SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Daniels*, 2021 NSSC 103

Date: 20210315
Docket: Halifax, No. 491797
Registry: Halifax

Between:

Her Majesty the Queen

v.

John Ross Benjamin Daniels

SENTENCING DECISION

Judge:	The Honourable Justice John P. Bodurtha
Oral Decision:	March 15, 2021
Written Decision:	March 23, 2021
Counsel:	Glen Scheuer, Crown Counsel Patrick MacEwen, Defence Counsel

By the Court:

Overview

[1] John Ross Benjamin Daniels ("Daniels") pled guilty to illegally selling cannabis pursuant to s. 10 of the *Cannabis Act*, SC 2018, c 16. The charge proceeded by way of Indictment. Daniels operated a marijuana dispensary in Bedford, Nova Scotia, called "Green Tree Dispensary" (the Dispensary) for a time, and only sold his product to people with "medical authorizations". He was arrested on November 21, 2018, and approximately 3.4 kilograms of cannabis was seized, along with a folding knife, several other types of cannabis products, and $960 in cash. The seized cannabis is valued at approximately $33,810 to $50,715.

[2] Although Daniels broke the law in a significant way, his sentence must reflect the circumstances and changing societal attitudes surrounding the offence. While the range of sentences for trafficking may generally start at one year's incarceration, that is not true for medical dispensary cases. Due to the apparent condonation by police, and the legalization of authorized marijuana sale and possession, Courts have recognized that a dispensary operating in the open is less morally blameworthy than a grow-op or drug smuggling racket.

[3] Therefore, the reasonable range of sentences for dispensary cases is broader than the trafficking cases cited by the Crown. The range of sentences in dispensary cases includes conditional discharges and fines, even in cases involving higher moral blameworthiness. Despite the indictable conviction, the range of sentences in Daniels' case must include suspended or intermittent sentences.

[4] Medical marijuana dispensary sentences have been found to uphold the principles of denunciation and deterrence, despite frequently involving discharges and conditional sentences. The accused is nearly always a first-time offender and is unlikely to reoffend. Generally, a criminal record and strict curtailment of freedom is sufficient to meet the principles of deterrence and denunciation in medical dispensary cases.

[5] The facts of this case support a sentence on the lower end of the range, and therefore a suspended sentence is appropriate in this case.

Facts

[6] During its operation, the Dispensary operated openly as a storefront. Daniels possessed a lease to operate his business and it was registered with the Registry of Joint Stock Companies. At one point prior to Daniels' arrest, the Dispensary was robbed and police were involved. No arrests were made at that time.

[7] On November 17, 2018, two undercover officers entered the Dispensary located on the Bedford Highway, Halifax, Nova Scotia. Upon entering the Dispensary, the undercover officers asked for cannabis product and were initially refused because they did not hold proper medical authorizations for cannabis. The employees directed the undercover officers how to register for a licence by going to the website "NamasteMD" and took photo identification from the officers. The officers were able to purchase five grams of cannabis with $50 cash without having a "licence" at hand. Although, the process was not rigorous, the Dispensary did not sell cannabis to anyone who did not provide proper photo identification and a medical authorization to possess cannabis.

[8] A *Cannabis Act* search warrant was granted on November 21, 2018 and police officers executed the warrant on the same day. During the search, Daniels was observed walking toward the Dispensary with two bags in his hands, a camouflage backpack and a pink and black bag. He was arrested, informed of his *Charter* right to counsel and given a police caution. He was subsequently searched and three cell phones, $620 cash, documents showing product weights, a set of keys and a spring-assisted folding knife. In the pink and black bag, two bags of cannabis totaling 119.08 grams were found. In the camouflage backpack, six bags of cannabis totaling 1,835.9 grams were found.

[9] The following further items were seized from the Dispensary:

- 1,426.7 grams of cannabis;
- 397 cannabis edibles;
- 51 vials of cannabis oils;
- 48 pre-rolled cannabis joints;
- 37.5 grams of cannabis resin;
- 15 cannabis resin pills; and

- $340 cash.

[10] The value of the seized cannabis products would range from $33,810 to $50,715.

[11] After Daniels' arrest, the Dispensary was closed and has not reopened.

[12] Daniels is approximately 42 years old, has no prior criminal record, and has support from his friends, family, and individual users of medical marijuana. He has not reoffended since his arrest, but has been subsequently charged for offences under the *Cannabis Act* and the *Criminal Code*, and those offences are being contested in another court. Daniels has not obtained gainful employment. He does not present with addictions or other vulnerabilities.

Applicable Sentencing Regime / Legislative Provisions

[13] Daniels pleaded guilty to selling cannabis to a person over 18 years old contrary to the *Cannabis Act*, and was charged under s. 10(5)(a) as follows:

> **10** (1) Unless authorized under this Act, it is prohibited to sell cannabis, or any substance represented or held out to be cannabis, to
>
> (a) an individual who is 18 years of age or older;
>
> (b) an individual who is under 18 years of age; or
>
> (c) an organization.
>
> (2) Unless authorized under this Act, it is prohibited to possess cannabis for the purpose of selling it contrary to any of paragraphs (1)(a) to (c).
>
> …
>
> (5) Subject to section 51, every person that contravenes any of paragraphs (1)(a) to (c) or subsection (2):
>
> (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years; or
>
> (b) is guilty of an offence punishable on summary conviction and is liable
>
> (i) in the case of an individual who contravenes paragraph (1)(a) or (c) — or subsection (2) other than by possessing cannabis for the purpose of selling it contrary to paragraph (1)(b) — to a fine of not more than $5,000 or imprisonment for a term of not more than six months, or to both,

> (ii) in the case of an individual who contravenes paragraph (1)(b) — or subsection (2) if the possession was for the purpose of selling contrary to paragraph (1)(b) — to a fine of not more than $15,000 or imprisonment for a term of not more than 18 months, or to both, or
>
> (iii) in the case of an organization, to a fine of not more than $100,000.

[14] The purpose of the *Cannabis Act* (see s. 7(d)) provides that deterrence is done through "appropriate sanctions and enforcement measures" under this Act:

> **7** The purpose of this Act is to protect public health and public safety and, in particular, to
>
> (a) protect the health of young persons by restricting their access to cannabis;
>
> (b) protect young persons and others from inducements to use cannabis;
>
> (c) provide for the licit production of cannabis to reduce illicit activities in relation to cannabis;
>
> (d) deter illicit activities in relation to cannabis through appropriate sanctions and enforcement measures;
>
> (e) reduce the burden on the criminal justice system in relation to cannabis;
>
> (f) provide access to a quality-controlled supply of cannabis; and
>
> (g) enhance public awareness of the health risks associated with cannabis use.

[15] The following are the other relevant sentencing factors under the *Cannabis Act*:

> **15** (1) Without restricting the generality of the *Criminal Code*, the fundamental purpose of any sentence for an offence under this Division is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community.
>
> (2) If an individual is convicted of a designated offence, the court imposing sentence on the individual must consider any relevant aggravating factors, including that the individual
>
> (a) in relation to the commission of the offence,
>
> (i) carried, used or threatened to use a weapon,

> (ii) used or threatened to use violence, or
>
> (iii) sold or distributed cannabis or possessed it for the purpose of sale or distribution, in or near a school, on or near school grounds or in or near any other public place usually frequented by young persons; and
>
> (b) was previously convicted of a *designated offence*, as defined in subsection 2(1) of this Act, or a *designated substance offence*, as defined in subsection 2(1) of the *Controlled Drugs and Substances Act*.
>
> (3) If, in the case of an individual who is convicted of a designated offence, the court is satisfied of the existence of one or more of the aggravating factors enumerated in paragraphs (2)(a) and (b), but decides not to sentence the individual to imprisonment, the court must give reasons for that decision.

[16] Therefore, the Act expressly contemplates situations where someone has infringed s. 10, an aggravating factor is present, and imprisonment is not ordered (see s. 10(3)).

