PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Lafitte*, 2019 NSPC 13

Date: 20190424
Docket: 8097171, 8097175, 8097179
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Jamie Lafitte

DECISION ON SENTENCE

Judge:	The Honourable Judge Theodore K. Tax
Heard:	May 2, June 13, September 12, December 18, 2018, March 6, 2019, in Dartmouth, Nova Scotia
Decision	April 24, 2019
Charge:	CDSA 5(2) X 3
Counsel:	Christian Girouard, for the Federal Crown Patrick Atherton, for the Defence

By the Court:

Introduction

[1] Mr. Jamie Lafitte is before the Court for sentencing after having been found guilty of three counts of having possession for the purpose of trafficking contrary to section 5(2) of the **Controlled Drugs and Substances Act (CDSA).** The three counts involved cannabis (marijuana) which is a substance listed in schedule II of the **CDSA** not in excess of 3 kg, cocaine which is a substance included in schedule I of the **CDSA** and Hydromorphone which is also a substance listed in schedule I of the **CDSA**. The Court concluded that Mr. Lafitte had possession of those three substances for the purpose of trafficking on or about April 21, 2017 in Dartmouth, Nova Scotia.

[2] The Crown had proceeded by indictment on all three charges before the Court. Trial evidence was heard on May 2, 2018 and at the conclusion of the evidence the Crown Attorney and Defence Counsel made their closing submissions. The Court reserved its trial decision. On June 13, 2018, the Court found Mr. Lafitte guilty of all three charges contained in the Information.

Position of the Parties:

[3] The principal issue in dispute between the parties is whether, and to what extent, the Court should apply the principle of totality which is stated in section 718.2(c) of the **Criminal Code** where consecutive sentences are to be imposed, in the determination of a just and appropriate sentence in all the circumstances of the offender and the three offences for which he was convicted.

[4] The point of contention with respect to the issue of totality is based upon the fact that Mr. Lafitte was arrested for a further charge of possession for the purpose of trafficking cocaine contrary to section 5(2) of the **CDSA** on or about May 3, 2018, which was shortly after the Court had adjourned the trial matter for its decision. Mr. Lafitte appeared in another court on May 8, 2018, entered a guilty plea and was sentenced to 3 years in a federal penitentiary for that offence.

[5] The Crown Attorney recommends a sentence of 3 years in prison to be served consecutively for each of the two (2) offences of possession for the purpose of trafficking of cocaine and hydromorphone contrary to section 5(2) **CDSA** which involved substances listed in schedule I of the **CDSA.** He points out that an offender is liable to imprisonment for life for those offences and there should be an emphasis on specific and general deterrence, given Mr. Lafitte's prior and related

record. The Crown Attorney recommends a 3 month concurrent sentence for the possession of cannabis (marijuana) contrary to section 5(2) of the **CDSA**, since there was a relatively minor amount of that schedule II substance of the **CDSA**, which would only be subject to a maximum of 5 years in prison.

[6] However, it is also the position of the Crown that the Court is required to consider the principle of totality as it relates to the impact of the recommended combined sentence on this sentencing decision in order to ensure the just and appropriate sentence imposed is not unduly long or harsh. The Crown Attorney submits that the Court ought to take a "last look" at the impact of the total sentence to be imposed on the offender. He notes that Mr. Lafitte is a relatively youthful offender and there are many **Gladue** factors present. In those circumstances, the Crown Attorney recommends that the just and appropriate sentence for Mr. Lafitte would be a total sentence of 4 years in prison, to be served on a consecutive basis to the sentence that he is now serving.

[7] Defence Counsel submits that the Court ought to take into account the principle of totality with respect to the total length of sentence recommended by the Crown as well as the impact of a consecutive sentence on the 3 year sentence ordered in May 2018. which Mr. Lafitte is now serving. Defence Counsel acknowledges that there are significant aggravating factors in this case, however,

there is a positive Pre-Sentence Report and the **Gladue** Report highlights Mr. Lafitte's very "tragic background." In those circumstances, the Court ought to impose the least restrictive sanction that is reasonable in all the circumstances, taking into account that Mr. Lafitte is still relatively youthful and there are good prospects for rehabilitation.

[8] Defence Counsel submits that a 4 year consecutive sentence as recommended by the Crown Attorney would result in a total combined sentence of 7 years, taking into account the earlier 3 year sentence. It is the position of the Defence that the total combined sentence would be unduly long and harsh and therefore, the principle of totality allows the court to consider the impact on this sentence of the remainder of the time to be served on earlier sentence. Therefore, he submits that an appropriate "step up" would be to order a sentence of 2 years consecutive, which would result in Mr. Lafitte serving a total combined sentence of 5 years in prison. Although this would be at the low-end of a sentence for this offence, he submits that the Court may apply the principle of totality to ensure that the sentence imposed here is not unduly long or harsh when the remainder of the existing sentence is taken into account.

[9] The Crown Attorney also seeks ancillary orders, namely, a DNA order under section 487.051 of the **Criminal Code**, an order of forfeiture pursuant to section

16 of the **CDSA** and a 10-year firearms prohibition order pursuant to section 109 of the **Criminal Code.** Those ancillary orders are not contested by the Defence.

