



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *R. v. Summers*, 2023 NLCA 8

Date: March 28, 2023

Docket Number: 201901H0083

BETWEEN:

BLAIR SUMMERS

APPLICANT/APPELLANT

AND:

HIS MAJESTY THE KING

as represented by the Attorney

General of Newfoundland and Labrador

FIRST RESPONDENT

AND:

HIS MAJESTY THE KING

as represented by the Attorney

General of Canada

SECOND RESPONDENT

Coram: Welsh, Knickle and Boone JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador,
St. John's

Appeal Heard: October 17, 2022

Judgment Rendered: March 28, 2023

Reasons for Judgment by: Welsh J.A.

Concurred in by: Boone J.A.

Dissenting Reasons by: Knickle J.A.

Counsel for the Appellant: Stephen P. Orr

Counsel for the First Respondent: Dana E. Sullivan

Counsel for the Second Respondent: Trevor N. Bridger

Authorities Cited:

CASES CITED:

Welsh J.A. (Boone J.A. concurring):

R. v. Summers, 2018 NLSC 84; *R. v. Murphy*, 2011 NLCA 16, 304 Nfld. & P.E.I.R. 266; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089; *R. v. Parranto*, 2021 SCC 46; *R. v. Hutchings*, 2012 NLCA 2, 316 Nfld. & P.E.I.R. 211; *R. v. Roberts*, 2019 NLCA 43, 4 C.A.N.L.R. 614; *R. v. Bissonnette*, 2022 SCC 23; *R. v. Johnson*, 2012 ONCA 339, 285 C.C.C. (3d) 120; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.

Knickle J.A. (dissenting):

R. v. Summers, 2018 NLSC 84; *R. v. Parranto*, 2021 SCC 46; *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *Paul v. The Queen*, [1982] 1 S.C.R. 621; *R. v. Crocker* (1991), 93 Nfld. & P.E.I.R. 222 (Nfld. C.A.); *R. v. Pittman*, 2019 NLCA 28, 4 C.A.N.L.R. 392; *R. v. O'Keefe*, 2018 NLCA 11, 2 C.A.N.L.R. 557; *R. v. Newhook (A.C.)*, 2008 NLCA 28, 276 Nfld. & P.E.I.R. 190; *R. v. B.H.*, 2022 NLCA 54; *R. v. Roberts*, 2019 NLCA 43, 4 C.A.N.L.R. 614; *R. v. Hutchings*, 2012 NLCA 2, 316 Nfld. & P.E.I.R. 211; *R. v. Barret*, 2012 NLCA 46, 324 Nfld. & P.E.I.R. 246; *R. v. Johnson*, 2012 ONCA 339, 285 C.C.C. (3d) 120; *R. v. Parry*, 2012 ONCA 171; *R. v. Park*, 2016 MBCA 107; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130; *R. v. Loor*, 2017 ONCA 696; *R. v. Suter*, 2018 SCC 34, [2018] 2 S.C.R. 496; *R. v. Gatfield*, 2015 ONCJ 526.

STATUTES CONSIDERED:

Welsh J.A. (Boone J.A. concurring):

Controlled Drugs and Substances Act, SC 1996, c. 19, section 5(2); *Criminal Code*, sections 348(1)(b), 675(1)(b), 718.1, 718.2, 718.3(4); *Canadian Charter of Rights and Freedoms*, section 9.

Knickle J.A. (dissenting):

Criminal Code, sections 348(1)(b)(e), 719, 718.2(c), 718.3(4), 718.1; *Controlled Drugs and Substances Act*, SC 1996, c. 19, section 5(2).

Welsh J.A.:

[1] Blair Summers pleaded guilty and was convicted of three counts of possession of drugs for the purpose of trafficking, contrary to section 5(2) of the *Controlled Drugs and Substances Act*, and one count of break and entry into a pharmacy, contrary to section 348(1)(b) of the *Criminal Code*. He was sentenced to five years imprisonment on the drug charges, and three years concurrent for the break and entry. The sentence of five years was ordered to be served consecutively to the sentence Mr. Summers was then serving for other offences.

[2] Mr. Summers seeks leave to appeal, and if granted, appeals against the sentence, submitting that the judge erred by refusing to order the sentence to be served concurrently with the sentence he was serving.

INTRODUCTION

[3] As discussed below, the essence of this judgment is that the trial judge erred in his application of the principle of proportionality, and in particular, in his failure to adequately explain how he took into account not only how much time remained to be served by Mr. Summers for previous convictions, but also, how, if at all, other relevant factors were assessed and taken into consideration. In the particular circumstances of this case, the net effect of the trial judge's decision was that Mr. Summers would serve nine years and eight months for the offences committed in February, March and June, which the trial judge recognized as the same criminal activity carried out within the same timeframe. The trial judge's error by failing to conduct a complete analysis had an impact on the sentence he imposed for the June offences. The error may have been avoided had counsel and the trial judge applied the *Hutchings* approach to sentencing for multiple counts, which begins with a determination of a proper sentence for each offence.

[4] Taking into account all the relevant circumstances, including, among other things, Mr. Summers' criminal history and the nature and quantity of drugs stolen, a proper sentence for the June offence of possession of drugs for the purpose of trafficking would be seven years, not the five years imposed by the trial judge. However, as discussed below, applying the fundamental principle of proportionality, that sentence is properly ordered to be served concurrently with the sentences for the other June offences and the sentence for the February and March offences.

BACKGROUND

[5] In April 2015, the police initiated a special project to deal with several pharmacy break-ins which appeared to be related. In the early morning hours of June 23, 2015, they responded to an alarm indicating a break-in at Tricon Pharmacy in Old Perlican. Mr. Summers was apprehended after a vehicle chase involving several officers. He was acquitted at trial of the charges of break and enter and possession of drugs for the purpose of trafficking when the judge found that Mr. Summers' right not to be arbitrarily detained had been infringed (section 9 of the *Canadian Charter of Rights and Freedoms*). On appeal, on March 4, 2019, that decision was overturned and a new trial ordered.

[6] Ultimately, based on an agreed statement of facts, Mr. Summers pleaded guilty and was convicted of breaking into Tricon Pharmacy and stealing a quantity of drugs, including morphine, codeine, ten fentanyl patches, oxycodone and hydromorphone with an estimated street value of approximately \$105,000. Although Mr. Summers was charged with these offences in June 2015, after the delay necessitated by the Crown's appeal of his acquittal, he was not sentenced following his subsequent guilty pleas until August 30, 2019.

[7] The agreed statement of facts specifies that, on the wall in Mr. Summers' residence, there was a map of the Island portion of the Province with the locations of pharmacies highlighted. The trial judge concluded in his oral decision, at page 86 of the transcript, that Mr. Summers played "a significant leadership role" in "a very well organized criminal operation" involving the break and entry into pharmacies and theft of drugs.