[17] Of importance in this case is that, because the charge proceeded by way of indictment, which has a maximum penalty of 14 years' imprisonment, Daniels is not eligible for either a discharge or a conditional sentence pursuant to ss. 730 and 742.1 of the *Criminal Code*, respectively. However, a suspended sentence is legislatively available to Daniels, as is an intermittent sentence. These sections are as follows:

> **731** (1) Where a person is convicted of an offence, a court may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission,
>
> (a) if no minimum punishment is prescribed by law, suspend the passing of sentence and direct that the offender be released on the conditions prescribed in a probation order; or
>
> (b) in addition to fining or sentencing the offender to imprisonment for a term not exceeding two years, direct that the offender comply with the conditions prescribed in a probation order.
>
> …
>
> **732** (1) Where the court imposes a sentence of imprisonment of ninety days or less on an offender convicted of an offence, whether in default of payment of a fine or otherwise, the court may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission, and the availability of appropriate accommodation to ensure compliance with the sentence, order

> (a) that the sentence be served intermittently at such times as are specified in the order; and
>
> (b) that the offender comply with the conditions prescribed in a probation order when not in confinement during the period that the sentence is being served and, if the court so orders, on release from prison after completing the intermittent sentence.

Other relevant sentencing principles found at s. 718 of the *Criminal Code* are as follows:

> **718** 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 of the following objectives:
>
> > (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
> >
> > (b) to deter the offender and other persons from committing offences;
> >
> > (c) to separate offenders from society, where necessary;
> >
> > (d) to assist in rehabilitating offenders;
> >
> > (e) to provide reparations for harm done to victims or to the community; and
> >
> > (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.
>
> …
>
> **718.1** A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> **718.2** A court that imposes a sentence shall also take into consideration the following principles:
>
> > (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
> >
> > > (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor,
> > >
> > > (ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,

> (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
>
> (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
>
> (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,
>
> (iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization,
>
> (v) evidence that the offence was a terrorism offence, or
>
> (vi) evidence that the offence was committed while the offender was subject to a conditional sentence order made under section 742.1 or released on parole, statutory release or unescorted temporary absence under the *Corrections and Conditional Release Act*.

shall be deemed to be aggravating circumstances;

> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

Sentence Recommendations of the Parties

Crown position

[18] The Crown argues that the sentence range for Daniels is one to three years' incarceration. The Crown says that the introduction of the *Cannabis Act* and its continued prohibition of the unregulated sale of marijuana supports the fact that sentencing ranges have not changed for this type of crime. The unauthorized sale of marijuana in a sophisticated storefront operation is analogous to organized crime

and attracts a high level of moral culpability. It cites several decisions, including appellate law, for this position; however, none of the cases deal with convictions under the *Cannabis Act*.

[19] The Crown says that, aside from pleading guilty a few days before trial, there are no mitigating factors that apply to Daniels' case. The Crown also says that because Daniels was found to be carrying a weapon when he was arrested, that is an aggravating factor pursuant to s. 15(2)(a)(i) of the *Cannabis Act*. The amount of marijuana seized and degree of the commercial operation points to incarceration.

[20] The Crown also seeks the following ancillary orders:

1. A Firearms Prohibition Order, s. 109(1)(a);
2. DNA Order; and
3. Forfeiture Order.

Defence Position

[21] Daniels says that a suspended sentence of between six to 12 months, coupled with strict conditions, is appropriate in the circumstances. He argues that there is no precedent for someone in his position being sentenced to years of incarceration. Society's view of the sale and possession of marijuana has changed dramatically, particularly since the passage of the *Cannabis Act*. Defence counsel refers to several unreported decisions where cases against owners and employees of dispensaries tend to result in peace bonds, discharges, and referrals to Restorative Justice. This suggests that the tide has changed regarding marijuana offences and that dispensary owners are not analogous to organized crime kingpins.

[22] Daniels argues there are several mitigating factors. He is a first-time offender, pled guilty ahead of trial, and is supported by his loved ones and medical marijuana users. He says there are no aggravating factors. Finally, Daniels also asks that the Victim Fine Surcharge be waived.

Circumstances of the Offender – Pre-Sentence Report ("PSR")

[23] Sheldon Larkin, Probation Officer, prepared a Presentence Report dated December 16, 2020. The relevant information contained in the report is as follows:

1. Daniels was born in 1977 and has no prior criminal record. He has one older brother and two younger step-siblings. His parents separated when he was two years old and both went on to remarry. The family moved around a lot but all of his basic needs were met.
2. Daniels' stepdad was an IV drug user and everyone in the family consumed alcohol growing up. Daniels denied any form of physical or sexual abuse and denied any outside agencies being involved with the family.
3. Daniels completed high school and then attended CDI College and obtained his diploma in Network Administration and PC repair. Next, Daniels obtained a trade certificate from the National Association of Corrosion Engineers as a certified coating inspector.
4. Daniels has been collecting disability pension cheques since February, 2020. For 11 months prior to this, Daniels owned a marijuana dispensary. He earns roughly $34,000 annually from his Worker Compensation Benefits cheques and describes himself as financially stable.
5. Daniels has not been diagnosed with any mental health issues. He admits to having consumed alcohol and illegal drugs in the past. He had a past addiction to opioids during his late teen years.
6. Daniels made no attempt to deny the offence and took full responsibility for it. Daniels stated, "I accept responsibility and understand now that cannabis can only be sold legal under legislation. However I feel I helped lots of people during that gap."

Principles of Sentencing

[24] In imposing an appropriate sentence, I must consider section 15 of the *Cannabis Act*, but also apply the purpose and principles of sentencing set out in ss. 718, 718.1, and 718.2 of the *Code*. These provisions provide me with the general principles and factors I should consider in reaching a just sentence. The purpose of sentencing is to protect society and to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the objectives outlined in s. 718 of the *Code*.

[25] Any sentencing hearing requires a careful consideration of the unique circumstances of the offender and the offence, and a balancing of sentencing objectives (see: *R. v. Lacasse*, 2015 SCC 64, at para. 1). I shall discuss briefly the relevant sentencing principles before applying my analysis.

Aggravating and Mitigating Factors

Aggravating Factors

- The commercial nature of the criminal activity;
- The open and brazen manner in which the offence was carried out;
- The high degree of moral culpability; and
- Daniels' possession of a weapon.

Mitigating factors

- No prior criminal record; and
- Guilty plea prior to trial.

Proportionality Principle

[26] Section 718.1 reads: "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." The sentence must not be more severe than what is just and appropriate given the seriousness of the offence and the moral blameworthiness of Daniels. The Supreme Court of Canada in *R. v. Lacasse*, *supra*, described it as:

> [12] … In other words, the severity of a sentence depends not only on the seriousness of the crime's consequences, but also on the moral blameworthiness of the offender. Determining a proportionate sentence is a delicate task. As I mentioned above, sentences that are too lenient and sentences that are too harsh can undermine public confidence in the administration of justice.

[27] The Supreme Court of Canada further explained the principles of proportionality and parity at paras. 53 and 54:

> 53 This inquiry must be focused on the fundamental principle of proportionality stated in s. 718.1 of the *Criminal Code*, which provides that a sentence must be 'proportionate to the gravity of the offence and the degree of

> responsibility of the offender'. A sentence will therefore be demonstrably unfit if it constitutes an unreasonable departure from this principle. Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s. 718.2(a) and (b) of the *Criminal Code*.
>
> 54 The determination of whether a sentence is fit also requires that the sentencing objectives set out in s. 718 of the *Criminal Code* and the other sentencing principles set out in s. 718.2 be taken into account. Once again, however, it is up to the trial judge to properly weigh these various principles and objectives, whose relative importance will necessarily vary with the nature of the crime and the circumstances in which it was committed. The principle of parity of sentences, on which the Court of Appeal relied, is secondary to the fundamental principle of proportionality. This Court explained this as follows in *M. (C.A.)*:
>
> > It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime ... Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. [para. 92]

[28] Assessing the gravity of the offence requires me to consider both the gravity of these offences in general and the gravity of Daniels' specific offending behaviour.

Denunciation and Deterrence

[29] The role of denunciation was explained by the Supreme Court of Canada in *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, at para. 81:

> The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law… Our criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated.

[30] Although medical marijuana dispensary operators are frequently sentenced to discharges and conditional sentences, these sentences have been found to uphold the principles of denunciation and deterrence.

