IN THE PROVINCIAL COURT OF NOVA SCOTIA

Cite as: R. v. Shields 2014 NSPC 69

Date: September 5, 2014

Docket: 2408443, 2408449

Registry: Halifax

Between:

Her Majesty the Queen

v.

Kyle Shields

SENTENCING DECISION

Judge:	The Honourable Judge Anne S. Derrick
Heard:	September 3, 2014
Decision:	September 5, 2014
Charges:	*Controlled Drugs and Substances Act*, section 5(1) and section 465(1) of the *Criminal Code of Canada*
Counsel:	Mark Donohue and Jeffrey Moors, for the Crown
	Brad Sarson for Kyle Shields

By the Court:

Introduction

[1] On May 30, 2014, I found Kyle Shields guilty of trafficking cocaine and conspiracy to traffic cocaine in the period of June 30 to October 11, 2011. My decision is reported at *R. v. Shields, [2014] N.S.J. No. 272*.

[2] In addition to seeking a substantial prison sentence for Mr. Shields, the Crown is asking for a DNA order. I will deal with that issue first.

The Crown's Application for a DNA Order

[3] Pursuant to section 487.04 of the *Criminal Code*, drug trafficking under section 5 of the *Controlled Drugs and Substances Act* is a secondary designated offence, and therefore Mr. Shields is liable to being ordered to provide a DNA sample. The making of the order is subject to judicial discretion: section 487.051(3)(b) provides that such an order may be made in the case of a secondary designated offence although the legislation provides that

> In deciding whether to make the order, the court shall consider the person's criminal record, whether they were previously found not criminally responsible on account of mental disorder for designated offence, the nature of the offence, the circumstances surrounding its commission and the impact such an order would have on the person's privacy and security of the person and shall give reasons for its decision.

[4] The Crown submits that an order should be made in Mr. Shields' case given the seriousness of the offence for which he has been convicted and the "very conscious choice" by Mr. Shields to engage in drug trafficking.

[5] Mr. Shields is not consenting to the order. He points to the fact that he has no prior criminal record and has spent three years on strict release conditions with only one curfew breach in March 2014 and no new substantive offences.

[6] The Supreme Court of Canada in *R. v. R.C.*, [2005] S.C.J. No. 62 has held that "Parliament has…drawn a sharp distinction between "primary" and "secondary" designated offences, which are defined in s. 487.04 of the *Criminal Code*. Where the offender is convicted of a secondary designated offence, the burden is on the Crown to show that an order would be in the best interests of the administration of justice." (*paragraph 20*)

[7] The Court also noted that section 3 of the *DNA Act* describes the purpose of the legislation as assisting in the identification of persons alleged to have committed designated offences. The Court went on to find:

> Other objectives include deterring potential repeat offenders, detecting serial offenders, streamlining investigations, solving "cold cases", and protecting the innocent by eliminating suspects and exonerating the wrongly convicted. [*cites omitted*] (*paragraph 23*)

[8] These objectives, the Court held, "…however laudable, may be seen to conflict with privacy and security interests that warrant judicial protection." (*paragraph 24*)

[9] No evidence was led on the specific privacy and security interests of Mr. Shields and the Supreme Court of Canada in *R.C.* has held that "the physical intrusion caused by the taking of a DNA sample is minimal" and not a serious affront to privacy or dignity. (*paragraph 26*)

[10] However, there is more to consider as the Supreme Court of Canada has said:

> …Of more concern, however, is the impact of an order on an individual's informational privacy interests. In *R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293, the Court found that s.8 of the *Charter* protected the "biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state". An individual's DNA contains the "highest level of personal and private information" [*cite omitted*]. Unlike a

> fingerprint, it is capable of revealing the most intimate details of a person's biological makeup.
>
> …
>
> Without constraints on the type of information that can be extracted from bodily substances, the potential intrusiveness of a DNA analysis is virtually infinite. Comprehensive safeguards have therefore been put in place to regulate the use of the bodily substances and of the information contained in a profile. [*cites omitted*] (*R.C., paragraphs 27 and 28*)

[11] The Supreme Court of Canada in *R.C.* acknowledged that while a DNA order is not a sentence, it is,

> …undoubtedly a serious consequence of conviction. This is evident from the comprehensive procedural protections that are woven into the scheme of the DNA databank. The taking and retention of a DNA sample is not a trivial matter and, absent a compelling public interest, would inherently constitute a grave intrusion on the subject's right to personal and informational privacy. (*paragraph 39*)

[12] I will now discuss the factors I am mandated by the legislation to consider.