[8] In assessing Mr. Summers' submissions, consideration of previous convictions for breaking into pharmacies for the purpose of stealing drugs in February and March 2015 is pertinent because, he submits, he was serving a sentence for those charges when he was sentenced for the June 2015 offences at issue in this appeal.

[9] It was only after the charges had been laid for the offences arising from the June 2015 Tricon Pharmacy break-in, that Mr. Summers was charged, in December 2015, with offences that had taken place in February and March 2015, in particular (2018 NLSC 84):

[1] ...

(i) Two counts of break and enter into pharmacies and committing therein an indictable offence [counts 2 and 4 – February 10 and February 16, 2015];

(ii) One count of break and enter into a pharmacy with intent to commit therein an indictable offence [count 7 – March 11, 2015]; and

(iii) One count of attempting to break and enter into a pharmacy with intent to commit an indictable offence therein [count 3 – February 16, 2015].

[10] Mr. Summers pleaded guilty and was sentenced for those February and March offences on April 18, 2018. The judge concluded that, but for applying considerations of totality, she would have imposed a total of eleven years imprisonment (three years each for three counts of break and enter and two years for one attempted break and enter):

[91] In this case, absent consideration of the totality principle, I would have sentenced the offender to three years on each count of break and enter either with the intent of committing an indictable offence or actually committing an indictable offence [for a total of nine years]. In each instance, the moral culpability and intention of the offender is clear. The offender actually broke into and entered the pharmacies and either did or attempted to leave with a quantity of prescription drugs to be sold in the community. I would have imposed a sentence of two years for count 3, the charge of attempted break and enter with intent to commit an indictable offence. While there is a similar degree of moral culpability, the charge is that of an attempt to break and enter and the offender did not cause as much property damage to the premises. In any event, as counts 3 and 4 are being served concurrent to each other on the basis that they constitute a single criminal adventure, but consecutive to the other two counts, a lower sentence on count 3 would not change the overall result. I would also have ordered that the other two counts 2 and 7 be served consecutive to the other counts. This would have resulted in a combined sentence of nine years. However, I find the combined sentence is unduly long and harsh.

(Emphasis added.)

[11] Having determined that the combined sentence for the February and March 2015 offences would be unduly long and harsh, the judge stated (2018 NLSC 84):

[93] In conclusion, I find Mr. Summers guilty of counts 2, 3, 4 and 7 of the indictment filed on February 10, 2017. In respect of these convictions, I impose a combined sentence of four years and eight months of incarceration.

[94] In accordance with section 719(3.1) of the *Criminal Code*, I grant Mr. Summers credit of one and one-half days for each day spent in pre-sentence custody. The Crown and counsel for the Accused both advised that the amount of time spent in custody for which credit should be given at this rate is the period from June 20, 2017 to the date of this sentencing hearing, i.e. 302 days. As a result, Mr. Summers will receive credit for that pre-sentence custody in the amount of 453 days. The sentence imposed is therefore four years and eight months less pre-sentence credit of 453 days.

[12] It is clear that the sentence imposed for the February and March convictions was four years and eight months. The reference to pre-sentence credit of 453 days does not reduce the sentence to three years and five months as Knickle J.A. concludes in her dissenting reasons. The pre-sentence custody is a component of the sentence of four years and eight months which was already served, and for which credit was properly given. The effect of deducting pre-sentence custody was not to alter the sentence but to specify how much of that sentence was left to be served.

[13] In addition to the offences committed in February, March and June of 2015, in June 2014, Mr. Summers was charged with break and entry into a pharmacy and stealing a quantity of narcotics several years earlier, on February 6, 2011. Ultimately he pleaded guilty, was convicted and was sentenced on May 13, 2016 to a term of imprisonment of three years. Given credit of 489 days for pre-sentence custody, he completed serving that sentence on June 20, 2017; that is, before he was sentenced for the February and March 2015 offences.

[14] I note here that, in his factum, counsel for the federal Crown adopted the submissions of counsel for the provincial Crown. Accordingly, unless it is necessary to distinguish their submissions, reference to the Crown will be a reference to both.

ISSUES

[15] Leave of the Court is required for an appeal against sentence only. The issues on appeal are: (1) what effect on sentence, if any, results from the fact that Mr. Summers was, at the time, serving a term of imprisonment for other offences; (2) what effect, if any, flows from the fact that the February, March and June offences are similar in type and method and committed within a short period of time; (3) did the trial judge err by failing to specify how much time he attributed to the sentence Mr. Summers was serving when he refused to impose a concurrent sentence for the June 2015 offences; and (4) was the consecutive sentence of five years demonstrably unfit?

ANALYSIS

Leave to Appeal

[16] Leave to appeal is required in an appeal against 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. Murphy*, 2011 NLCA 16, 304 Nfld. & P.E.I.R. 266, at paragraph 8).

[17] The Crown conceded and I am satisfied that the issues raised regarding the application of the principles of totality and proportionality in sentencing are sufficient to meet the test of an arguable basis for the appeal.

[18] Accordingly, I would grant leave to appeal.

General Sentencing Principles

[19] Section 718.1 of the *Criminal Code* states the fundamental principle of proportionality:

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[20] Additional principles to be taken into account in sentencing, set out in section 718.2 of the *Criminal Code*, include:

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

[21] Pursuant to section 718.3(4) of the *Criminal Code*, the court is required to consider directing that sentences be served consecutively in particular circumstances:

The court that sentences an accused shall consider directing

(a) that the term of imprisonment that it imposes be served consecutively to a sentence of imprisonment to which the accused is subject at the time of sentencing; ...

[22] The objective in sentencing is to impose “a just and appropriate sentence that is consistent with the objectives and principles set out in the *Criminal Code*” (*R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paragraph 11). Further, the “determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation” (*Lacasse*, at paragraph 58).

[23] On appeal, the court is limited in the extent to which it may interfere with the sentence imposed by the trial judge. The failure to consider a relevant factor is an error that may “justify the intervention of an appellate court and permit that court to inquire into the fitness of the sentence and replace it with the sentence it

considers appropriate” (*Lacasse*, at paragraph 43). However, intervention is permitted “only where it appears from the trial judge’s decision that such an error had an impact on the sentence” (*Lacasse*, at paragraph 44).

[24] The question of a demonstrably unfit sentence is also addressed in *Lacasse*. Wagner J., for the majority, explained:

[52] It is possible for a sentence to be demonstrably unfit even if the judge has made no error in imposing it. As Laskin J.A. mentioned, writing for the Ontario Court of Appeal, the courts have used a variety of expressions to describe a sentence that is “demonstrably unfit”: “clearly unreasonable”, “clearly or manifestly excessive”, “clearly excessive or inadequate”, or representing a “substantial and marked departure” All these expressions reflect the very high threshold that applies to appellate courts when determining whether they should intervene after reviewing the fitness of a sentence.

