PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Heickert*, 2020 NSPC 9

Date: 20200124
Docket: 8163898, 8163906, 8325381
Registry: Dartmouth, Nova Scotia

Between:

Her Majesty The Queen

v.

Mark David Heickert

Judge:	The Honourable Judge Frank P. Hoskins, J.P.C.
Decision	January, 24, 2020
Charge:	465(1)(c), 465(1)(c), 145(3) of the *Criminal Code of Canada*
Counsel:	M. Taylor, for the Crown K. Burke, for the Defence

By the Court: (Orally)

Introduction:

[1] Mr. Heickert pled guilty to the offence conspiracy to commit the indictable offence of trafficking in a substance included in Schedule 1 of the *Controlled Drugs and Substances Act*, (*CDSA*), to wit: cocaine, contrary to s. 465(1)(c) of the *Criminal Code.* This is a serious offence as reflected in the imposition of a maximum sentence of life imprisonment. Section 5 (2) of the *CDSA* imposes a maximum sentence of life for trafficking in cocaine. Section 465 (1) (c) of the *Criminal Code* states that everyone who conspires with any one to commit an indictable offence is guilty of an indictable offence and liable to the same punishment as that to which an accused who is guilty of that offence would, on conviction, be liable. Thus, in this case, Mr. Heickert is liable to the same punishment as that of trafficking in cocaine, which is life imprisonment.

[2] Mr. Heickert also pled guilty to the offence of conspiracy to commit the indictable offence of possession of property, to wit: Canadian currency, of a value exceeding five thousand dollars, knowing that all or part of the property was obtained by, or derived directly or indirectly from, the commission in Canada of an

offence punishable by indictment, contrary to ss. 354(1)(a) and 465 (1)(c) of the *Criminal Code.*

[3] These offences were committed over a seven-month period, between March 31, 2017 and November 1, 2017.

[4] Mr. Heickert also pled guilty to having failed to comply with a condition of his recognizance entered into before a judge which required him not to associate with or be in the company of the following persons: Members of the Hells Angles or associated clubs except incidental contact in an education or treatment program or while at work. On March 1, 2019, Mr. Heickert breached his recognizance by associating with Adam Kleinbub, a member of the Hells Angels, contrary to s. 145(3) of the *Criminal Code.*

[5] In assessing the issue of what is the appropriate and just disposition for these offences and offender, I have carefully considered and reflected on the following: the circumstances surrounding the commission of the offence and the offender, Mr. Heickert, the relevant statutory provisions, including s. 10 of the *CDSA* and s. 718 of the *Criminal Code*; the case law regarding sentences for trafficking in schedule 1 offences; the submissions of counsel; and the medical documentation relating to Mr. Heickert's personal circumstances.

Background of Proceedings:

[6] Mr. Heickert pled guilty to the offences after numerous court appearances, which included a re-election back to this Court, after the commencement of the Preliminary Inquiry, for the purposes of sentencing.

[7] The sentencing was adjourned until today's date, so that I could take the necessary time to consider the thorough and able submissions of Counsel in reaching my decision as to what is an appropriate disposition for the offences and Mr. Heickert.

Circumstances of the Offences:

[8] The circumstances surrounding the offences are set out in Exhibit 1 as a statement of the facts supporting the conspiracy charges. The Crown read into the record Exhibit 1. The facts are as follows:

> Operation HARLEY is an investigation into the drug trafficking of former London East Hells Angels Hangaround Chapter member Paul Francis Monahan
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> In early February of 2017, Paul Monahan posted an online advertisement to Kijiji selling a Harley Davidson Motorcycle on behalf of a full Patch Hells Angels London, Ontario Chapter member, James Andrew
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> (JAB) Undercover Operator 1 contacted Paul Monahan by e-mail and arranged to view the motorcycle. On February 24th, 2017, UC-1 attended the Nomads N.B Hangaround Chapter clubhouse in Musquodoboit Harbour, Nova Scotia and agreed to purchase . During the meeting, Paul Monahan overheard a staged call

received by UC -1 where a sale of marihuana was arranged. Paul Monahan attempted to interrupt the phone call and stated, once UC-1 hung up, that he was in possession of marihuana and could sell some to UC-1, if he wanted.

When UC 1 agreed, Paul Monahan left UC-1 in the clubhouse and attended his residence returning to the clubhouse with two ounces of marihuana which he sold to UC-1 for $360 cash. Paul Francis Monahan stated that he had a license to grow marihuana and could continue to sell to UC-1. Paul Monahan continued to sell marihuana to UC-1 throughout March, April, May, June, July and August with increasing amounts of up to 725 grams of marihuana

On May 31st, 2017, at 12:20 pm, UC-1 attended the London East Hells Angels Hangaround Chapter clubhouse and met with Paul Monahan.

After they spoke of the motorcycle recently purchased by UC-1, Paul Monahan mouthed that he had a price for cocaine; between $48,000 and $50,000. They continued the conversation in UC-l's truck where Paul Monahan stated that the cocaine would be coming from a Hells Angels member in Oshawa and that it would be pure and the best price because the Oshawa member was the main guy who controlled the cocaine for the Hells Angels. Paul Monahan stated that the Oshawa member often visited Nova Scotia for ten days at a time and would spend the time with Paul Monahan.

During their conversation, Paul Monahan and UC-1 determined that UC-3 would purchase the cocaine from Paul Monahan in Oshawa the following week as UC-1 was sending UC-3 to Kenora, Ontario for work, anyway. After reviewing TDR data from Paul Monahan's cell phone, investigators believed that the Oshawa male Paul Monahan referred to was using a phone subscribed to Donald Duck of 4 Duck Lane in Orillia, Ontario as contact was elevated after conversations of cocaine between UC 1 and Paul Monahan who stated that the cocaine dealer lived in Orillia, Ontario. The phone number 705-716-1620 was determined to belong to Mark Heickert following an open source intelligence search. Mark Heickert is a full patch Hells Angels member in Oshawa, Ontario who often visits Nova Scotia and spends his time primarily with Paul Monahan.

On June 4th, 2017, at 12:45 pm, UC-1 met with Paul Monahan at Dartmouth Crossing in Dartmouth, Nova Scotia in the parking lot of Home Depot. Monahan laid out the details of the previously discussed, upcoming purchase of one kilogram of cocaine by

UC-3 in Ontario, which was to take place on Thursday, June 8th, 2017. Paul Monahan stated that the cost of the kilogram would be $50,000 and that UC-3

should bring two envelopes of cash with him - one containing $47,000 for the cocaine and another with $3,000 for Paul Monahan for travel to Ontario and for setting up the deal. Paul Monahan would send a text message to UC-3 either stating he was having lunch or supper with his brother indicating that the deal would take place either between noon and 1:00 pm or between 4:00 pm and 6:00 pm, respectively. Paul Monahan stated that the cocaine deal would occur in Orillia as "Mark", the Oshawa affiliated Hells Angels member selling the cocaine, resided in Orillia and that the deal would occur either at Mark's residence or at the nearby hotel Paul Monahan would rent. Paul Monahan informed UC -1 that Mark would be introduced to UC-3 who would then decide whether he would continue working with UC-3.

