PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v Joyce*, 2022 NSPC 40

Date: 20220804
Docket: 8459689 8461286 8444503 8444505 8444507 8444509 8445111 8448032
Registry: Pictou

Between:

Her Majesty the Queen

v

David Alan Joyce

SENTENCING DECISION

Judge:	The Honourable Judge Del W Atwood
Heard:	2022: 24 May; 4 August in Pictou, Nova Scotia
Charge:	Sections 117.01, 145 *Criminal Code of Canada* Section 216 *Excise Act* Section 85 *Revenue Act*
Counsel:	Bronwyn Duffy for the Public Prosecution Service of Canada and the Nova Scotia Public Prosecution Service Trevor McGuigan for David Alan Joyce

By the Court:

Synopsis

[1] David Alan Joyce is before the court for sentencing for an array of offences committed between 12 March 2020 and 19 August 2020.

[2] The prosecution seeks the imposition of terms of imprisonment totalling 24 months along with various ancillary orders.

[3] Defence counsel argues that the court should find unconstitutional ¶ 742.1(c) and (e)(ii) of the *Criminal Code* as being in violation of § 7 of the *Charter*—provisions which render Mr Joyce ineligible for a conditional sentence for a charge under § 5(2) of the *Controlled Drugs and Substances Act* [*CDSA*]—and impose a conditional sentence order [CSO] of less than two years.

[4] For the reasons that follow, the court finds the *Charter*-grounds application moot, and declines to rule on the constitutionality of the challenged conditional-sentence-exclusion provisions. The court sentences Mr Joyce to a term of imprisonment of two years, less a remand credit of 26 days. The court declines to impose a term of probation. The court will grant the ancillary orders sought by the prosecution.

Summary of offences

[5] Mr Joyce elected trial in this court for a § 5(2) *CDSA* charge and pleaded guilty to eight counts.

Case	Charge	Process (S=summary I=indictment)	Circumstances of offence
8444503	5(2) *CDSA*: Possession of Sch I methamphetamine for the purposes of trafficking	I	12 March 2020: Police conduct a warranted search of Mr Joyce's residence and seize: 58 "ice" methamphetamine tablets, and 30.1 g of crystal methamphetamine, along with $2987 in cash. Mr Joyce is arrested at a parking lot near his home, and found in possession of 2 bags of "ice" methamphetamine tablets and $1000 in cash.
8444505	4(1) *CDSA*: Possession of Sch I hydromorphone	I	12 March 2020: police seize thirty-nine 6 mg tablets of hydromorphone during the residence search.

8444507	117.01(1) *Code*: Possession of a weapon while prohibited	S	12 March 2020: police seize a crossbow during the residence search. At the time, Mr Joyce was subject to a lifetime weapons-prohibition order, # 1978192 issued 17 May 2017.
8444509	39(1)(a) *Revenue Act (Nova Scotia)*: possession of contraband tobacco	S	12 March 2020: police seize 10,400 contraband cigarettes during residence search.
8448032	216(1) *Excise Act*	S	See case 844509.
8445111	145(4)(a) *Code*: breach of undertaking	S	17 April 2020: Mr Joyce is found in the presence of a person he was prohibited from contacting in virtue of undertaking # 2263450, imposed following his arrest for the 12 March 2020 matters.
8459689	145(4)(a): Breach of undertaking	S	10 August 2020: Mr Joyce found in the presence of the same person as on 17 April 2020, while subject to two undertakings prohibiting

			contact, # 2264325 and 2263450.
8461286	145(5)(a): Breach of release order.	S	19 August 2020: Mr Joyce found in possession of methamphetamine and in the presence of the same person as on 17 April and 10 August 2020, in contravention of release order # 2272719.

[6] In the remainder of this decision, the focus of the court will be on the § 5(2) *CDSA* count, as it is the one that exposes Mr Joyce to the greatest liability. It was also the main focus of the submissions of counsel.

Circumstances of Mr Joyce

[7] The court has reviewed a presentence report [PSR] dated 15 April 2021, and a supplement prepared 11 July 2022.

[8] Mr Joyce is a 62-year-old who was raised in Pictou County. His childhood and adolescence were chaotic; he witnessed substance abuse and family violence.