See also: *R. v. Parranto*, 2021 SCC 46, at paragraph 118.

Principles of Totality

[25] Mr. Summers was sentenced for multiple offences with the result that principles of totality were engaged. In *R. v. Hutchings*, 2012 NLCA 2, 316 Nfld. & P.E.I.R. 211, Green C.J.N.L., for the Court, summarized the approach to sentencing for multiple offences:

[84] ... I would state the following as guidelines for the analytical approach to be taken henceforth:

1. When sentencing for multiple offences, the sentencing judge should commence by identifying a proper sentence for each offence, applying proper sentencing principles.
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.
3. Whenever, following the determinations in steps 1 and 2, the imposition of two or more sentences, to be served consecutively, is indicated, the application of the totality principle is potentially engaged. The sentencing judge must therefore turn his or her mind to its application.
4. The approach is to take one last look at the combined sentence to determine whether it is unduly long or harsh, in the sense that it is disproportionate to the gravity of the offences and degree of responsibility of the offender.

...

[26] The Court, in step 5, enumerated factors that should be taken into account and balanced “to the extent of their relevance in the particular circumstances of the case”. These factors include: the range of sentence for the most serious offence; the number and gravity of the offences; the offender’s criminal record; the offender’s prospects for rehabilitation; and any other factors relevant to ensuring that the combined sentence is proportionate to the gravity of the offences and the offender’s degree of responsibility. Under step 6, if the judge finds the combined sentence to be “unduly long or harsh and not proportionate to the gravity of the offences and the offender’s degree of responsibility” the sentence should be reduced to achieve a proper total.

[27] The analytical approach in *Hutchings* provides a template that is intended to be a helpful framework to assist the judge in achieving an appropriate sentence together with clear reasons for the determination. Under the first step, identification of the appropriate sentence for each offence is necessary because, in addition to providing a baseline for considering an appropriate total sentence, the individual sentences may have precedential value. The remaining steps provide guidance in determining whether sentences for each offence should be served concurrently or consecutively, or otherwise adjusted.

Applying the *Hutchings* Principles

Single Criminal Venture

[28] In *Hutchings*, Green C.J.N.L., for the Court, discussed the characterization of multiple charges as a single criminal venture or enterprise:

[22] In some cases, separate offences of a similar type, though committed at separate times can be considered to constitute a single event for the purpose of this principle. In *Crocker* [(1991), 93 Nfld. & P.E.I.R. 222 (Nfld. C.A.)], Goodridge C.J.N.L. referred, for example, to a “single rampage”. In other cases, separate offences amounting to a repetition of the same behaviour towards the same victim have been described as a “single transaction” and have likewise been regarded as sufficiently interrelated to attract the application of the principle. See *R. v. Arbuthnot*, 2009 MBCA 106 at para. 22. In still other cases, separate offences committed on what has been described as a “crime spree” have likewise been regarded as sufficiently interrelated to attract the application of the principle. ...

[29] A summary of case law subsequent to *Hutchings* is found in *R. v. Roberts*, 2019 NLCA 43, 4 C.A.N.L.R. 614, at paragraphs 43 to 49. Factors relevant to characterizing multiple offences as a single criminal venture include: a

“temporal connection [among offences], similarity of victim and connections between offences (*Bourgeois* [2018 NLCA 13, 2 C.A.N.L.R. 581], at paragraph 36; *R. v. Flynn*, 2018 NLCA 61, at paragraph 22) or the nature of the offences (*O’Quinn* [2017 NLCA 10], at paragraph 18) might be indicative in a given case of a single criminal venture” (*Roberts*, at paragraph 46). Examples referenced in *Roberts* provide additional assistance.

[30] The fact that multiple offences are characterized as a single criminal venture does not necessarily result in concurrent sentences. The judge retains discretion to order consecutive sentences where the circumstances warrant.

[31] In this case, in assessing the June 2015 offences, the judge characterized the three counts of possession of drugs for the purpose of trafficking as a single criminal venture. The three counts were necessary because the types of drugs found in Mr. Summers’ possession were prohibited under three different schedules to the *Controlled Drugs and Substances Act*: Schedules I, III and IV. On the basis of the seriousness of each count, the judge imposed sentences of five, two and one year imprisonment. The two and one year terms were ordered to be served concurrently to the five year term because the charges arose “from the same criminal adventure” (decision of the trial judge, at page 89). That decision was not challenged on the appeal, and is consistent with the above principles.

[32] Regarding the break and entry into the pharmacy, the trial judge accepted the position of counsel for the provincial Crown that the sentence should be concurrent to the sentence for the drug offences. While the trial judge did not specify whether he made the sentence for the break and enter offence concurrent under step two or three of the *Hutchings* analysis, there is no basis on which to conclude that he erred in accepting the Crown’s position and imposing a concurrent sentence.

Currently Serving a Sentence

[33] When Mr. Summers was sentenced for the June 2015 offences, he was then serving a sentence of four years and eight months for the February and March 2015 offences. In *Roberts*, this Court concluded that the unexpired portion of a sentence currently being served may be added to the new sentence to determine whether the combined period of incarceration will be unduly long or harsh.

[34] The trial judge stated, at page 91, that, in determining an appropriate sentence, he was required to consider the fact of Mr. Summers' incarceration:

... In carrying out this exercise I am reminded that what I must do is to consider the unexpired portion of all previous sentences, since they represent the relevant portion of the existing incarceration that would impact on rehabilitation, together with all of the current sentences I am to impose that would otherwise be served consecutively. ...

[35] However, while the judge referred to the unexpired portion of the sentence Mr. Summers was serving at the time, he did not specify the length of time he would be taking into account in assessing whether a five-year sentence served consecutively would be unduly long or harsh. The judge stated, at page 93:

... I acknowledge here that Mr. Summers has been in custody or on parole since June 23rd, 2015. As noted by Justice of Appeal Goodridge at paragraph 17 of his decision, he was released under the supervision of a parole officer on December 9th, 2018 but returned to custody in March 2019 for a parole violation and released in April only to have been denied judicial interim release on these charges in the Court of Appeal. ...

[36] Crown counsel submit that the information necessary to calculate the time considered by the trial judge may be ascertained from the decisions. In summary (approximations by translating days into years and months):

- (1) Sentence imposed on August 30, 2019 for the June 2015 offences – five years.
- (2) For the February and March 2015 offences:
 - April 18, 2018 – sentence of four years, eight months;
 - Deduction for time served before sentencing – one year, three months;
 - Sentence to be served from April 2018 (subtracting time already served) – four years, eight months minus one year, three months leaves three years, five months to be served from April 2018;
 - April 2018 to August 30, 2019 – one year, four months;
 - Unexpired sentence as of August 30, 2019 – three years, five months minus one year four months leaves two years, one month.