Circumstances of the Offences:

[10] Mr. Lafitte was charged with the three **CDSA** possession for the purpose of trafficking offences along with three other people. Prior to the commencement of the trial, the charges against the two female co-accused were withdrawn. On the trial date, the male co-accused failed to attend court. The Crown severed that person from the trial and proceeded with the charges against Mr. Lafitte.

[11] On April 21, 2017, police officers executed a search warrant and entered an apartment located on Trinity Ave. in Dartmouth, NS around 11:30 PM. They located Mr. Lafitte, another male and two females in the living room area of the one-bedroom apartment. Mr. Lafitte was searched incidental to his arrest and in the front pockets of his sweatpants, police officers located $765 in Canadian currency, comprised of 6-$50 bills, 23-$20 bills and one $5 bill.

[12] In the living room, police officers seized three ziploc bags containing a total of 16.2 grams (including the weight of the bag) of cannabis marijuana, a black colored digital scale which was in working condition with white residue on it.

Police officers also seized a silver digital scale on the floor of the living room with white residue on it, which the Health Canada Analyst confirmed to be cocaine.

[13] Police officers also seized a plastic "baggie" containing, according to the Health Canada analyst, 44 pink-colored 6 mg hydromorphone pills which were located in a cup holder of a folding chair, in the living room of the apartment. In that same cup holder, police officers seized a "baggie" with a white substance which Health Canada confirmed to be 5.7 grams (out of bag weight) of crack cocaine.

[14] In addition to those seizures, police officers also seized a white Samsung cell phone which was located on the TV stand in the living room. The cell phone was sent to the RCMP's Tech Crime Unit for analysis and extraction of the data on that phone. The extraction report of the data in relation to SMS or text messages incoming or outgoing from the phone number associated with the Samsung cell phone between April 7 and April 21, 2017 was filed as an Exhibit in the trial.

[15] Mr. Lafitte testified that the white Samsung cell phone belonged to his friend and since he did not have his own cell phone or computer, he used his friend's cell phone for his Facebook messages and for sending some SMS or text messages. Mr. Lafitte stated that he had been staying with his friend at the Trinity Avenue

apartment, from time to time, since being released from prison on April 1, 2017, but added that he also had an apartment on the Waverley Road.

[16] Mr. Lafitte explained that the $765 in cash that police officers located in his pockets was from construction work done for a friend of his “under the table.” He added that his boss paid him $11.40 an hour and that, a few days earlier, he had received $1140 in cash for a week’s work.

[17] During his cross examination, Mr. Lafitte acknowledged that some of the Facebook Message exchanges and SMS messages on the white Samsung cell phone were sent by him to or received from his ex-girlfriend. When the Crown Attorney suggested that the messages related to drug transactions, Mr. Lafitte stated that he did not recall sending any of those messages. He added that he did not sell any of drugs that were in the apartment.

[18] The Court concluded that the presence of two working digital scales with cocaine residue on them, was consistent with the opinion evidence of the expert that the scales would have been used by a drug trafficker. In addition, the presence of tinfoil near those digital scales was, in the opinion of the expert, consistent with the trafficker measuring precise amounts of cocaine into tinfoil packages for sale, rather than personal use.

[19] Although Mr. Lafitte had stated that the white Samsung cell phone belonged to his friend, the evidence established that all of the key user accounts on that phone were in the name of Jamie Lafitte and that there were no user accounts associated to the male co-accused. Moreover, the Court reviewed, in detail, numerous SMS and text messages, which the Court found to have been sent to or received from Mr. Lafitte's ex-girlfriend. The Court found that some of those messages referred to her exchanging money or even sex in order to acquire **CDSA** substances. Based upon the messages sent and received on the Samsung cell phone as well as the timing of those messages, the Court concluded that Mr. Lafitte had used that cell phone to arrange drug transactions.

[20] The Court also concluded that the "coded" language utilized in the text messages was for the purchase and sale of hydromorphone, cocaine or marijuana and that the utilization of names and addresses left no doubt whatsoever that the person utilizing that cell phone was Mr. Lafitte. The Court concluded that the $765 in Canadian currency, which was primarily composed of $20 bills, was not from "under the table" construction work, but rather, was consistent with the expert evidence that drug trafficking is a cash business and that the amounts located on Mr. Lafitte were consistent with typical sales of the **CDSA** substances found in the apartment.

[21] Given the fact that the **CDSA** substances were in plain view in the living room as well as the other direct and circumstantial evidence, the Court concluded that Mr. Lafitte had the knowledge of their presence and exercised a significant degree of control over them. The Court rejected Mr. Lafitte's bald denial of any control over the **CDSA** substances in the Trinity Avenue apartment and was not left in any reasonable doubt by his testimony.

[22] In the final analysis, the Court was satisfied, beyond a reasonable doubt, that Mr. Lafitte was, at all material times, in constructive possession of the cocaine, hydromorphone and cannabis (marijuana) for the purpose of trafficking contrary to section 5(2) of the **CDSA** and he was found guilty as charged.

Circumstances of the Offender:

[23] The Court had ordered a Pre-Sentence Report to be prepared by the probation officer prior to the sentencing submissions made by Counsel on September 12, 2018. The Pre-Sentence Report contained a section which generally outlined Mr. Lafitte's **Gladue** factors. However, during those sentencing submissions, Defence Counsel advised the Court that Mr. Lafitte had identified himself as an indigenous person and requested the preparation of a Gladue Report.