On June 8th, 2017, at 2:11 Paul Monahan told UC-3 via text message that the location to meet would be 2594 Hampshire Line (2594 Hampshire Mills Line is a known residence for Mark Heickert.

At 3:07 pm Paul Monahan sent UC-3 a text message saying that he would be meeting UC-3 outside by himself.

At 4:06 pm, Paul Monahan gave directions to UC-3 on how to find Mark Heickert's residence. On the same date, at 5:50 pm UC-3 arrived at 2594 Hampshire Mills Line and saw Paul Monahan on the patio before he entered UC-3's vehicle. Paul Monahan described the cocaine UC-3 was purchasing as having just come off the boat detailing that it was wrapped in plastic and oil and was as hard as a brick. UC-3 paid $3,000 cash to Paul Monahan before also giving him $47,000 cash for the cocaine, which was concealed in a vacuum-sealed bag, wrapped in a towel and placed in a gym bag. Paul Monahan then retrieved a gift bag from his vehicle's trunk and returned to UC -3's vehicle. The gift bag was covered with tissue paper and inside Paul Monahan showed UC-3 the kilogram of cocaine stating that it was "not cut". Before departing, Paul Monahan explained that the first deal was always the hardest and that the next one would occur in the East.

Although UC-3 was not introduced to "Mark" during the cocaine deal on June 8th, 2017, at multiple times throughout the morning and into the late afternoon, the cell phones belonging to Paul Monahan and Mark Heickert were in the same location on Hampshire Mills Line just north of Cambrian Road in Orillia, Ontario. It is believed that Mark Heickert was present in his residence at the time of the cocaine deal and that he sold the cocaine through Paul Monahan. TDR analysis of Paul Monahan's cell phone and Mark Heickert's cell phone shows that in the days prior to the cocaine deal at Mark Heickert's residence in Orillia, Ontario, Paul

Monahan and Mark Heickert spoke many times via both text message and phone call.

On June 5th, 2017 there were fourteen points of contact and on June 6th, 2017 there were 13 points of contact between the cell phones belonging to Paul Monahan and Mark Heickert.

On July 25th, 2017, UC-1 contacted Paul Monahan and asked if the "1940's something Harley" was still available. In a previous discussion, Paul Monahan informed UC-1 that he would use "1947 Indian Chief Motorcycle" as a reference to cocaine that cost $47,000.

In UC-l's 1940's comment, UC-1 was talking about the upcoming cocaine transaction planned for July 27th, 2017 and knew that Paul Monahan would understand his guarded text message. Paul Monahan replied saying that everything was good and that "he" (believed by investigators to mean Mark Heickert) was still on his way back (investigators know that the Hells Angels Canada Run in Calgary was arriving at this time). Paul Monahan provided UC-1 with the address 2594 Hampshire Mills Line to provide to UC-3 - this is the residence of Mark Heickert and where the first cocaine purchase took place.

At 5:35 pm, UC-1 called Paul Monahan who said that everything would be the same as the previous cocaine deal, including the guy selling the cocaine. UC-1 said that he kept getting free barbeques and would give one to Mark Heickert since his kid was sick and could sell raffle tickets giving it away in an attempt to raise money for his son. Paul Monahan, through guarded talk, informed UC-1 that the cocaine would cost $47,000 and that an additional $5,000 would be Paul Monahan's commission for his role in setting up the cocaine deal.

At 6:43 pm (EST), UC-3 arrived at 2594 Hampshire Mills Line in Orillia, Ontario. Mark Heickert greeted UC-3 but said he only had half of the required cocaine to sell and that since he had just been out of town, he was running behind. Mark Heickert said that the cocaine would be available at approximately 8:30 pm (EST) and informed UC-3 that he could either wait at Mark Heickert's residence with him and his woman or leave and return when the rest of the cocaine had arrived. UC-3 stated he would leave and get some food to eat.

At 9:04 pm, UC-3 received a text message from the phone number provided by Mark Heickert saying that the 'bike' was ready and when he arrived at 9:27 pm (EST), Mark Heickert greeted him. UC-3 presented Mark Heickert with a brand

new barbecue on behalf of his brother that Mark Heickert could auction off in order to raise money for Mark Heickert's son who requires an $80,000 wheel chair van. UC-3 then provided Mark Heickert with $47,000 cash. Mark Heickert gave a yellow grocery bag to UC-3 which contained something much softer than the brick of cocaine in the June 8th, 2017 purchase. Mark Heickert whispered to UC-3 that this product was better than the product sold to UC-3 previously. The cocaine was packaged in four plastic bags within the yellow grocery bag.

On September 12th, 2017, at 11:54 am, UC-3 sent a text message to Paul Monahan informing him that he would be in Barrie for court on September 21 and got one ticket. Paul Monahan, knowing this was guarded conversation and that UC-3 was inquiring about a cocaine deal of one kilogram, replied stating that he would get back to UC-3 in a bit.

There were several messages between and among the three arranging a meeting time

On September 18th, 2017, numerous calls and texts between and among UC-1, Monahan, and Heickert were logged. At 11:53 pm, Paul Monahan called UC-3 and arranged for the cocaine deal to occur on Thursday, September 21st, 2017 at 11:00 am.

On Thursday, September 21st, 2017, UC-3 traveled to Orillia, Ontario to purchase one kilogram of cocaine from Mark Heickert. At 11:20 am (EST), UC-3 arrived at Mark Heickert's residence located at 2594 Hampshire Mills Line in Orillia, Ontario. UC-3 exited his vehicle and shortly after was greeted in the driveway by Mark Heickert. Mark Heickert was carrying a yellow grocery bag in his hands. Mark Heickert placed the yellow bag on UC-3's truck and said that this one, referring to the cocaine, was better than the last purchase.

UC-3 provided Mark Heickert with $47,000 cash and Mark Heickert thanked him; they shook hands and spoke of having a barbecue and a beer together one day. UC-3 stated that Mark Heickert was cordial and seemed comfortable with U C-3.

On October 20th, 2017, at 9:55 am, UC-3 met Paul Monahan at the Nova Scotia Hells Angels clubhouse. UC-3 arrived with a trailer for UC-1's motorcycle and the two drove together in UC-1's vehicle to Sheet Harbour, Nova Scotia to pick the motorcycle up, during which time they discussed price and the date the next sale of cocaine would take place. Paul Monahan said the price for two kilograms of cocaine would be the same as last time ($47,000 a kilogram) and that the price

in Nova Scotia for the same thing was $64,000. Paul Monahan stated that because his commission would now be $10,000, UC-3 would not be able to transfer the money without a receipt. Paul Monahan suggested UC-3 transfer $5,000 to two of Paul Monahan's bank accounts. Paul Monahan told UC-3 that he will not be making all of the money because he had to pay $2,000 to the Hells Angel separate from Mark Heickert, one that Paul Monahan describes as being in jail. UC-3 suggested to Paul Monahan that UC-2 meet him with the money to avoid having the money deposited into the bank. Paul Monahan said that he would meet UC-2 anywhere and would even fly to New Brunswick to meet him.