(3) Total combined sentence for the June 2015 offences and unexpired sentence for the February and March 2015 offences (five years plus two years, one month) – seven years, one month.

[37] Counsel for the federal Crown submits that the time Mr. Summers served prior to sentencing for the June 2015 offences should be deducted from the five-year sentence. In the result, he submits that the combined sentence would be approximately six years and six months. I do not agree.

[38] For purposes of determining an appropriate sentence where there are multiple convictions and the *Hutchings* principles are applied, the length of sentence to be considered in the analysis is the sentence imposed without regard to a deduction for time served on remand. This does not, of course, apply to calculation of the unexpired term of a sentence since time served on remand would be part of the expired portion of the sentence. I would add, further, that it is not the role of the courts to calculate the effect of legislation and regulations that determine where and how a sentence will be served. For example, the opportunity for parole may affect where a portion of a sentence is served. However, as discussed in *R. v. Bissonnette*, 2022 SCC 23:

[37] The parole system involves a process that is independent of and distinct from the sentencing process (*Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, at para. 1). ...

[39] In the result, for purposes of the *Hutchings* analysis, I am satisfied that the combined time for purposes of applying the principles of totality to the June offences, considering the unexpired portion of the earlier sentence, is approximately seven years and one month (five years plus two years, one month).

[40] However, it cannot be ascertained whether that is the calculation used by the trial judge since he did not specify the length of combined sentence he used in applying the totality principles. Further, in this Court counsel for the provincial and federal Crowns did not agree on that point. The failure by the judge to specify the length of sentence he was considering amounted to error because, in the absence of that information and reference to other relevant factors, this Court does not have a sufficient basis on which to determine the appropriateness of the judge's decision to order the five year sentence to be served consecutively to the sentence Mr. Summers was already serving.

[41] The question, then, is whether the error was sufficient to have an impact on the sentence.

Unduly Long or Harsh Sentence

[42] In assessing whether, in the circumstances, a five-year sentence, consecutive to the sentence Mr. Summers was already serving, would be unduly long or harsh, I reiterate two principles set out above: first, the objective in sentencing is to impose a just and appropriate sentence that is consistent with the objectives and principles set out in the *Criminal Code*; and second, section 718.3(4) of the *Code* requires the court to consider directing that the five-year sentence be served consecutively to the sentence already being served.

Fundamental to the application of those principles is the premise that a sentence must be just and appropriate, and must be seen to be fair and rational, consistent with the purpose of maintaining confidence in the integrity of the sentencing process (*R. v. Bissonnette*, at paragraph 50; *R. v. Johnson*, 2012 ONCA 339, 285 C.C.C. (3d) 120, at paragraphs 20 to 23; *Reference Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, concurring reasons of Wilson J., at page 533).

[43] The concerns discussed in *Roberts* that a sentence is intended to make the offender accountable and that he should not be given a “free ride” by a reduced sentence must be considered in conjunction with the above principles. For this purpose, it is relevant that, in *Roberts*, the focus was on the *Hutchings* totality analysis, and in particular, the rehabilitation prospects of the offender:

[63] That said, however, it should be noted that there are differences in the way that a previous unexpired sentence, as a factor, can and should be dealt with in a *Hutchings* analysis.

...

[70] Fourthly, when considering the effect of a prior unexpired sentence in the totality analysis, “it is only the fact that [the offender] is serving an incarcerating sentence and its duration that can be considered” (*Barrett* [2012 NLCA 46], at paragraph 54). Unlike in the case of current offences, the facts and background circumstances (even if they could be properly gleaned from the record) surrounding the commission of the previous offences that led to the prior sentence should not be considered. This follows from the fact that the current sentencing process, which engages totality, focuses on the impact that the length of the combined sentences (including the unexpired portion of the previous sentence), if served consecutively, would have on current rehabilitative prospects. That is the only relevance of the previous sentence.

[44] The approach set out in *Roberts* is limited in its purpose to assessing questions of totality as that concept is discussed in *Hutchings*, with particular

emphasis on the offender's rehabilitation prospects. That is only one aspect of the analysis.

[45] Indeed, the court's focus continues to be the determination of a just and appropriate sentence that is fair and rational, and consistent with the purpose of maintaining confidence in the integrity of the sentencing process. In applying that principle in this case, the question is whether the trial judge's error had an impact on the sentence when additional considerations are taken into account.

[46] In that assessment, the fundamental principle of proportionality plays a particular role. In the 2021 decision in *R. v. Parranto*, Rowe J., in concurring reasons, summarized the importance of proportionality in sentencing:

[111] As mandated by s. 718.1 of the *Criminal Code*, in all cases, "whatever weight a judge may wish to accord to the objectives listed above, the resulting sentence *must* respect the fundamental principle of proportionality" (*Nasogaluak* [2010 SCC 6, [2010] 1 S.C.R. 206], at para. 40 (emphasis in original)). Proportionality is the "*sine qua non* of a just sanction" (*R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 37). This principle provides that "sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender" (*Friesen* [2020 SCC 9, 1 S.C.R. 424], at para. 30). There are two converging perspectives on proportionality: first, it serves a restraining function as it requires that a sentence not exceed what is just and appropriate, and second, it seeks to ensure that the sentence "properly reflects and condemns [the role of offenders] in the offence and the harm they caused" (*Nasogaluak*, at para. 42). At the end of the day, a just sanction is one that reflects both of these "perspectives on proportionality and does not elevate one at the expense of the other" (*Ipeelee*, at para. 37).

Further, in the 2022 decision in *R. v. Bissonnette*, the Court reiterated:

[50] But sentencing must in all circumstances be guided by the cardinal principle of proportionality. The sentence must be severe enough to denounce the offence but must not exceed "what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence" (*R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 42; see also *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 37). Proportionality in sentencing is considered to be an essential factor in maintaining public confidence in the fairness and rationality of the criminal justice system. The application of this principle assures the public that the offender deserves the punishment received (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 533, per Wilson J., concurring).

[47] Application of these principles has special significance in the circumstances of this case.

The Proportionality Principle

[48] The objective in sentencing is reiterated in the decision of Brown and Martin JJ. in *Parranto*:

[10] The goal in every case is a fair, fit and principled sanction. Proportionality is the organizing principle in reaching this goal. Unlike other principles of sentencing set out in the *Criminal Code*, proportionality stands alone following the heading “Fundamental principle” (s. 718.1). Accordingly, “[a]ll sentencing starts with the principle that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender” (*R. v. Friesen*, 2020 SCC 9, at para. 30). ...

[49] In this case, the parties had diametrically opposing reasons for accepting a five year sentence for the June offences. From Mr. Summers’ perspective, a sentence concurrent to the sentence for the February and March offences would mean, essentially, that he would serve no additional time for the June offences. From the perspective of the Crown, if the June sentence was consecutive, Mr. Summers would serve a total of nine years and eight months for the February, March and June offences. In my view, neither of these results produces an appropriate and just sentence. In these unique circumstances, the trial judge erred by failing to consider all the factors relevant in assessing the effect of proportionality.