Rehabilitation

[31] Even in cases that require denunciation and deterrence to be emphasized, rehabilitation continues to be a relevant objective. I must take this into consideration because rehabilitation of offenders continues to be one of the main objectives of Canadian criminal law (see *R. v. Lacasse*, *supra*, at para. 4).

Parity

[32] Sentencing is not an exact science and it is incumbent upon the Court to view the circumstances of each offender and the circumstances of the offence. Section 718.2 requires me to consider the principle of parity. This means, within reason, a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. This requires an examination of the range of sentences imposed for the offence, taking into consideration that each sentence must reflect the unique circumstances of the offence and the offender.

Range of Sentence

[33] In *Rushton*, 2017 NSPC 2 , Judge Buckle spoke about sentencing principles at paras. 87 and 88:

> 87 Sentencing ranges are important. They are intended to encourage greater consistency between sentences and respect for the principle of parity. However, "they are guidelines rather than hard and fast rules" (*R. v. Nasogaluak*, 2010 SCC 6 (S.C.C.) at para. 44). This was recognized by Scanlan, J.A. in *Oickle (supra)* at para. 40 when he said 'it is not appropriate to set a bottom range or a top range for a particular offence without regard for the offender or other sentencing principles'. He went on to quote Justice Farrar in *R. v. Phinn*, 2015 NSCA 27 (N.S. C.A.) where he refers to *R. v. N. (A.)*, 2011 NSC A 21 (N.S. C.A.):
>
> > [34] Unless expressed in the Code, there is no universal range with fixed boundaries for all instances of an offence: [Authorities omitted]. The range moves sympathetically with the circumstances, and is proportionate to the Code's sentencing principles that include fundamentally the offence's gravity and the offender's culpability ...
>
> 88 Sentencing judges are permitted to go outside the established range for a given offence as long as the sentence imposed is a lawful sentence that adequately

reflects the principles and purposes of sentencing (*Nasogaluak (supra)*, at para. 44). This was recently affirmed by the Supreme Court of Canada in *Lacasse (supra)*, where Wagner, J., writing for the majority, said as follows:

> 58 There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. Once again, everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case. ...

Analysis

[34] There are several appellate decisions which provide that the range of sentences for trafficking marijuana is at least one year's incarceration. In most of these cases, a conditional sentence order is found to be inadequate to address the seriousness of the crime. There are several cases that refer to the *Cannabis Act*, but comparatively few that deal with it in depth. Most of the case law involves convictions under the *Controlled Drugs and Substances Act*, SC 1996, c. 19, ("*CDSA*") particularly s. 5(2), which, until June 2018, was the provision criminalizing the sale, or trafficking, of marijuana. The federal government amended the *CDSA*, removing marijuana from Schedule II. Now, authorized sale is legal and regulated by the government, similar to alcohol and tobacco. Unauthorized sale of marijuana is still illegal, but it is no longer punishable by a maximum of life imprisonment. Also, the *Cannabis Act* does not differentiate cases involving differing amounts of unauthorized marijuana possession.

Trafficking Cases

[35] There are several cases suggesting that, despite changing attitudes regarding marijuana offences, they must still be treated as serious crimes. The cases provide that the older sentencing ranges of at least one year's imprisonment are still relevant, and that such sentences are necessary to uphold the principles of denunciation and deterrence. These cases can be distinguished on the facts

because they do not deal with medical marijuana dispensaries. They also do not preclude the use of a suspended or intermittent sentence in Daniels' case.

[36] In *R. v. Bentley*, 2017 ONCA 982, the Crown appealed a 90-day intermittent sentence on the grounds that it was manifestly unfit. The accused in that case was charged with production of marijuana under the *CDSA* and stealing electricity under the *Criminal Code*; effectively, it was a "grow-op" and involved a large number of plants. The Ontario Court of Appeal allowed the appeal and imposed a sentence of 18 months' incarceration, saying that the trial judge overemphasized his own views that society's attitudes regarding cannabis had shifted. The trial judge also failed to address sentencing principles adequately. The 18-month sentence, however, was suspended because Mr. Bentley had completed his 90-day sentence and had "fully reintegrated back into his community" (see para. 13). Reincarceration at this point "would not be in the interests of justice, and would have undue adverse effects on this respondent" (see para 14).

[37] In *R. v. Strong*, 2019 ONCA 15, the Ontario Court of Appeal held that society's shift in attitudes toward trafficking marijuana has not resulted in lowering the range for this type of crime:

> 2 The appellant's main argument rests on the assertion that that the changed societal attitude toward marijuana use warrants a reduction in the established range for this kind of offence. We cannot accept this submission.
>
> 3 While the societal perception of the seriousness or harmfulness of the offender's conduct has a role to play in considering factors such as denunciation and deterrence, we see no basis to conclude that the conduct involved in this case would be viewed as anything other than serious criminal misconduct.
>
> 4 Parliament has not significantly altered the applicable penalty. Nor, in our view, can one assume that a large scale, prolonged trafficking for profit in marijuana is somehow viewed as less serious because of the legislative changes in respect of personal possession and use. The sentence was within the established range. We would dismiss the appeal.

[38] The accused in that case was convicted of trafficking, possession for the purpose of trafficking, conspiracy to traffic, and possession of the proceeds of crime totalling $53,832. Over 40 pounds of marijuana was seized and Mr. Strong had possessed or sold another 124 pounds in a ten-week period prior to his arrest. He was sentenced to three years for the drug offences and one year for the proceeds of crime, concurrently.

[39] In *R. v. Neary*, 2017 SKCA 29, the accused was convicted of possession of marijuana for the purposes of trafficking and trafficking of over three kilograms of marijuana under the *CDSA*, and possession of proceeds obtained by crime under the *Criminal Code*. He also pleaded guilty to possession of Psilocybin. Over 30 pounds of marijuana was seized. At trial, Mr. Neary argued that it would be "intellectually dishonest" to follow the older sentencing regime of 15–18 months' incarceration in light of the upcoming legalization of cannabis (see para. 10). The Crown conceded that, absent the 2012 amendments, Mr. Neary would be a candidate for a conditional sentence. The trial judge ordered a suspended sentence of two years, which the Crown appealed.

[40] The Saskatchewan Court of Appeal allowed the appeal and imposed a sentence of 15 months' incarceration, served concurrently. The Court of Appeal pointed out that at that time, it was unknown when the new marijuana legislation would be enacted, nor on what terms; judges must apply the law as it presently exists (see para 51). By over-emphasizing the eventual change in legislation, and Mr. Neary's personal circumstances, the trial judge "failed to take into account the seriousness of the offences and the level of his moral culpability" (see para. 53). The Court of Appeal found that the principles of denunciation and deterrence were paramount (see para. 41).

[41] Justice Burrage in *R. v. Murphy*, 2018 NLSC 256, aff'd 2021 NLCA 3, however, found that many of the above cases could be distinguished. Mr. Murphy pled guilty to one count of possession of cannabis for the purposes of trafficking pursuant to s. 5(2) of the *CDSA*. He was effectively an intermediary in a marijuana trafficking operation, transporting large quantities between British Columbia and Newfoundland via shipping stations. Over 11 kilograms of marijuana was seized, which was valued at between $168,600–$224,800.

[42] Mr. Murphy's conduct occurred before the *Cannabis Act* came into force and, because it remains a crime under that Act, the Crown argued that the range should not be lowered due to the fact that some possession is now legal. The Crown sought a range of 18–24 months' incarceration. The Defence acknowledged that the conduct was still illegal; however, society's present attitude towards marijuana had shifted such that the principles of deterrence and denunciation were less important. The Defence sought a suspended sentence and probation. The Court ordered a suspended sentence of two years, which was upheld on appeal.

[43] Justice Burrage discussed in detail the changes in how Canadian law dealt with marijuana over the years. The Court summarized the changes from the *CDSA* to the *Cannabis Act* as follows:

> 43 While continuing to treat the unauthorized possession of cannabis for distribution and sale of cannabis as a criminal offence, at its more serious level there are three noteable [*sic*] changes between the *CDSA* and the *Cannabis Act*:
>
> (a) The maximum period of imprisonment is reduced from life to 14 years;
>
> (b) The elimination of mandatory minimum terms of imprisonment; and
>
> (c) The lack of a graduated sentence based on the quantity of cannabis involved.
>
> 44 In circumstances, such as those faced by Mr. Murphy, there is no change in relation to the unavailability of a conditional sentence, or a discharge, the section 109 firearms' prohibition and discretionary DNA order.