Criminal Record

[13] Mr. Shields is 31 years old. He has no criminal record.

The Nature and Circumstances of the Offence

[14] During the summer and early fall of 2011, a period of three and a half months, Mr. Shields was a "busy mid-level" cocaine trafficker who supplied a limited group of trusted purchasers. He did not employ violence, intimidation or threats nor did violence, intimidation, or threats characterize the activities of his confederates.

The Impact an Order Would Have on Mr. Shields' Privacy and Security

[15] While there is no evidence that a DNA order would have an adverse impact on Mr. Shields' privacy and dignity, his DNA is a constitutionally-protected "biographical core of personal information." The statements I referenced from the Supreme Court of Canada in *R.C.* are not merely lofty, aspirational rights entitled to nothing more than lip-service: they are real rights protected by the *Charter* and they must not be marginalized in the analysis.

[16] The considerations I have just referenced were the subject of examination by our Court of Appeal in *R. v. Jordan*, [2002] N.S.J. No. 20. Cromwell, J. held that the offender's record "may be relevant as one indicator of the likelihood that the offender will reoffend." (*paragraph 64*) This is relevant to the important purpose of the DNA bank to assist in the identification of persons who have committed designated offences. In *Jordan*, the Court held that even an offender seen as unlikely to reoffend may come within the administration of justice rationale for the legislation. (*paragraph 65*) A criminal record may also be relevant as an indicator of dangerousness, which, according to *Jordan*, "makes the interference with the offender's privacy and security of the person more readily justifiable than it would be, for example, in the case of an offender with a record of nonviolent offences."

[17] As to whether a record may be relevant "to the extent that it tends to indicate whether the offender has been convicted of offences with respect to which DNA identification is generally a useful investigative tool", *Jordan* held that "identification of offenders is not the only objective of the DNA provisions." (*paragraph 71*) As I have said, this was also stated by the Supreme Court of Canada in *R.C.* It was observed in *Jordan* that "the availability of DNA samples at crime scenes continues to expand as technology advances." *Jordan* noted that the legislation "specifically does not require individualized suspicion in the case of offenders as opposed to suspects." (*paragraph 72*)

[18] *Jordan* also discussed the nature of the offence and the circumstances of commission issue, indicating that atypical circumstances "will be relevant considerations in determining whether the case is outside the balance which Parliament struck between the objectives of the DNA provisions and the offender's privacy and security of the person." (*paragraph 69*) In examining these criteria, *Jordan* noted a low "risk of recidivism" as also being a relevant consideration in

the analysis. This seems somewhat at odds with the Court of Appeal's comment about "individualized suspicion" not being a legislated consideration but it is a compelling point that a low likelihood of re-offending is a circumstance that should be taken into account in the judicial exercise of discretion in the case of secondary designated offences.

[19] *Jordan* was a case that involved a primary designated offence. Where the DNA order being sought is for a primary designated offence the onus is on the offender to establish that "the impact of such an order on their privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice, to be achieved through the early detection, arrest and conviction of offenders." (*section 487.051(2), Criminal Code*) In the case of a secondary designated offence, the onus is on the Crown to show that it is in "the best interests of the administration of justice to make the order." (*section 487.051(3)(b), Criminal Code*)

[20] Mr. Shields has been convicted of a non-violent offence where the evidence indicates he did not resort to any form of violence, intimidation or threats to achieve his drug trafficking objectives. He is a skilled tradesperson who was employed both before the 3 ½ month period of drug trafficking and afterwards. He served three years on strict release conditions with only one curfew breach in March 2014. He has not committed any new substantive offences. These are all relevant features that contextualize Mr. Shields' lack of a prior record.

[21] In Mr. Shields' case, the nature of the offence and the circumstances of its commission – mid-level trafficking in cocaine - are serious. However Parliament has not chosen to make trafficking in a Schedule I drug a primary designated offence. While trafficking in cocaine can fall along a broad spectrum, the atypical features of Mr. Shields' trafficking – the absence of violence, the involvement with a limited group of trusted purchasers, the otherwise pro-social life that Mr. Shields' led - are a basis for viewing the taking of Mr. Shields' DNA as not satisfying the "best interests of the administration of justice" requirement.