[50] One source of the error is a failure to identify a proper sentence for the most serious of the June offences, possession of drugs for the purpose of trafficking. The Crown emphasizes the seriousness of the theft of narcotics, including fentanyl, to be sold for profit. Mr. Summers responds that the stolen drugs included only ten fentanyl patches, and that patches, as opposed to powder, would be less dangerous.

[51] In *Parranto*, Brown and Martin JJ. (Wagner C.J.C. and Kasirer J. concurring) accepted a range of eight to fifteen years for trafficking in significant amounts of fentanyl and cocaine (987 fentanyl tablets, 1,834 or 2,000 pills) (*Parranto*, at paragraphs 64 and 68). A similar range for trafficking in large amounts of fentanyl was accepted by Moldaver J. (Côté J. concurring, Rowe J. concurring in the result), who discussed the grave danger associated with ingesting fentanyl and the risk of overdose “that can be difficult to guard against, as traffickers often surreptitiously mix small amounts of fentanyl with other substances” (*Parranto*, at paragraph 94). No reference is made to fentanyl that is delivered by means of patches rather than pills or powder, the latter two being easily mixed with other drugs, potentially increasing the risk for overdose. Karakatsanis J. (Abella J. concurring), applying the principles of proportionality

and demonstrably unfit sentence, would have restored the decision of the trial judge who applied a range of five to seven years in determining an appropriate sentence.

[52] In this case, Mr. Summers was breaking into pharmacies to steal whatever drugs were available. The Tricon pharmacy theft included ten fentanyl patches as well as morphine, codeine, oxycodone and hydromorphone with an estimated street value of approximately \$105,000. Taking into account the range of sentence of eight to fifteen years as discussed in *Parranto* together with Mr. Summers' past criminal conduct, the type and quantity of drugs found in his possession, the degree of planning and deliberation involved in commission of the offences, his leadership role, and the nature of the offence which amounted to a commercial enterprise, a fit and proper sentence would be seven years imprisonment. That sentence is marginally lower than the lower end of the range for trafficking in large amounts of fentanyl, but reflects the gravity of the offence together with Mr. Summers' moral blameworthiness.

[53] I accept the position of the provincial Crown that the three year sentence for break and entry into Tricon Pharmacy, imposed by the trial judge and not challenged on appeal, would properly be served concurrently with the sentence for the offence of possession of drugs for the purpose of trafficking.

[54] It remains necessary to consider the effect of the sentence for the February and March offences insofar as it may be relevant in ensuring a proportionate sentence which recognizes the seriousness of the offences and Mr. Summers' moral blameworthiness.

[55] The sentence of four years and eight months for the February and March offences is not before the Court and cannot be adjusted. However, when considered in conjunction with either the five year sentence imposed by the trial judge for the June offences or the seven year sentence substituted on appeal, an aggregate sentence of nine years and eight months or eleven years and eight months, respectively, would be clearly excessive.

[56] The question is, on what basis could the February and March sentence be considered?

[57] The Crown draws a distinction between the February and March convictions and the June convictions on the basis that Mr. Summers was also charged in the latter with three counts of possession of drugs for the purpose of trafficking. As discussed above, three counts were charged because the types of

drugs found in his possession were prohibited under three different schedules to the *Controlled Drugs and Substances Act*: Schedules I, III and IV. The sentences for the less serious counts, two years and one year, were concurrent to the five year sentence because the three counts were characterized as a single criminal venture. The same result applies to the seven year sentence.

[58] There is, of course, a distinction in the charges that were laid insofar as, in June, the stolen drugs were retrieved when Mr. Summers was apprehended while attempting to escape, resulting in the charge of possession of drugs for the purpose of trafficking. However, in the February and March cases, the trial judge was satisfied that the object was theft of drugs, and that drugs were, in fact, stolen on two occasions, February 10 and 16, with the intention that the drugs would be sold in the community.

[59] Unlike in cases where an offender, for example, commits an offence after having been charged earlier with another offence or while on parole or judicial interim release, which would increase the seriousness of the offence, Mr. Summers had committed but not been charged with the February and March offences when he was apprehended and charged with the June offences.

[60] While the vagaries of the criminal process will generally not have an effect on sentencing except in limited circumstances, the significant delay resulting from the Crown's appeal of Mr. Summers' acquittal on the June 2015 charges is relevant here when the delay is considered in light of the manner in which the February and March charges were addressed together even though they were not characterized as a single criminal venture. As recognized by the trial judge, at page 86, the June charges "arose from essentially the same activity during the same timeframe".

[61] In the result, I am satisfied that, in the unique circumstances of this case, the sentence imposed for the February and March offences is a valid consideration in determining an appropriate and just sentence for the June offences. This is not a matter of totality as contemplated by the *Hutchings* analysis. Rather, it is a question of proportionality, imposition of a just and appropriate sentence which is fair and rational, and consistent with the purpose of maintaining confidence in the integrity of the sentencing process.

An Appropriate Sentence

[62] The normal level of sentence for the most serious of the offences may provide assistance in determining a fit and just sentence in the case of multiple

convictions (*Hutchings*, at paragraph 84, point 5). In this case, the baseline would be the seven year sentence for the June offence of possession of drugs for the purpose of trafficking. As discussed above, that sentence incorporates consideration of Mr. Summers' criminal record, including his convictions for the February and March offences, the degree of planning and deliberation involved in commission of the offences, Mr. Summers' role as a leader in breaking into pharmacies in order to steal drugs for sale in the community, and the characterization of the criminal conduct as a commercial enterprise. These factors, other than the criminal record related to the February and March offences, are the same factors considered by the judge in sentencing Mr. Summers for the February and March offences. While no drugs were seized by the police as a result of the February and March offences, the judge was satisfied that drugs were, in fact, stolen for sale in the community.

[63] In the unique circumstances of this case, a proportionate sentence, one that achieves the goal of seeking to ensure that the sentence properly reflects and condemns Mr. Summers' role in the offences and the harm caused while not exceeding what is just and appropriate, is a term of imprisonment of seven years to be served concurrently with the four year and eight month sentence imposed for the February and March offences. That sentence satisfies the principle of proportionality given the moral blameworthiness of Mr. Summers and the gravity of the June offences which are the subject of this appeal.

SUMMARY AND DISPOSITION

[64] I would grant leave to appeal, the test having been met.

[65] The trial judge erred by failing to specify how much time he attributed to the sentence Mr. Summers was serving and how that and other factors were considered when he imposed a sentence for the June 2015 offences consecutive to the sentence Mr. Summers was already serving for the February and March offences. The judge further erred by failing to apply all the relevant factors when considering the principle of proportionality and determining the sentence for the June 2015 offences. These errors had an impact on the manner in which an appropriate sentence was determined, resulting in an unfit sentence.