[9] He began living independently when he was 12 or 13 years old.

[10] Mr Joyce has been married three times. He has four children now living; a fifth, a daughter, was the victim of a murder in 2015. He has been in a close relationship with a common-law partner for the past 16-17 years.

[11] Mr Joyce completed a GED program.

[12] He began working as a labourer when he was 15-16 years old, but had to stop working about 9 years ago due to a worksite accident.

[13] Mr Joyce has experienced chronic polysubstance-abuse disorder for over twenty years. He acknowledges using "coke, crack, acid, speed, methamphetamines, uppers." In the PSR supplement, Mr Joyce reports being clean of everything except "uppers."

[14] Mr Joyce has a tentative approach to clinical intervention for his substance-use disorder. As described in the PSR, he has been entrenched in the drug culture for a long time. He is good to report when under community supervision, but does not appear to be willing to make significant modifications to his lifestyle. The PSR supplement informs the court the Mr Joyce attended a clinic in Springhill for a couple days in the winter of 2022 (sentencing had been adjourned in accordance with § 10(4) of the *CDSA* to accommodate this);

however, Mr Joyce's partner stated that the program was not one that interested him.

[15] Mr Joyce's has been diagnosed as having several chronic medical conditions: he is diabetic, suffers from hypertension, and experienced a stroke in 2014.

[16] Mr Joyce has a significant criminal record, which includes findings of guilt for trafficking in a Schedule I substance in 2008 (sentence: 9-month CSO, 12-month term of probation), and possession of a Schedule I substance for the purpose of trafficking in 2011 (sentence: a jointly recommended 20-month CSO, followed by a 12-month term of probation). His last finding of guilt was in 2017 for drug-impaired driving.

Mitigating factors

[17] Mr Joyce's guilty pleas are a mitigating factor. Failure to consider a guilty plea as a mitigating factor can be an error in principle: *R v Friesen*, 2019 SCC 100 at ¶ 164 [*Friesen*]. While it has been suggested that a guilty plea offered in the face of overwhelming evidence will not necessarily attract so great a discount of sentence as one tendered in other circumstances (*R v Layte*, [1983] OJ No 2415 at ¶ 8 (Co Ct)), in my view, guilty pleas in cases involving

warranted searches—which help conserve limited forensic resources in these challenging times of pandemic—must be accorded significant weight.

The prosecution and the defence are agreed that Mr Joyce would fall within the petty-retailer category of persons who possess controlled substances for trafficking, as that category was described in *R v Fiefield*, [1978] NSJ No 42 at ¶ 7 (AD); further, it is agreed that Mr Joyce dealt in methamphetamine to help support his own dependency.

[18] Mr Joyce's actions as a petty retailer, trading in a controlled substance to support his own dependency, are at a lower level of moral responsibility; persons whose decisions are affected by a substance dependency do not have full agency, and are not purely profit driven.

Aggravating factors

[19] While Mr Joyce's inventory was a Schedule I substance, this cannot be treated as an aggravating circumstance. It does affect offence seriousness, as represented in the maximum penalty of life imprisonment for trafficking-related offences in Schedule I substances . However, an offence cannot be aggravating of itself; otherwise, the principle of proportionality would be nullified: *R v Johnston*, 2011 NLCA 56 at ¶ 18-20.

[20] In virtue of ¶ 10(2)(b) of the *CDSA*, it is aggravating statutorily that Mr Joyce was convicted previously of two § 5 *CDSA* offences (which are "designated offences" as defined in § 2(1) of the *CDSA*). However, the court must be cautious not to repunish Mr Hynes for offences committed in the past for which the sentences have been completed; in my view, ¶ 10(2)(b) operates as a signal that the court must place significant emphasis on specific deterrence.

General principles of sentencing

[21] In Canadian law, the fundamental purpose of sentencing is to protect society and to contribute, along with crime-prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more objectives, including denunciation, deterrence and rehabilitation: § 718 of the *Code*, and *R v Bissonnette*, 2022 SCC 23 at ¶ 45 [*Bissonnette*]; § 10

[22] All sentencing starts with the principle that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The principle of proportionality has long been central to Canadian sentencing law, and is now codified as the fundamental principle of sentencing in s. 718.1 of the *Code*: *Friesen* at ¶ 30; *R v Parranto*, 2021 SCC 46 at ¶ 10 (while the

panel in *Parranto* were divided on the issue of starting-point sentencing—a methodology favoured by the majority—they were unified on the organizing principle of proportionality).