[44] The Court further reflected on the sentencing principles regarding illicit cannabis activities and found that, while the relevant principles remained the same, the weight attached has changed:

> 62 As the language of the *Cannabis Act* closely approximates section 10 of the *CDSA*, and section 15(1) of the *Cannabis Act* is prefaced with the language 'Without restricting the generality of the *Criminal Code* ...', I do not discern any appreciable change in the principles of sentencing for cannabis related offences post legalization. As we shall see, the relative weight to be attributed to these principles, in particular those of denunciation and deterrence, may be another matter. What will now constitute 'appropriate sanctions' directed towards deterrence?

[45] Justice Burrage then assessed a wide range of sentences involving marijuana trafficking which were broken down into three time periods: the "conditional sentence era" (see paras. 65-86), the "post conditional sentence era" (see paras 87-99), and "sentencing in anticipation of legalization" (see paras 100-120). The Court found that it must give weight to the passing of the *Cannabis Act*, which was no longer speculative, as reflective of society's and the government's shifting attitudes. It concluded that denunciation and deterrence were made out in this case such that a jail term was unnecessary:

> 127 What, then, of the principles of denunciation and general deterrence? *On the facts of this case*, does a proportional sentence demand that these principles should take precedence over the antecedents of Mr. Murphy, such that a term in jail is nonetheless warranted? In my view, they do not.
>
> 128 In *Thompson* the Ontario Court of Justice observed that, "Assessment of communal values by sentencing judges is important, because values change. Sentencing ranges change too" (at paragraph 29).
>
> 129 In *Provost*, our Court of Appeal echoed a similar sentiment: "It is good when judges are mindful of developments in their communities and of patterns of offences that come before the courts," (at paragraph 14).
>
> …
>
> 132 It is true that there remains a societal interest in ensuring that the quality of legalized cannabis is preserved and that this drug does not find its way into the hands of young people. The illegal production, sale and distribution of cannabis runs contrary to this interest. Hence the continued need for general deterrence through 'appropriate sanctions and enforcement measures' (*Cannabis Act*, section 7(d)). The new Canadian world of legalized cannabis is not a world where anything goes. Of course, the same may be said for two of this country's other legalized drugs, alcohol and tobacco.
>
> …
>
> 135 All things being equal, it is fair to say that the principles of general deterrence and denunciation, while still relevant, have less prominence than prior to legalization. To this I would add an important caveat, for all things are seldom equal. Undoubtedly, there will be circumstances where deterrence and denunciation will merit greater weight than in the case before me. I am thinking, for example, of those cases where one or more of the aggravating circumstances in section 15 of the *Cannabis Act* are present. However, the application of the principles of denunciation and deterrence is not a matter of a one size fits all.
>
> [italics in original]

[46] The Newfoundland and Labrador Court of Appeal upheld Justice Burrage's treatment of past sentencing ranges (see para. 8) and the conclusion that denunciation and deterrence had less significance in marijuana trafficking cases since the passing of the *Cannabis Act* (see para. 46). The lower end of the range was supported by the case law and thus the parity principle was also addressed by the suspended sentence. This recent case provides a strong appellate counterbalance to the earlier case law suggesting that, in general, marijuana

trafficking cases start with a range of one year's incarceration despite present legalization.

[47] The Crown provided several Nova Scotia cases where the accused was sentenced to at least a year's incarceration for trafficking marijuana. These cases share the common thread that deterrence is a paramount concern in sentencing offences related to trafficking marijuana. Most of these cases predate discussions of the *Cannabis Act* and many deal with larger quantities of seized marijuana or other drugs. Furthermore, these are not medical marijuana dispensary cases.

[48] The Crown relied on three Nova Scotia Court of Appeal decisions, *R. v. O'Toole*, 1992 CarswellNS 501, *R. v. Collette*, 1999 NSCA 169, and *R. v. Jones*, 2003 NSCA 48. In these cases, the Court of Appeal overturned a lesser sentence at trial in favour of incarceration for trafficking offences. *O'Toole* dealt with two kilograms of marijuana, a half-gram of cocaine, and a loaded semi-automatic handgun. The Court of Appeal found that one year's incarceration insufficiently dealt with the principles of denunciation and deterrence (see para. 6) and instead ordered two years. The accused in *Collette* was caught trafficking ten kilograms of marijuana with two other men. The trial judge ordered a two-year conditional sentence, which was overturned on the grounds that it again did not properly reflect the principle of deterrence (see para. 16). Three years' incarceration was instead ordered. The accused in *Jones*, acting as a courier between Moncton and Halifax, was found with 4.6 kilograms of marijuana and $40,020 cash in his vehicle. The conditional sentence of 18 months was overturned and a sentence of three years' incarceration was imposed. Again, failure to adequately address deterrence was cited (para. 15). It is clear, from the Nova Scotia Court of Appeal, that sentencing in Nova Scotia for marijuana trafficking offences must uphold the principle of deterrence.

[49] Several more recent cases also provide that the range for trafficking marijuana is at least one year's incarceration, even in the face of the *Cannabis Act*. For example, in *R. v. Withrow*, 2019 NSSC 270, the accused played a critical role in a drug smuggling operation whereby marijuana would be flown in from British Columbia via checked baggage to Nova Scotia, and then cash smuggled back the same way. He was convicted of conspiracy to traffic marijuana, conspiracy to launder proceeds of crime, conspiracy to possess proceeds of crime, trafficking marijuana, and laundering proceeds of crime under the *Criminal Code* and the *CDSA*, respectively. In a three-month period, between 1,450 and 1,885 pounds of

marijuana was transported and criminal proceeds amounted to approximately $3.5 million. The accused was sentenced to 30 months' incarceration.

[50] Justice Coady noted that this was a "significant cannabis trafficking case", with a sentencing range of 1 - 4.5 years' incarceration (see para. 16). The introduction of the *Cannabis Act* did not affect this (see para. 18). He continued:

> 22 The courts, in many cases, have interpreted section 10 of the *CDSA* to mean that "except in highly unusual cases a custodial sentence is required for narcotic trafficking even in cases involving cannabis."

[51] *R. v. Boyer*, 2019 NSSC 332, is another marijuana trafficking case involving couriers travelling between Vancouver and Halifax. Mr. Boyer was convicted of six offences under the *Criminal Code* and the *CDSA*, including money laundering. The investigation revealed over $1.5 million in cash and the Court found that the "lucrative, sophisticated, large scale drug operation" was motivated by greed (see para. 9). Justice Coughlan found that "[t]he change in legislation or societal attitudes does not alter the fact the offences here are serious criminal misconduct" (see para. 28), and he cited cases like *R. v. Strong*, *supra*, and *R. v. Fifield*, (1978) 25 N.S.R. (2d) 407 (NSCA) with approval. Mr. Boyer's total sentence was 54 months' incarceration.

[52] In *R. v. Brady*, 2016 NSSC 148, the Court found that the range for marijuana trafficking offences is generally "two to five years' incarceration" (see para. 11). The accused was convicted of trafficking over three kilograms of marijuana contrary to the *CDSA*; over nine kilograms of marijuana was found in a car he owned. Mr. Brady's counsel made the argument that this was analogous to those medical marijuana operations that "jumped the gun" in relation to federal changes to the medical marijuana regime (see para. 16). Justice Boudreau said:

> 19 Having said that, **the medical use of marijuana raised an entirely different scenario.** The government was dealing with issues of compassionate concerns and constitutional challenges. It would appear, based on the cases provided by Mr. Rodgers, that certain people acted beyond the scope of the law, to speed up that process. This was to alleviate suffering. **The courts recognized what was happening.**
>
> 20 **When those persons were sentenced, the results in those cases were different than the normal range, in my view, because of those "sympathetic" realities**. Those realities do not exist here.

[emphasis added]

[53] She found that, as of 2016, there was no "great societal shift" warranting a change in the reasonable range for trafficking marijuana (see para. 21). The previous case law was still applicable. Nevertheless, Justice Boudreau ordered that Mr. Brady be given a conditional sentence of 18 months' house arrest with limited exceptions for leaving his home during that time (see paras. 28-29). Furthermore, Justice Boudreau acknowledged that Courts have been treating medical marijuana cases differently from conventional trafficking cases.