[66] Accordingly, I would grant leave to appeal, set aside the sentence imposed by the trial judge and substitute a sentence of seven years imprisonment

to be served concurrently with the four year and eight month sentence imposed for the February and March offences.

B.G. Welsh J.A.

I concur _____
D.M. Boone J.A.

Dissenting reasons by Knickle J.A.:

[67] This appeal raises the issue of consecutive sentences and when they should be imposed.

BACKGROUND CIRCUMSTANCES

[68] Mr. Summers pleaded guilty to four indictable offences: one count of break and enter into a place other than a dwelling, contrary to section 348(1)(b)-(e) of the *Criminal Code*, and three counts of possession of controlled substances, under Schedules I, III and IV, for the purpose of trafficking, contrary to section 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, c. 19 (*CDSA*).

[69] On June 23rd, 2015, Mr. Summers, in company with others, broke into a pharmacy. The offenders peeled back an exterior wall of the building with construction type tools; creating a hole through which Mr. Summers and his co-accused could enter. The offenders stole over 100,000 dollars of controlled substances of which over one half of that value was comprised of Schedule I drugs: morphine, codeine, oxycodone, hydromorphone and fentanyl.

[70] Mr. Summers was arrested after a “high risk” takedown by the police. When arrested, he was in possession of numerous sophisticated tools that were consistent with committing the break and enter.

[71] The offences were part of a planned operation of which Mr. Summers was the mastermind. When the police searched Mr. Summers’ home, they located a map of the island of Newfoundland on which various pharmacies across the island were pinpointed.

[72] After Mr. Summers' arrest, the police were able to solve several other break and enters into different pharmacies from earlier in the year. Mr. Summers was further charged with: three counts of break and enter and one attempted break and enter. The items stolen were never recovered, from these pharmacies.

[73] The two sets of offences proceeded differently in court.

[74] Mr. Summers pleaded guilty to the earlier offences and, after being given credit for remand time, was ultimately sentenced on April 18th, 2018, to a period of imprisonment of approximately 3 years, 5 months (*R. v. Summers*, 2018 NLSC 84, at para. 94, (Justice McGrath's sentence)).

[75] With respect to the offences before this Court, Mr. Summers initially pleaded not guilty. At his trial, he successfully argued that his *Charter* rights had been breached and was acquitted. Those acquittals were overturned by this Court, and the matter was returned to provincial court. When he reappeared in provincial court, Mr. Summers pleaded guilty and was sentenced on August 30th, 2019. At that time, 2 years, 1 month remained of Justice McGrath's sentence.

[76] In determining the fit sentence the only real issue before the sentencing judge was whether the new sentence, likely to be imprisonment, should run consecutively or concurrently to Justice McGrath's sentence.

[77] At the sentencing hearing, Mr. Summers asserted that if these matters had been before Justice McGrath, along with the other break and enters, there would have been no further imprisonment imposed. Mr. Summers argued that the two sets of offences involved conduct that was part of a continuing activity and no further time was warranted. He argued that whatever sentence was imposed, it should run concurrently with Justice McGrath's sentence.

[78] The federal and provincial crowns took slightly different positions on sentence, but were in agreement that any period of imprisonment imposed should be consecutive to the unexpired sentence. While the provincial crown agreed there were similarities between the offences insofar as the newer break and enter was into a pharmacy, the offence should not be treated as part of an ongoing criminal venture, given the separation in time and the aggravating features of the "high risk" take down. The federal crown further submitted that the additional offences under the *CDSA*, required different considerations. He argued that had these offences been before Justice McGrath, there was no

certainty that she would have imposed the same sentence; and it was speculation to suggest otherwise.

[79] After reviewing the principles of sentencing, the applicable sections of the *Criminal Code*, and sentencing jurisprudence, the sentencing judge determined that 5 years imprisonment would be the fit sentence for the most serious CDSA offence, possession for the purposes of trafficking of the Schedule I substances, including fentanyl. The other offences warranted lesser periods of imprisonment, which were ordered to run concurrently with the Schedule I offence sentence. The proposed 5 year sentence combined with the 2 years, 1 month remaining on Justice McGrath's sentence would be 7 years, 1 month.

[80] The sentencing judge ultimately imposed a total period of imprisonment of 1619 days (approximately 4 years, 5 months). In so doing, he awarded Mr. Summers credit for remand time, at a rate of 1:5 to 1. It is unclear as to why Mr. Summers was awarded remand credit given he was serving the sentence imposed by Justice McGrath. However, as the issue is not before the Court on this appeal, I leave it to another day to consider whether remand credit was appropriate in such circumstances.

[81] The 4 years, 5 months imprisonment was ordered to run consecutively to the sentence imposed by Justice McGrath. The combined effect of the 4 years, 5 months with the 2 years, 1 month remaining on Justice McGrath's sentence was approximately 6 years, 7 months imprisonment.

[82] Mr. Summers now seeks leave to appeal to this Court, and if leave is allowed seeks to have the sentencing decision set aside and the sentence imposed ordered to run concurrently with the previous sentence.

[83] For the reasons that follow, while I agree with my colleague that leave to appeal sentence should be granted, I would dismiss the appeal. The sentence was fit and the sentencing judge properly ordered that the sentence run consecutively to the sentence being served.

PRINCIPLES OF APPELLATE REVIEW OF SENTENCES

[84] The Supreme Court of Canada has repeatedly admonished appellate courts for not according a high level of deference to sentencing judges in their determination of sentence. Unless the sentencing judge makes an error in principle that impacts the sentence or the sentence is demonstrably unfit, an appellate court should not intervene (see *Parranto*; *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424; *Lacasse*; and *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500).

[85] Appellate courts play an important role in ensuring that sentencing judges apply the proper principles in imposing a fit sentence. But sentencing is an individualized process. The sentencing judge is often in a better position than an appellate court to appreciate the circumstances of a particular case. The sentencing judge observes and hears the parties, including the offender first hand. The sentencing judge is also typically in the community where the offences occurred and is often attuned to the impact of particular crimes.

[86] For this reason, an appellate court should not intervene in the absence of an error in principle that impacts the fitness of sentence or the sentence is demonstrably unfit. There is no room for appellate intervention merely because an appellate court would have imposed a different sentence.

The Criminal Code regarding the commencement of sentence

[87] Section 719 of the *Criminal Code* stipulates that subject to a relevant enactment that otherwise provides, a sentence commences when it is imposed. This means that unless otherwise ordered, a new sentence of imprisonment will run concurrently with an unexpired portion of a previously imposed sentence.