[22] The objectives of the DNA provisions - the identification of persons alleged to have committed designated offences, deterring potential repeat offenders, detecting serial offenders, streamlining investigations, solving "cold cases", and

protecting the innocent by eliminating suspects and exonerating the wrongly convicted - could be used to ground the argument that every offender's DNA should be collected. Parliament has expressly allowed for judicial discretion and crafted very specific criteria in the case of secondary designated offences. There is nothing in the legislation stipulating that only exceptional cases of secondary designated offences should be exempt from DNA sampling. Other than noting that Mr. Shields' offence is serious and his involvement in it deliberate, the Crown has not shown how it is in the best interests of the administration of justice to collect Mr. Shields' DNA.

[23] As for the issue of deterrence, I am satisfied that there is ample deterrence in the penitentiary sentence I will be imposing on Mr. Shields and that no further emphasis on either general or specific deterrence needs to be made.

[24] The Crown brought the British Columbia Court of Appeal decision of *R. v. Awasis*, [2009] B.C.J. No. 583 to my attention. I have reviewed the decision carefully. I find the factual circumstances are materially different: when Ms. Awasis was arrested she was serving a four month conditional sentence for possessing a controlled substance for the purpose of trafficking and was in breach of that conditional sentence. She also had a prior conviction for trafficking in a controlled substance. (*paragraphs 8 and 9*)

[25] Furthermore, *Awasis* has not been adopted or as far as I can tell, even considered, by any court in Nova Scotia and it is not binding authority in this province. I believe I have carefully considered the Crown's application for a DNA order in relation to Mr. Shields in accordance with the law from the Supreme Court of Canada and our Court of Appeal. I find the Crown has not established that ordering Mr. Shields to provide a DNA sample is in the best interests of the administration of justice and, accordingly I decline to make the order.

Determining the Appropriate Sentence for Mr. Shields

[26] The Crown is seeking a Federal penitentiary term of five years on each offence, concurrent to each other. As the Crown notes in its brief, "a charge of conspiracy does not subsume the substantive offence." (*R. v. Sheppe, [1980] 2 S.C.R. 22*) Concurrent sentencing is appropriate as Mr. Shields' conspiring with

others and active trafficking occurred throughout the same period – July through to October 11, 2011.

[27] Mr. Shields has instructed his counsel to recommend that I impose "the shortest period of time in a federal penitentiary" that I think is appropriate in the circumstances. (*email of August 26, 2014 from Brad Sarson*). In his oral submissions, Mr. Sarson argued for a two year sentence for Mr. Shields and also said, "It could be three and a half years, perhaps even lower."

[28] Mr. Shields plainly recognizes that in the circumstances of this case, he faces a federal penitentiary sentence. As noted by the Court of Appeal in *R. v. Scott, [2013] N.S.J. No. 98*, "…trafficking in cocaine, depending on the factors present with respect to the circumstances of the offence and of the offender, will frequently attract a period of federal incarceration." (*Scott, paragraph 5*) The 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.

[29] The Court of Appeal in *Scott* has described sentencing as "a highly individualized process." (*Scott, paragraph 7*) An appropriate sentence cannot be determined in isolation. Regard must be had to all the circumstances of the offence and the offender. (*R. v. Nasogaluak, [2010] S.C.J. No. 6, paragraph 44*) The determination of a "just and appropriate" sentence is "profoundly subjective" (*R. v. Shropshire, [1995] S.C.J. No. 52, paragraph 46*); "a delicate art" which requires the careful balancing of "the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence ..." (*R. v. M. (C.A.), [1996] S.C.J. No. 28, paragraph 91*); and a "profoundly contextual" process in which the sentencing judge has broad discretion. *(R. v. L.M., [2008] S.C.J. No. 31, paragraph 15*) That discretion is structured by how the various sentencing objectives are to be weighted in the determination of the appropriate sentence for this offence and this offender.

[30] Notwithstanding the requirement to tailor sentences to the specific offender, courts have been consistent in emphasizing denunciation and deterrence in sentencing for drug trafficking offences with Parliament prescribing life

imprisonment as the maximum penalty for trafficking Schedule I drugs such as cocaine.

