IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

Citation: *R. v. Bennett*, 2017 NLCA 41
Date: June 29, 2017
Docket: 201601H0001

BETWEEN:

JOSHUA AARON BENNETT — APPELLANT

AND:

HER MAJESTY THE QUEEN — RESPONDENT

Coram: Welsh, White and Hoegg JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
Stephenville

Appeal Heard: March 9, 2017
Judgment Rendered: June 29, 2017

Reasons for Judgment by Welsh J.A.
Concurred in by White J.A.
Dissenting Reasons by Hoegg J.A.

Counsel for the Appellant: Aaron Felt
Counsel for the Respondent: Elaine Reid

Welsh J.A.:

[1] On September 11, 2015, Joshua Bennett pleaded guilty to and was convicted of multiple counts of trafficking in drugs, which included marihuana, cocaine and ecstasy, contrary to the *Controlled Drugs and Substances Act*. The offences were committed on October 28, 2010 and May 6, 2011. He was also convicted of breaches of recognizance by failing to keep the peace (committing a drug trafficking offence), failing to comply with a curfew, and possessing or consuming alcohol contrary to conditions of his release. On October 13, 2015, he was sentenced to a total of thirty-nine months and eighteen days imprisonment, less two hundred and sixty-three days credit for time served on remand.

[2] Mr. Bennett appeals against the sentence having been granted leave to appeal at the hearing. He has been on judicial interim release pending the appeal since September 1, 2016.

BACKGROUND

[3] In sentencing Mr. Bennett, the trial judge concluded:

> [56] I am satisfied that a period of imprisonment is warranted for all of the sentences as Mr. Bennett has entered pleas of guilty to charges of multiple counts of possession of controlled substances for the purposes of trafficking, as well as multiple counts of breaches of Court orders.
>
> [57] In relation to the offences from October 28th, 2010, when I consider both the aggravating and mitigating factors as well as the sentencing precedents outlined in the case law provided to me by Counsel I am satisfied that the following are appropriate sentences:
>
> > Count 1, Possession of marihuana for the purposes of trafficking, six months incarceration,
> >
> > Count 2, Possession of cocaine for the purposes of trafficking, six months incarceration,
> >
> > Count 3, Possession of ecstasy for the purposes of trafficking, 12 months incarceration,
> >
> > Count 4, Possession of ecstasy, 3 days incarceration.

> [58] In relation to the offences from May 6th [2011],
>
> Possession of cocaine for the purposes of trafficking, 2 years,
>
> Breach of Recognizance, 1 month.
>
> [59] In relation to the offences from June 15th, 2015,
>
> Breach of Recognizance, 1 month,
>
> Breach of Probation, 45 days.
>
> [60] In relation to the charge from June 26th, 2015,
>
> Breach of Recognizance, 1 month.
>
> [61] If these sentences were all to be served consecutively it would total 52 months and 18 days. As the offences from October 28th, 2010 all arise from a "single criminal adventure" and when I consider the principles of totality particularly in light of Mr. Bennett's young age and lack of a criminal record in 2010, I am satisfied that these sentences should be concurrent. Applying the same principles to the breaches from June 15th, 2015, I am making these sentences concurrent to each other, but consecutive to the other offences. The remaining sentences are consecutive. This leaves the total sentence 39 months and 18 days without giving Mr. Bennett credit for time on remand.

(The sentencing decision, at paragraph 58, refers to offences committed on May 6, 2012. This was an error. The date on the Information is May 6, 2011.)

[4] Mr. Bennett, who was represented by experienced counsel, asked that a pre-sentence report not be prepared because he had hoped to have his sentencing dealt with as quickly as possible, and he was under the impression that a report would cause a delay of up to six weeks. Rather than providing a pre-sentence report, at the September 11, 2015 hearing, Mr. Bennett, having been sworn for the purpose, read a lengthy prepared statement into the record.

[5] Mr. Bennett described difficulties he faced in his childhood, how he started using marihuana at about age eleven as a result of peer pressure, and that he was experimenting with ecstasy by age fourteen. He admits that, over the years, he developed a serious problem with drug addiction.

[6] At about age sixteen he moved independently to British Columbia. He obtained work and trained as an insulation installer. He stated that he was successful in that business and that he has relied on this trade to make his living over the years. In addition, Mr. Bennett said he had obtained his high school equivalency and had commenced studies in business at Douglas College in British Columbia. He did not complete the course because his girlfriend was pregnant and he needed to work in order to be in a position to support a family, though that family unit was of short duration.

[7] Mr. Bennett included information about his personal relationships with three women, all of which terminated unhappily. He has a daughter from the first relationship but does not know where she is and has had no contact with her. He also has a daughter from his most recent relationship. He says that the child's mother has mental health issues, and he has expressed a desire to apply for custody of that child.

[8] Mr. Bennett stated that he became addicted to oxycontin which had been prescribed for pain due to injuries he had suffered. After ceasing to use oxycontin, he said that he obtained drug addiction counselling and had been on a methadone treatment program. He maintains that, in recent times, he has been "drug free" and "even kicked my methadone cold turkey".

[9] Mr. Bennett stated that he has matured and realizes the seriousness of his actions. He reminded the court that he had no prior criminal record and that the drug-related offences were committed in October 2010 and May 2011 when he was aged twenty-two.

[10] In addition, he described significant difficulties he had while in prison, and stated:

> I'm not trying to excuse what I did by any means but ask that the court please take mercy on me and give me just one shot at house arrest. At the time I wasn't myself. I was heavily addicted to drugs and wasn't thinking clearly and didn't understand the seriousness of what I was doing. Also, if I mess up the alternative is going to jail. Also, my safety is extremely at risk in custody. People want me dead and I fear for my life. I am just really happy to be off drugs and thinking clearly and want to start building and getting my life back on track more than anything in the world and I can't do this in custody and I'm afraid of becoming institutionalized. … And also, your Honour, I am not a lazy man who doesn't know how to work. I have been working and earning my own money as long as I can remember. …

[11] There is no indication in the sentencing decision that the judge took Mr. Bennett's statement into account.

ANALYSIS

Amendment of the Notice of Appeal

[12] When commencing his appeal, Mr. Bennett was self-represented. His notice of appeal refers to appealing just the sentence of two years imprisonment for trafficking in cocaine on May 6, 2011. Having subsequently obtained counsel, at the hearing of the appeal, he requested that the notice of appeal be amended to include the entire sentence.

[13] However, counsel for the Attorney General of Canada pointed out that the sentences for breaches of recognizances and probation were dealt with by the Attorney General in Right of Newfoundland and Labrador, and that counsel for the Attorney General for the Province was not present since notice had not been given that those sentences were under appeal.

[14] Counsel for the Attorney General of Canada consented to amending the notice of appeal to include all the offences for which she had responsibility. That amendment was allowed.