[23] Section 718.2 provides a non-exhaustive list of secondary principles that must guide the sentencing process. These principles include:

- the consideration of aggravating and mitigating circumstances,
- the principles of parity and totality,
- and the instruction to consider all available sanctions other than imprisonment that are reasonable in the circumstances.

[24] Parity requires that similar offenders who commit similar offences in similar circumstances receive similar sentences. A consistent application of proportionality will lead to parity. Conversely, an approach that assigns the same sentence to unlike cases can achieve neither parity nor proportionality: *Friesen* at ¶ 32; *Parranto* at ¶ 11.

[25] In applying and weighing these secondary sentencing principles, the court must ensure that the resulting sentence respect the fundamental principle of proportionality: *R v Nasogaluak,* 2010 SCC 6 at ¶ 40.

[26] Proportionality in sentencing is an essential factor in maintaining public confidence in the fairness and rationality of the criminal-justice system. It assures the public that the person to be sentenced deserved the punishment that was imposed. Proportionality has a restraining function, as it must guarantee that a sentence is individualized, just and appropriate. It is a cardinal principle: *Bissonnette* at ¶ 50.

[27] The sentencing component of denunciation expresses society's condemnation of the offence that was committed, and is the means by which society communicates its moral values. However, the denunciation criterion must be weighed carefully, as it could, if applied without restraint, be used to justify sentences of unlimited severity: *Bissonnette* at ¶ 46.

[28] The court must apply the principle that an offender not be deprived of liberty if less restrictive sanctions might be appropriate in the circumstances. Furthermore, the court must consider all available sanctions other than imprisonment that are reasonable in the circumstances. These principles of restraint are set out in ¶¶ 718.2 (d) and (e) of the *Code*.

[29] In *R v Gladue*, [1999] SCJ 19 at ¶¶ 31 to 33, and 36, the Court held that the statutory requirement that sentencing courts consider all available sanctions

other than imprisonment was more than merely a codification of existing law. Rather the provision was to be seen as a remedy whereby imprisonment was to be a sanction of last resort.

[30] The application of restraint criteria does not oust consideration of the other principles of sentencing in § 718-718.2; there is no such thing as a restraint-at-all-costs principle: *R v Proulx*, 2000 SCC 5 at ¶ 96. Put another way, restraint and rehabilitation do not trump deterrence. All principles and objectives of sentencing must be considered by a sentencing court in arriving at a fit sentence: *R v Howell*, 2013 NSCA 67 at ¶ 16. However, although all factors might be in play, it does not follow that each factor must be assigned equal weight; rather, a delicate balancing of the various sentencing principles and objectives is called for, in line with the overriding principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender: *R v Suter*, 2018 SCC 34 at ¶ 4.

Principles applicable to trafficking-related offences

[31] Trafficking in Schedule I substances has been characterised authoritatively as a serious offence, carrying significant if not staggering health-care and law-enforcement costs, one that tears at the very fabric of society: *Parranto* at ¶ 91;

R v Lloyd, 2016 SCC 13 at ¶ 26, rev'g 2014 BCCA 224 [*Lloyd*]; *R v Greyeyes*, [1997] 2 SCR 825 at ¶ 6; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, at ¶ 79-80, in a minority opinion which dissented on an unrelated issue. Having said this, the court must avoid extravagant, straw-man reasoning: Mr Joyce's role in this national epidemic is microscopic.

Legislative history

[32] As observed in *R v Shand* (1976), 13 OR (2d) 65 at ¶ 18 (CA) and cases that followed it, history shows that Parliament has taken an increasingly serious view of the drug traffic. This has continued as a steady public policy for decades. In *R v Malmo-Levine*, 2000 BCCA 335 at ¶ 96, aff'd 2003 SCC 74 the Court stated:

> Narcotics legislation in Canada has taken many twists and turns during the last century, but the overarching goal of stamping out drug trafficking has remained somewhat constant. Indeed, the efforts of Parliament to stamp out this problem has only grown more intense over time.