Purpose and Principles of Sentencing

[31] In sentencing Mr. Shields I am guided by the sentencing provisions of the *Criminal Code* and the *Controlled Drugs and Substances Act*. Section 718 of the *Criminal Code* sets out the objectives a sentence must achieve: denunciation, deterrence – both specific and general, separation from society where necessary, rehabilitation of the offender, reparations by the offender, and the promotion of a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[32] Assessing moral culpability is a fundamental aspect of determining the appropriate sentence: a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. (*section 718.1, Criminal Code*) I must also consider any aggravating or mitigating factors, and the principles of parity and totality. (*section 718.2, Criminal Code*)

[33] The sentencing provisions of the *CDSA* articulate similar principles to those found in the *Criminal Code*, indicating that the fundamental purpose of a sentence for drug offences is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging in appropriate circumstances the rehabilitation and treatment of offenders and acknowledging the harm done to victims and to the community. (*section 10, CDSA*)

Mr. Shields' Pre-sentence Report dated August 25, 2014

[34] Mr. Shields' pre-sentence report tells me that he had a very positive upbringing and continues to enjoy the support of his family. His mother describes Mr. Shields in terms that are consistent with what seemed evident to me from the intercepted communications – likeable, a good personality, someone who makes friends easily.

[35] Mr. Shields' girlfriend was also interviewed for the pre-sentence report. She and Mr. Shields have been involved for three years and have a positive relationship. She was unaware of Mr. Shields' activities as a drug dealer and has

only known him "to have legitimate employment and to associate with a peer group comprised of professionals." (*PSR, page 3*) Evidently Mr. Shields was able to operate his drug business under the radar of his family and girlfriend. Appropriately, when he addressed the court at the end of the sentencing hearing, he thanked them for their forebearance and support.

[36] The pre-sentence report indicates that Mr. Shields has no criminal record. He obtained a partial Grade 12 and has completed four years of a Sheet Metal apprenticeship through the Nova Scotia Community College. He has worked for various businesses, including since his arrest and was laid off in 2013. As a consequence of his criminal convictions, he is not presently looking for a job. He advised the author of the pre-sentence report that he anticipates receiving a custodial sentence, which as I have said, is a realistic appraisal of his situation.

Categories of Drug Traffickers

[37] A necessary 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…" (*R. v. Knickle, [2009] N.S.J. No. 245, paragraph 17*) 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*)

The Circumstances of the Offences –Trafficking in Cocaine and Conspiracy

[40] The circumstances of Mr. Shields' offences are comprehensively detailed in my decision, *R. v. Shields, [2014] N.S.J. No. 272*. The intercepted communications that formed the heart of the Crown's case against Mr. Shields indicate that through the summer and into the early fall of 2011 he accepted orders from regular customers, obtained cocaine from John Field and filled the orders. The re-supplied customers were selling the cocaine. Mr. Shields was well aware of this. He conspired with others to accomplish the mercenary objectives of trafficking.

[41] At trial, Mr. Shields was characterized by the Crown's expert, Sgt. Vail, as a "busy mid-level" cocaine trafficker. I said the following about that evidence:

> … Mr. Sarson has made the point that the quantities being transacted - 5, 6, 8, and 9 minutes - are street level amounts. He says I should be asking the question, if Shields is a busy mid-level dealer why is he dealing in street-level amounts? But the placement of Kyle Shields in the hierarchy seems to be the basis for Sgt. Vail's opinion – that is, in this investigation, John Field was at the top of the ladder, with Shields a rung down, and Ryan MacInnis, MB, Suzanne Davidson, and others on the rungs below. And these smaller amounts are not the only numbers mentioned: other calls refer to 20, 30, 50, 70, and in one call Ryan MacInnis has with Kyle Shields, even 100 is the amount requested. (*Session 4267, July 28 Shields and MacInnis*) (*Shields, paragraph 418*)

[42] I found that the amounts being referred to were gram amounts of cocaine. (*Shields, paragraphs 409 – 538*)

[43] Sgt. Vail testified that there are three main categories of traffickers in the Halifax marketplace - high-level, mid-level, and street level. He broke down the various categories:

> …High level traffickers are able to purchase and distribute 10 to 20 kilogram amounts per month. The lower end of high-level trafficking would involve purchasing and distributing single kilogram and half-kilogram amounts. Mid-level traffickers deal in less than half-kilogram amounts. Their trade is in 250 gram- and 100 gram- and down to ounce level-amounts. Street level traffickers deal in ounce amounts at the higher end, down to gram amounts. (*Shields, paragraph 66*)

[44] The evidence from the trial indicates that Mr. Shields was supplying cocaine that ranged from single-digit gram amounts up to 100 grams, and included ounce amounts, for example 25 and 30 grams. Mr. Shields dealt in smaller gram amounts when smaller amounts were ordered by his customers. The categorization of him as a "busy mid-level" drug trafficker is apt.

[45] Mr. Sarson says the evidence puts Mr. Shields on the *Fifield* spectrum between petty retailer and the large retailer. In my view, as a "busy mid-level" drug trafficker, Mr. Shields cannot be categorized as a petty retailer.

Aggravating Factors

[46] The *Criminal Code* provides that a sentence "should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender…" (*section 718.2 (a)*) The Crown has remarked on the deliberate nature of Mr. Shields' drug-trafficking activities, fairly pointing out that he made a conscious choice to traffic cocaine over a three-and-a-half month period. This was a feature of Mr. Shields being a "busy mid-level" drug dealer. It is really not possible to describe the activities of a "busy mid-level" drug dealer as anything other than deliberate.

[47] The circumstances of Mr. Shields' offences would have been aggravated by violence, intimidation or weapons but these were not features of his enterprise or the conspiracy in which he participated. This is somewhat anomalous. It means

some of the secondary harms that often accompany the drug trade were not present here.

[48] There was evidence that dog repellant spray and brass knuckles (*Trial Exhibits 20 and 24*) were seized in the search of Mr. Shields' residence but it should be noted I made no finding that these items had anything to do with Mr. Shields' drug trafficking business. That was deliberate. Notwithstanding Sgt. Vail's testimony that drug traffickers are acutely aware of the risk of "drug rips" by rival dealers or even clients, I was not satisfied there was any evidence that suggested Mr. Shields had armed himself to protect product he might have had on site or that the dog spray and brass knuckles were possessed by him as weapons related to his drug trafficking. Indeed there was evidence that on occasion, Mr. Shields even left his house open so that purchasers could easily access product when he wasn't in. (*Shields, paragraph 238, referring to July 22, Session 3440*)

Mitigating Factors

[49] It is a mitigating circumstance that Mr. Shields has no criminal record. According to the pre-sentence report, he has qualified as a skilled tradesperson and has been employed for significant periods of time. Financial information submitted by Mr. Sarson indicates that Mr. Shields was working during some months in 2011, and otherwise on Employment Insurance due to being laid off.

[50] Mr. Shields has the personal and occupational qualities to be a good and productive citizen. His prospects for rehabilitation are good, subject as the Crown notes, to the choices he makes. In addressing the Court at his sentencing hearing, Mr. Shields spoke of putting his involvement in the criminal justice system behind him and getting on with his sheet-metal trade. His remarks left me with the distinct impression that he has concluded crime does not pay.

[51] Having gone to trial, Mr. Shields does not get the mitigating benefit of a timely guilty plea. It is settled law that his choice to have a trial is not an aggravating factor.

Emphasizing Denunciation and Deterrence

[52] Mr. Shields' sentence must emphasize denunciation and deterrence. Cocaine is a dangerous drug and wreaks considerable havoc in the community. Its pernicious effects were visited on one of Mr. Shields' regular customers, Suzanne Davidson, who suffered serious adverse personal consequences due to becoming an addict and getting involved in the drug trade. She was separated from her small child and went to prison. There is no evidence, and it is not being suggested, that Ms. Davidson became addicted as a result of obtaining cocaine from Mr. Shields or that he knew she was addicted, but that is not my point. The reason I mention Ms. Davidson is because her experience illustrates the harm that cocaine visits on its users. As I noted when I sentenced Mr. Field, drug addiction inflicts all manner of harms on addicts, their families and friends, their children, and their communities. "The legacy of cocaine trafficking is addiction, parasitic crime, and violence. (*R. v. Bonin, [2008] N.S.J. No. 208 (S.C.), paragraph 12*) As I said in *Field* "…even the non-violent cocaine trafficker sows much misery and devastation." (*Field, paragraph 33*)