[15] There was no basis on which to adjourn the hearing for purposes of giving notice to the Attorney General for the Province, and, in fact, Mr. Bennett did not make that request. The sentences imposed for breaches of recognizances and probation committed on May 6, 2011, June 15, 2015 and June 26, 2015 fall well within the appropriate range. Further, requiring the sentences to be served consecutively, prior to consideration of totality, is consistent with the principles set out in *R. v. Murphy*, 2011 NLCA 16, 304 Nfld. & P.E.I.R. 266, at paragraphs 35 to 41. See also: *R. v. O'Quinn*, 2017 NLCA 10.

[16] In the result, the sentences under appeal are those related to possession of and trafficking in controlled substances on October 28, 2010 and May 6, 2011.

Leave to Appeal

[17] Leave to appeal is required because this is an appeal by Mr. Bennett as to sentence only (section 675(1)(b) of the *Criminal Code*). The test to be applied is whether the appeal is "frivolous in the sense of having no arguable

basis or sufficient merit" (*R. v. Hillier*, 2016 NLCA 21, 377 Nfld. & P.E.I.R. 121, at paragraph 7). Given the issues discussed below, the Court granted leave to appeal at the hearing.

The Three-Day Sentence for Possession of Ecstasy

[18] Counsel pointed out some confusion about the three-day imprisonment imposed for possession of ecstasy on October 28, 2010. The cumulative sentence would indicate the judge's intention that the three-day sentence would be served consecutively. However, this appears to be an oversight since the judge had already concluded, without making an exception, that the October 28, 2010 offences all related to a single criminal venture and should, therefore, be served concurrently.

[19] In the circumstances, I am satisfied that, of the two possible interpretations, the latter is the more reasonable. That is, there is no apparent reason to separate the three-day sentence for possession of ecstasy from the other drug-related counts that were ordered to be served concurrently. Accordingly, I would confirm the sentence for the October 28, 2010 offences, all being served concurrently, to be twelve months, not twelve months and three days.

Mr. Bennett's Aboriginal Status

Mr. Bennett's Sworn Statement

[20] Mr. Bennett's statement, which he read to the Court, having first been sworn for that purpose, made one short reference to his aboriginal status:

> I am native and a member of the local Qalipu band and at the time of these offences, I had a severe addiction problem and drug habit … .

[21] Neither a pre-sentence report nor a *Gladue* report was provided to the Court. The trial judge made no mention of Mr. Bennett's aboriginal status in her sentencing decision. After Mr. Bennett read his statement, the judge delayed the imposition of sentence, saying:

> I want to take the time to review the facts, review the case law and certainly consider your evidence in relation to the conditions, your personal circumstances as well as the conditions that have existed on remand. That I think would be relevant when it comes to whether or not there's to be an enhanced credit [for time served on remand]. …

[22] Following Mr. Bennett's statement, neither counsel for the Attorneys General requested time to consider the statement, nor did they seek to cross-examine Mr. Bennett though counsel for the Attorney General for the Province specifically recognized that Mr. Bennett had "taken the stand" to make his statement. Counsel for the Attorney General of Canada did not take the opportunity to cross-examine Mr. Bennett or to provide evidence in response though he said that there were "a lot of things said in Mr. Bennett's statement that he can't verify". In the absence of an appropriate challenge, the contents of the statement were properly before the Court for consideration on sentencing.

Application of General Principles

[23] Section 718.2(e) of the *Criminal Code* provides:

> A court that imposes a sentence shall also take into consideration the following principles:
>
> …
>
> (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.
>
> (Emphasis added.)

[24] This provision is discussed in detail in *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at paragraphs 56 to 87. LeBel J., for the majority, explained the need for information to be provided to the sentencing judge:

> [59] The Court held, therefore, that s. 718.2(e) of the *Code* is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing (*Gladue* [[1999] 1 S.C.R. 688], at para. 93). It does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders. … When sentencing an Aboriginal offender, a judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection (*Gladue*, at para. 66). Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people

> generally, but additional case specific information will have to come from counsel and from the pre-sentence report (*Gladue*, at paras. 83-84).
>
> (Emphasis added.)

[25] LeBel J. emphasized:

> [60] … Counsel have a duty to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered. In current practice, it appears that case-specific information is often brought before the court by way of a *Gladue* report, which is a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders. Bringing such information to the attention of the judge in a comprehensive and timely manner is helpful to all parties at a sentencing hearing for an Aboriginal offender, as it is indispensable to a judge in fulfilling his duties under s. 718.2(e) of the *Criminal Code*.
>
> (Emphasis added.)

[26] In this case, Mr. Bennett did not expressly waive his right to have his aboriginal status considered. The trial judge erred in principle by failing to obtain a waiver or to turn her mind to the application of section 718.2(e) of the *Code* when determining an appropriate sentence. While Mr. Bennett did not elaborate regarding his statement that he was a member of the local Qalipu band, it was incumbent on the judge to address the issue because it had been raised. The effect of the judge's failure is summarized by LeBel J. in *Ipeelee*:

> [87] The sentencing judge has a statutory duty, imposed by s. 718.2(e) of the *Criminal Code*, to consider the unique circumstances of Aboriginal offenders. Failure to apply *Gladue* in any case involving an Aboriginal offender runs afoul of this statutory obligation. As these reasons have explained, such a failure would also result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality. Therefore, application of the *Gladue* principles is required in every case involving an Aboriginal offender, … and a failure to do so constitutes an error justifying appellate intervention.
>
> (Emphasis added.)

See also: *R. v. O'Quinn*, *supra*, at paragraph 17.

[27] As a result of the trial judge's error, Mr. Bennett's aboriginal status and consideration of a variation of the sentence pursuant to section 687(1)(a) of the *Criminal Code* must be addressed.

Evidence Under Section 687(1)(a) of the Criminal Code

[28] While no pre-sentence or *Gladue* report was provided at the time of sentencing, for purposes of his application for judicial interim release pending the appeal in this Court, Mr. Bennett obtained a report from "Stonebridge Indigenous Justice", which he relies on for purposes of presenting his position as an Aboriginal offender.

[29] Section 687(1) of the *Criminal Code* provides:

> Where an appeal is taken against sentence the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
>
> > (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
> >
> > (b) dismiss the appeal.
>
> (Emphasis added.)

[30] Applying this provision, the Stonebridge report is properly received by this Court for purposes of considering the effect of Mr. Bennett's aboriginal status on an appropriate sentence.

[31] The report commences with several pages of "boiler plate" information by reference to various case law. This is of limited assistance. As set out in *Ipeelee*, the court is seeking information regarding "the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts" and "the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection" (*Ipeelee*, at paragraph 59, emphasis added).

[32] That said, the report contains information that is of assistance in considering Mr. Bennett's aboriginal status. He is a member of the Qalipu Mi'kmaq community located on the west coast of Newfoundland and derives his aboriginal heritage through both parents. The report refers to the following *Gladue* factors:

> "Mr. Bennett has personally experienced the adverse impact of many factors continuing to plague Aboriginal communities since colonization, including":
>
> - substance abuse personally and in the immediate family,
>
> - physical abuse at the hands of his mother's partners,
>
> - violence in the family, particularly, seeing his mother and brother physically beaten,
>
> - living below or at the poverty line.