[24] Given the request of Mr. Lafitte to have a **Gladue** Report prepared and that the Court has a statutory duty, found in section 718.2(e) of the **Code** to consider the unique circumstances of aboriginal offenders, the Court adjourned the further sentencing submissions until the **Gladue** Report was completed. The **Gladue** Report was completed in early December 2018, but the sentencing submissions, which were scheduled for December 18, 2018, had to be adjourned until March 6, 2019.

[25] Mr. Lafitte is now 27 years old. Both of his parents are of Mi'kmaq descent, although they separated very shortly after he was born. Mr. Lafitte lived with his mother and has had no contact with his father. He advised the probation officer that his mother was a drug addict and she lost custody of her children, but he was adopted and raised by his grandmother. He grew up in poverty as his grandmother and mother were both on income assistance and never employed, often relying on food banks in Nova Scotia.

[26] Mr. Lafitte said that his childhood was "chaotic and traumatizing" and he left his grandmother's home to move back in with his mother at age 13. His mother provided no structure or discipline with different boyfriends in the house all the time. He left her home, for the second time, at age 14 because there was "chaos and crack pipes everywhere." In fact, his mother was co-accused with him for his

first drug offence when he was supervised on a youth probation order. The youth worker assisted his move to a group home where he stayed for a short time, until he received a custodial sentence at the Youth Detention Centre in Waterville, Nova Scotia.

[27] Mr. Lafitte advised the probation officer that he had been sexually assaulted by one of the program people at the Youth Centre, which has caused him a significant amount of pain and suffering. He only maintains a close relationship with his grandmother at this time. Mr. Lafitte advised the author of the **Gladue** Report that, in 2012, he became homeless and moved around Canada, utilizing food banks and living in shelters.

[28] Mr. Lafitte stated that he continues to be in a relationship with his current girlfriend who is 22 years old. They had been together for about one year when he received the recent three-year prison sentence for drug trafficking. Mr. Lafitte's girlfriend advised the probation officer that she believes that he has the potential to change and make better decisions provided he stays away from negative influences.

[29] Mr. Lafitte had previously been in a relationship with a woman, who is the mother of their two young children, who are now 6 and 5 years old. Mr. Lafitte

advised the probation officer that Child Protection Services became involved with the family unit after he was incarcerated in 2014 and his girlfriend started abusing crack cocaine. Both children were placed in a foster home and Mr. Lafitte has not had any recent contact with them.

[30] Mr. Lafitte stated that he completed grade 6 at school and then, he quit attending. While he was involved with the Halifax Youth Attendance Centre program, he managed to complete his 7th and 8th grades. During his federal sentence at Dorchester Penitentiary, he was able to complete grade 10. He advised the probation officer that his education had challenges due to a lack of focus and concentration caused by his ADHD diagnosis. He would like to obtain his General Equivalency Diploma.

[31] Mr. Lafitte is currently unemployed due to his incarceration. Since 2013, he had been employed in an on/off basis by a renovation company and had worked in warehouses and restaurants. He would like to start his own renovation business upon his release from prison.

[32] As for his health and lifestyle, Mr. Lafitte described his physical health as being good, but he is taking prescribed medication for depression. As a child he was diagnosed with ADHD. He started smoking marijuana with his mother, on a

daily basis, when he was 13 years old. He became involved in the Pathways Program at Dorchester Penitentiary which provided traditional aboriginal teachings and spirituality to help him move forward. Since being incarcerated at Springhill Institution, he has reengaged with the Pathways Program to help guide him in traditional ways. His parole officer has indicated that Mr. Lafitte appears to be motivated to address the issues in his life and to avoid making poor choices in the future.

[33] At the present time, Mr. Lafitte is serving a 3 year sentence in a federal penitentiary. He was sentenced on May 8, 2018 for the offence of possessing cocaine for the purpose of trafficking contrary to section 5(2) of the **CDSA.** The offence occurred on or about May 3, 2018.

[34] He had previously been ordered to serve a 3 year sentence in a federal penitentiary on March 31, 2014 for a charge of possession for the purpose of trafficking a **CDSA** substance contrary to section 5(2) of the **CDSA**. At the same time, on March 31, 2014, he was ordered to serve two (2) one year concurrent sentences for each of the two offences of possession of a firearm knowing his possession was unauthorized contrary to section 92(1) of the **Criminal Code.** Mr. Lafitte's prior adult record also includes two offences for failing to comply with the terms of a recognizance or undertaking.

[35] In addition to his adult record, his youth record is retainable and includes several charges for failure to comply with **Youth Criminal Justice Act** probation orders between December 6, 2006 and June 29, 2009. There are also prior youth convictions for a theft under charge in January 2010, an assault charge in February 2009, mischief charges in February 2009 as well as failure to comply with officer in charge undertakings and possession of stolen property in December 2006.

Gladue Factors:

[36] Mr. Lafitte has personally experienced the adverse impact of many factors which continue to plague aboriginal communities across Canada, including:

- family deterioration, separation and absent parents;
- substance abuse personally as well as members of the family and in the community;
- domestic violence;
- physical, mental and emotional abuse;
- low income and unemployment due to lack of education;
- poverty and homelessness;
- overt and covert racism;
- prior personal and family involvement in the criminal justice system and involvement with Child and Family Services.