[53] The five year sentence being sought by the Crown for Mr. Shields is the same as the sentence imposed by the Court of Appeal in *R. v. Butt, [2010] N.S.J. No. 346*. Mr. Butt was an offender who had been "continuously involved in criminal activity with convictions running from 1990 through to 2009, for which he had received both custodial and non-custodial sentences". (*paragraph 5*) He was charged after authorities intercepted a package that had been sent from British Columbia to his address. The package contained two one-kilogram bricks of cocaine of significant purity. A search warrant executed at Mr. Butt's home located an additional 196 grams of powdered cocaine, two similar empty packages from British Columbia, packaging, and a safe. Unrepresented at his sentencing, Mr. Butt claimed to be a simple drop-box and not otherwise involved in the distribution of the drugs. (*R. v. Butt, [2009] N.S.J. No. 551, paragraph 4 (S.C.)*) The 3.5 year sentence he received, once certain mitigating factors had been taken into account was upped to 5 years on appeal. The original sentence was described by the Court of Appeal as "manifestly below the appropriate range for an offender operating at this level of the drug trade." (*Butt, paragraph 14*)

[54] Mr. Butt's sentence was increased after the Court of Appeal identified that his claims in mitigation – that he had reformed since being charged and that he had

serious health issues – were found to be untrue. (*Butt, paragraph 14*) Therefore, when the Court emphasized specific and general deterrence, referring to the substantial amount of drugs, the fact that the drug involved was cocaine, and Mr. Butt's lengthy prior record that included a drug conviction, there were no off-setting mitigatory factors.

[55] An offender who was "second-in-command" in a 24/7 "dial-a-dope" scheme (*R. v. Jones, [2008] N.S.J. No. 467 (C.A.), paragraph 2*) received a sentence of six years for conspiracy to traffic and possession for the purpose of trafficking in crack cocaine. It was noted at sentencing that Mr. Jones had a very lengthy, unbroken criminal record with four prior drug convictions, including a conviction for possession for the purpose of trafficking. (*R. v. Jones, [2007] N.S.J. No. 428 (S.C.), paragraph 21*)

[56] *R. v. Stokes*, [1993] N.S.J. No. 412 (C.A.) is another example of a drug trafficker with a lengthy criminal record – twenty-four prior offences including four drug charges – receiving a substantial custodial sentence, driven up by the imposition of consecutive sentences. Mr. Stokes was sentenced to seven years – two years consecutive on each of three trafficking charges and one year consecutive on a charge of possession for the purpose of trafficking. He had already served a federal penitentiary sentence for drug offences (*paragraph 14*), a sentence that plainly had failed to deter him from re-involving himself in the trade.

[57] In *Stokes*, Roscoe, J. recognized that "Sentencing is far from an exact science. It is more of an art that requires balancing several factors and fashioning a sentence that fits the particular offender and the particular offence." (*paragraph 10*)

The Principle of Parity

[58] Playing a principal role in the drug-trafficking chain, trafficking in cocaine, and having a significant prior record for drug offences, are key factors that increase the sentences imposed in the more serious drug cases. In Operation Timber, the investigation that led to Mr. Shields' arrest, other offenders lower down on the drug-trafficking ladder received federal prison terms of 24 months (Suzanne Davidson) and 38 months (Ryan MacInnis). Suzanne Davidson and Mr. MacInnis

both acquired cocaine from Mr. Shields. By contrast, the Crown is seeking a 60 month sentence for Mr. Shields.

[59] Mr. MacInnis was sentenced by joint recommendation on September 25, 2012 to 38 months on the conspiracy to traffic cocaine charge and 26 months on the possession for the purpose of trafficking charge, to run concurrently. A search of his residence on August 30, 2011 located 37.66 grams of cocaine. At Mr. MacInnis' sentencing, the Crown noted the mitigating factors of an early guilty plea, the fact of Mr. MacInnis' employment, and that he had an unrelated criminal record as an adult. He had never served time. The Crown described him as "a high level retailer of cocaine", a characterization that was not disputed by his counsel.