[33] The report states that Mr. Bennett had low income and unemployment due to lack of education. However, Mr. Bennett's statement to the Court indicated that he had always worked to support himself, has a trade as an insulation installer, and had obtained his high school equivalency.

[34] The report also states that "systemic racism against Aboriginal Peoples is acute in Newfoundland and Labrador". In his statement to the Court, Mr. Bennett provided no information that would support this broad statement particularly as applied to the Qalipu Mi'kmaq which have only recently been recognized as a landless band under the *Indian Act*, R.S.C. 1985, c. I-5.

[35] I would point out the importance of providing accurate information, particular to the individual, in a *Gladue*-type report. The Stonebridge report in this case is of limited assistance. Had I not been satisfied that the report was adequate for purposes of the appeal, I would have taken the position that the matter should be adjourned and a more detailed *Gladue* report obtained. I concluded that this was not necessary because I am satisfied that the report includes sufficient information regarding the involvement and support of the Qalipu community in assisting Mr. Bennett, whom they regard as a member. In addition, the factors in the report outlining his difficult childhood and the information provided to the Court in the sworn statement Mr. Bennett gave at the sentencing hearing, are sufficient to provide the necessary context to assess the statutory requirement to consider "all available sanctions, other than imprisonment", especially in the circumstances of Aboriginal offenders.

[36] In particular, the Stonebridge report sets out recommendations for Mr. Bennett's judicial interim release based on the following:

> - That Mr. Joshua Bennett receive ongoing support from the Qalipu Mi'kmaq community.
>
> - Mr. Darcy Barry, a Mi'kmaq councilor, has agreed to aid Mr. Joshua Bennett upon his release. Mr. Barry will meet with Mr. Bennett regularly to aid him in his sobriety for drug addiction and will enhance his awareness of his Mi'kmaq culture and teachings.
>
> - Mr. Darcy Barry is well positioned to take on this role for Mr. Bennett. Mr. Barry previously worked at the Bay St. George Youth Assessment Centre … .
>
> - Mr. Barry currently works as a Client Service Officer for Newfoundland Advanced Educational Skills and Training.
>
> …
>
> These recommendations will aid in Mr. Bennett's recovery and reconnection to his culture.

[37] No information was provided to this Court regarding Mr. Bennett's success in working with Mr. Barry since his judicial interim release.

[38] It is necessary, then, to consider Mr. Bennett's offences and appropriate sentences in the context of the statement he made at his sentencing hearing, the information in the Stonebridge report, and the direction in *Ipeelee* and in section 718.2 of the *Code* that "all available sanctions, other than imprisonment" are to be considered especially with Aboriginal offenders.

An Appropriate Sentence

[39] In *R. v. Hutchings*, 2012 NLCA 2, 316 Nfld. & P.E.I.R. 211, this Court adopted a three-step approach to be applied in sentencing for multiple offences. (See also: *R. v. O'Quinn*, *supra*.) The first step is to assign an appropriate sentence to each offence. The presumption at this stage is that the sentences will be served consecutively.

[40] A range of six to thirty-six months imprisonment for trafficking in Schedule I drugs, together with relevant case law are discussed in the recent decision of this Court in *R. v. Mitchell*, 2017 NLCA 26.

[41] In this case, on October 28, 2010, Mr. Bennett was found to have two pounds of marihuana, 1300 ecstasy tablets, 4 grams of cocaine and $9627.75 in cash, with the street value of the drugs being $21,000. In the circumstances, the sentences of six months each for trafficking in marihuana and cocaine on that date are at the low end, but within an appropriate range. The sentence of twelve months for trafficking in ecstasy is also at the low end, but within an appropriate range particularly given the quantity of tablets. (See *R. v. Mitchell*, *supra*, at paragraphs 22 to 33.) Even considering Mr. Bennett's aboriginal status, I would not vary these individual sentences.

[42] On May 6, 2011, Mr. Bennett was found to have 120 grams of chunk and powder cocaine, eleven grams of crack cocaine and $8801 in cash. This is a serious offence. Further, in committing this offence he breached the recognizance he entered into when released after the October 2010 charges. However, in the circumstances, the increase from twelve months imprisonment for the October 28, 2010 offences to twenty-four months for the May 6, 2011 cocaine trafficking offence must be considered particularly in light of the fact that Mr. Bennett was not charged with another drug-related offence prior to his conviction in September 2015. This factor, taken into account with Mr. Bennett's aboriginal status, which was not considered by the trial judge and, thereby, resulted in error, leads me to conclude that an appropriate sentence for the May 6, 2011 offence of trafficking in cocaine is twenty months imprisonment. (See *R. v. Mitchell*, *supra*, at paragraphs 22 to 33.) While this is not a significant reduction, in addition to being an appropriate sentence, it permits the Court, pursuant to section 718.2(e) of the *Code*, to consider the imposition of a conditional sentence. This approach is consistent with the principles set out in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paragraphs 43 and 44.

[43] The second step in the *Hutchings* analysis is a consideration of whether any of the offences should be characterized as a single criminal venture:

> [84] …
>
> 2. The judge should then consider whether any of the individual sentences should be made consecutive or concurrent on the ground that they constitute a single criminal adventure, without consideration of the totality principle at this stage.

[44] Generally, multiple offences characterized as a single criminal venture will be ordered to be served concurrently. In this case, I accept the trial judge's characterization of the October 28, 2010 offences as a single criminal venture resulting in concurrent sentences for a total sentence of twelve months imprisonment. A similar characterization of the two June 15, 2015 offences resulting in concurrent sentences for a total sentence of forty-five days imprisonment is not under appeal.

[45] The third step in the *Hutchings* analysis is the application of the principle of totality which requires a court to determine "whether the combined sentence is unduly long or harsh and not proportionate to the gravity of the offence and the degree of responsibility of the offender" (*Hutchings*, at paragraph 84).

[46] The distinction between the second and third steps is referenced in *O'Quinn*:

> [23] Finally, I would caution against conflating steps two and three. That is, assigning concurrent sentences at step two is not an application of the totality principle, which addresses the question of whether a total sentence is unduly long or harsh. Step two is designed to assign appropriate sentences for individual offences. Whether the total sentence should be adjusted for totality is a different, and subsequent question.

[47] Factors relevant to applying the principle of totality are discussed in *Hutchings*:

> [84] …
>
> 5. In determining whether the combined sentence is unduly long or harsh and not proportionate to the gravity of the offence and the degree of responsibility of the offender, the sentencing court should, to the extent of their relevance in the particular circumstances of the case, take into account, and balance, the following factors:
>
> (a) the length of the combined sentence in relation to the normal level of sentence for the most serious of the individual offences involved;
>
> (b) the number and gravity of the offences involved;
>
> (c) the offender's criminal record;
>
> (d) the impact of the combined sentence on the offender's prospects for rehabilitation, in the sense that it may be harsh or crushing;

> (e) such other factors as may be appropriate to consider to ensure that the combined sentence is proportionate to the gravity of the offences and the offender's degree of responsibility.

