

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R. v. Etmanskie*, 2019 NSPC 74

**Date:** 20191016

**Docket:** 8198961, 8198958

**Registry:** Dartmouth

**Between:**

Her Majesty The Queen

v.

Cody Etmanskie

|                 |  |
|-----------------|--|
| <b>Judge:</b>   | The Honourable Judge Jean Whalen, J.P.C.   |
| <b>Heard:</b>   | September 4, 2018, Dartmouth, Nova Scotia  |
| <b>Decision</b> | October 16, 2019   |
| <b>Charge:</b>  | S. 5(2) of the <i>Controlled Drugs and Substances Act</i><br>S. 7(1) of the <i>Controlled Drugs and Substances Act</i> |
| <b>Counsel:</b> | Glen Scheuer, for the Crown<br>Peter Kidston, for the Defence  |

**By the Court:**

**I. Introduction:**

[1] Mr. Etmanskie was found guilty after trial of possession for the purpose of trafficking of 11.3 grams of cocaine pursuant to s. 5(2) of the *Controlled Drugs and Substances Act* and attempting to produce crack cocaine pursuant to S. 463/7(1) of the *Controlled Drugs and Substances Act*.

[2] In assessing the issue of what is the appropriate and just disposition for this offence and this offender, I have carefully considered and reflected on the following:

1. The circumstances surrounding the commission of the offence and the offender, Mr. Etmanskie,
2. The relevant statutory provisions including s. 10 of the *CDSA* and s. 718, 718.1, 718.2 of the *Criminal Code*,
3. The case law regarding sentencing for trafficking and possession for the purpose of trafficking in schedule 1 offences,
4. Submissions of counsel,
5. The Pre-Sentence Report dated December 5<sup>th</sup>, 2018; the Impact of Race and Culture Assessment dated July 25<sup>th</sup>, 2019; letters from BEA-Adult Learning Program; the Emergency Services Achievement

Program of August 8<sup>th</sup>, 2019, and a letter from the defendant's current employer dated September 3<sup>rd</sup>, 2019.

## **II. Background and Proceedings**

[3] Mr. Etmanskie was arrested and charged on February 15<sup>th</sup>, 2018 pursuant to s. 5(2) and 7(1) of the *CDSA* along with Mr. Morgan Reddick and Ms. Sabrina Penney. On February 22<sup>nd</sup>, 2018 Mr. Etmanskie was released on a Recognizance with surety and conditions. On April 26<sup>th</sup>, 2018 Mr. Etmanskie's surety rendered. On May 4<sup>th</sup> Mr. Etmanskie turned himself in on the warrant (as his election and plea date was not until May 28<sup>th</sup>). On May 15<sup>th</sup>, 2018 Mr. Etmanskie was released again on a Recognizance with surety (the same surety).

[4] On May 28<sup>th</sup>, 2018 all three accused elected Provincial Court and set the matter for trial, which was September 4<sup>th</sup>, 2018. On June 6<sup>th</sup>, 2018 Mr. Etmanskie's surety rendered again, and in the afternoon, Mr. Etmanskie turned himself in. On June 28<sup>th</sup>, 2018 Mr. Etmanskie was released on a Recognizance with surety (the same one). The trial proceeded on September 4<sup>th</sup>, 2018. Ms. Penney was acquitted on that same day. I rendered a decision on October 29<sup>th</sup>, 2018 finding Mr. Reddick guilty of simple possession and Mr. Etmanskie guilty of s. 5(2) and attempted production.

[5] A PSR was ordered for Mr. Etmanskie and sentence was adjourned to January 2<sup>nd</sup>, 2019. On that date Mr. Etmanskie requested an Impact of Race and Culture Assessment be prepared and a status date of March 5<sup>th</sup>, 2019 was set with a sentence date of July 30<sup>th</sup>, 2019.

[6] On April 10<sup>th</sup>, 2019 Mr. Etmanskie appeared to vary his Recognizance; on July 30<sup>th</sup>, 2019 the sentence was adjourned to September 5<sup>th</sup>, 2019 to review the Impact of Race and Culture Assessment that had been prepared for Mr. Etmanskie.

### **III. Circumstances of the Offence**

[7] As I found in my oral decision dated October 29<sup>th</sup>, 2018, the police executed a search warrant on an apartment in Dartmouth. Three people were found inside including Mr. Etmanskie. Mr. Etmanskie was the target; it was his apartment.

[8] I found Mr. Etmanskie in possession for the purpose of trafficking 11.3 grams of cocaine which was found in his sock, wallet and on the kitchen table.

[9] Upon entry to the apartment and in particular the kitchen, the police found a spoon, a scale, baking soda, GNC bottle, phenacetin which is a cutting agent, Pyrex dishes, a pot of boiling water on the stove, and a pot of water in the freezer, all of the things needed to produce crack cocaine.

#### **IV. The Aggravating Factors**

[10] There is one aggravating factor as contemplated under s. 10 of the *CDSA*, that is s. 10(2)(b), a previous conviction. On August 29<sup>th</sup>, 2018 Mr. Etmanskie received two fines for two counts of s. 4(1) of the *CDSA*. The offence date was January 16<sup>th</sup>, 2018 (approximately one month before these offences). There were no weapons or firearms found.

[11] The inherent nature of these two offences, particularly the attempt production is aggravating. Based on the facts I found I conclude that Mr. Etmanskie made a conscious and deliberate choice to purchase this cocaine and the ingredients and prepared to produce the crack. He was interrupted by the police before he could complete the task.

[12] It is also aggravating that Mr. Etmanskie had 11.3 grams of cocaine, for the purpose of trafficking. The possession of a Schedule 1 drug is seen as a grave offence with a high degree of moral blameworthiness that requires emphasis on the overarching principles of denunciation and general deterrence. I found based on the expert's testimony that Mr. Etmanskie was the lowest level of a street level trafficker.

[13] Mr. Etmanskie also has a record. He has 11 previous convictions including three for possession pursuant to s. 4(1) of the *CDSA*, one in 2012 and two in 2018.

#### **V. Mitigating Factors**

[14] Mr. Etmanskie is in the lowest category of drug traffickers described in *Fifield* [1978] NSJ No 42 (CA). The Court of Appeal categorized drug traffickers based on the type and number of drugs involved and the level of involvement in the drug business, to assist in placing them within the appropriate sentencing range. Thus, the number of drugs involved helps determine the quality of the act or probable category of the trafficker.

[15] In the Pre-Sentence Report dated December 5<sup>th</sup>, 2018, Mr. Etmanskie denied responsibility and maintained the drugs were for personal use, but when given an opportunity to address the court he stated “he wants to be a role model for his son, he’s glad the police kicked his door in and he wants to play a positive role in the community.”