[33] In reviewing the history of controlled-drugs-and-substances legislation in Canada, I found as a helpful reference an article by R. Solomon & M. Green, "The First Century: The History of Nonmedical Opiate Use and Control Policies in Canada, 1870-1970" (1982), 20 UWO L Rev 307; if my legislative-history analysis is in error in any way, the fault is mine, and not the authors'.

[34] The starting-point statute which penalised the use of narcotics for non-medical purposes was the *Opium Act*, SC 1908, c 50, which was repealed and replaced in 1911 by the *Opium and Drug Act*, SC 1911, c 17. Originally, the main focuses of the legislation were cocaine, morphine and opium; however, the *Act* authorised the governor-in-council to make additions to the schedule of proscribed drugs if in the public interest.

[35] In 1923, Canada's drug legislation was consolidated and revised as the *Opium and Narcotic Drug Act*, SC 1923, c 22, which continued to criminalise simple possession and trafficking, but was silent as to possession for the purpose of trafficking.

[36] That changed in 1954, with SC 1954, c 38, § 3. The amending statute created a possession-for-the-purpose offence, and increased substantially the penalties for trafficking.

[37] The *Narcotic Control Act* was enacted as SC 1960-61, c 34. It upped the maximum penalties for trafficking and possession-for-the-purpose to life imprisonment.

[38] Possession and distribution of methamphetamine was banned for the first time in the *Food and Drugs Act* SC 1960-61, c 37, § 32(1)-(2) [*FDA*], a law that

was intended to deal with chemical drugs; the statute focussed mostly on LSD and thalidomide. Trafficking-related offences under the *FDA* were hybrid; the maximum penalty on summary conviction was 18-months' imprisonment, on indictment, ten years.

[39] The law was consolidated again and reorganised in its present form as the *Controlled Drugs and Substances Act*, SC 1996, c 19 in force 14 May 1997 by SI/97-47, (1997) C Gaz II.

[40] The trafficking-penalty provisions of § 5 of the *CDSA* got ramped up in the *Safe Streets and Communities Act*, SC 2012, c 1, § 39, in force 9 August 2012 by SI/2012-48, to call for the imposition of mandatory-minimum prison terms for Schedule I and II offences committed under certain aggravating circumstances. At the time of second reading—than as Bill C-10—the Minister of Justice stated:

> We are also addressing the serious issue of drug crimes in this country, particularly those involving organized crime and those that target youth because we all know the impact that such crimes have on our communities.
>
> Part 2's proposals to address drug crime include amendments to the *Controlled Drugs and Substances Act* to impose mandatory minimum sentences of imprisonment for the offences of production, trafficking or possession for the purposes of trafficking or importing, and exporting or possession for the purpose of exporting of schedule I drugs, such as heroin, cocaine and methamphetamine, and schedule II drugs, such as marijuana.

> These mandatory minimum sentences would apply where there was an aggravating factor, including where the production of the drug constituted a potential security, health or safety hazard, or the offence was committed in or near a school.
>
> As well, it would double the maximum penalty for the production of schedule II drugs, such as marijuana, from 7 to 14 years and it would reschedule GHB and flunitrazepam, most commonly known as the date rape drugs, from schedule III to schedule I.
>
> As a result, these offences would now carry higher maximum penalties.
>
> The bill would also allow a court to delay sentencing while the addicted offender completed a treatment program approved by the province under the supervision of the court or a drug treatment court approved program and to impose a penalty other than the minimum sentence if the offender successfully completes the treatment program.

House of Commons Debates, 41st Parl, 1st Sess, No 017 (21 Sept 2011) at 1524-1525 (Hon R Nicholson).