[88] However, it is well established that a sentence may be ordered to run consecutively to a sentence that is being served (see *Paul v. The Queen*, [1982] 1 S.C.R. 621). It is also well established that sentences for different offences should be consecutive (*R. v. Crocker* (1991), 93 Nfld. & P.E.I.R. 222 (Nfld. C.A.); *R. v. Pittman*, 2019 NLCA 28, 4 C.A.N.L.R. 392, at para. 9; *R. v. O’Keefe*, 2018 NLCA 11, 2 C.A.N.L.R. 557, at para. 30; *R. v. Newhook (A.C.)*, 2008 NLCA 28, 276 Nfld. & P.E.I.R. 190, at paras. 13, 17-19; and *R. v. B.H.*, 2022 NLCA 54, at paras. 9, 14-15, 23-24).

[89] Further, while section 718.2(c) of the *Criminal Code* reminds sentencing judges that where consecutive sentences are imposed, the combined sentence “should not be unduly long or harsh”, section 718.3(4)(a) requires a sentencing judge to specifically consider whether a sentence to be imposed shall be consecutive to a sentence being served:

- 718.3 (4) The court that sentences an accused shall consider directing
- (a) that the term of imprisonment that it imposes be served consecutively to a sentence of imprisonment to which the accused is subject at the time of sentencing; ...

The scope of section 718.3(4)

[90] Section 718.3(4) was considered by this Court in *Roberts*, in light of *Hutchings*, and *R. v. Barrett*, 2012 NLCA 46, 324 Nfld. & P.E.I.R. 246.

[91] While *Hutchings* established an analytical framework for determining a sentence for multiple offences, it did not address how a previously imposed sentence should be treated. In contrast, *Barrett* addressed precisely the problem of a previous sentence at the time that new sentences were imposed; however, section 718.3(4), as it now exists, was not in force.

[92] In determining the scope of section 718.3(4), using the framework in *Hutchings*, and the reasoning in *Barrett*, *Roberts* established that a previous sentence should be assessed as part of the overall fitness of the sentence.

[93] Drawing from other decisions such as *Johnson*, *R. v. Parry*, 2012 ONCA 171, and *R. v. Park*, 2016 MBCA 107, *Roberts* established that the “sentence” to which an offender is “subject” at the time a new sentence is imposed, is solely the unexpired portion of that sentence (*Roberts*, at paras. 61, 66). The *only* period of time of Justice McGrath’s sentence at issue in these circumstances is the unexpired portion of 2 years, 1 month.

[94] Further, in keeping with the approach in *Barrett*, it is only the “fact” of the existing sentence that is relevant (*Roberts*, at para. 70, reinforcing what was stated previously in *Barrett*, at para. 54).

[95] As well, one must assess whether the combined sentence will negatively impact the offender’s rehabilitative prospects (*Roberts*, at para. 70). Hoegg J.A. described the assessment of this impact in *Barrett*:

[55] The impact of a lengthy or harsh sentence is generally understood to mean that an offender must not be crushed by it such that he will be rendered unable to learn from his mistakes and will lose all motivation to successfully reintegrate into the community when released. That said, it cannot be forgotten that opportunities for rehabilitation exist within the prison system. ...

[96] However, the weight given to the potential impact on rehabilitative prospects is attenuated if a concurrent sentence does not comport with the fundamental principle of proportionality. The concern, always, is to impose the fit sentence. *Roberts* stated:

[77] In the end, therefore, in reacting to the perception that a long sentence will be crushing or otherwise harsh in respect of its impact on rehabilitative prospects, the

court cannot completely turn a blind eye to other sentencing goals when trying to arrive at an overall proportionate sentence.

[97] Finally, whether a new sentence should run concurrently or consecutively to the unexpired sentence has to be considered in light of an offender’s criminal history. As stated in *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130 in dissent, but not on this principle:

[77] ... [A] prior conviction for a related offence has historically and consistently been treated as an aggravating factor in sentencing justifying an increased sentence within the range of appropriate sentences for the offence and the offender...

[98] That an offender should receive an overall less severe sentence because they are serving a sentence for previous offences, conflicts with the established law that the prior criminal history is generally an aggravating factor on sentence. After discussing the practical difficulties with taking into account a previous sentence, *Barrett* stated:

[35] More important, though, as noted above and in Justice Welsh’s reasoning in *Penney*, is that there is an absurdity in granting an offender a reduction in sentence for new offences because he or she is incarcerated for a previously committed offence. Past convictions and sentences, which comprise a criminal record, are usually considered to be aggravating factors on sentence (see *R. v. Atkins* (1988), 69 Nfld. & P.E.I.R. 99 (Nfld. C.A.)). A criminal record is often quite relevant on sentencing in that it may show the offender to be a scofflaw, or lead to an inference that he or she has not been rehabilitated or otherwise learned from past mistakes. A criminal record does not become a mitigating factor because service of the past sentence has not been completed by the time of the current sentencing.

[99] This Court in *Roberts* referred to this concern as ensuring that an offender does not have a “free ride” with respect to the new offences by having the sentence run concurrently with the unexpired sentence (*Roberts*, at para. 101; and see also *Johnson*, at para. 23).

[100] In summary, when considering whether a sentence should run consecutively to a sentence being served, the focus is on the impact the combined sentence may have on rehabilitation in keeping with the other principles of sentencing and the established law respecting consecutive and concurrent sentences. A sentence should not be made to run concurrently with the unexpired sentence if to so do would result in a sentence that does not comport with the principles of sentencing; in particular the fundamental principle of proportionality.

DISCUSSION

[101] My colleague says that the sentencing judge erred because the sentencing judge 1) failed to specifically identify the duration of the unexpired sentence and 2) failed to properly consider the principle of proportionality as it related to the combined effect of the new and unexpired sentence.

1) The sentencing judge did not err in principle because he did not explicitly state the duration of the unexpired sentence

[102] The appellant argued and my colleague agrees that in determining whether to make the new sentence consecutive to the sentence being served, the sentencing judge erred by failing to explicitly identify the time remaining of the unexpired sentence. My colleague states that the failure to explicitly reference the length of sentence remaining means that it is unclear what overall sentence the sentencing judge contemplated. I disagree.

[103] Mr. Summers' criminal history, as well as the written judgment of Justice McGrath, were before the sentencing judge. This is the same documentation that my colleague relies on to compute what she understands to be the remaining sentence. These documents recorded the sentencing date of the previous offences: April 18th, 2018, and how much time was imposed: 3 years, 5 months. It was a simple matter of subtraction to calculate what was left of that sentence on the date that Mr. Summers was sentenced for the new offences on August 30th, 2019: 2 years, 1 month.

[104] The sole focus of the sentencing hearing was whether the sentence would run consecutively to the unexpired sentence. There were only two likely outcomes: the proposed sentence would run consecutively for a combined sentence of 7 years, 1 month, or it would run concurrently to the unexpired sentence; adding a further 2 years, 11 months. Once the remand credit was taken into account these two periods were reduced further by 5 months.