Analysis:

[37] In all sentencing decisions, determining a just and appropriate sentence is highly contextual and is necessarily an individualized process which depends upon the circumstances of the offence and the particular offender. The Supreme Court of Canada has stated in **R. v. M (C.A.),** [1996] 1 SCR 500 at paras. 91 and 92 that the determination of a just and appropriate sentence requires the trial judge to do a careful balancing of the societal goals of sentencing against the moral blameworthiness of the offender and the gravity of the offence, while at the same time, taking into account the victim or victims and the needs of and the current conditions in the community.

[38] The fundamental purposes and principles of sentencing are set out in sections 718 to 718.2 of the **Criminal Code**. Section 718 of the **Code** states that the fundamental purpose of sentencing is to contribute to respect for the law and maintenance of a just, peaceful and safe society by imposing just sanctions that have, as their goal, one or more of the following objectives: denunciation of the unlawful conduct; specific and general deterrence; separation from society where necessary; rehabilitation of the offender; promotion of responsibility in offenders; and acknowledgement of the harm done to victims and to the community.

[39] Section 718.1 of the **Criminal Code** sets out the fundamental principle of proportionality in sentencing. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. In other words, the severity of a sanction for a crime should reflect the seriousness of the criminal conduct. A disproportionate sanction can never be a just sanction.

[40] Pursuant to section 718.2 of the **Criminal Code**, a Court that imposes a sentence, it is required to consider several other sentencing principles in determining the just and appropriate sanction. Section 718.2(a) of the **Code** requires the Court to consider the aggravating and mitigating circumstances which may either increase or reduce the appropriate sentence.

[41] The parity principle is found in section 718.2(b) of the **Code** and requires the Court to consider that the sentence imposed should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. However, Justice Wagner (as he then was) stated in **R. v. Lacasse**, 2015 SCC 64 (Canlii) at paras. 53-54 that the principle of parity is secondary to the fundamental principle of proportionality. He added that 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.

[42] In this case, the Crown Attorney submits that the Court should have as its primary focus, the specific deterrence of Mr. Lafitte and the general deterrence of like-minded individuals as well as denunciation of his unlawful conduct.

[43] Defence Counsel does not take serious issue with those primary purposes. However, he also submits that the Court should also focus on the purposes of restraint and efforts towards Mr. Lafitte's rehabilitation, given the fact that he is a youthful aboriginal offender. Defence Counsel also submits that the Court should consider the principle of totality found in section 718.2(c) of the **Code**, that is, where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.

Aggravating and Mitigating Circumstances:

[44] Section 718.2(a) of the **Criminal Code** requires the Court to consider the aggravating and mitigating circumstances which may increase or reduce the sentence imposed by the Court.

[45] I find that the Aggravating Circumstances as follows:

- Mr. Lafitte has a prior related and recent record from March 31, 2014 for a section 5(2) **CDSA** charge of possession of cocaine for the purpose of trafficking, which is a statutory aggravating factor as stated in section 10(2)(b) of the **CDSA**;

- Mr. Lafitte had recently been released from prison after serving the sentence for the prior drug trafficking offence when he was arrested and charged with these drug trafficking offences on April 21, 2017;

- Mr. Lafitte had possession of two very addictive substances contained in schedule I of the **CDSA**, namely cocaine and hydromorphone for the purpose of trafficking, which have devastating impacts on the community;

- Mr. Lafitte's arrest on May 3, 2018 for possession of cocaine for the purpose of trafficking, occurred within hours after the completion of the evidence and closing submissions were made in this trial on that date and the Court reserved its decision.

[46] I find the Mitigating Circumstances are as follows:

- Mr. Lafitte is a relatively youthful offender, who is now only 27 years old;

- Mr. Lafitte is an aboriginal offender who has personally experienced and been affected by many of the gladue factors, which have plagued aboriginal communities, including family breakdown, domestic violence, physical, mental and emotional abuse, poverty and prior personal involvement in the criminal justice system.

The Principle of Proportionality and the Parity Principle:

[47] I find that the gravity or seriousness of Mr. Lafitte's possession for the purpose of trafficking of the two controlled substances listed in schedule I of the **CDSA** is very high. There can be no doubt of the seriousness or gravity of those offences. Parliament has determined that they are indictable offences for which an offender is liable to imprisonment for life.

[48] Given the findings of fact which led to the Court's conclusion that Mr. Lafitte was guilty of all three charges, I also find that his actions represent a high degree of responsibility or moral blameworthiness. I find that Mr. Lafitte's degree of responsibility was solely motivated by greed and is not minimized in any way by need to feed his own drug addiction. I find that his moral blameworthiness is heightened by the fact that I found that some of the drug transactions were with people who did not have cash, but were offered to be concluded by his "customer" offering to have sex with him or him telling them to steal high-value food items for him.

[49] Courts of all levels in this province and elsewhere have often found that the trafficker of cocaine or other schedule I **CDSA** substances impact individuals in very significant way, often leading to addiction, fostering crime and victimizing the most vulnerable members of society. As I indicated above, the text messages exchanged with Mr. Lafitte to conclude several drug transactions demonstrated the impact on the community and that he was motivated solely by greed and profit.

