence immediately. There will be corollary DNA-collection, firearm-prohibition and forfeiture orders.

[4] These are my reasons.

Circumstances of the offences

[5] On 21 September 2016, police conducted a warranted search of a room located inside a boarding house owned by Mr Kleykens. Police arrested Mr Kleykens after they had found and seized the following contraband and proceeds:

- 8.25 kg of cultivated and packaged cannabis marihuana;
- 56.6 grams of cannabis resin;
- 144.5 grams of cocaine;
- $5975 Canadian currency.

[6] Shortly after his arrest, Mr Kleykens was admitted to bail by a recognizance, order 1904819, which was replaced on 2 May 2018 by a recognizance, order 2077323.

Seriousness of the offences

[7] In situating the seriousness of these offences, I shall refer to a number of recent PPT cocaine cases out of this judicial centre as comparators: *R v Livingstone*, 2019 NSPC 62 (*Livingstone*), *R v Terris*, 2019 NSPC 11 (*Terris*) and *R v Scott*, 2019 NSPC 19 (*Scott*). The prosecution has applied for leave to appeal from sentence in *Terris* and *Livingstone*.

[8] Mr Kleykens was found in possession of the following quantities of cocaine and cannabis: 144.5 g of cocaine, 8.25 kg of cultivated cannabis and 56.6 g of resin. The court was not provided with information on the value of these substances. The measures here are far greater than the 36 g of cocaine seized in *Livingstone* and the 52 g of cocaine seized in *Terris*. Mr Terris and Mr Livingstone possessed cocaine only; neither one was involved in trafficking cannabis.

[9] In *Terris* and *Livingstone*, the court imposed suspended sentences.

[10] The controlled substances seized in this case are over double the Schedules I and II quantities in *Scott*, a case decided last month in this judicial centre which resulted in the court going along with a jointly recommended two-year

penitentiary term. Just as Mr Kleykens, Mr Scott had no prior record, and had pleaded guilty. A major distinction is that Mr Scott was found with a significant treasury: $111,559 of Canadian currency, admitted as being proceeds of crime; this was circumstantial evidence of a prolonged and well developed drug-dealing operation, which elevated significantly the seriousness of Mr Scott's offence, such that the joint recommendation was well justified. In contrast, Mr Kleykens was found with $5975, and there is no suggestion of there being untraceable proceeds as to engage § 462.37(3) of the *Code*. I would note again that the court was not provided with evidence of the value—street or otherwise—of Mr Kleykens' inventory. In *R v Burnett*, 2019 NSSC 97 at ¶¶ 104-5, the court was presented with expert evidence regarding cocaine value; indeed, there are many trial and sentencing cases in Nova Scotia that have considered controlled-substance-valuation evidence: see *eg R v Leblanc*, 2019 NSSC 43 at ¶¶ 53-57; *R v Conway*, 2009 NSCA 95 at ¶ 2; *R v Knickle*, 2009 NSCA 59 at ¶ 3; *R v Dann*, 2002 NSSC 237 at ¶ 3; *R v Crossan*, [1993] NSJ No 19 (AD); *R v Mackinnon*, [1987] NSJ No 60 (AD). These cases make clear that valuation evidence—much as evidence of the purity or potency of a controlled substance—is opinion based and case specific, received following forensic inquiries into expertise, credibility and reliability, unless the subject of

an admission under § 655 or § 724(1) of the *Code*. This court cannot lift specialty findings of fact from other cases and graft them onto this one: *R v Fead*, 2017 ABCA 222 at ¶¶ 15 and 24; *R v Daley*, 2007 SCC 53 at ¶ 86. Accordingly, I have no way of telling how much Mr Kleykens stood to be enriched by his stash.

[11] In my view, these offences rank in seriousness somewhere between the *Terris* and *Livingstone* cases, which I consider to be at the lower end, and *Scott*, which I would situate at the higher end. I situate this case in between those end points as Mr Kleykens possessed significantly greater quantities of controlled substances than Mr Terris or Mr Livingstone; however, he had only a fraction of the cash found on Mr Scott.

Circumstances and moral responsibility of Mr Kleykens

[12] Mr Kleykens appears to have been cooperative with police.

[13] He does not have a prior record.