An additional consideration that may be relevant at this stage is the aboriginal status of the offender.

[48] In this case, the total sentence is thirty-five months and fifteen days. In the circumstances, that sentence must be adjusted for totality. At the time of sentencing, Mr. Bennett did not have a criminal record. There were two incidents of trafficking in Schedule I drugs which occurred relatively close in time. There were no further drug-related charges between May 6, 2011 and September 2015 when he was convicted. Only one breach of a recognizance, on May 6, 2011, relates to commission of an additional criminal offence. The other breaches involved non-compliance with the conditions of a court order.

[49] A sentence of almost three years is disproportionate to the number and gravity of the offences and the degree of responsibility of the offender. As well, such a sentence is disproportionate when considered in relation to the normal level of sentence for the most serious of the individual offences. Further, I would take account of Mr. Bennett's aboriginal status and his prospects for rehabilitation particularly given the support being provided by the Qalipu community. In all the circumstances of this case, I would impose a total sentence of twenty-three months imprisonment.

[50] The approach to be used in adjusting a sentence for totality is discussed in *Hutchings*:

> [84] …
>
> 7. Where the sentencing court determines that it is appropriate to reduce the combined sentence to achieve a proper totality, it should first attempt to adjust one or more of the sentences by making it or them concurrent with other sentences, but if that does not achieve the proper result, the court may in addition, or instead, reduce the length of an individual sentence below what it would otherwise have been.

[51] To achieve a twenty-three month sentence, I would make adjustments to two of the sentences, with the following result:

> 1. October 28, 2010 possession of marihuana for the purposes of trafficking, six months incarceration, concurrent;

2. October 28, 2010 possession of cocaine for the purposes of trafficking, six months incarceration, concurrent;

3. October 28, 2010 possession of ecstasy for the purposes of trafficking, twelve months incarceration;

4. October 28, 2010 possession of ecstasy, three days incarceration, concurrent;

5. May 6, 2011 possession of cocaine for the purposes of trafficking, reduced solely for the purpose of totality from twenty months to eight months, consecutive;

6. May 6, 2011 breach of recognizance, 1 month, consecutive;

7. June 15, 2015 breach of probation, reduced for totality from forty-five days to one month, consecutive;

8. June 15, 2015 breach of recognizance, 1 month, concurrent;

9. June 26, 2015 breach of recognizance, 1 month, consecutive.

While the sentences regarding breaches of probation and recognizances have not been appealed, for purposes of totality, I have reduced one of the relevant sentences from forty-five days to one month. This is done for convenience in the particular circumstances set out at paragraphs 12 to 16, above.

Mr. Bennett's Request for a Conditional Sentence

[52] A conditional sentence, as requested by Mr. Bennett, would be available if the criteria in section 742.1 of the *Criminal Code*, in effect at the time of the drug offences, are satisfied. The amendments to the *Code*, proclaimed into force on November 20, 2012, which would preclude a conditional sentence for these offences, would not apply.

[53] Under section 742.1 in effect at the relevant time, a conditional sentence was available where "the court imposes a sentence of imprisonment of less than two years and is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 and 718.2".

[54] I am satisfied that these conditions have been met. Mr. Bennett was convicted in 2015 of drug-related offences committed in October 2010 and May 2011. The lapse of time from the commission of the offences to the convictions supports the conclusion that the safety of the community would not be endangered by ordering that his sentence be served in the community. Further, a conditional sentence would be consistent with the purpose and principles of sentencing, particularly considering Mr. Bennett's aboriginal status.

[55] That said, I have some concern about Mr. Bennett's commitment to complying with conditions that are to be imposed under a conditional sentence. This concern results from his failure to comply with conditions in an earlier recognizance regarding a curfew and abstaining from alcohol. However, I refer again to his statement to the trial judge:

> I'm not trying to excuse what I did by any means but ask that the court please take mercy on me and give me just one shot at house arrest. At the time I wasn't myself. I was heavily addicted to drugs and wasn't thinking clearly and didn't understand the seriousness of what I was doing. Also, if I mess up the alternative is going to jail.

[56] I am satisfied from this statement that Mr. Bennett understands the importance of complying with every condition imposed in a conditional sentence order, and the potential result if he fails.

[57] In exercising the discretion to order a conditional sentence, it is helpful to review the purpose and effect of section 742.1. In *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, Lamer C.J.C. explained:

> [127] At this point, a short summary of what has been said in these reasons might be useful:
>
> 1. Bill C-41 in general and the conditional sentence in particular were enacted both to reduce reliance on incarceration as a sanction and to increase the use of principles of restorative justice in sentencing.
>
> 2. A conditional sentence should be distinguished from probationary measures. Probation is primarily a rehabilitative sentencing tool. By contrast, Parliament intended conditional sentences to include both punitive and rehabilitative aspects. Therefore, conditional sentences should generally include punitive conditions that are restrictive of the offender's liberty. Conditions such as house arrest should be the norm, not the exception.

. . .

7. Once the prerequisites of s. 742.1 are satisfied, the judge should give serious consideration to the possibility of a conditional sentence in all cases by examining whether a conditional sentence is consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2. This follows from Parliament's clear message to the judiciary to reduce the use of incarceration as a sanction.

8. A conditional sentence can provide significant denunciation and deterrence. As a general matter, the more serious the offence, the longer and more onerous the conditional sentence should be. There may be some circumstances, however, where the need for denunciation or deterrence is so pressing that incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct or to deter similar conduct in the future.

. . .

10. Where a combination of both punitive and restorative objectives may be achieved, a conditional sentence will likely be more appropriate than incarceration. Where objectives such as denunciation and deterrence are particularly pressing, incarceration will generally be the preferable sanction. This may be so notwithstanding the fact that restorative goals might be achieved. However, a conditional sentence may provide sufficient denunciation and deterrence, even in cases in which restorative objectives are of lesser importance, depending on the nature of the conditions imposed, the duration of the sentence, and the circumstances of both the offender and the community in which the conditional sentence is to be served.

. . .

(Emphasis added.)

[58] Applying these principles and those set out in *Ipeelee* regarding Aboriginal offenders and given the above considerations, I am satisfied that a conditional sentence is appropriate in this case.

[59] Accordingly, I would vary the sentence to a term of imprisonment of twenty-three months to be served conditionally, less credit of two hundred and sixty-three days for time served on remand, as determined by the trial judge, and credit for the number of days served before his judicial interim release pending the appeal.