[16] Mr. Etmanskie is also enrolled in educational endeavors; attending counselling; gainfully employed full time, involved with positive role models such as Mr. Mario Rolle, and expresses plans for his future.

[17] Mr. Etmanskie admits he was addicted to cocaine, that was not challenged by the Crown.

## **VI. Pre-Sentence Report (Mr. Etmanskie's background)**

[18] Mr. Etmanskie was 27 years old when he committed these offences. He is no stranger to the criminal courts having 11 previous convictions, including three for possession and a robbery in 2007.

[19] Mr. Etmanskie was born in Halifax. His parents were never married. He has no communication with his father. Up until the writing of the PSR he had communication with only one sibling but now he has communication through Facebook with four other paternal siblings.

[20] Mr. Etmanskie spent all his life except two years growing up in North End Dartmouth. He never witnessed domestic violence in the home and denies being subject to physical, emotional or sexual abuse.

[21] His mother was very stern; he said there were loss of privileges as the typical form of discipline. Mr. Etmanskie played sports (basketball and soccer).

[22] Mr. Etmanskie left home at the age of 21 and moved to Windsor, Ontario. He has one son as the result of a previous relationship. He has been his primary

caregiver since 2013. Mr. Etmanskie admitted that Children's Aid has been involved in the past.

[23] Mr. Etmanskie completed Grade 9. When he got to high school he started hanging out with an older crowd and began using drugs. He quit school. He described himself as a capable student but did not apply himself. Mr. Etmanskie later reported to probation he was attending the Adult Learning Program (B.E.A.). He wants to apply to the Nova Scotia Community College. Defence counsel indicated Mr. Etmanskie has future plans to enroll in the "culinary arts".

[24] Ms. Bernard confirmed that Mr. Etmanskie began attending the A.L.P., he is carrying a full course load; he has good attendance and participates in all classes. He has expressed the desire to transition to NSCC. Ms. Bernard also recalled supervising Mr. Etmanskie when she was a probation officer. She opined that Mr. Etmanskie's participation in a program such as "902 man up" would provide him with suitable male mentors and a community sentence would be beneficial.

[25] Mr. Etmanskie had his first job delivering papers at age 11. He has had numerous jobs since then. The most recent was at Sobeys but he lost that job when he was arrested for these charges.



[26] Mr. Scott was running an employability program and that was how Mr. Etmanskie got placement at Sobeys and then hired. Mr. Scott stated despite Mr. Etmanskie having a difficult life and struggling with anxiety he completed the classroom component and work term. Mr. Scott expressed his belief that these offences were “out of character” for Mr. Etmanskie.

[27] At the time of the writing of the Pre-Sentence Report Mr. Etmanskie was receiving income assistance and working part time at a convenience store.

[28] Mr. Etmanskie reported he has been diagnosed with schizophrenia, bi-polar and psychosis. He had two admissions to the IWK. He said he is not taking any medication. “He does not trust medications”. Mr. Etmanskie says he is seeing Mr. John Manning for counselling.

[29] Mr. Etmanskie reports he began experimenting with drugs and alcohol at the ages of 15 and 17 respectively. He has experimented with various substances including cocaine, acid, mushrooms and marijuana. His use of cocaine has interfered with his work. He reports no alcohol or drug use since February of 2018.

[30] He was not participating in any organized groups because of his house arrest condition.

**i. September 5<sup>th</sup>, 2019 (Update)**

[31] Defence counsel advised that Mr. Etmanskie is still under strict release conditions and there have been no breaches; he continues to attend counseling and the ALP class. He has a full-time job and expresses an interest in the “culinary arts”. He continues to take care of his son, who is now 7 years old. His mother continues to be a positive influence and he is involved with positive role models such as Mr. Rolle and Mr. Grosse. Counsel submits that Mr. Etmanskie was not running a commercial enterprise, he was addicted. Mr. Etmanskie has taken significant steps to turn his life around.

**ii. Letters of Support**

[32] Mr. Conrad-Grosse of the A.L.P., Black Educators Association writes that he is the coordinator of that program. The program supports African Nova Scotian adults who have dropped out of school. They provide support in various areas such as literacy, cultural identity, life skills development, they connect clients to mental health, addictions, anger management, cultural identity and employment providers. During intake Mr. Etmanskie shared information about his legal matters, his education and family. He expressed a desire to be a better father and son. He acknowledged his “life choices have put him in bad situations”.

[33] Mr. Bernie Scott of the Emergency Services Achievement Program writes that Mr. Etmanskie expressed his desire to provide a safe healthy environment for his son; to be a role model for him and other minority youth. He stated he wasn't always exposed to positive role models. Mr. Etmanskie did not make excuses if he was late or missed work. He did well at his work placement at Sobeys and was hired. In the last year he states Mr. Etmanskie is trying extremely hard to rehabilitate himself by completing his GED, he has a full-time job and is staying away from negative people. Mr. Etmanskie wants to be a positive contributor to society. He is working hard to rehabilitate his life.

[34] Ms. Natalie Durand, the General Manager of Montana's writes that Mr. Etmanskie has been employed in excellent standing since April 23<sup>rd</sup>, 2019. He is punctual, helpful and demonstrates respect for himself and his co-workers. He is eager to go above and beyond to help with any task, learn new responsibilities or assist in covering absences. He is considered a valuable associate.

## **VII. The Law**

[35] In *R v. Masters*, 2017 NSPC, 15 Judge Hoskins states at para 37-46:

[37] The Supreme Court of Canada has enunciated the correct approach to sentencing in *R. v.M. (C.A.)* (1996), 105 C.C.C. (3d) 327 and Parliament has enacted legislation which specifically sets out the purpose and principles of

sentencing. Thus, it is to these sources, and the common law jurisprudence that courts must turn in determining the proper sentence to impose.

[38] It is trite to say that the imposition of a just and appropriate sentence can be difficult a task as any faced by a trial judge, as it was in this specific case. However, as difficult as the determination of a fit sentence can be, that process has a narrow focus. The Court aims at imposing a sentence that reflects the circumstances of the specific offence and the attributes of the individual offender. Sentencing is not based on group characteristics, but on the facts relating to the specific offence and offender as revealed by the evidence adduced in the proceedings. Generally, it is recognized that a fit sentence is the product of the combined effects of the circumstances of the specific offence with the unique attributes of the specific offender.

[39] Although the sentencing process is highly contextual and necessarily an individualized process, the judge must also take into account the nature of the offence, the victims and community. As Lamer, C.J., (as he then was) noted *in M. v. (C.A.)*, sentencing requires an individualized focus, not only of the offender, but also of the victim and community as well.

[40] As previously mentioned, sentencing of drug offenders is governed by the specific sentencing principles enunciated in the *CDSA* in conjunction with the more general principles of sentencing provided for in s. 718 of the *Criminal Code*.