[14] He was not perfectly bail compliant, and was sentenced on 2 May 2018 to a jointly recommended one-day-time-served sentence for violating house arrest. As Mr Kleykens has already been punished for that offence, I cannot treat non-

compliance with bail as an aggravating factor in this proceeding: *R v Stewart*, 2016 NSCA 12 at ¶ 27; *R v MacDonald*, 2018 NSPC 25 at ¶ 25.

[15] He pleaded guilty—perhaps not at the earliest opportunity; however, the record satisfies me that the passage of time from arraignment to plea was not dilatory, but was necessary to allow negotiation between counsel.

[16] Police did not find any weaponry. I consider this significant, as it is the experience of the court that well established traffickers will often assemble private armories to guard against rip-offs, and to aid in coercive enforcement and turf-protection efforts: see, *eg*, *R v Holland*, 2017 NSSC 146; *R v Greencorn*, 2014 NSPC 10 at ¶9 (*Greencorn*) ; *R v Oickle*, 2015 NSCA 87 at ¶ 24 (*Oickle*). That aggravating element is not in evidence in this case.

[17] Counsel for Mr Kleykens presented to court as Exhibit 1 on the sentencing hearing an array of letters of reference from members of the public who know Mr Kleykens well, attesting to his good character and describing the shock and dismay that overtook them when they learned of what this young man had gotten himself into doing. Although a good reputation is regarded generally as a mitigating factor—*R v McNamara et al (No 2)*, [1981] OJ No 3260 at ¶¶ 7-12 (CA)—the court appreciates well that stellar name is a characteristic that may

be perverted into a camouflage for premeditated, prolonged and privy misconduct. If there were greater evidence against Mr Kleykens of a deeply embedded secret life—say, higher-value proceeds of crime, drug-retail paraphernalia, intercepted communications, score sheets and the like, or other things that might be indicative of, for example, a well developed dial-a-dope operation as in *R v Conway*, 2009 NSCA 95—the court would be constrained to discount the effect of good character; however, that sort of elevated incriminating evidence is not before the court.

[18] In his § 726 allocution to the court, Mr Kleykens expressed his regret for his conduct, and assured the court that he is focussed now on his family and his employment.

[19] The court reviewed a presentence report dated 23 January 2019.

[20] Although his mother and father divorced when he was very young, Mr Kleykens' upbringing was otherwise unremarkable. He enjoys a close relationship with both parents.

[21] Mr Kleykens graduated with honours from high school, and completed a two-year carpentry course at NSCC; he earned a certificate in cabinetry. He is

employed as a foreperson for a construction crew and has worked for the same employer for over a decade. His supervisor attests to his strong work ethic.

[22] Mr Kleykens earns substantial employment and real-estate investment income; his monthly expenses are modest.

[23] Mr Kleykens described to the author of the presentence report a substance-use history—Schedule I, II and III substances—going back to his mid-teens.

[24] Mr Kleykens, and no one else, is responsible for his conduct. The quantity of contraband seized would suggest a level of involvement in the drug trade in the mid-to-upper reaches of petty retailing as categorised in *R v Fifield*, [1978] NSJ No. 42 (AD) (*Fifield*). Recall that *Fifield* classified trafficking as:

- The mere accommodator, only slightly more serious than mere possession--¶6;
- Petty retailing--¶7;
- Full-time or large-scale commercial distribution--¶7.

[25] I would observe that forensic experience has rendered these forty-year-old, finding-of-fact categories as somewhat imprecise.

[26] Among mere accommodators, there might be, yes, the cannabis Samaritan who passes around a joint—or the narcotic-analgesic patient who diverts a crushed-up pill to someone else for insufflation or intravenous injection: the hazards are far different.

[27] Among petty retailers, there might be those supporting habits or those moved by pure profit—or a bit of both; there are those who resort to weapons and violence, and those who do not; there are independent vendors, and those who feed into organizations or gangs; there are those newly initiated into the trade, and those who have been at it a long time; some might have moist and mouldy home grow-ops or toxic meth cookeries, and others who get their inventories elsewhere. Again, the hazards are various.