[50] The Nova Scotia Court of Appeal has consistently commented on the fact that specific and general deterrence must be stressed when sentencing a drug trafficker of schedule I **CDSA** substances. In **R. v. Dawe**, 2002 NSCA 147; **R. v. Steeves**, 2007 NSCA**; R. v. Conway,** 2009 NSCA 95; **R. v. Oickle,** 2015 NSCA

87 and others, the Court of Appeal has consistently stated that, in the absence of some exceptional circumstances, the range of just and appropriate sentences imposed for even youthful, petty retailers of relatively small amounts of cocaine for profit who did not have a prior **CDSA** record, is a federal sentence in the range of 2 years to 3 years depending on the number of aggravating factors or mitigating factors.

[51] In view of the findings of fact made during the trial, which ultimately led to the conviction of Mr. Lafitte on all three charges before the court, I find that, based upon the categories or levels of drug traffickers described in **R. v. Fifield,** [1978] NSJ no.42 at para.10 (NSSC-AD), he was a petty retailer of hydromorphone, cocaine and cannabis (marijuana). However, given the fact that he had possession for the purpose of trafficking of two very addictive, schedule I **CDSA** substances in addition to the cannabis (marijuana) listed in schedule II of the **CDSA**, I find that he was a higher level petty retailer who was likely more connected to the drug subculture in order to obtain those 3 substances to supply to his purchasers.

[52] While he is a relatively youthful offender, he comes before the Court for sentencing as a repeat petty retailer, who was in possession of three different **CDSA** substances for the purpose of trafficking. It is evident that he was not deterred by the previous term of incarceration nor a benefit from the opportunities

provided for his rehabilitation in prison or the community. In fact, it is clear from the Court's trial decision and Mr. Lafitte's conviction for another drug trafficking offence during this trial, that after serving his prior prison sentence, he almost immediately resumed his drug trafficking activities for profit and greed.

[53] The parity principle found in section 718.2(b) of the **Code** provides a range of sentences involving similar offenders who have committed similar offences in similar circumstances. The range established by a review of cases does not preclude a greater sentence on grounds of denunciation, deterrence and the gravity of the offence, nor does it preclude a lesser sentence because of special circumstances. The range is simply a guideline for trial judges.

[54] The Crown Attorney referred to several recent reported and unreported decisions of the Nova Scotia Provincial Court where 2 to 3-year sentences were imposed for similar offenders who had committed similar offences in similar circumstances.

[55] In **R. v. Connolly**, 2014 NSPC 68, Judge Whalen imposed a 2 year sentence on a 51-year-old accused who had possession of 30 g of cocaine for the purpose of trafficking. He had pled guilty and had no prior record.

[56] In **R. v. L.C.,** 2011 NSPC 35, Judge Derrick (as she then was) sentenced the accused to 30 months of incarceration (less remand credit). He was a 19-year-old, who had pled guilty to possession of 5 g of crack cocaine for the purpose of trafficking, was in a relationship, had two young children and was on a recognizance when he was arrested. He had three prior **CDSA** convictions for trafficking as a young person under the **Youth Criminal Justice Act.**

[57] In **R. v. Smith,** 2012 NSPC 82, Judge Hoskins ordered a 2 year sentence for an accused who was a 30-year-old first time offender. He had pled guilty to possession of 7 g of crack cocaine for the purpose of trafficking. The commission of the offence was out of character and there were several positive letters of reference.

[58] With respect to the offence of possession of hydromorphone pills for the purpose of trafficking, the Crown Attorney referred to the decision of Justice Chipman in **R. v. Swaine**, 2015 NSSC 265. In that case, Chipman J. noted that the trafficking of hydromorphone pills should be treated in a similar manner to the trafficking of cocaine as the consequences of both drugs are "dire for all involved." The accused was 47 years old, had a very dated record for a property offence in 1995 and was fined for possession of a **CDSA** substance in 1998. He was on social assistance. The Court imposed a sentence of 2 years in prison for the 62

hydromorphone pills possessed for the purpose of trafficking and ordered 3 months concurrent for the possession and production of cannabis charges.

[59] Based in my review of the comments of our Court of Appeal and recent trial level decisions in relation to the range of sentence, I cannot conclude that Mr. Lafitte is a similar offender who has committed similar offences in similar circumstances. While he is relatively youthful, I find that he possessed for the purpose of trafficking three different **CDSA** substances, two of which are listed in schedule I of the **CDSA** as a higher-level petty retailer by being a "one-stop shop" for his purchasers.

[60] In addition, unlike the cases referred to above, Mr. Lafitte has a prior, recent and related **CDSA** record and he was not deterred by his prior 3 year prison sentence or the fact that he was on trial for the present offence and subject to a recognizance with a surety. Moreover, I find that, in almost all of the cases referred to by Counsel, the trial judge noted that there were several mitigating factors which are not present in this case and would tend to reduce the sentence imposed.

[61] Having come to those conclusions, I find that the just and appropriate range for these offences for Mr. Lafitte, would be 3 years in prison at the very lowest end of the range, if he was to receive the identical sentence to the one which was

imposed on May 8, 2018. However, I find that the sentence imposed for the May 3, 2018 offence cannot be regarded as part of a continuing transaction with this offence given the fact that they occurred about one year apart and a sentence for which specific deterrence must be emphasized would likely result in a "step up" from the prior sentence to achieve that sentencing objective, rather than a lesser sentence.