[41] The fundamental purpose to be pursued in sentencing drug offenders is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society, taking into account the rehabilitation and, where appropriate, the treatment of offenders, and acknowledging the harm done to victims and the community.

[42] In addition to complying with these principles of sentencing, dispositions or sentences must promote one or more of the six objectives identified in s. 718; (a) to (f), inclusive.

[43] The purpose of sentencing is achieved by blending the various objectives identified in s. 718(a) to (f). The proper blending of those objectives depends upon the nature of the offence and the circumstances of the offender. Thus, the judge is often faced with the difficult challenge of determining which objective, or combination of objectives deserves priority. Section 718.1 directs that the sentence imposed must fit the offence and the offender. Section 718.1 is the

codification of the fundamental principle of sentencing, which is the principle of proportionality. This principle is deeply rooted in notions of fairness and justice.

[44] In addition to the specific sentencing principles articulated in s. 10(1) of the *CDSA*, s. 10(2) of the *CDSA* identifies a number of aggravating factors that must be considered by the Court when sentencing drug offenders.

[45] I am also mindful of the principle of restraint which underlies the provisions of s. 718 of the *Criminal Code*.

[46] Accordingly, in accordance with s. 726.2 of the *Criminal Code*, what follows are my reasons for imposing the sentence that I view as a “just and appropriate”, “a fit and proper sentence” for this offender and for this offence.

### **VIII. Position of the Crown**

[36] The Crown seeks 27 months in custody for the 5(2) offence and 6 months consecutive for the 7(1) offence. Plus, ancillary orders (i) Firearms Prohibition pursuant to s. 109 (10 years) (ii) Forfeiture Order of the offence related property (iii) DNA order.

[37] In support of this sentencing position the Crown relies on the following cases:

In *R v Cormier*, 2018 NBCA 38, the accused, 25 years old, had possession of 24.7 g of crack cocaine for the purpose of trafficking. He was a grade eight educated seasonal worker and the father of a six year old. He was addicted to oxycodone and suffering from depression. He had a prior record, although unrelated to drugs, and was found guilty after trial. The Court held that a four year sentence would have been appropriate but for the prospect of rehabilitation disclosed by his presentence report. The Court imposed a three year term of custody on the crack cocaine count and a two year concurrent custodial term for the 50 Percocet pills he was also convicted of having of the purpose of trafficking.

The Court remarked as follows in relation to the crack cocaine trade:

36 [...] There is a general consensus among courts that crack cocaine is a highly addictive drug causing harm to society and that the main objective of sentencing in possession of trafficking cases should be deterrence. Some courts of appeal consider crack cocaine to be an aggravating factor in sentencing, and, in some cases, court have determined **trafficking in crack cocaine indicates an added degree of commercialization and premeditation, not directly associated with powder cocaine, because of the additional steps required to convert powdered cocaine into crack. Some courts have characterized the sale of crack cocaine as an “immensely profitable crime of premeditation”** (see *R. v. Wong*, 2004 ABCA 260, [2004] A.J. No. 861 (QL), at para. 14).

[...]

40 In *R. c. Dorvilus*, [1990] J.Q. No. 1243 (QL), the court emphasized that courts should be unyielding toward crack cocaine, due to its high addiction rate and low cost, which are attractive features to the youth. Moreover, in *R. c. Moreira*, 2011 QCCA 1828, [2011] J.Q. No. 14006 (QL), the Court of Appeal reiterated that crack cocaine traffickers should expect higher sentences than those trafficking in powder cocaine (see para. 33).

41 The Nova Scotia Court of Appeal expressed a strong statement against trafficking crack cocaine in *R. v. Carvery*, [1991] N.S.J. No. 501 (C.A.) (QL). The court stated evidence had been led **“reinforcing crack cocaine’s reputation as a cruelly addictive narcotic, and held that “[t]rafficking in crack cocaine is a crime so corrosive to the social fabric that sentences must reflect deterrence above all other considerations, even when the offender [...] has no previous record”**.

In *R v Smith*, 2012 NSPC 82, the accused was a 30 year old first time offender who plead guilty to possession of 7.1 grams of crack cocaine for the purpose of trafficking. The commission of the offence was out of character for the accused who provided several character letters in support of himself at the sentencing hearing. Judge Hoskins imposed a sentence of two years of incarceration.

In *Smith*, Judge Hoskins quoted Justice Goodfellow of the Supreme Court of Nova Scotia:

81 Despite a positive Pre-Sentence Report and strong mitigating factors Mr. Justice Goodfellow observed:

Trafficking cocaine is a despicable crime that has far-reaching consequences. **The trafficker places his greed for the easy almighty dollar above all other considerations. The trafficker is a retailer of poison. Cocaine destroys lives and breeds crime. In addition, cocaine is known to foster theft, robbery,**

**embezzlement and often it results in people who are exposed to it becoming involved in the drug trade itself. Often the initial victims are the young and other vulnerable members of society, their families and friend, it is an evil trade. The consequences to society in both human and financial terms are substantial. Many consumers lose all dignity and ability without help to stay away from cocaine. Traffickers are an essential link in this evil trade and by making cocaine available they help to sustain, if not expand, the cocaine consumer market.**

[Emphasis added.]

[*Smith* at para. 81.]

In *R v Connolly*, 2014 NSPC 68, the accused, 51 years old, had possession of 30.03 grams of cocaine for the purpose of trafficking. He plead guilty and had no prior record. Judge Whalen imposed two years of incarceration.

[38] *R v McMaster*, [2017] A.J. No. 268, was supplied by the crown to inform the court regarding the impact of race in the sentencing context. The case involved:

Sentencing of the accused for possession of methamphetamine, possession of a prohibited weapon with readily accessible ammunition, possession of a weapon while prohibited, possession of property obtained by crime over \$5, 000, possession of cocaine and breach of recognizance. The accused was stopped by police while operating a stolen vehicle. The accused was arrested again after he showed a sawed-off shotgun to an acquaintance at a transit station. The weapon was operational, and the accused had a shotgun shell in his possession. The accused also had 0.4 grams of methamphetamine on his person.

The accused was subject to six firearms prohibitions at the time. The other counts arose from an incident in which police were called to a bar due to assault allegations, and the accused was found with two grams of cocaine. The accused was bound by a recognizance with house arrest at the time. The 31-year-old accused was an Aboriginal man with an extensive criminal record. He was on probation at the time of the offences. The accused lived on a reserve as a child and his parents were survivors of residential school who abused alcohol. The accused spent time in foster care as a result. The accused's parents were now sober and he lived with them. The accused had some high school education and had been employed. The accused had issues with drug and alcohol abuse. The

Crown sought a global sentence of four years' imprisonment, less time served. The defence sought two years, less times served and two years' probation.

HELD: Accused sentenced to 987 days' imprisonment.