[28] Importers—a class not mentioned in *Fifield*— at the body-pack-courier level might fall in the vulnerable-tourist, one-and-done group, and resemble the petty retailer in their level of moral culpability; or they might be serial smugglers who have made a custom out of evading the customs. There are suitcase-level commercial distributors, and those who need cargo containers and large ocean-going vessels. Some control city blocks; then there are others who control countries and paramilitaries.

[29] Sometimes, the category of offending behaviour will be unambiguous. Other times, evidence might be needed. As held in *R v Knickle*, 2009 NSCA 59 at ¶ 17, situating the "level of involvement in the drug business" is a necessary finding of fact in *CDSA* sentencing, and the burden of proving aggravating facts rests with the prosecution on the beyond-a-reasonable doubt standard: ¶ 724(3)(e).

[30] Whatever the precise category, it would seem to me that Mr Kleykens was not a big player in the illegal trade in controlled substances. I assess his lower moral culpability based on that finding.

Statutory range of sentencing

[31] Section 5 of the *CDSA* states:

> 5 (1) No person shall traffic in a substance included in Schedule I, II, III, IV or V or in any substance represented or held out by that person to be such a substance.
>
> (2) No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III, IV or V.
>
> . . . .
>
> (3) Every person who contravenes subsection (1) or (2)
>
> (a) if the subject matter of the offence is a substance included in Schedule I or II, is guilty of an indictable offence and liable to imprisonment for life, and
>
> . . .

(a.1) if the subject matter of the offence is a substance included in Schedule II in an amount that is not more than the amount set out for that substance in Schedule VII, is guilty of an indictable offence and liable to imprisonment for a term of not more than five years less a day;

. . . .

[32] Schedule VII sets out the threshold Schedule II amounts for trafficking or possession-for-the-purpose charges:

SCHEDULE VII

(Sections 5 and 60)

Substance	Amount
1 Cannabis resin	3 kg
2 Cannabis (marihuana)	3 kg

[33] Schedule II amounts not more than the Schedule VII limits are absolute-jurisdiction offences under ¶ 553(c)(xi) of the *Code*, punishable up to five years less a day, as noted above. Greater amounts are punishable by terms up to life.

[34] Given the quantities seized from Mr Kleykens, he is subject to potential life terms for case numbers 8032066 (possession of in excess of 3kg of cannabis for the purpose of trafficking) and 8032072 (possession of cocaine for the purpose of trafficking). Case number 8032070 alleges trafficking-related possession of cannabis resin within the absolute-jurisdiction, five-years-less-a-day scope.

[35] To any terms of imprisonment might be added fines (s 734 of the *Code*), or periods of probation (¶ 731(1)(b)); the PPT cocaine and cannabis marihuana

counts are not eligible for conditional sentences, given ¶ 742.1(e)(ii) of the *Code*, nor are they eligible for discharges, given § 730 of the *Code*. However, each of the charges before the court is eligible for a number of purely non-custodial sentences: a fine alone (§ 734); a suspended sentence (¶ 731(1)(a)); a fine and probation (¶ 731(1)(b)). The PPT resin count is eligible for a conditional sentence, as the maximum term of imprisonment is less than 10 years, and so not caught by ¶ 742.1(e)(ii). A weapons-prohibition order is mandatory under ¶ 109(1)(c) of the *Code*. Forfeiture of offence-related property is mandatory under § 16 of the *CDSA*. The PPT cocaine and PPT cannabis marihuana counts are secondary-designated-DNA-collection offences under § 487.04 of the *Code,* falling under the heading "secondary designated offence" ¶(b)(i).

[36] Although the penalty provisions of § 5(3) *CDSA* go on to provide for mandatory-minimum terms of imprisonment in specified cases, none is applicable here.

[37] Subsection 10(1) of the *CDSA* conforms to the general sentencing principles in § 718 of the *Code*; it shares in common with ¶ 718(d) of the *Code* the objective of rehabilitating offenders; significantly, it adds a requirement—

augmented in §§ 10(4)-(5)—that serves to encourage the treatment of offenders in appropriate circumstances.

[38] Paragraphs 10(2)(a)-(c) of the *CDSA* identify a number of aggravating sentencing factors; counsel agree that none is applicable in this case.