[41] In *Lloyd*, the *Safe-Streets* one-year mandatory-minimum for trafficking with a designated prior was found by the majority of the Court to be unconstitutionally cruel and unusual, in violation of § 12 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. See also: *R v Dickey*, 2016 BCCA 177, aff'g 2015 BCSC 1210: mandatory-minimum for trafficking near a former school held to be cruel and unusual given the particular circumstances of a young adult who had made significant rehabilitative progress; *R v Elliott*, 2017 BCCA 214, aff'g 2016 BCSC 1135, mandatory-minimum for cannabis cultivation ruled unconstitutional based on reasonable

hypotheticals; and *R v Boudreau*, 2018 NSPC 19: 6-month mandatory-minimum for cannabis production held to be cruel and unusual, based on the individual circumstances of a non-violent accommodator whose grow-op was for personal use and limited redistribution to friends.

[42] The *CDSA* contains five schedules of controlled substances; Schedule V was repealed fully on 18 May 2017 in virtue of SC 2017, c 7, § 50, so that only Schedules I-IV and VI remain in force.

[43] Schedule I includes substances with no medical use (*eg*, cocaine and heroin) and that are well known as being highly toxic and addictive. Schedule II, III and IV substances are of lesser toxicity, which is reflected in lesser penalties for possessing or dealing in them. In *R v Bercier*, 2004 MBCA 51 at ¶ 26, the Court held that sentencing judges must give weight to the fact that Parliament has prescribed different maximum sentences for substances in different schedules; the fact that penalties vary by schedule reflects a legislative judgment about the levels of dangerousness of controlled substances.

Methamphetamine and regulatory-impact analysis

[44] Methamphetamine started out in Schedule III of the *CDSA*, but was elevated to Schedule I on 10 August 2005 by § 60 of the *CDSA* and SOR/2005-235. The

regulatory-impact-analysis statement (which accompanied publication of the order in council in (2005) 139:17 C Gaz II at 1827-1837) sought to explain the reclassification of methamphetamine in reference to its risk of harm to users and to the community:

> Methamphetamine can be produced domestically. Its low cost and ease of synthesis, along with a variety of possible administration routes, such as oral, intravenous, snorting or inhaling, make methamphetamine an attractive drug of abuse that is readily accessible in comparison to other illegal substances. Its popularity as a drug of abuse is increasing at an alarming rate. The number of seized methamphetamine samples analyzed by Health Canada has increased seven fold since 1999, tripled since 2000, and doubled since 2002. Thirty-nine clandestine labs were dismantled by the Royal Canadian Mounted Police (RCMP) in 2003 versus two in 1998. Greater numbers of clandestine lab seizures in Canada indicate that the industry is expanding. Such expansion increases supply, lowers prices further and leads to a larger number of users. In 2004, Drug Analysis Services reported methamphetamine as the 2nd most prevalent hard drug of abuse, behind cocaine, according to the number of exhibits analyzed. According to the Centre for Addiction and Mental Health Ontario Student Drug Use Survey, 2003, methamphetamine has been ranked the fourth most frequently used illegal substance (after cannabis, cocaine, and MDMA, or ecstasy) among students in Grades 7-12.

[45] The impact analysis identified also a number of environmental risks:

> . . . [M]ethamphetamine production involves chemicals that are poisonous, corrosive, flammable, explosive, or emit toxic vapours, and can cause health and safety problems at the production site and within the surrounding area. The toxic by products of methamphetamine production are often improperly disposed of outdoors in rivers, streams, and other dump areas, which cause serious environmental damage, endangering children and others who live, eat, play, or walk at or near the site. Normal cleaning may not remove all the methamphetamine or some of the chemicals used to produce it; dangerous by products generated from the ingredients pose environmental hazards that can persist in the soil and groundwater for years.

[46] It does not appear to have been decided expressly whether regulatory-impact-analysis statements ought to be noticed judicially. A statutory instrument, itself, is required to be noticed judicially pursuant to § 16(1) of the *Statutory Instruments Act*, RSC 1985, c S-22. However, a regulatory-impact-analysis statement is really nothing more than an executive-branch signing statement; and, although it will be found almost always in the *Canada Gazette* immediately following the subordinate legislation it purports to explain, it will be headed with a caveat: "This statement is not part of the Order." Nevertheless, I am satisfied that regulatory-impact-analysis statements have been accepted, at least informally, by a number of courts as conspicuous and reliable sources of information which describe the evidence and the policies behind the making of subordinate laws. They may be utilised by sentencing courts in interpreting statutes. See, *eg*, *R v Iverson*, 2006 BCSC 1684 at ¶ 18 (rev'd in part by 2007 BCCA 3), and *R v Copeland*, [2007] OJ No 3390 at ¶ 15 (SCJ) [*Copeland*]: impact analysis accompanying rescheduling of methamphetamine considered in sentencing hearings. See also *Sfetkopoulos v Canada (Attorney General)*, 2008 FC 33 at ¶ 13-14, aff'd 2008 FCA 328, leave to appeal dismissed [2008] SCCA No 531, which referred to a regulatory-impact-analysis statement regarding medical-marihuana-access regulations in