General and specific deterrence and denunciation were the primary sentencing objectives. The mitigating factor was the accused's guilty plea. Traveling on public transit with a firearm and while in possession of drugs was a seriously aggravating factor, as was the accused's criminal record and fact he was bound by a probation order at the time of the offences. The firearms offences were very serious, and the accused had an extensive record of failing to comply with court orders. The accused's background reduced his moral culpability but, given his history of non-compliance, a community-based sentence was not appropriate, and the firearms offences were too serious for anything but incarceration. The appropriate sentences were 36 months for possessions of a prohibited firearm, 12 months consecutive for possession while prohibited, one month consecutive for possession of a controlled substance, three months consecutive or possession of stolen property, one month consecutive for possession of a controlled substance and one month consecutive for breach of recognizance. This totaled 54 months but was reduced to 48 months due to the Gladue factors and totality principle. The accused was then credited with 473 days served. Sentence: 987 days' imprisonment; lifetime weapons prohibition; victim fine surcharge—*Controlled Drugs and Substances Act*, s. 4(1); *Criminal Code*, ss. 95(1), 117.01(1), 145(3), 355(b).

[39] I would distinguish *McMaster* by stating:

1. In Canada there is a growing understanding and practice of presenting material to the court as it relates to Aboriginal Canadians. The experience of Aboriginal Canadians is unique. Mr. Etmanskie does not identify as Aboriginal, he identifies as African Nova Scotian. Each has a unique perspective.
2. The accused in *McMaster* was sentenced for weapons, meth and cocaine, and breaches.



3. 60 criminal convictions including (3) for trafficking and (6) for possession of drugs

[40] I would distinguish *R v. Cormier*, [2018] NBJ No 150, by stating:

1. The Court of Appeal concluded the trial judge erred by considering the absence of an expression of remorse as an aggravating factor and also the accused's refusal to cooperate with a probation officer for a pre-sentence report. This is not the case with Mr. Etmanskie.
2. The Court of Appeal recognized the possibility of rehabilitation and imposed a 3-year sentence.
3. The Court of Appeal declined to set a definitive range for sentencing offenders who traffic in or are in possession of Schedule 1 drugs because there would need to be a fairly clear line of demarcation between the types of dealers who engage in these crimes.
4. Three different types of drugs were found in the accused's possession. That is not the case with Mr. Etmanskie.

[41] *R v. Smith*, [2012] NSJ No. 511, can be distinguished:

1. Accused found in possession of a large roll of money (x2)
2. 7.1 grams crack cocaine=\$700.00
3. Court found accused engaged in selling cocaine for profit. He was motivated by greed, to make easy money.
4. No record.

## **IX. Position of the Defence**

[42] Counsel on behalf of Mr. Etmanskie is seeking

1. 90 days custody intermittent
2. Probation for 3 years with strict conditions
3. Is not opposed to the ancillary orders

[43] In support counsel cites the Impact of Race and Culture Assessment which sets out the accused's circumstances as an African Nova Scotian male growing up in North End Dartmouth.

[44] Counsel argues that Mr. Etmanskie is well into his rehab, there is a range of sentences, they are not "cast in stone", the Court does not need to find exceptional circumstances to impose a sentence that does not attract a federal term of imprisonment and Mr. Etmanskie has taken significant steps to turn his life around.

[45] In support of this argument counsel relied on the following cases:

*R v. Scott*, 2013 NSCA 28, the Court of Appeal stated at para. 15:

He [TJ] recognized the importance of emphasizing deterrence and denunciation in cases involving the trafficking and possession for the purpose of trafficking. But he was also mindful that deterrence and denunciation are not the only objectives of sentencing.

At para. 20:

It is extremely common for sentences of federal incarceration to be imposed where the offender has a significant prior record, and there are aggravating features such as larger quantities of the drug, involvement beyond a mere petty retailer, or the offence occurred in relation to a prison facility.

At para. 59:

...even if one accepts that (2) years is the minimum starting point for all who traffic or possess cocaine for the purpose of trafficking, the selection of a lesser sentence is not per se legal error....Deviation from starting point sentences set by an appellate court is not an error in principle.

[46] *R v. Chase*, 2019 NSCA 36

The accused was in possession of a weapon, multiple packages of cocaine, texts showing possession for the purpose of trafficking; 13 prior convictions, full-time job, 28 years old; associated with negative peer group; dysfunctional/abusive childhood

[47] At para. 55:

The Court of Appeal rejected the Crown's attempt to sound the floodgates alarm [regarding the Provincial Court imposing a lesser sentence than 2 years] citing C. J. Lamar in *R v. M (CA)* [1996] 1 SCR 500 (91-92) at para. 56:

A sentencing judge also possesses the unique qualifications and judgement from having served in 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.

[48] *R v. Rushton*, 2017 NSPC 2:

Distinction: The accused plead guilty after a failed Charter Challenge to possession of trafficking in cocaine and cannabis and possession of methamphetamine and failure to comply with youth order.

## X. Analysis

[49] In *R v. Masters*, 2017 NSPC, 15 Judge Hoskins states at para. 49:

[49] This is a very serious offence as reflected by Parliament's imposition of a maximum sentence of life imprisonment. Indeed, the Nova Scotia Court of Appeal has repeatedly stated, for more than 25 years (at least since 1984), that persons involved in trafficking in Schedule 1 offences will be subject to sentences of incarceration. For example, in *R v. Steeves*, 2007 NSCA 130, at para. 18, the Court stated:

[18] This court has been steadfast in emphasizing that deterrence is a primary consideration in sentencing for drug offences. In *R. v. Robins*, [1993] N.S.J. No. 152 (C.A.), Chief Justice Clarke stated at p. 1:

...The position of this court, repeated in many of our decisions since **Byers**, is that there are no exceptional circumstances where cocaine is involved. We are persuaded that general deterrence must be prominently addressed if the public is to be protected from the nefarious trade that has developed in this drug that is so crippling to our society.

See also, for example, *R. v. MccCurdy* [2002] N.S.J. No. 459 at para. 15.

[50] In *R. v. Butt*, [2010] N.S.J. No. 346 at para. 13, the Nova Scotia Court of Appeal, in addressing the devastating effects of cocaine, stated:

[13] ...cocaine has consistently been recognized by this Court as a deadly and devastating drug that ravages lives. 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 classified cocaine as one of the drugs for which trafficking can attract a life sentence.

[51] More recently, in *R. v. Oickle*, 2015 NSCA 87, Scanlan, J.A., stressed that sentences must continue to send a message that possessing Schedule 1 drugs for the purpose of trafficking, or trafficking in cocaine and morphine, will be treated most seriously by courts. He wrote, at para. 31:

[31] This court has consistently commented on the dangers to the communities posed by individuals who choose to traffic Schedule 1 drugs such as cocaine. Deterrence and denunciation remain at the forefront in terms of sentencing in relation to trafficking of Schedule 1 drugs.