[62] At the other end of the sentencing range, keeping in mind the principle of proportionality as stated in section 718.1 of the **Code**, I have found that the gravity of these offences is very high and that Mr. Lafitte also has a very high degree of responsibility or moral blameworthiness in this case. In those circumstances, I find that the upper end of a sentence of imprisonment could be in the range of 4 to 5 years in prison, considering the very significant aggravating circumstances, relatively few mitigating circumstances and the need to emphasize specific deterrence of Mr. Lafitte, general deterrence and denunciation on the lawful conduct.

The Totality Principle:

[63] As I indicated previously, the disparity in the positions of the Crown Attorney and the Defence Counsel relates primarily to the differences in which they recommend that the Court apply the totality principle which is found in section 718.2(c) of the **Code**.

[64] The Supreme Court of Canada, in **R. v. M. (C.A.),** 1996 Canlii 230 (SCC); [1996] 1 SCR 500 at para. 42 discussed the totality principle as follows:

> 42. In the context of consecutive sentences, this general principle of proportionality expresses itself through the more particular form of the "totality principle." The totality principle, in short, requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. As D.A. Thomas describes the principle in *Principles of Sentencing* (2nd ed. 1979), at page 56:
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> > The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate sentence is "just and appropriate."

[65] In **R. v. Adams**, 2010 NSCA 42 at paras. 23 and 24, the Nova Scotia Court of Appeal clearly endorsed the Supreme Court of Canada's approach in **C.A.M.** to the application of the totality principle:

> [23] In sentencing multiple offences, this Court has, almost without exception, endorsed an approach to the totality principle consistent with the methodology set out in **C.A.M.**, *supra*. (see for example **R.**

> **v. G.O.H.** (1996), 148 N.S.R. (2d) 341 (C.A.); **R. v. Dujmovic**, [1990] N.S.J. No. 144 (Q.L.) (C.A.); **R. v. Arc Amusements Ltd.** (1989), 93 N.S.R. (2d) 86 (S.C.A.D.) and **R. v. Best**, 2006 NSCA 116, but contrast **R. v. Hatch** (1979), 31 N.S.R. (2d) 110 (C.A.)). The judge is to fix a fit sentence for each offence and determine which should be consecutive and which, if any, concurrent. The judge then takes a final look at the aggregate sentence. Only if concluding that the total exceeds what would be a just and appropriate sentence is the overall sentence reduced. (See for example, **R. v. G.O.H.**, *supra* at para. 4 and **R. v. Best**, *supra,* at paras. 37 and 38).
>
> [24] This Court has addressed and rejected any approach that would suggest that, when sentenced for a collection of offences, the aggregate sentence may not exceed the "normal level" for the most serious of the offences (see **R. v. Markie**, 2009, at paras. 18 to 22, per Hamilton, J.A.).

[66] More recently, in **R. v. Skinner**, 2016 NSCA 54, at para. 41, Justice Saunders succinctly summarized the sequential steps to follow when sentencing an offender for multiple offences. Saunders JA confirmed that in **Adams**, *supra*, the Court had directed that when sentencing for multiple offences, sentencing judges should proceed in the following order:

- Fix a sentence for each offence;
- Determine which should be consecutive and which, if any, concurrent;
- Take a final look at the aggregate sentence; and
- Only if the total exceeds what would be a just and appropriate sentence, is the overall sentence reduced.

[67] In **Skinner**, *supra*, at para. 42, Saunders JA added that the sequence outlined above had been mandated in **Adams,** *supra*, at para. 23, but he noted further, and

in any event, the Nova Scotia Court of Appeal has "always cautioned against a slavish, mathematical and formulaic approach to sentencing for multiple offences." He then referred to the remarks of Chief Justice MacKeigan in **R. v. Hatch,** [1979] N.S.J. no. 520:

> [6] We have frequently noted that the **Code** seems to require consecutive sentences unless there is a reasonably close nexus between the offences in time and place as part of one continuing criminal operation or transaction: [citation omitted]. This does not mean, however, that we should slavishly impose consecutive sentences merely because offences are, for example, committed on different days. It seems to me that we must use common sense…
>
> [7] The choice of consecutive versus concurrent sentences does not matter very much in practice so long as the total sentence is appropriate. Use of the consecutive technique, when in doubt as to the closeness of the nexus, ensures in many cases that the total sentence is more likely to be fit than if concurrent sentences alone are used. Conversely, unthinking use of concurrent sentences may obscure the cumulative seriousness of multiple offences.

[68] The Ontario Court of Appeal has held in **R. v. Parry**, 2012 ONCA 171 (Canlii) at para. 18 that the principle of totality "applies where an offender is sentenced and part of the total term of incarceration includes a pre-existing sentence": See **R. v. Cathcart,** [1976] O.J. no. 1225 and **R. v. Bond**, [2005] O J No. 108.

[69] More recently, in **R v. Johnson**, 2012 ONCA 339 (Canlii) at para. 19 the Court noted that there are at least two types of situations where the principle of

totality in the context of consecutive sentences may arise. The first is where a single judge must deal with a series of offences, some of which may require the imposition of consecutive sentences. A second situation is where a sentencing Judge must impose a fit sentence on an offender convicted of one or more offences when that offender is serving the remainder of a sentence for a previous conviction or convictions.