Community-based sentences and Schedule I/II trafficking

[39] It has been argued in some cases that the removal in 2012 of trafficking offences—involving either Schedule I substances or in Schedule II substances in quantities greater than Schedule VII amounts—from the conditional-sentencing regime (effected by the *Safe Street and Communities Act*, SC 2012, c 1, § 34, in force 20 Nov 2012 by SI/2012-48) (*SSCA*) evinces a Parliamentary intent to rule out persons charged with those sorts of crimes from getting any type of purely community-based sentences: see *R v Smith*, 2013 BCCA 173 at ¶¶ 71-72, leave to appeal refused [2013] SCCA No 251. What is proposed is essentially a penal revanchism, and a partial rolling-back of the restorative-justice norms evident in the major reform of Part XXIII of the *Code* in SC 1995, c 22, § 6 (in force 3 Sept 1996 in virtue of SI/96-79), a measure which, as described in *R v Gladue*, [1999] 1 SCR 688 at ¶¶ 39 and 48, (*Gladue*) sought to reduce the use of prisons for non-violent persons.

[40] To be sure, the *SSCA* expresses the clear intent of Parliament that prison sentences for certain types of offences not be served in the community: *Oickle* at ¶ 43.

[41] However, the simple fact is that the *SSCA* preserved fines alone and suspended sentences as legal outcomes in cases such as this one: ¶¶ 731(1)(a) & (b) and § 734.

[42] What is the effect of the statutory revocation in the *SSCA* of eligibility for conditional sentences for certain offences, and the preservation of suspended sentences as lawful outcomes in those same cases?

[43] First of all, there can be no strength to any argument that the *SSCA* effected an implied repeal of the suspended-sentence provisions of ¶731(1)(a), as there is no conflict between a law that rules out prison sentences served in the community and one that permits purely probationary sentences, any more than there was a conflict prior to the law that permitted conditional sentences when probation alone was a statutorily permissible outcome for trafficking offences under the *Narcotic Control Act* and the *Food and Drugs Act*.

[44] An implied repeal of ¶ 731(1)(a) of the *Code* would throw the sentencing process into chaos, and would, in any event, run counter to the norm that repeal

be carried out through the enactment of provisions in which the legislation to be repealed is expressly designated: Ruth Sullivan, *Sullivan on the Construction of Statutes,* 7th ed (Markham: LexisNexis, 2014) at ¶ 24.39 (*Sullivan*).

[45] It has been suggested by times that allowing fines or suspended sentences to survive in cases when conditional sentences are statutorily inadmissible would lead to an absurd result, a consequential analysis which would require, so the argument goes, some degree of judicial response: *Sullivan* at ¶ 10.9-10.23. It seems to me that no such absurdity exists, as there were comprehensible policy reasons for Parliament ruling out conditional sentences in cases such as PPT in circumstances when a jail term would be the only fit outcome.

[46] Allow me to explain.

[47] When conditional sentences were first rolled out in 1996, courts were confronted with the argument in trafficking and PPT cases that persons deserving of imprisonment for such crimes ought not to be sent to serve their sentences in the very homes which had been the drug-operation centres, even if those sentences would not exceed the maximum permissible duration for conditional sentencing: see, *eg*, *R v Quilty*, [1997] NJ No 253 at ¶ 4; a later case which considered this issue is *R v Strickland*, 2010 NLTD 2 at ¶¶ 47-48. With

that concern in mind, the Parliamentary judgment foreclosing admission to conditional sentencing for trafficking-related cases, in those circumstances when imprisonment would be the proper outcome, but preserving suspended sentences and fines in cases when imprisonment would not be required, is entirely rational and supportable.

[48] It is necessary to make one final point. Consider *Oickle*, a case in which a sentencing judge imposed a statutorily permissible conditional sentence for a dangerous-weapon charge, and a suspended sentence for a related PPT count. The prosecution sought leave to appeal the PPT sentence. In reading over *Oickle*, it is useful to recall that a court may consider imposing a conditional sentence only when satisfied that, among other things, probation alone or a penitentiary term ought to be ruled out: *R v Proulx*, 2000 SCC 5 at ¶ 58. I would propose that a careful analysis of *Oickle* discloses that the reversible error of the sentencing court was not the imposing of a suspended sentence for a trafficking-related offence, *per se*; rather, having determined initially that probation alone for Mr Oickle should be excluded (a finding inherent in the conditional sentence imposed for the dangerous-weapon offence), the sentencing judge essentially walked back the circumstances of the related PPT count to accommodate probation alone, as a conditional sentence was no longer

available legally because of the *SSCA*. It was this artificial walking-back that constituted error, based on the standard of review applicable to sentence appeals as described in *R v Murphy*, 2015 NSCA 14 at ¶ 15.