[60] The following conditions, which include house arrest as set out in condition 7, will apply and form part of the order:

> Mr. Bennett shall:
>
> 1. Keep the peace and be of good behaviour;
>
> 2. Appear before the court when required to do so;
>
> 3. Report to a supervisor within two working days after this order is made, and thereafter when required by the supervisor and in the manner directed by the supervisor;
>
> 4. Remain within the jurisdiction of the court unless prior written permission to go outside that jurisdiction is obtained from the supervisor;
>
> 5. Notify the supervisor of his current address and employment status;
>
> 6. Notify the supervisor in advance of any change of name or address, and promptly notify the supervisor of any change of employment or occupation;
>
> 7. Remain within his residence or on the property attached to the residence except for
>
> > a. attendance at his place of employment for purposes of employment only between the hours of 6:00 a.m. and 7:00 p.m., and traveling to and from his place of employment by direct route;
> >
> > b. one hour each day during daylight hours at a regular time approved by the supervisor for exercise, shopping or carrying out personal business;
> >
> > c. attendance at medical or dental appointments;
> >
> > d. attendance at appointments with Mr. Darcy Barry;
> >
> > e. attendance at church or other religious or spiritual ceremony or activity approved by the supervisor;

f. attendance at appointments or activities approved by the supervisor for the purpose of Mr. Bennett's rehabilitation;

8. Respond at the door personally when required by a police officer or the supervisor;

9. Not possess or consume drugs except in accordance with a medical prescription;

10. Not enter or be in any premises licensed to sell beer, wine or spirits for consumption on those premises, including but not limited to all hotels, motels, lounges, clubs, military messes, bars, taverns or restaurants;

11. Not consume alcoholic beverages;

12. Attend and participate actively in any treatment, educational, assessment or counselling programs directed by the supervisor;

13. Obtain the prior written permission of the supervisor to attend to any unforeseen circumstances, with limits to be set by the supervisor for the particular occasion or circumstance; and

14. Complete one hundred hours of community service at the direction of his supervisor.

[61] In addition, I would order Mr. Bennett to be on probation for one year, conditions 1, 2, 3, 4, 5, 6, 9 and 12 as set out in the above order shall apply.

SUMMARY

[62] In summary, the trial judge erred in principle and in law by failing to consider Mr. Bennett's aboriginal status in determining an appropriate sentence.

[63] I would allow the appeal, leave having been granted at the hearing, and vary the sentence, pursuant to section 687(1)(a) of the *Criminal Code*, to a term of imprisonment of twenty-three months, less credit of two hundred and sixty-three days for time served on remand, as determined by the trial judge, and credit for the number of days served before Mr. Bennett's judicial interim release pending the appeal, to be served in the community under the

conditions set out in paragraph 60, above. In addition, I would order a term of probation of one year as set out in paragraph 61, above.

_____

B. G. Welsh J.A.

I Concur: _____

C. W. White J.A.

Dissenting Reasons by Hoegg J.A:

[64] I agree with my colleague that leave to appeal be granted and it was an error on the part of the Judge to sentence Mr. Bennett without considering his statement to the court that he was "native and a member of the local Qalipu band". However, the context in which that information was presented to the court and the involvement of counsel or lack thereof at the sentencing hearing bear some explaining so as to illustrate how this error occurred.

[65] Three counsel were heard at Mr. Bennett's sentencing: experienced criminal defence counsel represented Mr. Bennett, federal Crown counsel represented the interests of the federal Crown and a provincial Crown attorney represented the interests of the provincial Crown. After the facts supporting the charges were read into the record, Mr. Bennett's guilty pleas were accepted, and convictions were entered on several charges, the most serious of which were two drug trafficking offences that occurred approximately six months apart from each other several years earlier. After all counsel made their sentencing submissions to the court, Mr. Bennett gave a sworn personal statement to the court. He began his remarks by telling the Court that he had been incarcerated over the summer and that there had been no time for him to get a pre-sentence report. This is what he said:

> … Considering the fact that I don't have a pre-sentence report and I've been trying to deal with this all summer. I basically spent my entire summer in the lockup and every time that I try to deal with it, it's been put off and put off and put off so given the fact that I thought I would be dealing with it much sooner, there was no time to get a pre-sentence report cause it takes up to six weeks. As well, I phoned the Probation Officer directly to ask if they could put a rush on it and they told me that what they have to say basically explains my story and it has no weight or bearing on sentencing, they can't say I want this guy to get house arrest or I want him to get this much time in jail. …

[66] Mr. Bennett's counsel did not say anything, before or after Mr. Bennett's statement, about having tried to obtain a pre-sentence report or about Mr. Bennett's decision to proceed to sentencing without one. Mr. Bennett had been incarcerated since June 2015 – approximately three months before his sentencing date, which by his own reckoning was plenty of time within which to obtain a pre-sentence report before the sentencing hearing of September 11, 2015. Even if obtaining a pre-sentence report delayed the sentencing a little longer, it would hardly have mattered, especially if he thought that the pre-sentence report would be helpful to him. No one at the sentencing hearing mentioned a *Gladue* report.

[67] Mr. Bennett informed the court of his aboriginal status by his words "I am native and a member of the local Qalipu band", stated in the context of a detailed description of his upbringing and personal circumstances to date. He made no other reference to his aboriginal status, and did not refer to or provide any information pertaining to an aboriginal influence in his life, living an aboriginal lifestyle, or his aboriginal heritage. Neither did he mention any connection between his parents, stepparents, or other relatives and an aboriginal heritage. He made a lengthy submission describing his early years in Newfoundland, early teenage years in Nova Scotia, time spent employed in British Columbia, and his life when he returned to Newfoundland in 2010 and when he returned again in 2015 to face the outstanding charges. Mr. Bennett's lawyer did not comment on Mr. Bennett's reference to being native and Qalipu before or after his statement to the court. As well, neither of the Crown attorneys or the Judge commented on the issue. In short, there was no reference whatsoever to "unique systemic or background factors which may have played a part in bringing [Mr. Bennett as an Aboriginal offender] before the courts", or how the "broad systemic and background factors affecting aboriginal people" affected him, or "the types of sentencing procedures and sanctions which [could have been] appropriate in the circumstances for [Mr. Bennett]

because of his particular aboriginal heritage or connection" (*Ipeelee*, at paragraph 59).

[68] The complete lack of reference to *Gladue* and the above-referenced factors which inform the application of section 718.2(e) respecting Aboriginal offenders suggest to me that Mr. Bennett, with his counsel, for their own reasons, chose not to focus or make submissions on Mr. Bennett's aboriginal status, and chose not to request a pre-sentence report addressing the *Gladue* factors. These circumstances come very close to Mr. Bennett waiving his right to have his aboriginal status considered by the court from a *Gladue* perspective. Nevertheless, and being mindful of the direction from the Supreme Court that section 718.2(e) must be considered by a court unless the accused expressly waives its application to his or her case, I am not prepared to say that Mr. Bennett's position amounts to an express waiver (*Ipeelee*, at paragraph 60). Accordingly, I agree with my colleague that once Mr. Bennett mentioned his being native and a member of the Qalipu nation, it was incumbent on the Judge to raise the issue, and if no express waiver was forthcoming at that time, to order a pre-sentence report addressing the *Gladue* factors. I add only that while it is the Judge's ultimate responsibility (*Ipeelee*, at paragraph 87), it was also the responsibility of all counsel, in particular Mr. Bennett's counsel, to directly address the issue (*Ipeelee*, at paragraph 60). (See also *R. v. Kakekagamick* (2006), 81 O.R. (3d) 664, 211 C.C.C. (3d) 289 (Ont. C.A.), leave to appeal to SCC refused, 31826 (May 10, 2007)).