making a determination whether one of the regulations was compliant with § 7 of the *Charter*; and see *R v Mersey Seafoods*, 2008 NSCA 67 at ¶ 84, in which the Court referred to a regulatory-impact-analysis statement in confirming the legislative purpose of the *Canada Labour Code* in a federal-grounds review of the constitutionality of provincial occupational-health legislation. In my view, it would not be an undue extension of what was decided in these cases to utilise the regulatory-impact-analysis statement which accompanied the rescheduling of methamphetamine to help assess offence seriousness.

Seriousness of methamphetamine trafficking offences

[47] In addition, sentencing courts in Canada have described methamphetamine consistently as a dangerous drug that may have significant damaging impact upon the health of users: *R v Dixon*, [2017] OJ No 3477 (OCJ); *R v Potts*, 2011 BCCA 9 at ¶ 19; *R v Pitvor*, 2010 ONCJ 29 at ¶ 25-29; *R v Punko*, 2010 BCCA 365, leave to appeal refused, [2010] SCCA No 361; it has been decided in the Province of Ontario that it not be treated any less seriously than cocaine: *Copeland* at ¶ 38; *R v Ramos*, 2014 ONSC 6822 at ¶ 63; see also *R v Cote*, 2002 BCCA 29 at ¶ 10; and *R v Okonta*, 2020 ONSC 1412 at ¶ 15. Even when the substance was covered by the *Food and Drugs Act*, with trafficking attracting a maximum sentence of, not life, but 10 years, the penalties were substantial: see

eg R v Serroul, [1990] NSJ No 169 (AD), a 5-month sentence followed by a two-year term of probation; a dissenting opinion would have imposed a two-year federal term. In a more recent case, *R v Taylor*, 2018 NSPC 42, the sentencing judge imposed a two-year penitentiary term for methamphetamine trafficking; the sentence was recommended jointly by counsel, and the prosecution had conceded at trial (2018 NSPC 41 at ¶ 129) that Taylor was a petty retailer, whose record was dated, short, and included no prior findings of guilt for designated substance offences.

[48] I recognize that I must be cautious in relying on findings of fact regarding drug risks made by other courts in other cases. For instance, in *R v Fead*, 2017 ABCA 222 at ¶ 15 and 24, a sentencing judge was found to have relied erroneously on expert testimony given in another case about the potency of methamphetamine; the Alberta Court of Appeal decided that a sentencing court ought not simply lift expert opinions from other cases, although it was careful to note that the prosecution need not prove the dangerousness or addictive qualities of drugs in every case. See also *R v Daley*, 2007 SCC 53 at ¶ 86.

[49] The elevating of methamphetamine from a Schedule III to a Schedule I substance raised the potential maximum penalty for trafficking-related offences from 10 years to one of life imprisonment.

[50] Assuming that cocaine-trafficking cases are valid parity comparators, the court must apply *R v Livingstone; R v Lungal; R v Terris*, 2020 NSCA 5 [*Livingstone, Lungal, Terris*]. In that decision, the Court was dealing with three persons who had received suspended sentences for Schedule I-trafficking-related offences. The sentence for Ms Lungal was affirmed; the sentences for Mr Terris and Mr Livingstone were varied to terms of 18-months' imprisonment, stayed in the interests of justice. All three were categorized as low-level, petty retailers. None had a prior record. All demonstrated good prospects for rehabilitation. None was encumbered by a statutory aggravating factor.