[49] Of course, just because a sentencing outcome might be authorized by statute does not make it fitting. As I stated at the beginning, the court is imposing an intermittent prison term. The purpose of the analysis in this part was to demonstrate that I considered imposing a suspended sentence. I shall continue explaining why neither a suspended sentence, nor a penitentiary term, would be fit for Mr Kleykens.

Sentencing principles applicable to PPT offences

[50] I reviewed in *Terris* and *Livingstone* in what I hope was sufficient detail—they are under appeal, so their sufficiency may be evaluated shortly—the sentencing principles which ought to govern Mr Kleykens' case; I considered also the applicability of an array of sentencing-parity cases, most of which have been put before me again. I confirm that I have considered the same factors and the same precedents. I have also considered my reasons in a PPT case involving methamphetamine, also under appeal: *R v AL*, 2019 NSPC 61.

[51] I had intended rendering my decision last month; however, I held my decision on reserve for an additional several weeks to give counsel time to make written submissions on the effect of *R v Chase*, 2019 NSCA 36 (*Chase*), a decision of the Court of Appeal which was published a couple of weeks after counsel had made their submissions in this case. *Chase* affirmed a 90-day intermittent sentence, accompanied by a three-year term of probation for a member of a First Nation charged with PPT cocaine; Mr Chase had thirteen prior convictions, including violence offences and robbery, and had served federal time. In affirming the original sentence, the unanimous panel stated, starting at ¶ 56:

> If there happened to be a noticeable spike in the number of Schedule I drug offences taking place in the city, one can say with confidence that they would be the first to see it. Their unique vantage point as judges serving at the "front lines" of our justice system, is one of many reasons why such a heightened level of deference is paid to the broad discretion they wield in sentencing. These advantages of personal insight and familiarity were underscored by Chief Justice Lamer in *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500 at para91-92:
>
>> [91] This deferential standard of review has profound functional justifications. ... in the absence of a full trial, where the offender has pleaded guilty to an offence and the sentencing judge has only enjoyed the benefit of oral and written sentencing submissions ... the argument in favour of deference remains compelling. A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of both the Crown and the offender. A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will

> have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly.
>
> [92] ... courts of appeal must still exercise a margin of deference before intervening in the specialized discretion that Parliament has explicitly vested in sentencing judges. It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. See Mellstrom, Morrissette and Baldhead. Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred. ...

[Emphasis added in *Chase.*]

[52] As the only resident Provincial Court judge in this judicial centre, I have not noticed a spike in Schedule I trafficking or PPT cases in this area. Yes, we have had *AL*, *Terris, Livingstone* and *Scott,* which occurred in 2017-2018 and post-dated Mr Kleykens' matters. It would seem overreaching to call these numbers statistically significant or representative of a pattern; should more Schedule I cases land in court, a reassessment of the situation would be necessary.

[53] Further, in attempting to identify from the everyday experience of the court those controlled substances that project substantial vectors of harm into the

community, I would have to single out without hesitation medical opioids. What happens is that they get misused by people who are prescribed them, or they end up in the wrong hands. There are few sentencing cases in this county that do not implicate these substances. People are suffering physically and mentally because of opioid abuse. They are losing jobs, housing, families, and other social connections. They are committing offences in order to support their dependencies. As their relationships with friends and families collapse, they are hurting those who care about them the most. The crisis is well known, if not well understood, and emerged from deficient testing, marketing, dependency-risk-assessment analysis, labelling, clinician-training, prescribing decisions and policies. In a cause-of-harm ordinal, cocaine and cannabis rank a number of rungs down the ladder from medical opioids. That is the everyday experience of the court.