[60] Suzanne Davidson was also sentenced on the basis of a joint recommendation. It was her first custodial sentence as well.

[61] Each of the sentences meted out to the Operation Timber offenders - Field, MacInnis, Davidson - reflect an emphasis on denunciation and deterrence for trafficking and/or conspiracy to traffic in cocaine. Parity – conformity in sentencing similar offenders committing similar crimes – is a necessary consideration. (*section 718.2(b), Criminal Code; R. v. Collette, [1999] N.S.J. No. 190, paragraph 14(C.A.); R. v. McCurdy, [2002] N.S.J. No. 459, paragraph 21 (C.A.)*) In the Crown's submission, Mr. Shields has to receive a sentence that is more severe that Mr. MacInnis' given their respective positions in this trafficking hierarchy. The Crown's submission is that a five year sentence for Mr. Shields is still less than Mr. Field would have received for his role had I not taken totality into account.

[62] Mr. Sarson has argued that the Davidson and MacInnis sentences are not helpful or appropriate considerations in the parity analysis due to having been jointly recommended. It can be fairly said that jointly recommended sentences do not tell the complete story: how various factors were assessed and valued will have occurred at the negotiations stage between counsel. (*R. v. MacIvor, [2003] N.S.J. No. 188, paragraph 32 (C.A.)*) Sentencing judges are to give joint recommendations "very serious consideration" and accept them unless there are sound reasons to depart from them. (*MacIvor, paragraph 31*)

[63] I have found nothing to support Mr. Sarson's submission that the MacInnis and Davidson sentences have no application in the sentencing of Mr. Shields. In *McCurdy*, the Nova Scotia Court of Appeal held that the "…principle of parity is an important consideration where more than one person is involved in the same criminal operation." (*paragraph 21*) McCurdy was one of six co-conspirators: there is no mention in the Court of Appeal's decision that jointly recommended sentences cannot be considered in a parity analysis.

[64] I will also note that Mr. Sarson did not suggest the MacInnis and Davidson sentences were outside the range of appropriate sentences in the circumstances of those cases.

[65] I am satisfied it is appropriate for me to consider the MacInnis and Davidson sentences. Particularly in relation to Mr. MacInnis, this is not a situation where the parity principle "has little application" in light of very different circumstances as in *R. v. Robbins*, [2008] N.S.J. No. 454, paragraph 45 (C.A.) The "very different circumstances" are apparent when looking at Mr. Shields and Ms. Davidson, but as I explain below, not so much when it comes to Mr. Shields and Mr. MacInnis.

[66] Proportionality is another critical principle of sentencing. Mr. Shields' sentence has to be proportionate to his moral culpability as a drug trafficker and drug trafficking co-conspirator. However in considering Mr. Shields' culpability in relation to Mr. MacInnis', I want to note that while the intercepted communications disclosed a hierarchical relationship between Mr. Shields and Mr. MacInnis, the distinction between their roles was actually not that significant. Their business relationship was characterized by collegiality and reciprocity. Mr. Shields got cocaine from Mr. Field who maintained control over access to the stash house. Mr. Shields collaborated with Mr. MacInnis in distributing it, as well as dealing directly with other purchasers. Mr. MacInnis also distributed to other purchasers. That is how he came to be characterized by the Crown at sentencing as a "high-level retailer." As my reasons in *R. v. Shields* describe, Mr. MacInnis was more than just a down-stream distributor. For example, it was Mr. MacInnis who brought Patrick Scott into the distribution chain while MacInnis kept a low-profile after his August 30 drug bust. (*Shields, paragraphs 555 and 754*)

[67] While the evidence indicates that Mr. Shields was a somewhat bigger cog in the drug trafficking conspiracy wheel than Mr. MacInnis, the distinction between them in the hierarchy was not pronounced. Mr. Shields' position in the drug trafficking network was however significantly different from that of Suzanne Davidson. This fact and her circumstances mean the parity principle in relation to her sentence has little application to the determination of what is appropriate for Mr. Shields.