[52] The Nova Scotia Court of Appeal has repeatedly emphasized that deterrence is a primary consideration in sentencing for drug offences, especially offences involving trafficking in Schedule 1 offences or for possessing it for the purpose of trafficking. Thus, in the present case there must be a strong emphasis on the principles of *denunciation and deterrence*. Sections 718(a) and (b) of the *Criminal Code* identify denunciation and deterrence as appropriate objectives of sentencing. Where the primary objective of sentencing is denunciation, the sentence must publicly condemn the offender's conduct. Denunciation typically plays a more central role in drug offences involving dangerous drugs such as Schedule 1 offences because they pose an especially high risk to users and the community.

Where the primary objective is also deterrence, the sentence must attempt to discourage individuals through specific deterrence as well as to deter other potential offenders from committing similar offences by way of general deterrence. Where, as in this case, the primary purpose of sentencing is to deter and denounce this type of behaviour, the Court must ensure its sentence is perceived by the public as strong condemnations of this type of behaviour.

[53] While the Nova Scotia Court of Appeal has repeatedly and consistently stated that offenders involved in trafficking Schedule 1 offences should receive a federal term of incarceration as the norm, the Court has clearly recognized that there is no minimum punishment of imprisonment mandated for these specific offences. In other words, the Court of Appeal had not precluded the possibility of the imposition of a conditional sentence for persons involved in trafficking in cocaine or involved in the possession of it for the purposes of trafficking, when it was available.

[54] In other words, the Court of Appeal has not created a judicial minimum punishment of imprisonment for these types of offences, as that would be clearly inconsistent with what the Supreme Court of Canada stated in *R. v. Proulx*, [2000] 1 S.C.R. 61...

[56] In *Rushton*, 2017 NSPC 2, Buckle, J., observations, at para. 81 to 90 are apposite. She wrote:

[81] The Court, however, has never established that a federal penitentiary term is mandatory and has recognized that in some circumstances the principles of sentencing can be otherwise satisfied. In those cases, shorter periods of custody served in a provincial institution or in the community under a conditional sentence order, when those were available, have been accepted. (See for example: *R. v. Scott (supra)*; and, *R. v. Howell*, 2013 NSCA 67.)

[82] In *R.v. Scott (supra)*, Beveridge, J.A., writing for the majority, concluded that it was not necessary for a sentencing judge to find “exceptional” circumstances to justify a sentence lower than two years for trafficking cocaine (at para. 53). The task of a sentencing judge in imposing a sentence for cocaine trafficking is the same as any other offence—“considering all of the relevant objectives and principles of sentence as set out in the *Criminal Code*, balancing those and arriving at what that judge concludes is a proper sentence” (para. 26).

[83] I take from his reasons that while it may be rare for a cocaine trafficker to receive a sentence less than a federal penitentiary sentence, where the proper application of sentencing principles justifies that result, a sentencing judge is not required to make any specific conclusion that the circumstances are exceptional.

[84] In the more recent decision of *Oickle (supra)*, Scanlan, J.A. does not comment on whether “exceptional” circumstances are required but he specifically declines to set a hard and fast bottom or top boundary to the range (para. 40). He does, however, make it clear that the message to potential Schedule 1 traffickers should continue to be that incarceration will be the normal sentence (at para. 61).

[85] Based on the majority decision in *Scott (supra)* and its interpretation of the previous cases, I would say that the range in Nova Scotia for cocaine trafficking included incarceration in a penitentiary and incarceration in a provincial institution or a lengthy conditional sentence order (when that was an available sentence). The lower end of the range has generally been used in cases involving one or more of the following: addictions, youth; limited or no prior record; relatively small amount of the drug; some hope of rehabilitation; and absence of aggravating factors.

[86] As was noted in *Oickle (supra)*, the range across Canada is broader and includes, in some provinces, intermittent sentences or suspended sentences with probation (see for example: *R. v. Peters*, 2015 MBCA 119; *R. v. McGill*, 2016 ONCJ 138; *R. v. Maynard*, 2016 YKTC 51; *R. v. Voong*, 2015 BCCA 285; *R.v. Carrillo*, 2015 BCCA 192; *R. v. Fergusson*, 2014 BCCA 347; *R. v. Arcand*, 2014 SKPC 12; and, *R. v. Yanke*, 2014 ABPC 88).

[87] Sentencing ranges are important. They are intended to encourage greater consistency between sentences and respect for the principle of parity. However, “they are guidelines rather than hard and fast rules” (*R. v. Nasogaluak*, 2010 SCC 6 at para. 44). This was recognized by Scanlan, J.A. in *Oickle (supra)* at para. 40 when he said, “it is not appropriate to set a bottom range or a top range for a particular offence without regard for the offender or other sentencing principles”. He went on to quote Justice Farrar in *R. v. Phinn*, 2015 NSCA 27 where he refers to *R. v. A.N.*, 2011 NSCA 21:

[34] Unless expressed in the *Code*, there is no universal range with fixed boundaries for all instances of an offence: [Authorities omitted]. The range moves sympathetically with the circumstances, and is proportionate to the Code’s sentencing principles that include fundamentally the offense’s gravity and the offender’s culpability...

[88] Sentencing judges are permitted to go outside the established range for a given offence as long as the sentence imposed is a lawful sentence that adequately reflects the principles and purposes of sentencing (*Nasogaluak (supra)*, at para.44). This was recently affirmed by the Supreme Court of Canada in *Lacasse (supra)*, where Wagner, J., writing for the majority, said as follows:

There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, it is not demonstrably unfit. Once again, everything depends on the gravity of the offence, the offender’s degree of responsibility and the specific circumstances of each case...

[50] Finally, s. 718.2 requires me to consider that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances and that all available sanctions, other than imprisonment, that are

reasonable in the circumstances and consistent with the harm done to victims of to the community should be considered for all offenders.

[51] In *R. v. Perry*, 2018 NSSC 16, at para. 22 J. Woods cites *R.v. Borde*, [2003] ONTJ 354, at para. 32:

[32] However the principles that are generally applicable to all offenders including African Canadians, are sufficiently broad and flexible to enable a sentencing court in appropriate cases to consider both systemic and background factors that may have played a role in the commission of the offence and the values of the community from which the offender comes.

[52] The court ordered at the request of Mr. Etmanskie an Impact of Race and Culture Assessment. The report was completed by Mr. Robert Wright MSW, RSW and Natalie Hodgson, BA, BED, MED.