[54] Furthermore, given the infrequent incidence of cocaine-trafficking-related offences in this area, I feel that it would be unsafe to draw inferences about community impact absent the calling of aggravating-fact evidence by the prosecution, as required by ¶ 724(3)(e) of the *Code*. In saying this, I must acknowledge that findings I have made in earlier cases about community impact might have gone beyond reasonable inference, or proper judicial notice, and

strayed into the realm of speculation: see *Greencorn* at ¶¶ 4-5 and *R v Donaldson*, 2013 NSPC 41 at ¶ 4-5.

[55] Finally, I would make the following comment which flows from what was said in *Chase* about the observational advantages of trial courts that operate in the front lines. Reviewing courts carry the authority of superiority and the binding effect of *stare decisis*; consequently, their decisions will affect many people.

[56] Original-jurisdiction courts, on the other hand, carry the authority of volume: they hear and judge lots and lots of cases, which will affect many people. Frequently, in the criminal-law context, these cases will involve persons who have re-offended, allowing judges to assess to some degree the effectiveness of earlier sentences. Reflecting on the history of cases that have come before me, I am sorely pressed to recall any when I felt that a person had returned to court much improved by the experience of long-term imprisonment. This does not allow me to rewrite the law of sentencing; however, it does allow me to conclude that the Supreme Court of Canada was entirely correct in its observations in *Gladue*:

> 52 Canada is a world leader in many fields, particularly in the areas of progressive social policy and human rights. Unfortunately, our country is also

distinguished as being a world leader in putting people in prison. Although the United States has by far the highest rate of incarceration among industrialized democracies, at over 600 inmates per 100,000 population, Canada's rate of approximately 130 inmates per 100,000 population places it second or third highest: see Federal/Provincial/Territorial Ministers Responsible for Justice, *Corrections Population Growth: First Report on Progress* (1997), Annex B, at p. 1; Bulletin of U.S. Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 1998* (March 1999); The Sentencing Project, *Americans Behind Bars: U.S. and International Use of Incarceration*, 1995 (June 1997), at p. 1. Moreover, the rate at which Canadian courts have been imprisoning offenders has risen sharply in recent years, although there has been a slight decline of late: see Statistics Canada, *"Prison population and costs" in Infomat: A Weekly Review* (February 27, 1998), at p. 5. This record of incarceration rates obviously cannot instil a sense of pride.

53 The systematic use of the sanction of imprisonment in Canada may be dated to the building of the Kingston Penitentiary in 1835. The penitentiary sentence was itself originally conceived as an alternative to the harsher penalties of death, flogging, or imprisonment in a local jail. Sentencing reformers advocated the use of penitentiary imprisonment as having effects which were not only deterrent, denunciatory, and preventive, but also rehabilitative, with long hours spent in contemplation and hard work contributing to the betterment of the offender: see Law Reform Commission of Canada, *Working Paper 11*, Imprisonment and Release (1975), at p. 5.

54 Notwithstanding its idealistic origins, imprisonment quickly came to be condemned as harsh and ineffective, not only in relation to its purported rehabilitative goals, but also in relation to its broader public goals. The history of Canadian commentary regarding the use and effectiveness of imprisonment as a sanction was recently well summarized by Vancise J.A., dissenting in the Saskatchewan Court of Appeal in *McDonald*, *supra*, at pp. 429-30:

> A number of inquiries and commissions have been held in this country to examine, among other things, the effectiveness of the use of incarceration in sentencing. There has been at least one commission or inquiry into the use of imprisonment in each decade of this century since 1914. . . .
>
> . . . *An examination of the recommendations of these reports reveals one constant theme: imprisonment should be avoided if possible and should be reserved for the most serious offences, particularly those involving violence. They all recommend restraint in the use of incarceration and recognize that incarceration has failed to reduce the crime rate and should be used with caution and moderation*. Imprisonment has failed to

> satisfy a basic function of the Canadian judicial system which was described in the Report of the Canadian Committee on Corrections entitled*: "Toward Unity: Criminal Justice and Corrections"* (1969) as "to protect society from crime in a manner commanding public support while avoiding needless injury to the offender".
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> [Emphasis added in *Gladue*; footnote omitted in *Gladue*.]