[68] The Crown is seeking a sentence for Mr. Shields that is not that much different from the sentence imposed on Mr. Field even though, in my view, there are some material differences between Mr. Shields and Mr. Field. Mr. Field had a related *CDSA* record for possession for the purpose of trafficking, albeit in cannabis marijuana not cocaine. During June to October 2011 when he was trafficking and conspiring to traffic with Mr. Shields, Mr. Field was on release conditions in relation to yet other drug charges. These aggravating factors played an influential role in the determination of a pre-totality sentence of six years for Mr. Field. As I said in my reasons: "A six year sentence is a very substantial sentence reflecting Mr. Field's culpability *and the aggravating factors in his case.* (emphasis added) (*Field, paragraph 41*)

[69] At Mr. Shields' sentencing hearing, it was noted that Mr. Field benefitted from having pled guilty: the mitigation of a guilty plea not being available to Mr. Shields. That did benefit Mr. Field as I noted at paragraph 29 of that decision. It was worth something in Mr. Field's case but, as my written reasons indicated, the degree of his culpability and the aggravating factors were significant factors that I took into account in fixing his pre-totality sentence at six years.

The Appropriate Sentence for Mr. Shields

[70] During three and a half months in 2011, Mr. Shields was a mid-level cocaine distributor who kept a regular group of trusted purchasers supplied with cocaine. I did not find that those purchasers worked for him: the trial evidence indicates that they bought their supply from Mr. Shields, either paying up front or being "fronted", and then made their own sales and profit. It appears from the records of employment provided by Mr. Sarson that I was correct in inferring that Mr. Shields was not working at the time (*Shields, paragraph 37*) although his drug trade was

not his only source of income. The intercepts reveal that for Mr. Shields, drug dealing in the summer and early fall of 2011 was a means for making some relatively easy money during a time when he was unemployed due to lay off.

[71] Mr. Shields was not naïve about the risks involved. Intercepted communications with Ryan MacInnis revealed that Mr. Shields knew the penal consequence for drug trafficking was imprisonment although he either down-played or was unaware of how stiff the penalties can be. (*Shields, paragraphs 115, 118, 119*)

[72] However, Mr. Shields is before the Courts for the first time and has previously held legitimate, skilled employment. He has good prospects for rehabilitation and is supported by a caring family and a responsible girlfriend. He has spent three years on strict release conditions with only one breach for which he has taken responsibility by pleading guilty. Three years abiding by strict release conditions is a punitive consequence of his criminal offending. Mr. Shields' sentence, which will expose him to the harsh and potentially violent environment of prison, should be only as long as is required to serve the paramount objectives of denunciation and deterrence. The fact that the sentence being imposed is the first sentence of incarceration is a relevant consideration in sentencing Mr. Shields. As the Nova Scotia Court of Appeal noted in *R. v. Colley*, [1991] N.S.J. No. 62 (N.S.C.A.): "If the need to protect society can be well served by a shorter sentence as by a longer one, the shorter is to be preferred." The Ontario Court of Appeal has expressed a similar view: "...a first sentence of imprisonment should be as short as possible and tailored to the individual circumstances of the accused [rather] than solely for the purpose of general deterrence."(*R. v. Priest, [1996] O.J. No. 3369 (Ont. C.A.)*)

[73] I have concluded, taking into account all the circumstances of Mr. Shields' offences and his circumstances, the need to emphasize denunciation and deterrence in cocaine trafficking cases, and the principles of proportionality, parity, and totality, that a penitentiary sentence of 48 months, that is four years in prison, is the appropriate sentence to impose. I am satisfied that a sentence of four years strongly emphasizes denunciation and deterrence and appropriately reflects Mr. Shields' place in the drug distribution network.

[74] I find that the five years being sought by the Crown is longer than is required to satisfy the imperatives of denunciation and deterrence and risks compromising Mr. Shields' rehabilitation and reintegration back to the community. These reparative principles of sentencing must be accorded some value and not simply marginalized in the sentencing analysis. Five years is also too close to the sentence I would have given Mr. Field - six years - considering the aggravating factors in his case, aggravating factors that are not present here.

[75] I therefore sentence Mr. Shields to four years in prison on the conspiracy charge and four years on the cocaine trafficking charge to be served concurrently. I have signed the section 109 prohibition order. I have waived the victim surcharge as it would be an undue hardship in the circumstances to impose it.

[76] I wish you well, Mr. Shields. I feel confident you have what it takes to overcome the challenges of incarceration and be a successful and law-abiding citizen when you return to the community.

J.