On November 1, 2017, UC-3 traveled to Orillia, Ontario where he was to attend Mark Heickert's residence located at 2594 Hampshire Mills Line and purchase two kilograms of cocaine from Mark Heickert. At 10:42 am UC-3 sent a text message to Mark Heickert informing him that he was on his way. Mark Heickert replied to UC-3 with 'Nice, and stated that he was outside with his bike. At approximately 11:00 am, UC-3 arrive at 2594 Hampshire Mills Line and paid $94,000 cash in two vacuum sealed bags to Mark Heickert in exchange for two kilograms of cocaine. After the purchase was complete, UC-3 departed the residence and sent a text message to Paul Monahan advising him that all had gone well using coded language of two bike parts for the two kilograms of cocaine, to which Paul Monahan replied "Great sweet". Paul Monahan asked UC-2 to meet him in Jeddore, Nova Scotia to collect his previously agreed upon $10,000 of commission for facilitating the sale of the two kilograms of cocaine between Mark Heickert and UC-3.

Following UC-3's departure from 2594 Hampshire Mills Line in Orillia, Ontario, at 11:23 am (EST), police attended the residence of Mark Heickert with copies of the signed Section 487 CC and Section 11 CDSA search warrants. Mark Heickert was arrested by Constable Kyle Brake and was provided his rights to counsel and the police caution. Mark Heickert stated that he understood and requested to speak with his lawyer. Mark Heickert was transported to the Ontario Provincial Police (OPP) detachment in Orillia, where he spoke with legal counsel on the phone. Mark Heickert was photographed wearing a Hells Angels t -shirt. A Hells Angels tattoo was on Mark Heickert's right arm. Mark Heickert's residence and outbuildings were searched and the cash provided to Mark Heickert by UC -3 was recovered save for $300. The vacuum-sealed bags were located under a towel on Mark Heickert's bed. One of the bags appeared to have been cut open with a knife; a knife sat on the bed next to the bags of cash. A Hells Angels cut (vest) was also located in the residence along with large quantities of Hells Angels and Hells Angels support clothing, jewelry, chapter pins, patches phone lists and a banner associated to the Oshawa Hells Angels.

The Personal Circumstances Surrounding the Offender:

[9] The personal circumstances surrounding Mr. Heickert have been ably described by his counsel, Mr. Burke, as well as discussed in the medical documents.

[10] Mr. Heickert was born in Oshawa, Ontario on April 28, 1969 and is 50 years of age. He was raised by both parents until age 14 at which point, he left the family home to live on his own. He described his childhood as being "brutal" as his father was abusive. In 1992 he moved to Orillia with the mother of his son.

[11] Mr. Heickert married in 1997 and is separated from his wife. He maintains an amicable relationship with his ex-wife.

[12] Mr. Heickert has three children – three sons and one daughter.

[13] With respect to education and employment history, Mr. Heickert completed his GED and a Refrigeration and Maintenance certificate that he obtained while being retrained following a workplace injury. He worked full-time in a manual labour field for many years, initially building bus seats for approximately 15 years, before transitioning into bridge-building work for approximately 7 years. During his tenure in the bridge-building industry, he injured his hand on the job, resulting in a diagnosis of hand-arm vibration syndrome. As a result of the injuries

sustained, he was unable to return to work in this field. Following that, Mr. Heickert took part in a three-month Zamboni/Ice maintenance course in 2009 before beginning work as a full-time Zamboni driver until 2011. Following this position, he took time off work to attend to his disabled son, who was an inpatient in hospital at the time.

[14] In 2012, Mr. Heickert's son was badly injured due to a serious acquired brain injury, leading to a coma and paralysis. Mr. Heickert was actively involved in caregiving and the recovery process following his son's injuries, from 2012 until 2015. Aside from a busy work schedule, Mr. Heickert maintained an integral role in caregiving for his son. He was chiefly responsible for his son's physiotherapy and the driving force behind the family's optimism regarding his son's prognosis.

[15] Mr. Heickert was also actively involved in his youngest son's extracurricular activities.

[16] In January 2015, Mr. Heickert was involved in a motor vehicle accident. He was the front-seat passenger in a motor vehicle, not wearing a seatbelt, when the car was hit by a truck that went through a red light. The car was hit on the driver's front end and there were no airbags on the passenger's side. Mr. Heickert suffered and/or sustained injuries for which he continues to seek treatment.

[17] Prior to the accident, Mr. Heickert resided with his youngest son. He was largely in charge of his son's physiotherapy up until the motor vehicle accident. He was unable to provide the continued care that he was providing to his son as a result of the injuries that he sustained from the accident, for which he continues treatment. According to the medical documents, "due to the injuries sustained and his resulting physical and cognitive impairments, Mr. Heickert has ceased to be involved in the care giving role of his disabled son, a setback that he harbours substantial guilt about." (pp. 29-30 of *Medico-Legal Neuropsychological Assessment Report*, dated October 20, 2018)

[18] As noted in the *Medico-Legal Neuropsychological Assessment Report*, dated October 20, 2018, at, pp. 30 to 31, the accident resulted in novel physical, psychological, and cognitive impairments that substantially interfered with Mr. Heickert's ability to work, perform his daily tasks, and return to his pre-accident social routine. He currently continues to experience a number of post-concussion and chronic pain symptoms. He is also experiencing significant anxiety and depressive symptoms in response to his difficulties adjusting to his accident-related limitations.

[19] Mr. Heickert's family physician provided an update on November 22, 2019, which states that there has been, overall, minimal change in his chronic conditions.

[20] In a medical report dated August 2, 2018, Dr. Wong opined, "that Mr. Heickert's chronic pain will continue to flare up in the near future and he will require intermittent physiotherapy and medication to control his pain". In the *Medico-Legal Neuropsychological Assessment Report* the author commented, at p. 11, that Mr. Heickert "suffers from mild to moderate impairment in the area of activities of daily living, social functioning, concentration, persistence and pace, and adaptation".

[21] Mr. Heickert has a dated criminal record which expands from 1987 to 1993, for offences relating to administration of justice, assault, theft, and one drug conviction. Mr. Heickert's criminal record is dated and unrelated.

[22] As Justice Beveridge observed in *R. v. Mauger*, 2018 NSCA 41 at paras. 63-68, a prior record may well speak to the need for greater emphasis on specific deterrence or diminish the importance of rehabilitation, but on its own it is not an aggravating factor.

[23] In this case, while Mr. Heickert's criminal record is relevant, in the sense he is not a first offender, it has very little, if any, weight given that the record contains one related but dated drug offence and unrelated previous convictions.

The Aggravating Factors Surrounding the Commission of the Offences:

[24] There are no aggravating factors as contemplated under s. 10 of the *CDSA*, nor are there any overt aggravating factors such as, the presence of firearms or weapons.