[53] The Impact of Race and Culture Assessment at page 2 states:

**Objective of This Report**

Cody Etmanskie is an African Nova Scotian (ANS) with parental roots in the historical communities of North and East Preston. This should be considered as a significant factor in considering his sentence. We have learned much about systemic racism in the Justice and Education systems in Nova Scotia through the Marshall Inquiry and the BLAC report. Nova Scotia’s recent review of the Mental Health and Addictions system has also indicated that there are significant gaps in serving the needs of ANS there as well. Knowing this, it is critical to understand how an individual’s ANS heritage has affected their involvement in criminal behaviour, will be a factor in their treatment while incarcerated and will be a factor in their rehabilitation and reintegration in the community. I will present the following information in this report:

1. What is known about ANS experience, and how might that have influenced Cody Etmanskie’s involvement with criminal behavior;
2. How should this history and Cody Etmanskie’s unique history and status as an ANS be considered when delivering sentence;



3. What services or resources should be made available to Cody Etmanskie to support his rehabilitation and reintegration given his unique history and status as an ANS, and;
4. What light does Cody Etmanskie's status as an ANS shed on the conclusions and recommendations that were offered in the reports that are already before the court?

[54] At page 5:

Historically, Black people represent the only ethnic group in North America whose immigration was completely involuntary (Vargas & Koss-Chioino, 1992, p. 65). The vast majority of African peoples who arrived early in North America had a rather desperate social circumstance. Removed from their native lands, they were disconnected from all stabilizing elements of their culture, stripped of their language, disconnected from all family structure, and were regularly supplied with biologically foreign forms of alcohol to mollify them and lower their resistance to slavery and oppression.

One of the great paradoxes of the experience of African people in North America is that when it comes to substance use, trafficking, and crime, things got dramatically better for some but worse for others after emancipation. From the mid-1800s until the early 1900s in both Canada and the United States many people of African descent remained in their segregated and largely rural communities. Many of these developed subsistence economies and established strong and functional communities centered on the black church and the multigenerational family unit.

Many others migrated to urban areas. It is here that large numbers engaged in education or founded businesses and integrated into the larger economy experiencing a measure of wealth. Unfortunately, even larger numbers of urban Blacks established the large urban ghettos and experienced an urban poverty that was unmitigated by rural subsistence agriculture. It is in this urban ghetto that the strong link between African North Americans and crime was established.

North End Dartmouth (NED), is Cody Etmanskie's home. His mother also grew up in Dartmouth's North End most of her life. Although, Mr. Etmanskie enjoys living in his community and appreciates the connectedness, by geographic location, he is surrounded by poverty and crime. This creates circumstances lacking productive opportunities.

[55] At page 5, para. 4:

Patterns of Crime in Criminally affected African Nova Scotian Communities:

Robert Wright has written elsewhere about the unique patterns of criminal activity that have been seen in recent years in ANS communities: The rise in drug trafficking, the explosion of juvenile prostitution, the spread of a loosely formed ANS criminal organization across the country (and internationally), and the proliferation of gun violence. Though the criminal justice system holds people individually accountable for the crimes they commit, there is a recognition that social forces are at the root causes of crime. Understanding these social forces, however, are critical to properly understanding and adjudicating persons of ANS descent. He offers discussion of three such factors as examples to form a basis for considering issues in Cody Etmanski's case:

[56] At page 6, paras. 1, 2 and 3:

1) Community Displacement:

Though it is true that all communities in Nova Scotia have been affected by shifts in population caused by economic and urbanizing forces, this is particularly true of ANS communities. There are places around the province where ANS lived in very large numbers in cohesive communities, yet today those communities barely exist. Beechville and Amherst are two examples of this, though Africville would be the most dramatic example in Metro. The gentrification of the North End of Halifax and the creation of public housing in Bayers Westwood and Greystone are other examples. North End Dartmouth continues to be neglected when it comes to services and resources. With a mixture of housing and cheaper rent, a large population of extremely low socio-economic and impoverished people make up much of the community. People live in apartments and units that landlords are either incapable or negligent to upkeep. With the expansion of the city, the largely ANS communities of Lake Loon, Cherry Brook, East and North Preston are also being encroached on by suburbanization which threatens their traditional fabric.

2) Increased Demand for Education within a Eurocentric System:

Many ANS were historically employed in labor and domestic work. Throughout Halifax ANS' s worked as stevedores at the dockyards, laborers on road crews, stone masons and sought-after craftsman. There was also a significant amount of subsistence husbandry that supported rural Blacks in Halifax. Most families kept a cow and a couple of pigs, dozens of chickens or turkeys; others were craftspeople who sold their wares in downtown markets. These economic opportunities are now relics of a not too distant past.

3) In terms of education, over the last generation the demand for education in order to enter the economy has grown dramatically. In the mid 80's the need was recognized and gave rise to a national effort to encourage students to stay in school (the federal stay-in-school initiative). Prior to this, Nova Scotians of

all ethnic groups from the working classes had low educational attainment rates. The pressures and needs to remain in school gave rise to the recognition that schools were fewer welcoming places for ANS than others (Black Learners Advisory Committee, 1994). ANS were faced with the same increased demand for education as White students but were less well integrated and supported in the education system. This increasing demand for education but differential success in integrating ANS students into the education system may go a long way to explaining some of the racial differences in criminal and violent patterns we see. Being educated in a Eurocentric system, has impacted ANS learners with a feeling of being left out and isolated from curriculum, books, materials and classroom lessons. This along with lower expectations from teachers, underrepresentation of Black educators, and institutional racism, all contribute to negative schooling experiences and poor academic achievement (Black Learners Advisory Committee, 1994). We can see the effects of this on Mr. Etmanskie, who dropped out of high school when he was younger.

[57] At page 7, para. 1:

#### **Particular Patterns of ANS Violence**

- 1) Mr. Wright has written earlier about the cohesive and extensive relational bond that exists between ANS communities. It is a commonly held belief that ANS hold these kinship bonds as a more substantial part of their culture than do their NS neighbors of European heritage (Nichols, n.d.) This may be due to the culture being more high context and relational (Kuykendal, 1992; Nichols, n.d.), or it may be that the racialization process causes ANS to form a deeper racial alliance than those of other racial groups. Regardless, this recognition of the large extended family bond means that each tragic loss of an ANS life to violence is felt as a deep personal loss throughout a wide network of extended families and throughout the entire affected community. When the violence is "Black on Black" it inevitably involves overlapping social and/or family ties between victim and perpetrator. This results in many consequences but two of them are quite dramatic: First, the ANS community senses each loss as tragic and deep and the losses mobilize a sentiment of outrage and community disruption that could arguably be suggested to be out of step with the actual number of such losses; and secondly, among those ANS who are engaged in criminal activities the loss is not simply about business but it is personal and family. Mr. Etmanskie has lost some friends to street violence and still suffers from this trauma.