[54] Therefore, in my view, it is proper to look beyond the trafficking cases and consider medical dispensary cases. In these cases, the evidence supports the accused's belief that, by offering marijuana for medicinal purposes, their operation provided a net good to society; it was the law that was unjust. In each of these cases, the accused operated publicly, often with a legitimate business licence. The police's tacit condonation of the operation, at least for a period, is also common throughout these cases. I find these cases provide further support for departing from trafficking sentences and giving Daniels a sentence on the lower end of the range.

Dispensary Cases

[55] Daniels argues that there are several unreported decisions in Nova Scotia dealing with owners and employees of dispensaries. He says that "most" of these cases resulted in "peace bonds, discharges, and referrals to Restorative Justice". He provided summaries of *R. v. Leclerc* (2018, Truro Provincial Court) and *R. v. Morgan* (2018, Pictou Provincial Court). These cases are examples of conditional sentences being ordered for a dispensary owner under the *CDSA* for conduct similar to that of Daniels'. In *Leclerc*, the accused continued operating his dispensary even after charges were laid and yet a conditional sentence was ordered. In *Morgan*, the accused operated two dispensaries, and a larger amount of marijuana was seized; the accused in *Morgan* was also given a conditional sentence. In each of these unreported cases, the moral blameworthiness of the accused is higher in my view, yet it is clear the Crown proceeded summarily, as a conditional sentence was legally available. This appears to be implicit recognition by the Crown of the shifting attitude in Nova Scotia towards marijuana. Dispensary cases are treated differently than other trafficking cases, and where the

matter proceeds by way of summary conviction, non-custodial sentences are frequently ordered. Furthermore, it must be presumed that the principles of denunciation and deterrence are made out in these cases, despite a lack of a prison sentence.

[56] Cases outside of Nova Scotia, provide further support that the range for a dispensary owner includes non-custodial sentences. In *R. v. Louka*, 2017 CarswellOnt 14008 (ONCJ), the Court found that a couple who ran a medical marijuana dispensary were motivated purely out of compassion for their customers in providing access to marijuana for medical purposes (see para. 17). The couple, who were recent immigrants to Canada, so impressed Justice Westman of their good character that probation was not even ordered; they were granted absolute discharges. The Court repeatedly referred to the couple as "activists" (e.g. see para. 27), and found that Ms. Louka operated with a strict "code of conduct" (see para. 24). Anything but a discharge would prevent them from visiting family in the United States (see paras. 27-28).

[57] Clearly, certain aspects of this case are distinguishable from that of Daniels. However, the Court's discussion of the "rule of law" is applicable when considering sentencing:

> 16 No harm here, other than disrespect for the rule of law. This is an offence of compassion, concern for your fellow human being, concern for those who are suffering, concern for those who may not have equal access to this medical remedy.
>
> …
>
> 22 I didn't hear any harm identified. Interesting, isn't it? In my own struggle to find harm, I talked about the rule of law, not that the rule of law is insignificant. The rule of law is what protects us from chaos, from anarchy. It protects us from that. But I have yet to hear any anarchy coming about as a result of these dispensaries providing medical marihuana for those who are entitled to have it.
>
> …
>
> 30 To go back, because what I was struggling with was how to define, how to understand what the Crown attorney was attempting to - how she was describing the offensive nature of this crime. And I say that because, typically, offences in the *Criminal Code* involve some evil. Is it evil to want to provide those that have the right to have medical marihuana denied that right because of the difficulties of securing it? Is it wrong for a fellow Canadian to want to help his brother or his sister? So maybe my search to find meaning in this case was to say there is the

> rule of law - this is an offence against the rule of law. Nobody is hurt, nobody is endangered, but there is this issue of the rule of law.

[58] The Court found that deterrence was made out by the reputational consequences endured by the Loukas, and the other stressors involved in closing up shop and dealing with a potential criminal conviction (see para. 31). Both were remorseful and the Court was confident that neither would commit any further crimes. Although a conditional sentence was available, it was not necessary because there was no need for rehabilitation in this case (para. 8).

[59] The Court, in *R. v. Thompson*, 2018 ONCJ 310, pointed out that the Crown in *Louka* initially sought jail time, but ended up seeking a fine of $10,000. Of this, the Court in *Thompson* said at para 25:

> I infer that the Crown took its position in recognition of the lack of notice given to the Loukas and in recognition of the parity principle. Nevertheless, the Crown's position in the Louka case seems to reflect a recognition of the relaxation of social values in relation to marijuana. It is important to note that the Crown did not appeal the sentences -- another implicit recognition by the Crown of the social context (in Kitchener, in particular, and Canada as whole) in which the offence occurred.

[60] Similar to Daniels, the Loukas' dispensary operated in the open as a legitimately-registered business; no one was "hiding" (see para. 24). *Louka* also raised the fact that the police in the area planned to visit the known dispensaries, observe them committing crimes, and issue warning letters (see para. 43). The Court found that, had this plan been in place before the Loukas' arrest, they surely would have closed up shop earlier (see para. 42). Justice Westman quoted the police chief, who concluded that the plan to issue letters first – despite evidence of overt criminal activity – was "fair". Of this, Westman J. continued, "The duty of the court is to be fair and just. And the chief had the same concern and had the discretion, the power, the common decency to recognize the distinction between what the legislation was all about, for which you pleaded guilty, and what the actual circumstances were practically on the ground" (see para. 43). The Court's comparison to the police condoning these medical dispensaries to the Court's duty to be fair and just is relevant for our purposes. Similar to Ontario, there is evidence before me that the police issued a warning letter to known dispensary owners in Nova Scotia (see Exhibit S-6). There is also evidence that the police visited the dispensary after it was robbed and no arrests were made.

[61] A case factually similar to Daniels is *R. v. Churchill*, 2018 ONCJ 852. Mr. Churchill, 53 years old, operated a dispensary in which he only sold marijuana for medicinal purposes. He was convicted of possession for the purposes of trafficking under the *CDSA*. Less than three kilograms of marijuana was seized, along with other marijuana-related products and $475 cash. Unlike other dispensaries in the area, he did not reopen after the search warrant was executed. He resisted the suggestion that the business was "lucrative" (see para. 13) and the Court found that "any type of limit Mr. Churchill placed on acquiring membership would have necessarily reduced his sales" (see para. 17). The Court also found that Mr. Churchill had a strong moral compass, and that his motivation for breaking the law was because he disagreed with the government's existing medical marijuana scheme (see para. 10).

[62] Justice Pringle turned to sentencing principles:

> 29 The sale of marijuana for any use, including recreational use, is today a legal government enterprise. At the time Mr. Churchill committed this offence, however, he was knowingly operating outside the law and his punishment must reflect that prior scheme. In *R. v. Tran*, at paras. 26 and 27, Trotter J. (as he then was) wrote, prior to marijuana decriminalization:
>
> > If judges refuse to apply laws based on their subjective impressions of the likelihood of reform, the rule of law would be seriously undermined. It would cause great confusion about which laws are enforceable and which ones are not. As the Court of Appeal held in *R. v. Song* (2009), 249 C.C.C. (3d) 289 (Ont. C.A.), at p. 292:
> >
> > > Judges are entitled to hold personal and political opinions as much as anyone else. But they are not free to permit those views to colour or frame their trial and sentencing decisions. **They are bound to apply the law as it stands.**
> >
> > [emphasis added]
> >
> > Just as judges are not entitled to pick and choose which laws they wish to apply, members of the public are not free to select which laws they wish to obey, even with the prospect of reform on the horizon. In present circumstances, prosecutorial discretion and executive clemency, not judicial fiat, are the only legitimate sources of reprieve. In the meantime, I must apply the CDSA faithfully and sentence offenders according to the customary principles and binding precedent.
>
> 30 I must, therefore, still impose a sentence that speaks to general deterrence and denunciation. I am not allowed to impose my own views, as was the error skewing sentence in *R. v. Bentley*, 2017 ONCA 982 at para. 6. Irrespective of the subsequent decriminalization of marijuana, Mr. Churchill's sentence must still

send the message that if you disagree with a law, you are not free to go break it. As the BCCA said in *R. v. DeFelice,* 2010 BCCA 273, at para. 4:

> The appellants, who are advocates of the use of marihuana, disagree with Canada's drug laws and seek to change them. Expressing disagreement with existing law and advocating change is lawful. Indeed, it is a fundamental right in a free and democratic society. Undertaking illegal activity as part of expressing disagreement and advocating is not lawful. On the contrary, it strikes at the core of a free and democratic society: the rule of law.
>
> [footnote removed; emphasis in original]

[63] The Court reviewed several decisions, reported and unreported, involving dispensaries and individuals selling medicinal marijuana (see para. 36), concluding that the reasonable range of sentences for this type of crime includes non-custodial sentences. This demonstrates a shift in society's attitudes:

> 37 **From my review of these cases, clearly the range of available sentences is broad and includes both discharges and substantial fines**. The cases of best assistance to me are those from this level of court, this moment in time, and this community. **In reviewing these cases, I cannot help but notice a de-escalation, towards present day, of sanctions imposed on the offenders. This, in my view, reflects society's changing attitude towards the sale and consumption of marijuana**. To borrow from O'Donnell J.'s decision in *R. v. Bao,* 2018 ONCJ 136 at para. 18:
>
> > At the same time, the sentence imposed on him must, like any sentence, take into account the social mores of the time when he is sentenced. **Canadian society has come a tremendous distance from the hysterical and fear-mongering outlook towards cannabis** characterized by films such as Reefer Madness in the 1930s (and criminal law policies that were not much more rational than that film), to a more nuanced view that, while cannabis use presents some very real dangers, especially for some groups such as young people, **it also has rather benign uses no worse than alcohol, as well as some medically advantageous uses, including uses that could be much safer than society's over-reliance on prescribed opioids for pain relief, the effects of which this court sees daily.** Recognizing those social realities in determining an appropriate sentence, is qualitatively different than calling in aid a legislative change that has not taken place, even if it may lead some distance down the same path in determining sentence.
>
> 38 I agree. I accept the Crown's submission about the risk of community harm these dispensaries present. **I wholly recognize the need to communicate that, in**

> **sentencing Mr. Churchill, a peaceful and orderly society depends on all of us respecting the rule of law. But I cannot ignore how our government and our society currently views marijuana consumption.** It is an intoxicant with some risks similar to alcohol, but with indisputable medicinal qualities, as Rosenberg J.A. accepted in *R. v. Clay*, (2000) 135 O.A.C. 66 and *R. v. Parker*, (2000) 135 O.A.C. 1.
>
> 39 It is not for me to decide, here, whether marijuana as medicine is less addictive or harmful than a prescription for fentanyl or oxycodone. It is not for me to decide whether marijuana is more or less harmful than alcohol. **But in my considered view, sentences imposed for similarly situated offenders, for similar offences, currently reflect a change in social mores and attitudes towards marijuana consumption, even pre-decriminalization. This is why recent sentences imposed, in Ontario, are non-custodial and include the imposition of conditional and absolute discharges. The tide has been demonstrably changing.**
>
> [emphasis added]

[64] Justice Pringle balanced the various factors relevant to Mr. Churchill's sentence. It was not a small operation, despite the small amount of cash found. She found that his motivation was both the provision of a medicinal substance and profit (see para. 40). There was risk to the community as Mr. Churchill was not a qualified medical professional, and because illegal dispensaries often beget further crime (see paras. 41-42). Justice Pringle found other aggravating factors were not present in this case, such as opening multiple locations. Mr. Churchill pleaded guilty and was a first-time offender.

[65] The Court ordered a conditional discharge:

> 49 Having considered the agreed facts, the supplementary Crown evidence, the *viva voce* testimony of Mr. Churchill and Det/Cst. Edgar, and after weighing the aggravating and mitigating factors, I am satisfied that a conditional discharge is both in Mr. Churchill's interest and is not contrary to the public interest. **Mr. Churchill's dispensary operation posed a risk of harm, but caused no actual harm. His choice to limit product sales further minimized that risk. His motive for offending was deeply rooted in a desire to help people suffering from illness and pain.** I have no evidence of actual community harm or complaints about his business. The only evidence I do have on the point is that the Kensington Market community welcomed him.
>
> 50 **I see no meaningful connection between registering a conviction against Mr. Churchill's name and achieving the goals of sentencing. In considering general deterrence, I am mindful of the fact that a suspended sentence "is not necessarily a greater deterrent to others than a conditional discharge"**: *R. v.*

> *Cheung and Chow* (1976), 19 Crim. LQ. 281 (Ont. C.A.), as quoted by Hill J. in *R. v. Hayes*, [1999] O.J. No. 938 (S.C.A.D.) at para. 32. In my opinion, general deterrence in this case can and will be addressed through the sentence I am imposing.
>
> 51 **He has been specifically deterred**. His rehabilitative potential is strong. **Evidence establishes that Mr. Churchill's continued rehabilitation, and the reparation he must make to society for breaking its laws, can be achieved through probation terms**. He needs to give back to the community what he took by breaking the law, and his probation order will accomplish that. It is not contrary to the public interest to conditionally discharge Mr. Churchill, and thus I will do so.
>
> [emphasis added]

[66] Among other things, the conditional discharge required that Mr. Churchill perform 100 hours of community service and the Court sought submissions on increasing the Victim Fine Surcharge to reflect the unseized proceeds of crime found in the ATM.

[67] The Court in *Churchill* acknowledged that justice requires that the rule of law must be respected. However, the Court could not ignore the shifting societal and legal attitudes related to medical marijuana dispensaries. The sentencing range for these cases is broad and reflects the Court's view that deterrence may still be upheld with a non-custodial sentence.

[68] In *R. v. Thompson*, *supra*, Mr. Thompson initially operated his own dispensary "with impunity…[,] as the promise of legislative changes lingered, the local police force gave notice to vendors … [that they] could expect at some point in the future that the police would begin to crack down on dispensaries" (see para. 2). As a result, Mr. Thompson closed his dispensary but continued to supply what he believed were other medical marijuana dispensaries. He was arrested and over 11 kilograms of marijuana was seized. He was eventually convicted of possession and trafficking of marijuana under the *CDSA*.

[69] Regarding the fact that dispensaries were allowed to operate openly for a time before the police issued warnings, the Court said:

> 23 In this case, the parties have agreed upon aspects of the historical context of this case. Until recently, our police force was not actively prosecuting medical marijuana dispensaries, nor were many other Ontario forces. The police force appears to have recognized the implicit message sent by this lack of enforcement.

> When it ultimately decided to crack down on dispensaries in our region, it gave a heads-up to them in the summer of 2016. This seems to have been done out of a sense of fairness: in recognition that its previous inaction might be construed as tacit permission.
>
> 24 While Mr. Thompson knowingly flouted the law, he did so at a time when a reasonable person might perceive that law enforcement attitudes towards marijuana vendors had been permissive and obviously in a state of flux. […]

[70] Justice Parry then referred to the fact that many medical marijuana dispensary cases are disposed of by way of peace bond or "other forms of diversion":

> 27 Evidence of the change in the societal values and social context might be seen as well in the Crown approach to other dispensary cases in the recent past. The Crown concedes that in the recent past, dispensary cases have been known to resolve by way of peace bonds or other forms of diversion. Counsel for Mr. Thompson provided a letter by Jack Lloyd, who has acted for counsel on scores of dispensary cases. Given the Crown's general concession -- which accords with my general awareness of such resolutions during the relevant time frame -- I do not find it necessary to rely upon the specifics provided in the letter of Mr. Lloyd, which essentially proposes to keep score. Simply put, it was not unheard of for individual dispensary cases to be diverted in some fashion during the time period in which Mr. Thompson was supplying dispensaries. This reality provides insight into the relaxed social mores towards marijuana at the time Mr. Thompson committed his crimes. That said, I recognize that in any individual case, many factors (which are unknown to me) are brought to bear on the Crown's exercise of its prosecutorial discretion. I do not intend to peek behind the curtain of that discretion.