[69] Given the sentencing Judge's error, and accepting that Mr. Bennett's statement to the Court engages a consideration of his aboriginal status under section 718.2(e) of the *Code*, the next consideration is whether the Judge's error had an impact on sentence, for intervention is only warranted where such an impact can be shown (*R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 44 and *R. v. Scott*, 2016 NLCA 16, 376 Nfld. & P.E.I.R. 167, at para. 30), or the sentence imposed is demonstrably unfit (*Lacasse*, at paragraph 51).

[70] I am of the view that the Judge's error had no impact on sentence and that she would have imposed the same, in my view fit and fair, sentence in any event. In this regard, I am of the view that an appellate court's correction of a sentencing error ought to reflect correction of the judge's error and explain how it has been achieved by the appellate court's intervention.

[71] The reason why I am of the view that the Judge's error had no impact on sentence in Mr. Bennett's case is because there is still nothing before the Court which would provide a basis for a different sentence in accordance with *Gladue* principles. This Court has no more information on Mr. Bennett's aboriginal status or heritage than the sentencing Judge had. The Stonebridge report, which this Court received in August 2016 in relation to Mr. Bennett's application for judicial interim release, is of little to no assistance. It simply states that Mr. Bennett is a member of the Qalipu Mi'kmaq community and that he derives his aboriginal heritage through both parents. The report does not specify where Mr. Bennett's aboriginal status sits in his ancestry, nor does it refer to any aboriginal influence in his life or any unique systemic or background factors that brought him as an aboriginal before the courts. While the report states that Mr. Bennett has suffered "the adverse impact of many factors continuing to plague aboriginal communities since colonization", it does not draw any connection between Mr. Bennett's hardships and his aboriginal heritage.

[72] In *Ipeelee*, the Supreme Court explained that the purpose of section 718.2(e) is to address the serious overrepresentation of Aboriginal offenders in Canadian prisons by encouraging:

> [59] … sentencing judges to have recourse to a restorative approach to sentencing … [and] to use a different method of analysis in determining a fit sentence for Aboriginal offenders. Section 718.2 (e) directs sentencing judges to pay particular attention to the circumstances of Aboriginal offenders because those circumstances are unique and different from those of non-Aboriginal offenders (*Gladue*, at para. 37). When sentencing an Aboriginal offender, a judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection (*Gladue*, at para. 66). Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people generally, but additional case-specific information will have to come from counsel and from the pre-sentence report (*Gladue*, at paras. 83-84).

[73] Justice LeBel went on to explain that the offender does not have to prove a direct connection between his or her Aboriginal circumstances and the commission of the crime for which he or she is being sentenced, for such would be an undue burden. Nevertheless, I read *Ipeelee* as requiring that an offender's particular aboriginal circumstances be established so as to enable the sentencing court to consider them as causes of the criminal behavior in

play and suggestions for sentencing procedures and sanctions which may be more appropriate than a purely punitive sentence and may better achieve the objectives of sentencing for the particular Aboriginal offender (*Ipeelee,* at paragraph 73). Moreover, I read *Ipeelee* to require judges to explain how the offender's aboriginal circumstances are addressed by the sentence imposed (*Ipeelee*, at paragraph 75).

[74] Both *Gladue* and *Ipeelee* say that systemic and background factors do not operate as an excuse for the criminal conduct and, unless the offender's unique circumstances bear on his or her culpability for the offence, they will not influence the ultimate sentence (*Ipeelee,* at paragraph 83). As a practical reality, the more serious the offence, the more likely the sentence would be the same for Aboriginal and Non-Aboriginal offenders (*Gladue,* at paragraph 79), although this is not to say that creative sentences cannot be appropriately crafted to apply to Aboriginal offenders who have committed serious offences. Rather, it is to say that doing so requires explaining how and why the sentence imposed addresses the circumstances of the Aboriginal offender before the court (*Ipeelee,* at paragraphs 84 and 85).

[75] Accordingly, in my view there must be some information put before a sentencing court to provide a context for considering how the Aboriginal offender's circumstances relate to the offence or offences in play and the sentence imposed (*Gladue,* at paragraph 69). If there is not, sentencing judges are unable "to pay particular attention to the circumstances of Aboriginal offenders" which "are unique and different from those of Non-Aboriginal offenders" (*Ipeelee,* at paragraph 59) to determine a fit and proper sentence (*Ipeelee,* at paragraphs 72 and 75).

[76] In this case there is simply no information as to how Mr. Bennett's aboriginal status brought him before the courts and how this Court could meaningfully address his aboriginal circumstances (*Ipeelee,* at paragraph 59). To draw meaning from the Stonebridge report so as to affect Mr. Bennett's sentencing in the way envisioned and intended by *Gladue* and *Ipeelee*, is in my view, to draw meaning from an inadequate source. Accordingly, I am at a loss to see how Mr. Bennett's aboriginal status would have impacted his sentence in the way intended by section 718.2(e).

[77] The absence of information respecting Mr. Bennett's aboriginal circumstances could be explained by the fact that there may not be aboriginal circumstances in his case which the *Gladue* factors could meaningfully address under section 718.2(e). Many people of aboriginal

heritage may legitimately claim Qalipu or other aboriginal status, yet their aboriginal heritage or status may have played no role in bringing them before the courts and would not provide a basis for a sanction or sentencing procedure that would address their particular aboriginal circumstances. Accordingly, in my view something more than self-identification as aboriginal, like Mr. Bennett's bald statement that he was native and a member of the local Qalipu band, is required for the purposes of applying the *Gladue* and *Ipeelee* principles under section 718.2(e) of the *Code*. Reducing an otherwise fit sentence on the basis of such limited information alone, would, in my view, extend the *Gladue* and *Ipeelee* principles far beyond what Parliament and the jurisprudence intends, so far beyond, I suggest, as to undermine them. Reducing a sentence in such circumstances does not meaningfully address the *Gladue* and *Ipeelee* principles.

[78] This issue was considered by the Alberta Court of Appeal in *R. v. Laboucane*, 2016 ABCA 176, 38 Alta.L.R. (6th) 275, leave to appeal to SCC refused, 37177 (December 22, 2016). In *Laboucane*, the sentencing judge decided that Mr. Laboucane did not show that his aboriginal status bore on his culpability for his offences nor did he indicate sentencing objectives that could be actualized to give effect to section 718.2(e). The appellate court agreed with the sentencing judge that Mr. Laboucane did not establish that *Gladue* factors ought to influence the sentence to be imposed on him.