[51] The decisive factors in favour of leniency for Lungal were that she had been pressured into a trafficking enterprise by an intimate partner, and she had made remarkable strides following her arrest in overcoming her chronic substance dependency—¶ 33. Cases such as:

- *R v Chase*, 2019 NSCA 36;
- *R v Saldanha*, 2018 NSSC 169, esp at ¶ 108;
- *R v Masters*, 2017 NSPC 75;
- *R v Casey*, 2017 NSPC 55;

- *R v Christmas*, 2017 NSPC 48; and
- *R v Rushton*, 2017 NSPC 2

involved persons with pro-social profiles similar to Ms Lungal's that resulted in similar lower-end outcomes.

[52] Eighteen-month sentences for Terris and Livingstone, rather than the typical two-year custodial sentence, were held by the Court to be warranted because of their lack of prior record, bail compliance, and good rehabilitative prospects.

[53] In *R v Murphy*, 2019 NSCC 105, the Court briefed the relevant authorities thoroughly, and concluded that the normal range of sentence for small, petty retailers in cocaine was 18-30 months; see also *R v LeBlanc*, 2019 NSSC 192 at ¶ 22. I accept this range as correct, with the caveat that general descriptive or prescriptive ranges should speak solely to the gravity of an offence—in this case, low-level, petty trafficking in Schedule I substances—and should not be taken as including the characteristics of an archetypal offender: *Parranto* at ¶ 47.

Range of penalty

[54] In reckoning an individual range of penalty for Mr Joyce, I conclude that purely probationary sentences would not be sufficient to reflect the degree of

denunciation and specific deterrence required in this case. Given Mr Joyce's individual circumstances, the low-end range of penalty for the § 5(2) charge alone would be at least two-years' imprisonment, factoring in the statutory aggravating factor of two prior designated-substance convictions; the high end of the range would be three years. A sentence toward the lower end of that range would account for Mr Joyce's guilty plea, and the fact that he trafficked in methamphetamine to help support his own dependency. Although Mr Joyce is entitled to a remand credit of 27 days, the court must reckon range of penalty prior to the deduction of remand credit; this is because time spent on remand is part of the total punishment imposed, and is not a mitigating factor affecting the range of sentence: *R v Fice*, 2005 SCC 32 at ¶ 14-28. As a sentence of two years or greater exceeds the upper limit for a CSO, the court declines to address the issue of the constitutionality of the CSO exclusions in ¶ 742.1(c) and (e)(ii) of the *Code*; the issue is moot and not properly litigable: *R v Kennedy*, 2021 NSSC 75 at ¶ 71-75.

[55] The range of penalty for each of the remaining *Criminal Code* counts and the 4(1) *CDSA* count would be one-month prison terms, as proposed by the prosecution—see *R v Young*, 2014 NSCA 16 at ¶ 27; with characteristic

fairness, the prosecutor has proposed that sentences for these charges run concurrently to the sentence for the CDSA charge, to account for totality.

[56] The *Excise Act* and *Revenue Act (Nova Scotia)* charges call for mandatory fines or discretionary terms of imprisonment (between $1664-$2496 or a term not exceeding 18 months under the *Excise Act*; a minimum of $2500 plus treble the exigible tax or, in default, a term not exceeding 180 days under the *Revenue Act*). The prosecution has proposed lighter-end concurrent terms of imprisonment, and Mr Joyce is not opposed.

Sentence

[57] The sentence of the court is as follows:

- case 8444503: a sentence of 704 days; but for the remand time, the sentence would have been an additional 26 days (this credit is to be recorded on JEIN and on the warrant of committal, as required by § 719(3.3) of the *Code*); there will be a lifetime § 109 order and a secondary-designated-offence DNA collection order; finally there will be a § 16 *CDSA* forfeiture-of-contraband order to be drafted by the prosecution;

- for all remaining cases, there will be 30-day terms of imprisonment to be served concurrently; there will be a § 491 order forfeiting the crossbow,

applicable to case 844507, which will be drafted by the prosecution; the contraband tobacco is ordered forfeited.

[58] Given the duration of the sentence, I find that the imposition of victim-surcharge amounts would be an undue hardship; none is imposed.

[59] While adding a term of probation would be legal—as per ¶ 731(1)(b) of the *Code*—I decline to impose one as it would be a set-up-to-fail order.

JPC