[25] The inherent nature of the offences, however, are aggravating because it requires a significant degree of planning and forethought. Mr. Heickert made a conscious and deliberate choice to engage in the offences on more than one occasion over a seven-month period. His participation in these offences occurred well after 2012, the year his son was hospitalized, and after 2015 the year of his motor vehicle accident. Therefore, while he suffered mild to moderate impairment in the area of daily activities, it is reasonable to infer that he knew what he was doing when he deliberately engaged in the drug transactions over a seven-month period. As a reasonably intelligent mature adult in his fifties, Mr. Heickert presumably considered the serious risks of going to jail for a significant period of time for trafficking in such large quantities of cocaine, but nonetheless, continued to engage in it.

[26] On July 5, 2017, Mr. Heickert sold an uncover police officer one kilogram of cocaine for $47,000 cash. Mr. Heickert ensured the purchaser that the cocaine he purchased was better than the previous purchase.

[27] On September 21, 2017, Mr. Heickert sold to the same uncover police officer another kilogram of cocaine for $47,000 cash. Mr. Heickert, again, ensured the purchaser the cocaine that he purchased was better than the last purchase.

[28] On November 1, 2017, Mr. Heickert, met with the same undercover police officer and sold him two kilograms of cocaine for $94,000. Mr. Heickert was arrested shortly afterwards.

[29] The nature of and amount of the illicit substance, cocaine, involved in this case is extremely aggravating, as cocaine is a Schedule 1 substance.

[30] The total quantity of the cocaine involved in this case is substantial and the fact that it can be cut and/or distributed widely is inherently dangerous because of its potential harmful effects to the community, as it is an insidious drug that destroys lives. The direct and indirect consequences of the availability of cocaine in the community are notorious.

[31] The number of transactions involved in the conspiracy over a seven-month period is also aggravating because it clearly demonstrates that Mr. Heickert is a person that is trusted by those within the criminal subculture to handle such a large quantity of cocaine to the extent that he is provided with a large amount of cocaine, in kilograms, to sell. That, suggests that he is well immersed in the criminal

subculture to have that kind of trust, access and ability to sell large quantities of cocaine.

[32] Mr. Heickert's place in the hierarchy as a "large retailer or small wholesaler" is an aggravating factor.

Mitigating Circumstances Surrounding the Offences and Offender:

[33] Mr. Heickert has pled guilty and in doing so has accepted responsibility for the offences, thereby saving substantial resources to the justice system.

[34] He has sustained serious personal injuries which will cause additional hardship during his incarceration.

[35] Mr. Heickert's motivation to engage in theses offences was not purely greed, as he was at the time trying to raise financial support for his disabled son, while struggling to deal with his own health issues.

Purpose and Principles of Sentencing:

[36] Every sentence must reflect the purpose and principles of sentencing as set out in s. 718 of the *Criminal Code*. In the case of drug offences, s. 10 of the *CDSA* provides further guidance and direction.

[37] The Supreme Court of Canada has enunciated the correct approach to sentencing in *R. v. M.* (C.A.), [1996] 1 SCR 500, (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 court 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.(C.A.), supra, 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 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 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] Therefore, 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" and "a fit and proper sentence" for this offender and for this offence.

Position of the Crown:

[47] The Crown submits that a fit and appropriate sentence for this offence and offender, is five years in a federal institution having considered all of the aggravating and mitigating factors surrounding the offences and Mr. Heickert, which includes that he pled guilty, accepted responsibility, and has a unrelated criminal record, and was at the time of the offences suffering from health issues and struggling to care for his disabled son. However, the Crown contends that

given the serious circumstances underlying the offences, a term of imprisonment of 5 years is the appropriate sentence.

[48] In essence, the Crown argues the principle under s. 718.2 (b) of the *Criminal Code* must be considered, which states that, "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances".

Position of the Defence:

[49] Defence contends that there are *exceptional circumstances* in this case that warrants a *departure* from the normal range of sentence for this offence and for this offender, Mr. Heickert. The Defence submits that Mr. Heickert pled guilty, accepts responsibility and has suffered and continues to endure very difficult personal challenges which have been noted in his medical documentation. The Defence submits that Mr. Heickert's motivation to engage in these offences was to raise financial support for his disabled son, while struggling to deal with his own health issues. In other words, he was acting under circumstances of severe stress during the commission of the offences which included concern about the wellbeing of his disabled son, and his own health issues, which were compounded by financial difficulties.

[50] Thus, Defence argues that a federal sentence of two years' imprisonment is a fit and appropriate disposition for the offences and offender, Mr. Heickert.

The Seriousness of Trafficking in Cocaine:

[51] As previously mentioned, trafficking in cocaine 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:
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> > . . . 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. McCurdy* [2002] N.S.J. No. 459 at para. 15.

[52] In *R. v. Butt*, 2010 NSCA 56, [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 classifies cocaine as one of the drugs for which trafficking can attract a life sentence.

[53] 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.

[54] 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. In *R.* v. *Smith*, 1992 NSCA 73, [1992] N.S.J. No. 365, the Nova Scotia Court of Appeal recognized the consequential effects of drug trafficking where the Court observed:

> In numerous cases this Court has, with strong language, denounced the drug trade with its disastrous effect upon users, many of them young, and those near to them. This crime is known to breed crime. Often money used to buy drugs is obtained from crimes of theft and robbery. People, otherwise free of crime, are lured into this detestable business, because of the quick, easy money, willing to accept the odds because of relatively light sentencing. That attraction is, no doubt, the reason for the existence of importers, wholesalers and retailers, every one a necessary link in the chain of distribution. Crimes of this type are conducted with planning, connections with wholesalers and purchasers,

> and a recognition of the risks involved. The gravity of the offence is such that the maximum penalty of life imprisonment may be imposed.

[55] 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. Indeed, the Nova Scotia Court of Appeal, and all other provincial appellate courts have repeatedly held that denunciation and general deterrence must dominate sentencing for large scale drug transaction, particularly in cocaine trafficking cases. Denunciation and general deterrence most often find expression in the length of the jail term imposed.

[56] 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.

[57] Specifically, in relation to cocaine trafficking, Justice Roscoe stated in *R v Knickle*, 2009 NSCA 59:

> 16 The first step of the analysis is a consideration of the appropriate range of sentence for the offence. Here the judge briefly commented that the *sentencing* range *in* Nova Scotia for *cocaine* trafficking is a penitentiary term *in* the range of two to five years. Then without further analysis, indicated that there was nothing to warrant a sentence in a three-and-a-half year range, and finally concluded that the defence had satisfied her that a sentence of two years less a day would be appropriate because of exceptional circumstances.
>
> 17 The judge failed to recognize how this court has consistently categorized drug traffickers, based on the type and amount of drug involved and the level of involvement in the drug business, to assist in placing them within the range. In *R. v. Fifield*, [1978] N.S.J. No. 42, the court described the following general categories of drug traffickers: the young user sharing marijuana with a companion; the petty retailer who is not shown to be involved full-time or in a large-scale commercial distribution; the large-scale retailers and commercial wholesalers. Chief Justice MacKeigan noted that the amount of drugs involved helps determine the quality of the act or the probable category of trafficker. The *Fifield* categories have also been applied by this court to *cocaine* and crack *cocaine* trafficking cases. See, for example:
>
> *R. v. Carvery*, [1991] N.S.J. No. 501 -- high level retailer -- 6 1/2 ounces cocaine [184 g] -- five years' incarceration;
>
> *R. v. Steeves*, 2007 NSCA 130 -- not a lower level trafficker -- 77 grams of cocaine [2.7 ounces], and 100 pills of ecstasy -- 2 years, six months' incarceration;
>
> *R. v. Sparks*, [1993] N.S.J. No. 448 -- four counts of selling small amounts of crack cocaine and one count of possession for the purpose -- totaling just over 1.5 grams -- not a petty retailer -- 32 months' incarceration.
>
> 18 Numerous other sentencing decisions from this court repeatedly and consistently emphasize that persons involved in trafficking in cocaine will be subject to sentences of incarceration. This has been absolutely clear since the very first case heard by this court involving trafficking in cocaine: *R. v. Merlin*, 1984 CanLII 3488 (NS CA), [1984] N.S.J. No. 346, 63 N.S.R. (2d) 78. See also, for example: *R. v. Dawe*, 2002 NSCA 147; *R. v. Jones*, 2008 NSCA 99; *R. v. Stokes*, 1993 CanLII 3115 (NS CA), [1993] N.S.J. No. 412, 126 N.S.R. (2d) 66; and *R. v.*

> *J.B.M.*, 2003 NSCA 142. This court has never approved or endorsed a conditional sentence on charges of possession for the purpose of trafficking or trafficking in cocaine.
>
> …
>
> 27 As noted above this Court has never wavered in expressing these principles in cocaine trafficking cases. Another example is found in *McCurdy*, *supra*: … "Although it is not necessary that the length of sentence be precisely proportionate to the quantity of drugs involved, commercial distributors and growers require 'materially larger sentences than petty retailers".

[58] As Judge Derrick, as she then was, observed in *R. v. Shields*, 2014 NSPC 69, [2014] N.S.J. No. 473, at paras 37 – 39:

> 37 The categorizations set out by the Nova Scotia Court of Appeal in *R. v. Fifield,* [1978] N.S.J. No. 42 continue to be relevant. The *Fifield* Court identified an escalating list of traffickers: "...the isolated accommodator of a friend, the petty retailer, the large retailer or small wholesaler, or the big-time operator." The Court went on to note: "The categories respectively have broad and overlapping ranges of sentence into which the individual offender must be appropriately placed, depending on his age, background, criminal record, and all surrounding circumstances." (*Fifield*, paragraph 10)
>
> 38 The *Fifield* Court observed that the activities of wholesalers and large retailers warrant "materially larger sentences" than those imposed on petty retailers, noting the release on the market of large quantities of drugs by more significant drug dealers "clearly widen the use of a prohibited drug to many other persons." (*Fifield,* paragraph 9) More recently, in Scott, the Court of Appeal noted that sentences of federal incarceration are "certainly common" where the offender's involvement is "beyond a mere petty retailer..." (paragraph 20)
>
> 39 I sentenced John Field, the commercial retailer/wholesaler who was supplying Mr. Shields with cocaine. Although for reasons unique to that case which required consideration of the issue of totality I imposed a sentence of five years, but for the application of the totality principle, a six year sentence would have been appropriate. (*R. v. Field*, [2013] N.S.J. No. 330, paragraph 41)

[59] In view the of foregoing, the first step in sentencing for drug offences is the accurate characterization of the degree of the offender's culpability as reflected by

the type and amount of drug involved and the level of involvement in the drug business. The categories have broad and overlapping ranges of sentence into which the individual offender must be appropriately placed, depending on his or her age, background, criminal record, and all surrounding circumstances.

[60] The Crown submits Mr. Heickert should be classified as "a large retailer or small wholesaler" as defined in *Fifield*, at para. 10. In that case, as mentioned, the Court of Appeal categorized drug traffickers based on the type and amount of drugs involved, and the level of involvement in the drug business, to assist in placing them within the appropriate sentence range. Thus, the amount of drugs involved helps determine the quality of the act or probable category of trafficker.

[61] In my view, the nature and the amount of illicit substance involved in this case clearly places Mr. Heickert in the – *the large retailer or small wholesaler*- of drug traffickers described in *Fifield*; mindful, that he made four transactions over a seven month period to an undercover officer.

[62] Let me be clear, Mr. Heickert's financial problems and his struggles to assist his disabled son do not mitigate the seriousness of his drug trafficking. (See: *Field, Smith*, *Collette*). However, they provide a context for his choices and lead me to conclude that it would be inaccurate to describe his financial motivation as purely greed, especially when he was trying to raise financial support for his disabled son.

[63] As Judge Derrick, as she then was, observed in *R. v. Field*, 2013 NSPC 51:

> [31] The moral culpability of the financially strapped drug-trafficker is not much different, however, from the drug trafficker whose entrepreneurship bankrolls a lavish lifestyle. The harm inflicted on the community and addicts is the same. The financially- motivated drug trafficker bears responsibility for maintaining or even worsening, the addictions of the purchasers further down the drug chain. Drug addiction inflicts all manner of harms on addicts, their families and friends, and communities. (*Field*, at para. 31).

[64] Judge Derrick further observed in *Field*, at para. 33, "the legacy of cocaine trafficking is addiction, parasitic crime, and violence". She also recognized that even the non-violent cocaine trafficker, such as Mr. Heickert, "sows much (misery and devastation."

The Sentence Range for Large Retailer or Small Wholesaler:

[65] In *R. v. LeBlanc*, 2019 NSSC 192, Justice Rosinski extensively reviewed the range of sentences throughout the cocaine trafficking hierarchy. At para. 12 his observation is apposite. He wrote:

> [12] The hierarchical aspect of drug trafficking requires courts to be mindful of the parity principle in a larger context if we are to fairly assess the moral blameworthiness of the various participants in this pyramid-like distribution system. Hence, ranges of sentences for each of the *Fifield* categories inform an understanding of the proper ranges for each of the other categories.

[66] Justice Rosinski's review of the jurisprudence suggests, before the application of mitigating and aggravating factors the range of sentence appropriate for medium scale retailers/small wholesalers (distributing more than 1/3 kilogram

and up to lower single digit kilograms) is from 5 to 8 years imprisonment. For larger wholesalers and large scale retailers (distributing higher single digit, double digit or more multi-kilogram quantities), Justice Rosinski opined that the range of sentence is from 8 to 15 years imprisonment.