[58] The accused: Cody Etmanskie: page 7, at para. 2:

- 2) Cody has ties to three ANS communities; East Preston from his maternal grandmother, North Preston from his paternal grandparents, and North End Dartmouth where he spent the majority of life growing up. He has lived most of his life in the Dartmouth area between public housing and lower socio-economic neighbourhoods...

.... Over the years Dartmouth's North End has had a shift in underworld activity. This is not always reflective in crime stats recorded by police departments due to the nature that crime stats only have information on reported crimes. With the increase in gun and weapons violence, only the ones brought to the attention of police by result of serious injury, death, bystander or victim reporting make it to statistics. Whereas there are many attempted shootings not reported on a regular basis.

[59] Page 8, at paras. 1, 2, 3 and 4:

- 1) For young Black men in Dartmouth's North End, access to services looks very different than for their counterparts. Systemic racism, mistrust of authority, and an aggressive police presence plague North End Dartmouth. Black men in general are more likely to be stopped by, questioned, followed or put under suspicion than white men. According to a recent study conducted by Scot Wortley (2019), people of African descent are six times more likely to be stopped by police than people of European descent. 30% of all Black males in Halifax have been arrested for a crime at some point in their lives, contrary to only 6.8% of the white male population (Wortley, 2019).
- 2) ... Mr. Etmanskie's employment history is threaded with lower wage gigs such as convenient/grocery stores. He has been employed multiple times and is very content with the job he has at present. We can examine criminal theories to support the complexity of NED environmental lifestyles. Robert Merton's Strain Theory suggests that pathways to crime can stem from individuals wanting what mainstream society has yet having no access or means to obtain it. Although, Cody maintains his innocence in the current charges before the court, regardless we can see how his social position in NED has created an environment of have-nots. His lack of access to prosocial means for getting ahead, role models, networking, and educational opportunities shaped his capacity to succeed and his choices with substance abuse.

### **Mental Health and Addiction in ANS Communities**

- 3) Many African Nova Scotians do not utilize counselling or other services in the same way as their White counterparts. Seeking support for Mental Health is seen as taboo or a sign of weakness in the Black community. Counselling and other therapeutic services tend to be inaccessible to ANS as well as other

marginalized groups. Services are typically not situated within the Black community, which limits who has access. Education about accessing services for Mental Health for people of African descent and the larger Black community is an area that needs great attention. Black people, historically, look to family, community and faith rather than professionals to assist with personal challenges. ANS people have mistrust and assumptions about not being able to relate to a counsellor (the assumption is that the counsellor is of European descent). Hopefully, with the increase in Black counsellors from the Afrocentric Master's program, more ANS people will access support.

#### Cody's Mental Health History: ...

...He said he had surgery around 15 years...After surgery he began to have side effects causing pain in his side while running...he was no longer able to play soccer. This initiated his involvement with substances. He began using ecstasy two to three times a day. This led to bizarre behaviour observed by his mother;

...

...at the age of 17, his mother brought him to the IWK for treatment and he was admitted for one month into the 4-South unit...

...He had a negative experience in the IWK and said he was put on Lorazepam and Benzotropine...

...Shortly after being discharged, he remembers being brought back but because it was such a negative experience for him the first time, he requested to go to Waterville Youth Centre instead of the IWK...

...he spent another two months in the hospital...

...he was diagnosed with Schizophrenia, Bi-polar, psychosis, and personality disorder.

#### 4) Cody's Addiction and Substance Use: ...

...He recalls abusing this substance for two and a half years...

...His next substance to engage with was alcohol when he was 19 years old. It started out as a recreational weekend substance, but the he began drinking heavily...

...Cocaine was introduced into his substance history when he was 27 years old. This too began as social, but the became a source of addiction when one of his friends were murdered. Cody lost a job and experienced other stress related circumstances. Whenever he couldn't access cocaine, he would use pills such as oxycontin and Percocet in its place. While maintaining his innocence, he says he is still glad the police kicked in his door on February 14, 2018, as looing back on the event, he speculates that he had done a lot of drugs that day and may have overdosed otherwise.

Family Constellation: Cody grew up living with his mother, Karen Etmanskie, and his older brother Christopher. Cody's grandparents on his mother's side reside in East Preston, Gary Etmanskie (passed away in 2010) and Mabel Etmanskie (Glasgow). Morgan Cain of North Preston is Cody's biological father, but he hasn't been involved in Cody's life...

...Mr. Cain's parents, both of North Preston, Shirley Willis (passed away a couple years ago) and Wally Cain.

[60] At page 10, paras. 1, 2 and 3:

Education History:

- 1) ...John Martin Junior High, started labelling him as a behaviour problem...  
...instead of the school working with him, they were suspending him a lot...  
...He was pushed along to high school, and it was here that he started skipping school because he felt the teachers weren't monitoring and it was easy to do. After his health issues affecting his sports, things shifted for him, and this led to him not completing high school...  
...Mr. Etmanskie is continuing with his education through Black Educators Association's Adult Learning Program to complete his high school equivalency.
- 2) Need for Culturally Relevant Positive Male Role Models: ...  
...He lacked male figures almost entirely in his younger years.
- 3) Additional Observations from Interviews and Collaterals:  
...He speaks highly of the Black men in his life that have impacted him positively. He identified an ANS coach he had as an adolescent...  
...He also had a counselling relationship with Dr. John Manning...  
...His current relationship with Mario Rolle steers Cody to mobilize positive choices. Mr. Rolle is an ANS male who works for the Nova Scotia Brotherhood Initiative, which is an Afrocentric organization committed to assisting Black males with their overall health and well-being development.

[61] African Nova Scotian perspective in the Criminal Justice System

1. How did the accused's background and circumstances touch upon:
  - a. gravity of offence and circumstances of its commission and degree of responsibility of offender?

[62] Up until Mr. Etmanskie was 21, he lived at home in North End Dartmouth (except two years in London, Ontario) His father was never “a significant person” in his life. He denied being a witness to any domestic violence or a victim of abuse, but says CAS was involved with the family. Once he reached grade 10, he could no longer play soccer and began hanging out with an older crowd and quit school. He began using drugs at the age of 15, including ecstasy, cocaine, acid, mushrooms and marijuana. He began using alcohol at 19. His first criminal offence (s. 344) occurred January 21<sup>st</sup>, 2007 and he was sentenced to 18 months in custody on June 13<sup>th</sup>, 2007. He lacked positive African Nova Scotian male role models in his younger years. He did not receive guidance or support from his teachers in Junior High or High School. He continued to use drugs and was sentenced most recently August 29<sup>th</sup>, 2018 to two counts of possession under s. 4(1). He did not address his mental health issues.

[63] Mr. Etmanskie has expressed his desire to change “to be there for his son”. I accept his expression of the desire to rehabilitate himself. Not only has he said it, he has acted upon it. I disagree with the Impact of Race and Culture Assessment conclusion that the accused poses no real threat to society, anyone involved in

offences such as Mr. Etmanskie can pose a threat but his efforts to change his lifestyle have significantly reduced the risk of him reoffending.