[70] The Ontario Court of Appeal also noted in **Johnson**, *supra,* at para. 20 that if the combined consecutive sentences "are unduly harsh and excessive, the overall length of incarceration may work against the attainment of the various goals of sentencing", such as rehabilitation and reintegration into society, by depriving the offender of any hope of release or rehabilitation.

[71] However, the Court of Appeal in **Johnson**, *supra*, at para. 23 stated that there was an equally relevant counterpoint that the integrity of the sentencing regime must be seen as being fair and rational – both to the offender and the community. "Just as a sentence cannot be unduly harsh and excessive, neither can it be overly lenient or unresponsive to the other purposes and principles that underpin the sentencing regime," as set out in section 718 of the **Code**. The Court also noted, at para. 23, that an offender "ought not to be seen to be reaping benefits from his previous serious criminal misconduct."

[72] The Newfoundland Court of Appeal came to a similar conclusion in **R. v. Barrett**, 2012 NLCA 46 at paras. 19 and 35-36. In **Barrett**, at para. 19, the Court referred to its decision in **R. v. Penny**, 2005 NLCA 31 to reiterate that in the earlier case, the Court had "cautioned that care must be taken not to signal to offenders that there is a benefit (by way of sentence reduction) to reoffending while on parole" and that when an offender reoffends while on parole, it is a fair inference that rehabilitation has not been achieved by the former sentence.

[73] In **Johnson**, *supra,* at para. 25 the Court of Appeal added that before the sentencing judge imposes a new and consecutive sentence on an offender presently serving a sentence:

> "… the subsequent sentencing judge will determine how much weight to give to the existing remaining sentence by assessing whether the length of the proposed sentence *plus* the existing sentence will result in a "just and appropriate" disposition that reflects as aptly as possible the relevant principles and goals of sentencing in the circumstances."

[74] As the Nova Scotia Court of Appeal has clearly pointed out the last step where the trial judge determining the "just and appropriate" sanction for multiple offences, is that the Judge should then take a "last or final look" at the total sentence, to ensure that it is not unduly long or harsh.

[75] In taking that "last or final look," the Judge should consider what he or she has previously determined in the earlier analysis of the fit sentence for the most serious of the offences. In doing so, the Judge may conclude that the total sentence for the most serious of the offences is broadly commensurate with the overall gravity of the offences and the offender's moral culpability. Then, if some adjustment is necessary, the Judge may make adjustments to the length of the consecutive sentences as s.718.2(c) of the **Code** stipulates that "(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh."

[76] Finally, once the Court has concluded what the global sentence will be, then the Court should deduct any pre-sentence custody credits from that total to reach the final "go forward" sentencing decision.

The Just and Appropriate Sentence:

[77] In my opinion, I agree with the Crown Attorney that this is a case where specific and general deterrence as well as denunciation of the unlawful conduct must be emphasized. Although Mr. Lafitte is a relatively youthful offender, this sentencing decision marks his third conviction in four years for the offence of possession for the purpose of trafficking schedule I **CDSA** substances. Parliament

has determined that a person convicted of trafficking those substances is liable to imprisonment for life.

[78] The Court has no background information with respect to the other **CDSA** offences for which he was sentenced in 2014 or 2018, other than to note that it was for possession of cocaine for the purpose of trafficking contrary to section 5(2) of the **CDSA**. However, in this case, Mr. Lafitte was convicted of having possession of two schedule I **CDSA** substances, being cocaine and hydromorphone, as well as a schedule II substance, cannabis marijuana. While I have found that the possession of those substances would be as a petty retailer, I also find that it is significant that in this case, he became a higher level petty retailer by possessing for the purpose of trafficking multiple **CDSA** substances.

[79] It is evident from the circumstances of the present offence that Mr. Lafitte was not specifically deterred by the earlier 3 year sentence imposed in 2014, and in fact, commenced drug trafficking almost immediately after the completion of his sentence. Equally aggravating, Mr. Lafitte added a second schedule I **CDSA** substance (hydromorphone) with its equally devastating effects on the community to his trafficking activities. Moreover, it is also evident from the subsequent conviction, that Mr. Lafitte was not deterred by his prior conviction and sentence, as he entered an early guilty plea to drug trafficking while in the midst of the trial

for these offences. On May 8, 2018, Mr. Lafitte was ordered to serve a 3 year sentence in a federal penitentiary for the possession of cocaine for the purpose of trafficking contrary to section 5(2) **CDSA** prior to the Court's trial decision in this case.

[80] In determining the just and appropriate sanctions for these offences, I agree with both counsel that they require a consecutive sentence to any sentence that Mr. Lafitte is now serving. While both Counsel agreed that the ultimate decision of the Court would require a consecutive sentence to the remainder of the current sentence that Mr. Lafitte is serving, there is the issue of whether the three charges for which Mr. Lafitte was convicted in this case should be served on a consecutive or concurrent basis, and then consecutive to the remainder of the sentence that Mr. Lafitte is now serving.