[67] Similarly, in *R. v. Chevrefils*, 2019 NSPC 16, after conducting a thorough review of the case law, Judge Buckle expressed the view that sentences in the range of 4 to 8 years are typical in cases involving trafficking or possession of cocaine for the purposes of trafficking at the kilogram or single digit multi-kilogram level. In reaching that decision she reviewed several cases, including the following: *R. v. Oddleifson*, 2010 MBCA 44; *R. v. D'Onofrio*, 2013 ONCA 145; *R. v. Bacon*, 2013 BCCA 396; *R. v. Nero*, 2008 ONCA 622; *R. v. Bryan*, 2011 ONCA 273; *R. v. Mendoza-Jaramillio and Galindo-Escobar*, NBQB, unreported, 1989; *R. v. Malanca*, 2007 ONCA 859; *R. v. Buttazzoni*, 2016 ONSC 1287; *R. v. Couture*, 2009 ONCJ 655; *R. v. Ziaee*, 2016 BCSC 1293; *R. v. Majnoon*, 2009 ONCA 876; *R. v. Bajda*, 2003, ONCA ; *R. v. Williams*, 2016 NBQB 2319; *R. v. Sean Decker*; unreported, NSSC, 2015; *R. v. Field*, 2013 NSPC 5111; *R. v Butt*, 2010 NSCA 5612; *R. v Mugford*, 2019 NSSC 12713; *R. v Majnoon*, 2009 ONCA 876 - leave denied [2010] SCCA No. 28814; *R. v Bajada*, [2003] OJ No. 721 (CA)15; *R. v Bryan* 2011 ONCA 273; and *R. v Nero*, 2008 ONCA 62216.

[68] In my view, it would appear from all the cases referenced in both the *Chevrefils* and *LeBlanc* decisions, that circumstances surrounding the commission of the present offences, and offender, Mr. Heickert, places this case well within the ranges discussed in these decisions.

[69] For the reasons that follow, I am of the view that the circumstances surrounding this case and offender , Mr. Heickert, do not warrant a departure from the normal range but does, however, warrant some mitigation within the range to account for all of the mitigating factors present in this case. This includes Mr. Heickert's guilty pleas, his acceptance of responsibility, that serving a sentence in a penitentiary will be somewhat harder for him given his present medical condition, and that he was not purely motivated by greed.

[70] In other words, although Mr. Heickert's health issues are a mitigating factor, they do not justify a departure from the established range of sentence for these offences as described earlier in these reasons because of the presence of significant aggravating factors. Moreover, I should add that there was no evidence proffered in this case that Mr. Heickert's health issues could not be addressed by the correctional authorities. In *R. v. H.S.*, 2014 ONCA 323, the Ontario Court of Appeal held that where the offender seeks to rely on a medical condition as a

mitigating factor, they ought to present evidence that the conditions cannot be properly treated while incarcerated.

[71] Furthermore, let me be clear, I am not satisfied that the circumstances surrounding Mr. Heickert's personal circumstances, which includes his health issues, and the tragic circumstances surrounding his disabled son justify a departure from the established range of sentence. Let me explain.

[72] In my view Mr. Heickert made a deliberate and conscious decision to traffic in cocaine on several occasions. This is not a situation where Mr. Heickert acted rather impulsively while committing an isolated act. To the contrary, he was directly involved in three transactions with an undercover officer over a seven-month period that involved kilograms of cocaine. Moreover, these offences occurred after Mr. Heickert was directly and extensively caring for his son. As previously mentioned, after Mr. Heickert was injured in the motor vehicle accident in January 2015, he could not provide the degree of care and support for his disabled son that he did before his accident.

[73] While I acknowledge that Mr. Heickert's meritorious desire to assist and care for his disabled son are admirable qualities that clearly and unquestionably demonstrate that he is a loving and caring father, well intentioned and motivated to help and provide for his son, they do not justify a departure from the established

range of sentence for these offences, especially when he engaged in trafficking such large quantities of cocaine.

[74] Having carefully considered and weighed all the mitigating factors earlier identified in this case against the seriousness of the offence and the normal range of sentence for this specific offence and offender, I am of the view that a significant federal sentence is warranted because of the amount and nature of the illicit substances, coupled with the number of transactions over a significant period of time. As Derrick P.C.J., as she was then, in *R. v. Shields*, 2014 NSPC 69, [2014] N.S.J. No. 473, at para. 28 observed:

> [t]he case law in this province makes it clear that our Court of Appeal has taken a hard line when it comes to drug traffickers, especially where the drug is cocaine. Cocaine is an illegal commodity notorious for its direct and collateral harmful effects.

[75] While there are mitigating factors surrounding the offence and offender, Mr. Heickert's, they do not justify a departure from the established range of sentence for these offences. Put differently, I am not persuaded that there are exceptional circumstances in this case that warrant a departure from the established range of sentence for theses offences and offender.

[76] It is my view that the Crown recommendation of 5 years is a fair and reasonable request considering all of the circumstances surrounding the offence

and offender, Mr. Heickert. Indeed, but for the cumulative weight of the mitigating factors present in this case, I would have imposed a much higher sentence given the amount of cocaine involved and Mr. Heickert's degree of involvement.

[77] Considering the need for denunciation and general deterrence as emphasized in the case law when sentencing persons involved in trafficking schedule 1 offences and having considered the totality of the circumstances of the offence and Mr. Heickert' I am *not* satisfied an appropriate sentence in this case would be a two year term of imprisonment.

[78] Mr. Burke, defence counsel, forcibly argues that this case is an appropriate case which justifies a departure from the range of sentence suggested by the Crown, and contends that a shorter federal penitentiary sentence of two years is appropriate because of the exceptional circumstances surrounding Mr. Heickert's personal circumstances.

[79] Again, in my view, while the cumulative weight of the mitigating factors justifies some leniency or reduction of the sentence such as was the circumstances in cases such as: *Cameron*, *Messervey*, *Coombs*, *Talbot*, *Provo*, *Scott*, *Jamieson*, *Carruthers*, and *Chase.*

[80] I should note that I am mindful that while each case appears to turn, very much, on its own unique set of circumstances and thus no case can be an exact guide for another, it is important to carefully review the cases in an effort to apply the principle under s. 718.2 (b) of the *Criminal Code*.

[81] What can be seen by comparing the aforementioned cases, is that no two cases are exactly alike, and it is often difficult to compare cases because of the multitude of varying factors or considerations that are considered and weighed cumulatively.

[82] Unfortunately, the case law does not clearly define or delineate factors to consider in determining when a case is *exceptional* to warrant a sentence outside of the usual range. The reason for that may be because sentencing is a highly contextual and necessarily an individualize process, therefore a wide and flexible approach is required.

[83] I am sure that there is an indefinite number of factors or considerations that could be considered, as each case very much turns on its own unique set of circumstances. Moreover, while there is no definite test of what constitutes an exceptional case, the court is required to consider a multitude of considerations or factors, and balance them accordingly. Obviously, in some cases, more weight will be attributed to some considerations or factors than the others.

[84] In *R. v. Ruiz*, 2019 BCCA 323, [2019] B.C.J.No. 1738, at paras. 17-19, the British Columbia Court of Appeal held that the phrase "exceptional circumstances" is not a term of art, but rather a generalized description intended to encompass circumstances of the offender and of the offence that call out for sentence that is well below the generally accepted range. There is no litmus test for exceptional circumstances of which there are various degrees.