55 In a similar vein, in 1987, the Canadian Sentencing Commission wrote in its report entitled *Sentencing Reform: A Canadian Approach*, at pp. xxiii-xxiv:

> Canada does not imprison as high a portion of its population as does the United States. However, we do imprison more people than most other western democracies. The *Criminal Code* displays an apparent bias toward the use of incarceration since for most offences the penalty indicated is expressed in terms of a maximum term of imprisonment. A number of difficulties arise if imprisonment is perceived to be the preferred sanction for most offences. Perhaps most significant is that although we regularly impose this most onerous and expensive sanction, it accomplishes very little apart from separating offenders from society for a period of time. *In the past few decades many groups and federally appointed committees and commissions given the responsibility of studying various aspects of the criminal justice system have argued that imprisonment should be used only as a last resort and/or that it should be reserved for those convicted of only the most serious offences. However, although much has been said, little has been done to move us in this direction.*
>
> [Emphasis added in *Gladue*.]

56 With equal force, in *Taking Responsibility* (1988), at p. 75, the Standing Committee on Justice and Solicitor General stated:

> *It is now generally recognized that imprisonment has not been effective in rehabilitating or reforming offenders, has not been shown to be a strong deterrent, and has achieved only temporary public protection and uneven retribution, as the lengths of prison sentences handed down vary for the same type of crime.*
>
> Since imprisonment generally offers the public protection from criminal behaviour for only a limited time, rehabilitation of the offender is of great importance. However, prisons have not generally been effective in reforming their inmates, as the high incidence of recidivism among prison populations shows.
>
> *The use of imprisonment as a main response to a wide variety of offences against the law is not a tenable approach in practical terms.* Most offenders are neither violent nor dangerous. Their behaviour is not likely

> to be improved by the prison experience. In addition, their growing numbers in jails and penitentiaries entail serious problems of expense and administration, and possibly increased future risks to society. Moreover, modern technology may now permit the monitoring in the community of some offenders who previously might have been incarcerated for incapacitation or denunciation purposes. *Alternatives to imprisonment and intermediate sanctions, therefore, are increasingly viewed as necessary developments*.
>
> [Emphasis added in *Gladue*; footnotes omitted in *Gladue*.]

The Committee proposed that alternative forms of sentencing should be considered for those offenders who did not endanger the safety of others. It was put in this way, at pp. 50 and 54:

> [O]ne of the primary foci of such alternatives must be on techniques which contribute to offenders accepting responsibility for their criminal conduct and, through their subsequent behaviour, demonstrating efforts to restore the victim to the position he or she was in prior to the offence and/or providing a meaningful apology.
>
> . . .
>
> [E]xcept where to do so would place the community at undue risk, the "correction" of the offender should take place in the community and imprisonment should be used with restraint.

57 Thus, it may be seen that although imprisonment is intended to serve the traditional sentencing goals of separation, deterrence, denunciation, and rehabilitation, there is widespread consensus that imprisonment has not been successful in achieving some of these goals. Overincarceration is a long-standing problem that has been many times publicly acknowledged but never addressed in a systematic manner by Parliament. In recent years, compared to other countries, sentences of imprisonment in Canada have increased at an alarming rate. The 1996 sentencing reforms embodied in Part XXIII, and s. 718.2(e) in particular, must be understood as a reaction to the overuse of prison as a sanction, and must accordingly be given appropriate force as remedial provisions.

[57] Notwithstanding the norm that regards actual custody as a punishment of last resort, there will be times when, as in this case, the need for general deterrence

will be elevated sufficiently as to require a person being separated from society. However, as stated in *R v Colley*, [1991] NSJ 62 (AD):

> [C]ourts must not lose sight of the fact that each day, to say nothing of each year, an individual is deprived of liberty is a significant punishment. If the need to protect society can as well be served by a shorter sentence as by a longer one, the shorter is to be preferred.

[58] This principle is amply applicable in a case of a person who is not violent, youthful, and with no prior record. Furthermore, probation with stringent terms can operate as an effective punishment and deterrent: *R v Barrons*, 2017 NSSC 216 at ¶¶ 39-46. A prison term, even if of short duration, coupled with plenty of probationary restrictions and obligations, will work as a substantial punishment.

Sentence calculation

[59] In imposing sentences for multiple offences, the court ought first to notionally assign a penalty to each case as if it were standing alone.

[60] As per my earlier analysis, I considered a suspended sentence. In my view, the quantities of cocaine and cultivated cannabis found in Mr Kleykens' possession were significant enough that a sentence of probation alone would not reflect the need for proportionate denunciation and deterrence. However, a

penitentiary term would, given Mr Kleykens' very good prospects for rehabilitation, not be required.