[81] In my opinion, I find that there is a complete nexus between the offence of possession for the purpose of trafficking cocaine and the offence of possession for the purpose of trafficking hydromorphone and, for that matter, the similar charge involving cannabis marijuana. In those circumstances, I find that sentence to be imposed for the three possession for the purpose of trafficking offences in April 2017, should be considered as being part of one continuing criminal operation or transaction. Therefore, I find that the just and appropriate sentence for the April

2017 offences, is to order the period of incarceration to be concurrent to each other but consecutive to the sentence that Mr. Lafitte is presently serving.

[82] As I indicated previously, I find that specific deterrence of Mr. Lafitte which clearly has not been accomplished up until now, general deterrence of like-minded individuals and denunciation of the unlawful conduct must be emphasized in the circumstances of this case. It is evident that Mr. Lafitte has not been rehabilitated or otherwise learned from his past convictions.

[83] Given the fact that there are relatively few mitigating factors but several very significant aggravating factors, I find that the just and appropriate sentence should reflect a "step up" and I hereby order Mr. Lafitte to serve a sentence of 46 months in a federal penitentiary for the two charges contrary to section 5(2) of the **CDSA** for the possession of the cocaine and the hydromorphone, which shall be served concurrently, but consecutive to the remainder of the sentence he is now serving.

[84] I agree with the Crown Attorney that the possession for the purpose of trafficking cannabis marijuana contrary to section 5(2) of the **CDSA** shall be 3 months in prison which shall be served concurrently with the other two offences, but once again, consecutively to the sentence he is now serving.

[85] Mr. Lafitte has now served approximately one year of the 3 year sentence that was imposed in May 2018. Taking that into account, I cannot concur with the Defence recommendation that the total combined sentence imposed at this time should be reduced to 2 years consecutive to the sentence he is now serving by applying the principle of totality. In my opinion, a sentence of 2 years consecutive to the present sentence that Mr. Lafitte is serving would be overly lenient and unresponsive to the other purposes and principles of sentencing at play in this case. Furthermore, I also find that it would also result in a situation where Mr. Lafitte was "reaping benefits from his previous serious criminal misconduct."

[86] Section 718.2(e) of the **Code** imposes a statutory duty on a sentencing judge to consider the unique circumstances of aboriginal offenders. The procedure for considering **Gladue** factors in sentencing was addressed by the Supreme Court of Canada in **R. v. Ipeelee**, 2012 SCC 13 (CanLii) at para. 60:

> "To be clear, court must take judicial notice of such matters as the history of colonialism, displacement, residential schools and how that history continues to translate to lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case specific information presented by counsel." (Emphasis in original text)

[87] As I indicated previously, I find that the imposition of concurrent 46 month sentences for possessing cocaine and hydromorphone for the purpose of trafficking as well as a concurrent 3 month sentence for the possession of the cannabis (marijuana) for the purpose of trafficking concurrent, which shall be served on a consecutive basis to the sentence that Mr. Lafitte is now serving, is a just and appropriate sentence. In coming to that conclusion, I have considered the number of **Gladue** factors that Mr. Lafitte has personally experienced and undoubtedly been affected by them. However, given the number of very significant aggravating factors present in this case, I have also found that it would not be a just and appropriate sanction to order a sentence at the low-end of the range of sentences for these offences. At the same time, I have taken those factors into account in ordering a restrained and measured "step up" from the previous sentences to emphasize the need for specific deterrence of Mr. Lafitte, general deterrence and denunciation of the unlawful conduct.

[88] During their submissions, Counsel advised the Court that Mr. Lafitte had served 8 days of presentence custody prior to being released on the 2017 drug trafficking charges. Since May 3, 2018, he has been held in custody and ultimately been sentenced on the 2018 drug trafficking charge. Therefore, with enhanced credit for presentence custody of 1.5 days for each day served that would provide a

credit of 12 days. Taking that enhanced presentence custody credit into account, I hereby order Mr. Lafitte to serve a total sentence of 45½ months going forward, which shall be served on a consecutive basis to the remainder of the prison sentence that he is serving.

[89] In taking a "last or final look" at the prison sentence ordered today, I cannot conclude that the imposition of two concurrent 45½ month sentences for trafficking schedule I **CDSA** substances to be served on a consecutive basis to the May 2018 imposition of a 3 year sentence for a similar drug trafficking offence would be unduly long or harsh.

[90] In the Pre-Sentence Report as well as the **Gladue** Report, it was evident that there are several culturally appropriate programs available in the federal penitentiary to assist Mr. Lafitte in his efforts towards rehabilitation and his reintegration into society. In those circumstances, I do not find that the imposition of this concurrent sentence of 45 months and 15 days (for the half month) which shall be served consecutive to the sentence that Mr. Lafitte is currently serving would be unduly long or harsh or crushing to any realistic opportunity or motivation for him to continue his rehabilitative efforts.

[91] I will also grant the following ancillary orders which were sought by the Crown and not opposed by Defence Counsel:

1. the mandatory weapons prohibition pursuant to section 109(1)(c) of the **Criminal Code**, beginning today and ending 10 years after Mr. Lafitte's release from imprisonment;

2. an order of forfeiture of certain articles listed in an order prepared by the Crown pursuant to section 16 of the **CDSA**; and

3. a secondary designated offence DNA order pursuant to section 487.051(3) of the **Criminal Code** as I conclude, given the factors to be considered, that it is in the best interest of the administration of Justice to do so.