[85] In considering the issue of whether the present case is an exceptional case, I have considered several factors, including the nature and quantity of the illicit substance. In my view, while the nature and quantity of the drugs is not determinative of the issue, it is a significant factor which must be considered. It would appear from review of the case law that courts embrace the notion that the nature and quantity of the drugs is relative to the risk of danger to the general public.

[86] The degree of the offender's involvement in the commission of the offence is also a relevant factor, which includes consideration of the offender's motivation to engage in the offence. Often, in drug trafficking cases, offenders are motivated by the greed to make easy money as this type of offence is an enterprise crime offence. However, there are cases where the offender was involved in trafficking in drugs to feed his or her drug addiction. Generally, courts seem to be more

lenient in sentencing of drug addicts than in sentencing offenders motivated by greed: for example, *Scott*, and *Ruston.* Perhaps this is a reflection of an emphasis on rehabilitation as well as on the principles of general and specific deterrence and restraint. Similarly, the courts seem to be more lenient in sentencing offenders who acted under a degree of duress, or compulsion to help a friend, rather than for profit. For example, see: *Cameron*, *Messervey*, and *Coombs*.

[87] The age of the offender is often considered in cases involving youthful offenders, particularly in cases where the personal antecedents of the youthful person demonstrates a real potential for successful rehabilitation.

[88] In my view, an important or critical consideration to justify a departure from the norm is whether there has been a significant and remarkable change in the personal circumstances of the offender since the commission of the offence. In circumstances where the offender has clearly shown a substantial or remarkable improvement in his or her life, such as successful enrollment in a rehabilitation treatment program, where success is imminent and thus rehabilitation is certain, a departure from the norm could be justified, all things being equal. However, there will be cases, such as the case at bar, where the nature and quantity of the cocaine is just too great to be seriously considered as an exceptional case for these

purposes when balancing it against all of the mitigating and aggravating circumstances surrounding the offence and offender.

[89] Another factor although perhaps not as significant as a remarkable change in the offender's life, is the criminal record of the offender. The absence of a criminal record is a mitigating factor, which is obviously considered favorably toward an offender. Unfortunately, in the Provincial Court it is not uncommon to deal with cases involving persons charged with serious drug offences who do not have a criminal record or have never been charged with a criminal offence or has an unrelated record. Usually, first offenders are persons of previous good character, but are lured by greed to make easy money in the very lucrative business of drug trafficking. Thus, it is not a rarity to have first time offenders charged with drug offences appear in the Provincial Court, nor is it rare to read about them in the case law; for example, *R. v. Smith*, 1990 NSCA 4, [1990] N.S.J. No. 30 (C.A.), *Talbot*, *R. v. VanAmburg*, 2007 NSSC 220, *Conway*, and *Messervey*.

The Just and Appropriate Disposition:

[90] Having considered all of the circumstances of this case, which includes the circumstances of the offences and Mr. Heickert, it is my view that this is not an appropriate case to justify or warrant a deviation from the normal range of sentence for these offences and for Mr. Heickert.

[91] To conclude, I want to re-emphasize the important principles that have guided me in reaching my decision here today to impose a substantial term of imprisonment; that is, the principles of denunciation and deterrence. These principles have been repeatedly and consistently emphasized by the Court of Appeal, as noted earlier in these reasons.

[92] I am mindful that a proper sentence must take into account the aggravating factors of these offences namely: the nature of the offence; the type of drugs involved; and the prevalence of the offence in the community and balance them against all of the mitigating factors identified earlier in these reasons.

[93] For all of the foregoing reasons, having carefully considered all of the circumstances surrounding the offences, and Mr. Heickert, I conclude that the appropriate sentence to be imposed upon Mr. Heickert is a global term of imprisonment of 57 months having considered all of the mitigating and aggravating factors present in this case.

[94] Further, Mr. Heickert is entitled to receive enhanced credit under s. 719 of the *Criminal Code*. Accordingly, given that Mr. Heickert has been on remand for 60 days, he is entitled to a credit of 90 days to be deducted from the global sentence of 57 months. Therefore, his actual sentence is 54 months going forward.

The sentence of 54 months is for having committed the offence of conspiracy to traffic in cocaine.

[95] With respect to the charge of conspiracy to commit the indictable offence of possession of property, to wit: Canadian currency, of a value exceeding five thousand dollars, knowing that all or part of the property was obtained by, or derived directly or indirectly from, the commission in Canada of an offence punishable by indictment, contrary to ss. 354(1)(a) and 465 (1)(c) of the *Criminal Code,* I impose a sentence of six months imprisonment to run *concurrently* to the conspiracy to commit trafficking in cocaine charge. (*R. v. Hatch,* (1979), 31 N.S.R. (2d)110 (CA))

[96] With respect to the offence of breaching s. 145 (3) of the *Criminal Code*, on March 1, 2019, I impose a sentence of 30 days, or one month, to be served *consecutively* to the other two conspiracy charges. Mr. Heickert was found to be in the company of another Hells Angels member at the Halifax Stanfield International Airport. Police took photographs of the two of them in each other's company which made it clear that Mr. Heickert was in breach of his release conditions.

[97] In reaching this decision, I have considered the nature of the breach that occurred during the court proceedings, which is an aggravating factor. I have also considered the *Hatch* decision where our court of appeal set out the considerations

that are relevant in determining whether one sentence should be concurrent or consecutive to another, which include:

- The time frame within which the offences occurred;
- The similarity of the offences;
- Whether a new intent or impulse initiated each of the offences; and
- Whether the total sentence is fit and proper under the circumstances.

[98] Having applied these considerations to the circumstances surrounding Mr. Heickert's breach of recognizance which occurred on March 1, 2019, I am persuaded that a *consecutive sentence* is warranted. Having concluded that the sentence for the breach recognizance must be *consecutive* I must now turn my mind to whether the totality principle should be applied.

[99] As clearly pointed out in *R. v. Adams*, 2010 NSCA 42, the last step before the trial judge determines the just and appropriate sanction for multiple offences is that the judge should then take a last or final look at the total sentence, to ensure it is not unduly long or harsh.

[100] In taking that last or final look, the judge should consider what they have previously determined in the earlier analysis as the fit sentence for the most serious of the offences. In doing so, the judge may conclude that the total sentence for the most serious of the offences is broadly commensurate with the overall gravity of

the offences and the offender's moral culpability. Then, if some adjustment is necessary, the judge may adjust the length of the consecutive sentences. Section 718.2(c) of the *Criminal Code* stipulates, "(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh."

[101] In this case, I am satisfied that an additional sentence of 30 days, or one-month, does not impose an unduly long or harsh sentence.

[102] Therefore, the actual sentence going forward is 55 months imprisonment.

[103] Mr. Heickert, would you please stand,

[104] The Court sentences you to a term of 54 months imprisonment for having committed the offence of conspiracy to traffic in cocaine.

[105] The Court also sentences you to a sentence of 6 months imprisonment for having committed the offence of conspiracy to commit the indictable offence of possession of property, to wit: Canadian currency, of a value exceeding five thousands dollars, knowing that all or part of the property was obtained by, or derived directly or indirectly from the commission in Canada of an offence by indictment. This sentence is to be served *concurrently*, based on the considerations set out in *Hatch* decision of our Court of Appeal.