[71] The facts are quite similar to the case before me, where the Halifax Regional Police initially issued warnings to dispensaries operating in the open, which were more-or-less condoned for a time in Nova Scotia. The Defence submits this is why the police attended the robbery at the Dispensary, but no arrests were made at that time. Daniels has cited similar unreported case law indicating that peace bonds and discharges are the norm in Nova Scotia dispensary cases – when they are legally available. The parity principle requires that I take these facts into consideration.

[72] As for denunciation and deterrence, they remained "primary considerations" (see para. 32) in *R. v. Thompson*, *supra*. The Court continued:

> This case involves a sizeable amount of marijuana. The statute as currently conceived envisions significant potential sentences when significant quantities are involved. Mr. Thompson acted in flagrant defiance of the statute. General deterrence and denunciation must remain amongst the primary considerations in the sentencing of Mr. Thompson. However, I have concluded that evolving societal attitudes towards marijuana have dulled the blades of these principles somewhat.

[73] The Court in *Thompson* found that, despite the Ontario Court of Appeal's language in *Bentley*, sentencing ranges have and do change. Distinguishing the production of marijuana in a grow-op from a medical dispensary as significantly more serious, Justice Parry noted that reliance on *Bentley* was like "comparing oranges to tangerines. They have a similar flavour, but one fruit is obviously more substantial than the other" (see para. 30). I believe the same is true of many of the cases provided by the Crown in this case. While they deal with trafficking marijuana, they are dated and do not reflect the shifting (and to some, the already shifted) attitudes of Canadians toward the sale of medical marijuana. The Court in *Thompson* concluded that a 45-day intermittent sentence and one year's probation both reflected the changing attitudes and the seriousness of the crime when it was committed (see para. 39).

[74] Similar to Daniels, Mr. Thompson was a first-time offender and provided the Court with letters of support from his customers who said his efforts relieved their pain at a reasonable price. However, unlike Daniels, Mr. Thompson is aboriginal and of a relatively young age. His gainful employment since his arrest was also a mitigating factor.

[75] The common themes I draw from my review of the cases are:

1. Society's attitudes have shifted such that medical marijuana dispensaries are not directly analogous to traditional trafficking cases. Due to the apparent condonation by police, and the legalization of authorized marijuana sale and possession, courts have recognized that a dispensary operating in the open is less morally blameworthy than a grow-op or drug smuggling racket.
2. The reasonable range of sentences for dispensary cases is broader than the trafficking cases cited by the Crown. The range of sentences in dispensary cases includes conditional discharges and fines, even in cases of higher moral blameworthiness. Therefore, despite the

indictable conviction, the range of sentences in Daniels' case must include suspended or intermittent sentences.

3. Despite frequently involving discharges and conditional sentences, these sentences have been found to uphold the principles of denunciation and deterrence. The accused is frequently found to be a first-time offender and is unlikely to reoffend.

[76] Furthermore, on the topic of deterrence, the purpose of the *Cannabis Act* says as follows at s. 7(d):

> (d) deter illicit activities in relation to cannabis through appropriate sanctions and enforcement measures

[77] Operating a dispensary that only sells to users with "medical authorization", in the open, at a time when *authorized* sale is perfectly legal, is not the same as smuggling millions of dollars of drugs and cash through the airport, or a large-scale grow-op. It is not even the same as trafficking marijuana surreptitiously because it relies on the tacit acceptance of the police and public to continue operating in a public storefront. Although many of the decisions dealing with dispensary owners at this crucial time are unreported, the fact that they are frequently handled by way of discharge speaks volumes. It is only because the Crown proceeded by way of indictment that a conditional discharge or conditional sentence is unavailable to Daniels in this case. The parity principle requires that I take into consideration these dispensary cases where the accused is given a non-custodial sentence.

[78] Furthermore, adopting a sentence at the lower end of the range in this case does not mean that future cases will not be treated more harshly. There is no evidence in this case that illegal dispensaries continue to operate with impunity in Nova Scotia but, if another dispensary was found to be operating despite this police "crack down", both in Nova Scotia and across Canada, a harsher sentence may be warranted. Sentencing is tailored to each accused and the circumstances surrounding each case.

A Suspended Sentence is Fit and Proper in this Case

[79] In *R. v. Proulx*, 2000 SCC 5, McLachlin C.J., for a unanimous Court, addressed the problem of overincarceration in Canada and how Parliament, through the enactment of sections 718.2(d) and (e), intends to bring prominence to

the principle of restraint when considering incarceration as a sanction. The Court said at paras. 16 and 17:

> 16 Bill C-41 is in large part a response to the problem of overincarceration in Canada. It was noted in *Gladue*, at para. 52, that Canada's incarceration rate of approximately 130 inmates per 100,000 population places it second or third highest among industrialized democracies. In their reasons, Cory and Iacobucci JJ. reviewed numerous studies that uniformly concluded that incarceration is costly, frequently unduly harsh and "ineffective, not only in relation to its purported rehabilitative goals, but also in relation to its broader public goals" (para. 54). See also Report of the Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* (1969); Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987), at pp. xxiii-xxiv; Standing Committee on Justice and Solicitor General, *Taking Responsibility* (1988), at p. 75. Prison has been characterized by some as a finishing school for criminals and as ill-preparing them for reintegration into society: see generally Canadian Committee on Corrections, *supra*, at p. 314; Correctional Service of Canada, *A Summary of Analysis of Some Major Inquiries on Corrections — 1938 to 1977* (1982), at p. iv. At para. 57, Cory and Iacobucci JJ. held:
>
> > Thus, it may be seen that although imprisonment is intended to serve the traditional sentencing goals of separation, deterrence, denunciation, and rehabilitation, there is widespread consensus that imprisonment has not been successful in achieving some of these goals. Overincarceration is a long-standing problem that has been many times publicly acknowledged but never addressed in a systematic manner by Parliament. In recent years, compared to other countries, sentences of imprisonment in Canada have increased at an alarming rate. The 1996 sentencing reforms embodied in Part XXIII, and s. 718.2(e) in particular, must be understood as a reaction to the overuse of prison as a sanction, and must accordingly be given appropriate force as remedial provisions. [Emphasis added.]
>
> 17 Parliament has sought to give increased prominence to the principle of restraint in the use of prison as a sanction through the enactment of s. 718.2(*d*) and (*e*). Section 718.2(*d*) provides that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances", while s. 718.2(*e*) provides that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders". Further evidence of Parliament's desire to lower the rate of incarceration comes from other provisions of Bill C-41: s. 718(*c*) qualifies the sentencing objective of separating offenders from society with the words "where necessary", thereby indicating that caution be exercised in sentencing offenders to prison; s. 734(2) imposes a duty on judges to undertake a means inquiry before imposing a fine, so as to decrease the number of offenders who are incarcerated for defaulting on

> payment of their fines; and of course, s. 742.1, which introduces the conditional sentence. In *Gladue*, at para. 40, the Court held that "the creation of the conditional sentence suggests, on its face, a desire to lessen the use of incarceration".

[80] Finally, it must be acknowledged that a suspended or intermittent sentence is a serious form of punishment. As a result, Daniels will have a criminal record. His freedom will be strictly curtailed for a significant period of time. This will undoubtedly affect his life in a negative way.