[61] Although the PPT resin case is conditional-sentence eligible, and although blended conditional-and-custodial sentences are permissible—*R v Ploumis* (2000) OAC 88, leave to appeal refused [2001] SCCA No 69—I do not believe that a conditional sentence would achieve a sufficient degree of denunciation and deterrence; in any event, Mr Kleykens did not ask the court to consider a conditional sentence.

[62] The court must then determine whether the sentences should be served consecutively or concurrently. These charges were part of a single enterprise or endeavour, so that concurrency is appropriate: *R. v. Oldham* (1975), 11 NSR (2d) 312 (AD) at ¶ 13 (a principle recognized but not applied in that case, as Oldham's offences were done a week apart); "one single criminal enterprise": *R v Brush* (1975), 13 NSR (2d) 669 (AD) at ¶ 9; "part of a linked series of acts within a single endeavour": *R v Potts*, 2011 BCCA 9 at ¶ 88, leave to appeal refused, [2011] SCCA No 172.

[63] In my view, a 90-day sentence, prolonged to allow for intermittent service, would be appropriate for the PPT cocaine case. It takes into account the higher

quantity found in Mr Kleykens' possession as compared to *Terris* and *Livingstone*. Further, I feel it is in line with the 90-day term affirmed in *Chase*; although there was a significantly lesser quantity of cocaine seized in that case, Mr Chase's criminal record was significant and substantial, and his prospects for rehabilitation were uncertain. Not so for Mr Kleykens, who is unlikely to return to court again. Shorter terms would be warranted for the resin and cultivated cannabis counts.

[64] The sentence of the court will be as follows:

- Case 8032072 PPT cocaine, a sentence of 90-days' imprisonment;
- Case 8032066 PPT in excess of 3 kg cannabis marihuana, 60-days' imprisonment to be served concurrently;
- Case 8032070 PPT not in excess of 3 kg cannabis resin, 30-days' imprisonment to be served concurrently.
- The total 90-day prison term will be served intermittently, with the initial intake to be at the Northeast Nova facility, 20h00 Fridays to 6h00 Mondays beginning 12 July 2019. As concurrent sentences have been imposed, there is no need for a last-look adjustment as described in *R v*

Adams, 2010 NSCA 42 at ¶¶ 25-30; indeed, a totality adjustment would not be appropriate: *R v Skinner*, 2016 NSCA 54 at ¶ 47.

- In relation to all charges before the court, there will be a three-year term of probation to begin immediately (probation is mandatory when an intermittent sentence is imposed--§ 732); the order is to include the following terms:

    - Keep the peace and be of good behaviour;
    - Appear before the court when required;
    - Notify the court or the probation officer, in advance, of any change of name, address, employment or occupation;
    - Report to a probation officer at the community corrections office in New Glasgow no later than 4:00 p.m., 11 July 2019;
    - Not possess, take or consume any controlled substance as defined in the *CDSA* except in accordance with a physician's prescription for you;
    - Complete 150 hours of community-service work within the first 24 months of probation;

- Attend for substance use, assessment and counselling as directed by the probation officer;
- Attend for any other assessment, counselling or programming directed by the probation officer;
- Participate in and cooperate with any assessment, counselling or programming directed by the probation officer, and you must report immediately to the probation officer any missed assessment or counselling appointments;
- Comply immediately with any demand for urinalysis made of you by a peace officer or probation officer in accordance with the terms of ¶¶ 732.1(3)(c.1) and (c.2) of the *Code*;
- Sign immediately all consents for release of information required by your probation officer to arrange services;
- For the first six months, be subject to a daily 10:00 p.m. to 7:00 a.m. curfew and the court will allow exceptions set out in the checklist;

[65] The court imposes a § 16 *CDSA* order of forfeiture.

[66] There will be a secondary-designated offence DNA-collection order in relation to case 8032072 which shall refer to the specific charge and the specific substance: PPT cocaine.

[67] There will be a 10-year/lifetime § 109 order under the *Code* in relation to that case and case 8032066 as well.

[68] I wish to thank counsel for the very thorough submissions made in this case.

JPC