[106] Lastly, the Court sentences you to a sentence of one month, or 30 days, for breaching your recognizance, which is to be served *consecutive* to the conspiracy charges, for a total sentence of 55 months imprisonment.

[107] The Crown also seeks as part of this sentencing three ancillary orders, namely, a weapons prohibition order under s. 109 of the *Criminal Code* for 10 years, a DNA sampling order, and an order of forfeiture of items seized from Mr. Heickert. Those ancillary orders are not contested by the defence and will be granted by the Court in the usual form.

[108] Before I conclude, Mr. Heickert is suffering from health issues that will require special care and rehabilitative therapy during the time he will spend in custody. I presume that the correctional authorities are obliged under the *Corrections and Conditional Release Act* to provide inmates with essential health care. For that purpose, Mr. Heickert should be assessed immediately, and appropriate steps taken to provide the proper medical care, including the rehabilitative treatment which his medical documents indicate he requires.

Forfeiture of Proceeds of Crime: Fine in lieu of Forfeiture

[109] Separate from the sentencing hearing, the Crown sought an order for a fine in lieu of forfeiture of proceeds of crime.

[110] Part XII.2 of the *Criminal Code* governs forfeiture of proceeds of crime. These provisions were enacted to ensure that crime does not pay. They reflect a Parliamentary intention to give teeth to the general sentencing provisions in Part XXIII. While the purpose of the sentencing regime is to punish an offender for committing a particular offence, the objective of forfeiture is to deprive offenders of proceeds of crime and deter future crimes: *R. v. Angelis*, 2016 ONCA 675, at para. 32.

[111] Mr. Heickert benefited from receiving $141,000 in "proceeds of crime" as defined in s. 462.3 of the *Criminal Code*. The monies received from the drug transactions are clearly benefits obtained through the commission of designated offence as defined in s. 462.3 of the *Criminal Code*.

[112] The evidence establishes, on a balance of probabilities, that the monies obtained by Mr. Heickert's criminal acts are proceeds of crime obtained through the commission of designated offences. Accordingly, pursuant to section 462.37(1), the Court shall order that property be forfeited to Her Majesty.

[113] As Justice Watt observed in delivering the judgment for the Ontario Court of Appeal in *Angelis*, at para. 33:

> 33 Parliament also recognized that the forfeiture of proceeds of crime is not always practicable. Sometimes, proceeds can't be found. They may be outside

> Canada. Or in the hands of a third party. What was taken may have been substantially diminished in value, rendered worthless or commingled with other property that cannot be divided without difficulty: Lavigne, at para. 18. And so, Parliament enacted a provision, s. 462.37(3), to permit judges to impose a fine in lieu of forfeiture.

[114] Thus, when the monies cannot be subject to an order of forfeiture given the circumstances, including those outlined in s. 462.37(3) of the *Criminal Code*, the Court may order a fine in lieu of forfeiture. Where the offender advised that he or she does not have the monies and, therefore, there are no proceeds to forfeit, a sentencing judge may impose the fine in lieu of forfeiture: *Angelis*, at paras. 33 - 36.

[115] In this case, it is reasonable to infer from all of the circumstances that Mr. Heickert does not have the monies he received from the three drug transactions that he was directly engaged in with an undercover officer, which totals the amount of $141,000. He received directly from the uncover officer in exchange for a kilogram of cocaine the amount of $47,000.

[116] I have not been persuaded by the defence's submission that the $141,000, should be divided evenly between Mr. Heickert and his co-conspirator Mr. Monahan as I am satisfied that Mr. Heickert received the full amount himself as a result of his direct engagement with the undercover officer. Indeed, the amount that Mr. Heickert received directly form the undercover officer is indisputable.

[117] In *Angelis*, Justice Watt, distilled a number of principles to guide the decision of whether to order the fine in lieu of forfeiture:

> (a)The principles of Part XXIII of the Criminal Code (sentencing) are applicable to only the extent that they are compatible with the specific provisions of Part XII.2 (proceeds of crime): para. 40;
>
> (b)The imposition of a fine in lieu of forfeiture is not punishment imposed upon an offender: para. 50;
>
> (c)The fine in lieu of forfeiture is not to be consolidated with sentencing on a totality approach: para. 51;
>
> (d)The sufficiency of the carceral component of a sentence to satisfy the applicable sentencing objectives and principles cannot justify refusal to order payment of a fine in lieu: para. 53;
>
> (e) Once the conditions for the imposition of a fine in lieu of forfeiture are met, a sentencing judge has limited discretion to refuse to make the order: para. 72;
>
> (f)The exercise of discretion to refuse to order a fine in lieu of forfeiture is necessarily limited by the objective of the provision, the nature of the order, and the circumstances in which the order is made: para. 73;
>
> (g)The provisions of Part XXIII have no say in exercising the limited discretion to refuse to impose a fine in lieu of forfeiture: para. 56;
>
> (h)The ability of a victim to pursue civil remedies does not militate in favour of refusing to impose a fine in lieu of forfeiture: para. 74;
>
> (i)Ability to pay is not a factor to consider in deciding to impose a fine in lieu of forfeiture nor in determining the amount of the fine: para. 81; and
>
> (j)Ability to pay is a factor to be considered in determining the time in which the fine is to be paid: para. 81.

[118] In this case, I am satisfied that the monies cannot be made subject to an order of forfeiture given the circumstances, including those outlined in section 462.37(3) of the *Criminal Code*. Accordingly, a fine in lieu of forfeiture is imposed because Mr. Heickert does not have the monies to forfeit.

[119] Having considered all the evidence proffered in this hearing, including the contents the medical documents, and submissions of Counsel, I am satisfied that an order of forfeiture is not possible or practicable in this case.

[120] The objective of Part XII.2 would be frustrated if a fine in lieu of forfeiture was not ordered, and the circumstances do not justify exercising the limited discretion available to this Court to not order the fine.

[121] Accordingly, I hereby order a fine in lieu of forfeiture in the amount of $141,000 pursuant to s. 462.37(3) of the *Criminal Code*.

[122] The Court has discretion for the amount of time to be given to Mr. Heickert to pay the fine. Further, the Court has discretion to set the amount of default time to be served between twelve months and eighteen months of imprisonment, pursuant to s. 462.37(4)(a)(iii).

[123] In the result, I order that payment be made by Mr. Heickert within ten years of from the date of his release from prison, as suggested by his counsel, Mr. Burke, as this would provide him with time to pay the full amount.

[124] Further, in the unfortunate event that he defaults, he shall be subject to a period of 18 months in custody for being in default. However, as pointed out in *R. v. Lavigne*, 2006 SCC 10,[2006] 1 S.C.R. 392, at paras. 45 to 48, when the time

allowed for payment of the fine instead of forfeiture has expired, the Court may not issue a warrant of committal unless it is satisfied that the offender has, without reasonable excuse, refused to pay the fine. Failure to pay because of poverty cannot be equated to refusal to pay.

Frank P. Hoskins, JPC