[79] The Alberta Court of Appeal in *Laboucane* remarked on the Ontario Court of Appeal decision in *R. v. Kreko*, 2016 ONCA 367, 131 O.R. (3d) 685, wherein a similar issue was argued. In *Kreko*, the Ontario appellate court found a connection between Mr. Kreko's aboriginal heritage and his offences so as to reference the application of section 718.2(e) on sentence. The connection found was that Mr. Kreko's adoption into a non-aboriginal family was "dislocation and loss of identity" which was traced to "disadvantage and impoverishment" (*Kreko*, at paragraph 24). Accordingly, *Kreko* was held to be distinguishable from *Laboucane* and is similarly distinguishable from Mr. Bennett's case. However, the *Laboucane* court had more to say about the basis for the aboriginal connection found in *Kreko*, which was that such a connection "runs perilously close to creating an obligation of sentencing courts to somehow deploy section 718.2(e) in mitigation of specific cases without the circumstances in those cases making the basis of such deployment, an actual "factor" relevant to sentencing", and that the *Kreko* approach to aboriginal factors "puts at risk the overall

purpose" of section 718.2(e) of the *Code* (*Laboucane*, at paragraphs 67 and 68). I share this view.

[80] In this case, I see no basis for correcting the sentencing Judge's error by imposing a different sentence — one that does not connect Mr. Bennett's aboriginal circumstances to his crimes or address his unique aboriginal circumstances.

The Judge's Sentence

[81] The Judge sentenced Mr. Bennett to a total of 39 months and 18 days (although it ought to have been 39 months and 15 days as referenced in paragraphs 18-19 above) minus credit for pre-sentence custody. She treated the three trafficking charges from October 2010 as a single criminal adventure for a total sentence of 12 months, and sentenced Mr. Bennett to two years consecutive for the May 2011 trafficking offence, recognizing that the significant quantities of Schedule I drugs and committing the offence while on bail were aggravating factors. The additional 3 months and 45 days for breaches of four different court orders was made, properly, consecutive to the trafficking charges (*Murphy*, at paragraph 27).

[82] The facts of Mr. Bennett's trafficking offences bear repeating so as to illustrate their gravity. On October 28, 2010, he was found in possession of two pounds of marihuana, a modest amount of cocaine, 1,300 ecstasy pills, trafficking paraphernalia, and $9,627.75 in cash. He was charged and released on bail.

[83] On May 6, 2011, while on bail from the October charges, Mr. Bennett was found in possession of a significant amount of cocaine, some crack cocaine, weigh scales, and $8,801.00 in cash. The Schedule I drugs were found individually packaged in a suitcase bearing flight tags from a flight which Mr. Bennett had very recently taken from British Columbia to Deer Lake, Newfoundland and Labrador.

[84] While I recognize that seriousness is a relative concept when considering the seriousness of an offence, I nevertheless regard possession for the purpose of trafficking in large quantities of cocaine, crack cocaine, and ecstasy, which Mr. Bennett was doing in a sparsely populated rural community, as serious crime. I am of the view that this type of serious crime "has devastating individual and social consequences" (*R. v. Silveira*, [1995] 2 S.C.R. 297, at para. 142). Other Supreme Court of Canada

jurisprudence has also recognized the negative impact of such crime on people and communities (see *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, at para. 20 and *R. v. Oakes*, [1986] 1 S.C.R. 103, at para. 76).

[85] This Court recently sentenced a young first offender for a single charge of trafficking in Schedule I pills to support her own addiction to oxycodone and who took very positive steps to rehabilitate herself directly upon being charged, to a seven month term of imprisonment. In so doing, the Court stated:

> … This serves as notice to those who might consider undertaking similar drug trafficking activities, particularly involving Schedule I drugs, that a term of imprisonment is to be expected … .
>
> (*Mitchell*, at paragraph 33.)

[86] The facts of Ms. Mitchell's offence pale dramatically in comparison to either of Mr. Bennett's offences. Mr. Bennett's offences, including the number and nature of the charges, the amounts of different drugs involved, and the fact that the May 2011 offence was committed while Mr. Bennett was on bail for the October offences, are by any measure much more serious than those in Ms. Mitchell's case. Moreover, the evidence respecting rehabilitation in the two cases is also very different. This Court has no evidence that Mr. Bennett has tried to rehabilitate himself save for his statement to the sentencing court that he had quit doing drugs while in British Columbia, whereas Ms. Mitchell made sincere and independently verified efforts to kick her habit, disengage from criminal conduct, and rehabilitate herself. Mr. Bennett's remorse, expressed in his statement to the sentencing court that he had made "a" mistake, hardly compares to Ms. Mitchell's expressed remorse. Although it is difficult to compare sentences after they have been adjusted for totality, Mr. Bennett's effective sentencing after the totality adjustment is just slightly more than Ms. Mitchell's sentence. This result causes me concern. In my view, Mr. Bennett's sentence runs afoul of the principles of sentencing in that it is not sufficiently denunciatory of his conduct and does not serve to effectively deter others who might be tempted to engage in trafficking drugs. Denunciation and deterrence are especially important principles of sentencing in drug trafficking cases (*Mitchell*, at paragraph 31). The majority's total sentence, pre-totality, of 35 months and 15 days, is not disproportionate to the number and gravity of Mr. Bennett's offences and his

level of responsibility. Indeed, this sentence is within the range for either of Mr. Bennett's two drug-trafficking offences alone.

[87] In my view the sentencing judge was very fair to Mr. Bennett. She considered the facts and circumstances of his offences and the submissions to the court, including his own, and took time to consider them. She sentenced Mr. Bennett in accordance with the principles of sentencing, the case law, and applied the totality principle so as to reduce a sentence of 52 months and 18 days to 39 months and 18 days. The Judge then subtracted Mr. Bennett's remand credit, and arrived at a remaining sentence of two years, six months, and 25 days, which she said meant that a conditional sentence was not an option for Mr. Bennett. I would point out that the Judge's subtraction of Mr. Bennett's remand time before considering whether a conditional sentence was available was in error. In *R. v. Fice*, 2005 SCC 32, [2005] 1 S.C.R. 742, at para. 21 the Supreme Court made clear that time served pre-sentencing is part of the total sentence, meaning that the sentence to be considered for purposes of determining the availability of a conditional sentence does not include a reduction of time served on remand.

[88] In the result, I conclude that the Judge's sentence was appropriate and ought to be accorded deference. Moreover, it has not been shown to be unfit. I would not disturb it.

Is a Conditional Sentence Appropriate?

[89] Regardless of my opinion that the Judge's sentence should not be disturbed, I would be remiss not to comment on the majority's imposition of a conditional sentence on Mr. Bennett. In my view, the law does not support a conditional sentence on the facts of his case.

[90] I preface my concerns by referring to paragraph 36 of *Proulx*, where Chief Justice Lamer quoted the Minister of Justice of the day when the *Code* was amended to provide for conditional sentences:

> … [t]his sanction is obviously aimed at offenders who would otherwise be in jail but who could be in the community under tight controls.

[91] Section 742.1 of the *Code* which was in effect when Mr. Bennett committed his offences, set out the conditions to be met before a conditional sentence could be imposed. It provided that once it was determined that the offence involved was one which was not rendered ineligible, a court could

order that an offender could serve his or her sentence in the community if (1) the court imposed a sentence of imprisonment of less than two years, (2) the safety of the community would not be endangered, and (3) a conditional sentence would be consistent with the fundamental purposes and principles of sentencing. The majority decision enables the first criterion to be met. Regardless, I am of the view that the latter two criteria have not been met.