[64] Currently he appears to have a good handle on his addiction. He is abstaining from use and shows some insight into his addiction and the consequences of same. He is involved in fulltime parenting of his 7-year-old son, he is taking classes through the Adult Learning Program and connecting with positive role models like Mr. Mario Rolle.

[65] Mr. Etmanskie acknowledges his mental health diagnosis. He recognizes he needs help and has connected with Mr. Manning (who he sees regularly). He states he finds this service helpful.

[66] It is evident, from the collateral sources (three letters, PSR and Impact of Race and Culture Assessment) that Mr. Etmanskie acknowledges the mistakes he has made, expresses a desire to change and is following through. The letters are very positive. He is changing his lifestyle. It is obvious he has the support of his mother too.

[67] In addition to the very positive improvements in his personal life Mr. Etmanskie has a full-time job. His manager writes “Myself and the rest of the



management team are continually impressed with his performance and character and consider him a valuable associate”.

[68] Mr. Etmanskie lost his job at Sobeys because of these charges and Mr. Scott wrote “it was an extreme blow to his confidence but in the last year he has tried extremely hard to rehabilitate himself. He is in the process of completing his G.E.D... he is getting support there... the Brotherhood, has secured full time employment and is staying away from negative people”.

African Nova Scotian Perspective Community in general...

- (a) Opportunities and benefits of community participation in the administration of any sentence
- (b) Need to immigrate both community interest and community confidence in the sentencing process and prospects of the accused.

[69] It states at page 5 of The Impact of Race and Culture Assessment: “The unique patterns of criminal activity that have been seen in recent years in African Nova Scotian communities. [Include], the rise in drug trafficking, the explosion of juvenile prostitution, the spread of a loosely formed African Nova Scotian criminal organization across the country...and the proliferation of gun violence. Through the criminal justice system holds people individually accountable for the crimes

they commit, there is a recognition that social forces are at the root cause of crime.”

[70] Then at page 11: “It is well documented that African Nova Scotians have been and continue to be victims of institutional racism, and that the likelihood of having involvement with the criminal justice system is disproportionate to White counterparts.”

[71] Later at page. 11: “Mr. Etmanskie has already had enough pitfalls in life, and incarceration will only place him in a vulnerable position by surrounding himself with others convicted of crimes. His best chances for rehabilitation are outlined as recommendations...”

[72] At page 12, paras. 3 and 4 of the Impact of Race and Culture Assessment:

What services or resources should be made available to Cody Etmanskie to support his **rehabilitation and reintegration given his unique history and status as an ANS?**

Cody Etmanskie would benefit from counselling to support his healthy development and to address the consequences from his longstanding history with addictions. Oral traditions are embedded in multigenerational practices for Indigenous Black and Aboriginal people. Hence the success with narrative approaches for Indigenous people and healing. Mr. Etmanskie also values and recognizes his need for counselling. He demonstrated through the interview process his desire to share his narrative. If a jail sentence is imposed, counselling he may receive within the institution wouldn't be culturally sensitive, and therefore a counselling relationship would not exist. Such a programme may be accessible through the Nova Scotia Brotherhood Initiative.

We recommend that he continue with his weekly meetings with Mario Rolle. Mr. Rolle is a strong role model and mentor in Cody's life. Mr. Rolle speculates that a jail sentence will interrupt his mentorship, that Cody would be traumatized by the jail culture, and that incarceration will provide no benefit to him.

Cody Etmanskie has shown progress and success with his Adult Learning Program. He is approximately half-way to completing this program and has the desire to continue with further post-secondary studies. An incarceration sentence will put a huge roadblock in his progress and set him back with these goals.

Mr. Etmanskie has recently attended a Narcotics Anonymous session and says he has plans to continue attending. He appreciated hearing other people's stories as well as sharing his own. We recommend that Cody should continue accessing group support to help him succeed in conquering his addiction problem.

What light does Cody Etmanskie's status as an ANS shed on the conclusions and recommendations that were offered in the reports that are already before the court.

This report has provided some review of the history of ANS, their disadvantage and the link between that disadvantage and crime. We have seen how that has played out in Mr. Etmanskie's life. Clearly there are systemic factors that have influenced Mr. Etmanskie's trajectory. Though Mr. Etmanskie was deemed ineligible for Mental Health Court, he has significant Mental Health and Addictions issues that have influenced his life.

[73] In *R.v. McMaster*, [2017] A.J. No 268, the court stated at para. 71:

...systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need to be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.

[74] Having considered the facts, the aggravating and mitigating factors, Mr. Etmanskie's circumstances, the seriousness of the offence and the principles of sentencing including general and specific deterrence I do not think Mr. Etmanskie

should be sacrificed on the altar of general and specific deterrence and forgo any possible hope of rehabilitation.

[75] I recognize that our Court of Appeal has emphasized denunciation and deterrence and set a range of sentence as two years or more and although I am of the view that a custodial sentence is warranted, it should not be a federal sentence.

[76] The disposition should be a custodial sentence with a lengthy period of probation and strict conditions. Mr. Etmanskie is 30 years of age and there is tremendous potential for rehabilitation. Societal protection is best achieved by encouraging Mr. Etmanskie's rehabilitation by imposing a lengthy measure of constructive supervision.

[77] J. Green stated in *R. v. Zachar*, 2018 ONCJ 631, at para. 83:

Rehabilitation like deterrence, has an instrumental purpose: the repudiation of criminal activity and transition to a pro-social lifestyle offers the best assurance of confirming societal protection. But rehabilitation also has an expressive role that, like denunciation, conveys shared normative principles and value through its considered application. As explained in the introductory passages to *R.v. Lacasse*, at para. 4:

One of the main objectives of Canadian criminal law is the rehabilitation of offenders. Rehabilitation is one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world, and it helped the courts impose sentences that are just and appropriate.

[78] I find based on all of the above that the systemic and background factors affecting African Nova Scotians in society have impacted the defendant's life in a way that bears on his moral blameworthiness and indicated which sentencing objectives should be prioritized in this accused's case.

[79] Mr. Etmanskie is 30 years old, there is a significant opportunity for successful rehabilitation; there has been a significant change in his circumstances and lifestyle since the commission of these offences.

[80] Therefore, I find the following is a fit and proper sentence for Mr. Etmanskie:

1. S. 109 *CC*-10 years weapons prohibition
2. S. 6(1) *CDSA*-Forfeiture Order
3. S.487.051 *CC*-Secondary DNA on S. 5(2) *CDSA*
4. Custodial Disposition 155-65 remand credit=90 days intermittent s. 5(2), 90 days concurrent S.463/7(1) and probation 3 years with very strict conditions

Jean Whalen, JPC