[81] Nova Scotia Courts have held that a suspended sentence can have a "significant deterrent effect", as stated by Justice Arnold in *R. v. Barrons*, 2017 NSSC 216, referring to a number of Nova Scotia Court of Appeal decisions:

> 39 As Mr. Barrons points out, **a suspended sentence can have a significant deterrent effect.** In *R. v. Scott*, 1996 NSCA 165 (N.S. C.A.), on a charge of robbery, the court overturned a sentence of two years less a day in jail for a first-time offender, and imposed a suspended sentence with three years probation. In doing so, Pugsley J.A. stated:
>
> > I agree with counsel's submission and add that the approach of the sentencing judge, in addition, ignored the deterrent effect of a suspended sentence, implying that deterrence could only be reflected in a custodial sentence.
> >
> > The sentencing judge was quite right in noting that cases involving robbery with violence in this province generally attract a three year sentence. There are exceptions, however, to every norm, and I am convinced this case falls within that class.
>
> Chief Justice MacKinnon cautioned against an inflexible approach in *Grady*. he said at p. 266:
>
> > It would be a grave mistake, it appears to me, to follow rigid rules for determining the type and length of sentence in order to secure a measure of uniformity, for almost invariably different circumstances are present in the case of each offender. There is not only the offence committed but the method and manner of committing; the presence or absence of remorse, the age and circumstances of the offender, and many other related factors. For these reasons it may appear at times that lesser sentences are given for more serious offences and vice versa, but the court must consider each individual case, on its own merits, even if the different factors involved are not apparent to those who know only of the offence charged and the penalty imposed.
>
> …

44 In upholding a suspended sentence of two years for an accused convicted of threats and firearms offences where alcohol was involved, in *R. v. George* (1992), 112 N.S.R. (2d) 183 (N.S. C.A.), Chipman J.A. stated for the court:

> [14] The trial judge correctly identified the relevant principles and the only question is whether in balancing the importance of deterrence against the attempt to rehabilitate the respondent, she erred. On consideration, we have concluded that it was not shown that she did. **Deterrence has not been totally overlooked. As the judge said, the sword of Damocles does, figuratively, hang over the respondent's head. Should there ever be a repetition of his dangerous behaviour during the period of suspension of sentence he not only will face punishment for that, but will face the very real risk of severe consequences flowing from these three convictions.**

45 More recently, in *R. v. Perrin*, 2012 NSCA 85 (N.S. C.A.), Beveridge J.A. upheld a 30-day sentence for a 21-year old accused who was convicted of a break and enter into an unoccupied dwelling while serving a conditional sentence. Justice Beveridge found:

> [18] Here the trial judge exercised his discretion in electing to impose a short additional period of incarceration. **I agree with the respondent that the imposition of what is sometimes referred to as a short, sharp sentence is appropriate, particularly where the offence was one of property as opposed to a crime of violence.** Martin J.A. in *R. v. Vandale* (1974), 21 C.C.C. (2d) 250, quoted with approval the reasons of McKenna J. of the English Court of Appeal in *R. v. Curran* (1973), 57 Crim. App. R. 945, where he said:
>
> > As a general rule it is undesirable that a first sentence of immediate imprisonment should be very long, disproportionate to the gravity of the offence and imposed as this sentence was for reasons of general deterrence, that is, as a warning to others. **The length of a first sentence is more reasonably determined by considerations of individual deterrence and that sentence is needed to teach this particular offender a lesson which he has not learned in the lighter sentences which he has previously received.**

46 **Therefore, our Court of Appeal has ruled that general deterrence and denunciation can be achieved by way of a suspended sentence**. They have also clarified that in most circumstances home invasion cases require a period of incarceration.

[emphasis added]

[82] In *Murphy*, *supra*, Justice Burrage also addressed how a suspended sentence can uphold the principle of deterrence, particularly where it results in a criminal record for a first-time offender:

> 136 None of the aggravating circumstances are present in this case and the Court's sentence will enable Mr. Murphy to return to his current employment, pursue his career as a millwright and continue forward as a law-abiding member of society. To now send him to prison would be entirely counterproductive and, in my view, contrary to the interests of justice.
>
> 137 Lest I be accused on focusing too highly on the antecedents of Mr. Murphy, I am satisfied that, on the facts of this case, **the imposition of two years' probation and the suspension of sentence will adequately serve the principles of denunciation and deterrence. This young man, with no criminal antecedents, now has a criminal record. The simple fact of such a record is not without its repercussions.** In addition, Mr. Murphy is further subject to a lengthy (two-year) period of probation. Taken alone, this serves as a restriction on his liberty.
>
> 138 I further observe, that while admittedly on the low end of the available range, a suspended sentence for the possession of cannabis for the purpose of trafficking is not without judicial precedent.
>
> [emphasis added]

[83] While in that case the accused was relatively young and was gainfully employed at the time of sentencing, he was also found with a much larger quantity of marijuana and cash, and was engaged in smuggling and trafficking marijuana, not openly operating a medical dispensary.

[84] A suspended sentence can have the effect of upholding the principles of denunciation and deterrence, particularly for a first-time offender. Although Daniels is not young and is not currently gainfully employed, if he has any rehabilitative potential, then a suspended sentence is most appropriate. This sentence also acknowledges that Daniels was found with a weapon, albeit a spring-loaded knife. This is an aggravating factor at s. 15(2)(a)(i) of the *Cannabis Act* and must also be given weight. I believe that a suspended sentence can be justified, based on the reasons above, despite evidence of a weapon, pursuant to s. 15(3) of the *Cannabis Act*.

Conclusion

[85] In marijuana trafficking cases, Nova Scotia Courts require that the principles of deterrence and denunciation be given significant weight. The *Cannabis Act* provides that deterrence is achieved by both appropriate sanctions and enforcement measures. In my view, punishing Daniels by giving him a criminal record and curtailing his freedom for a period of time does just that. There is no evidence before me to support that Daniels will offend in this way again (although, the Crown reply brief alludes to charges in a different Court, to which I have no knowledge). Furthermore, there is no evidence that unauthorized dispensaries are still enjoying the open success they once had. Clearly, both generally and specifically, people are deterred.

[86] Having considered all of the relevant facts, the circumstances of this offence, and the circumstances of Daniels, the sentencing principles and case authorities, I sentence Daniels to a suspended sentence with two years' probation. The terms of his probation will be as follows:

1. Keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court; and
3. Notify the Court and his Probation Officer 48 hours in advance of any change of name, address, or telephone number, and promptly notify the Court or the Probation Officer of any changes of employment or occupation.

[87] The terms of Daniels' probation will also include the following:

- Report to a probation officer at 277 Pleasant Street, Suite 112, Dartmouth, Nova Scotia (Telephone: (902) 424-5350) within one (1) business day and, thereafter, as directed by your probation officer or supervisor.
- Remain within the province of Nova Scotia unless you receive written permission from your probation officer.
- Refrain from consuming alcohol or other intoxicating substances;
- Complete 100 hours of community service, as directed by your Probation Officer, by March 15, 2023.
- Refrain from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition or explosive substance or weapons as defined in the Criminal Code.

- Attend for assessment, counselling or a program directed by your probation officer.
- Attend for substance abuse assessment and counselling as directed by your probation officer.
- Attend for mental health assessment and counselling as directed by your probation officer.
- Attend for assessment and counseling in anger management as directed by your probation officer;
- Make reasonable efforts to locate and maintain employment or an educational program as directed by your probation officer.
- Curfew: Remain in your residence, for the first 12 months of probation, from 11:59 p.m. until 6 a.m. the following day, seven days a week, except as indicated below:

  (a) When at regularly-scheduled employment, which your supervisor knows about, and travelling to and from that employment by a direct route;

  (b) When attending a regularly scheduled education program, or at a school or educational activity supervised by a principal or teacher, and travelling to and from the educational program or the activity by a direct route;

  (c) When dealing with a medical emergency or medical appointment involving you or a member of your household and travelling to and from it by a direct route after advising the Halifax Regional Police at 902-490-3600;

  (d) When attending a scheduled appointment with your lawyer, your supervisor or a probation officer, and travelling to and from the appointment by a direct route;

  (e) When attending court at a scheduled appearance or under subpoena, and travelling to and from court by a direct route;

  (f) When attending a counselling appointment, a treatment program or a meeting of Alcoholics Anonymous or Narcotics Anonymous, at the direction of or with the permission of your supervisor or probation officer, and travelling to and from that appointment, program or meeting, by a direct route;

- Prove compliance with the curfew condition by presenting yourself at the entrance to your residence should a peace officer attend there to check compliance.
- Report back to court after six (6) months of probation for a status update on October 1, 2021 at 2 p.m.

[88] The following mandatory ancillary orders, proposed by the Crown will be imposed: a s.109(1)(a) Firearms Prohibition for ten years and a Forfeiture Order.

[89] Regarding Daniels' request to waive the victim fine surcharge, I find that the new provisions do not apply here because they apply to an offender who is sentenced for an offence that was committed after the day on which the provisions came into force being on or after July 22, 2019. There will therefore be no victim fine surcharge in this instance.

[90] Lastly, the Crown withdraws Count 1 of the Indictment.

Bodurtha, J.