[92] The trafficking offence of May 6, 2011 involved a significant quantity of Schedule I drugs, packaged for sale, and was committed just six months after Mr. Bennett had been charged with trafficking in large quantities of marihuana and ecstasy, and while he was on judicial interim release. A conditional sentence on these facts is, in my view, disproportionate to their gravity, and again, insufficiently denunciatory of Mr. Bennett's repeated criminal conduct. Such a sentence is unlikely to deter Mr. Bennett or send a deterring message to others. Neither is it supported by the jurisprudence as summarized in *Mitchell*. I note that while a conditional sentence is technically available to Mr. Bennett because he committed his offences before the law changed to preclude conditional sentences in drug-trafficking cases, the change signals Parliament's view that conditional sentences are considered to be inappropriate in such cases. In this regard, I also refer to two decisions of the New Brunswick Court of Appeal – *R. v. Frost*, 2012 NBCA 94, 396 N.B.R. (2d) 305, and *R. v. Martin*, 2012 NBCA 95, 396 N.B.R. (2d) 343, which were decided on the basis of the law prior to the change. In *Frost*, a first offender had been given a conditional sentence for trafficking in marihuana and psilocybir by the sentencing judge. The Crown appealed. The appellate court allowed the appeal and substituted an incarcerating sentence, saying that an emphasis on general deterrence and lengthy jail sentences are necessary in drug-trafficking cases in order to deter persons from entering "this highly lucrative and hard-to-detect activity" (paragraph 12). The court said that conditional sentences may be appropriate in exceptional circumstances, but found that there were no exceptional circumstances in Mr. Frost's case, and went on to say that "imposing a conditional sentence to be served in the same university community where Mr. Frost had trafficked drugs for two years, and allowing him to continue to attend classes, was unreasonable" (paragraph 19). In *Martin* the Court reiterated these principles. While there have been some drug-trafficking cases in this jurisdiction where conditional sentences have been found to be appropriate, I am not aware of any which involve facts as serious as those of Mr. Bennett's combined offences. I therefore conclude

that imposing a conditional sentence on Mr. Bennett would not be consistent with the fundamental purposes and principles of sentencing.

[93] Another reason why I cannot agree with imposing a conditional sentence on Mr. Bennett is because I am not satisfied that the community would be safe by permitting him to serve his sentence in the community. Safety of the community must be established to a court's satisfaction before a conditional sentence can be imposed (*Proulx*, at paragraphs 63 and 73).

[94] Mr. Bennett has a demonstrated record of not obeying court orders. He was convicted of violating his probation, and of thrice failing to comply with conditions of his recognizances. Three of these offences occurred in 2015. The record discloses that he was brought back from British Columbia under warrant to face the charges for which he was sentenced because he failed to show for trial on earlier dates.

[95] At paragraph 48, my colleague notes that the Court understands that Mr. Bennett was not charged with any *drug-related* offences between May 6, 2011 and when he was convicted in September 2015. Most of this period of time was when Mr. Bennett lived in British Columbia. However, his counsel did advise, on questioning from the bench, that Mr. Bennett has been charged with a drug-trafficking offence since he was released on bail by this Court in August 2016, and Crown counsel verified that this was so. As well, the record shows that there were other charges relating to breaches of court orders which were outstanding but not dealt with at the time of Mr. Bennett's sentencing. We were provided with no information on the status of these matters. While I am dubious about the Court's reliance on charges as opposed to convictions, even though an argument might be made that they could come before the court by way of a pre-sentence or *Gladue* report and could be relevant to consideration of a conditional sentence, I would say if the majority of this Court considers the absence of charges to be relevant to whether a conditional sentence can be imposed, then surely the occurrence of charges is relevant.

[96] As well, Mr. Bennett has little to no community support. At paragraph 36 of *Proulx*, Chief Justice Lamer stated that "conditional sentences should generally include punitive conditions that are restrictive of the offender's liberty" and "[c]onditions such as house arrest or strict curfews should be the norm not the exception." Given that Mr. Bennett's case is not exceptional, a conditional sentence is inappropriate for him

because the Court has not been advised that Mr. Bennett has a "house" in which to serve a sentence of house arrest.

[97] Neither Mr. Bennett nor his appellate counsel told this Court that he had a place to live where his house arrest could be supervised, or that he had support from a probation officer, family, or otherwise, for living in the community. There is no evidence respecting available community supervision, which I read *Proulx* to require (paragraphs 72 and 73). Notably, the Stonebridge report does not address Mr. Bennett's living situation. As well, Mr. Bennett told the sentencing court that after he was charged in 2010 his family wanted nothing to do with him due to the "newspaper reports". We have no information that his family situation has changed.

[98] Mr. Bennett's appellate counsel advised the Court that Mr. Bennett was living with his grandmother at the time of the appeal. This Court has no information from Mr. Bennett's grandmother respecting her ability or willingness to have Mr. Bennett live with her. In this regard, the record respecting the facts of his conviction for violating his curfew while living in a tent in his grandmother's backyard shows that this living arrangement proved challenging in the past.

[99] The only discernable community support Mr. Bennett has of which this Court is aware is the offer, made in August 2016, by Mr. Darcy Barry to meet with Mr. Bennett regularly "to aid him in his sobriety for drug addiction" and "enhance his awareness of his Mi'kmaq culture and teachings". The Court has no information on the current status of this offer, or if Mr. Bennett has availed of it during the past year. In any event, I note that Mr. Barry was described in the Stonebridge report as a former counselor now working as a client service officer for Newfoundland Advanced Educational Skills and Training. I infer from this information that he is a paid employee and that his work would not encompass counseling Mr. Bennett during working hours. No formal meeting schedule was proposed. While I applaud Mr. Barry for agreeing to help Mr. Bennett, this informal (and now dated) arrangement does not provide the kind of community support or supervision required for the imposition of a conditional sentence (*Proulx,* at paragraphs 72-73). Chief Justice Lamer underscored the requirement for an appropriate level of community supervision at paragraph 73, where he quoted with approval the words of Fraser C.J. in ***R. v. Brady*** (1998), 121 C.C.C. (3d) 504 (Alta. C.A.), at para. 135:

> A conditional sentence drafted in the abstract without knowledge of what actual supervision and institutions and programs are available and suitable for this offender is often worse than tokenism: it is a sham.

The Chief Justice's penultimate sentence on this issue is especially apt:

> … the judge must know or be made aware of the supervision available in the community by the supervision officer or by counsel. If the level of supervision available in the community is not sufficient to ensure safety of the community, the judge should impose a sentence of incarceration.

[100] Information respecting community supervision is conspicuously absent in this case.

[101] Accordingly, given the absence of current, reliable information respecting Mr. Bennett's suitability to serve his sentence in the community, I am of the view that a conditional sentence ought not to be imposed.

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L. R. Hoegg J.A.