[105] Given the criminal record and judgment of Justice McGrath were before the sentencing judge, it was patent to the sentencing judge, and the parties, including Mr. Summers what the potential outcomes would be.

[106] Further, the transcript of the sentencing hearing is replete with references of how to account for the previous sentence imposed by Justice McGrath (see for example, Transcript, at pages 8, 12-13, 15-16, 20-21, 57-58, 60, 63, 74). When the sentencing judge raised with counsel postponing the hearing so that he could review the jurisprudence on this issue, the sentencing judge commented

on the significance of how to consider the unexpired sentence (Transcript, at page 23):

There's a lot at stake here for Mr. Summers. These are serious offences and depending on the way things turn out it could result in more or even substantially more incarceration for him.

[107] In his decision, the sentencing judge observed that Mr. Summers "has already served a significant portion of that sentence" in reference to Justice McGrath's sentence (Transcript, at page 90).

[108] In such circumstances, to say the sentencing judge erred because he did not explicitly state the remaining sentence, when it was patent to everyone in the courtroom, is to have form triumph over substance. This is not an error in principle, and to have characterized it as such "trivializes" the meaning of "error in principle" (*Lacasse*, at para. 43).

The failure to explicitly state what remained of the unexpired sentence had no impact on the sentence imposed

[109] Even if it could be said the sentencing judge erred because he did not state exactly what he understood the unexpired sentence to be, this was not an error in principle that warrants intervention by this Court. It had no impact on the sentence. As stated, the record supports that the sentencing judge was well aware of what remained on the sentence, and properly considered section 718.3(4) and all the relevant sentencing principles.

[110] In considering whether to make the sentence consecutive, the sentencing judge was obliged to apply the approach as explained in *Roberts*. This is exactly what the sentencing judge did. In fact, the sentencing judge quoted directly from paragraph 77 of *Roberts*, observing that whether to impose a consecutive sentence is analyzed "with respect to its impact on rehabilitative prospects" (Transcript, at page 91). The sentencing judge continued:

In carrying out this exercise I am reminded that what I must do is to consider the unexpired portion of all previous sentence[s], since they represent the relevant portion of the existing incarceration that would impact on rehabilitation, together with all of the current sentence I am to impose that would otherwise be served consecutively.

[111] The sentencing judge further recognized, as stated in *Roberts*, that section 718.3(4) was an "admonition" to sentencing courts that in certain circumstances the sentences should be consecutive (Transcript, at pages 91-92).

[112] After considering section 718.3(4), the sentencing judge correctly found that there was no basis to make the new sentence concurrent to the remaining sentence. Mr. Summers' level of moral blameworthiness was high and his established "recidivistic tendencies" supported that the sentences should run consecutively.

[113] There were compelling reasons to make the sentence for the offences of possession of the Schedule I substances consecutive to the unexpired sentence.

[114] In particular, despite Mr. Summers' assertion and my colleague's agreement, that both sets of offences were part of the "same" criminal activity, there was a significant difference between the circumstances when Mr. Summers was sentenced by Justice McGrath and the circumstances before the sentencing judge on the matters now on appeal. These offences were not a "single criminal venture".

[115] Not only were the commission of the offences separated in time by months (February and March versus June), Justice McGrath sentenced Mr. Summers only for the offences of break and enter and one attempted break and enter into pharmacies. There were no offences of possession for the purposes of trafficking before Justice McGrath. The offences involved different victims and different levels of harm, to each victim (This reason alone merited treating the offences as separate).

[116] The differing maximum punishments available for break and enter into commercial establishment and possession for the purposes of trafficking a Schedule 1 substance illustrates their differing gravity. The offence of break and enter into a commercial establishment is subject to a maximum period of imprisonment of 10 years. The attempted break and enter, as an attempt, was subject to half that maximum, 5 years imprisonment.

[117] In contrast, possession of a Schedule I substance for the purpose of trafficking is subject to a maximum period of imprisonment for life.

[118] The seriousness of the offences of possession of Schedule I substances for the purposes of trafficking of, particularly fentanyl, cannot be overstated. As recently stated in *Parranto*, the maximum available punishment of life imprisonment is a compelling indicator of the seriousness of an offence:

[60] ... Parliament has chosen to employ the mechanisms of criminal law and sentencing law to advance public safety, hold those who distribute drugs accountable, and communicate the wrongfulness of poisoning people and communities. This is

perhaps most apparent in the maximum sentence for trafficking in a Schedule I drug, which is life in prison (*CDSA*, s. 5(3)(a)). As stated in *Friesen*, “[m]aximum penalties are one of Parliament’s principal tools to determine the gravity of the offence” (para. 96, citing *C. C. Ruby et al.*, *Sentencing* (9th ed. 2017), at § 2.18; *R. v. Santkar* (1981), 64 C.C.C. (2d) 325 (Ont. C.A.), at p. 327; *Hajar*, at para. 75).

[119] The focus in addressing the harms caused by these offences is different. Break and enter into commercial premises is an offence that affects an individual’s property rights. The offence aims to dissuade wrongful conduct in relation to personal or commercial property. Trafficking in a Schedule I substance, is criminal conduct that has implications beyond individual property rights, but, as stated above in *Parranto*, can have devastating consequences for entire communities. In agreeing with the majority in the result in *Parranto*, Moldaver J. wrote a separate judgment highlighting the devastation caused by the offence of trafficking in Schedule I substances, particularly fentanyl. Moldaver J. stated:

[88] Trafficking in such substances causes both direct and indirect harms to society. Directly, the distribution and abuse of hard drugs leads to addiction, debilitating adverse health effects, and, all too frequently, death by overdose. As Lamer J. (as he then was) astutely observed, where addiction and death occur — as they so often do — those who oversee the distribution of these drugs are personally “responsible for the gradual but inexorable degeneration of many of their fellow human beings” (*R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1053).

[120] In *R. v. Loor*, 2017 ONCA 696, the Court referred to Schedule I opioids, especially fentanyl, this way:

[33] Unless used for therapeutic purposes, under proper medical supervision, fentanyl is a highly dangerous drug. Its widespread abuse, though recent, has quickly become entrenched in our country. Every day in our communities, fentanyl abuse claims the lives of Canadians.

[121] Further, despite that defence counsel submitted and my colleague suggests (at paragraphs 50 and 51) that because the fentanyl was in a “patch” form it was somehow less dangerous, as observed in *Loor*, the patch form of fentanyl can be very dangerous:

[39] When abused, fentanyl patches are especially dangerous. People can abuse a fentanyl patch in many different ways. They can inject the patch contents intravenously, cut up the contents and chew small portions at a time, inhale it, smoke it, and even make tea with it. What makes the patch particularly dangerous is the medication’s location within the patch. The medication is in a matrix, essentially buried inside the patch. To get the medication out of the patch a person has to chop it up or melt it down or heat it up. But then the person will not know how much fentanyl

has been released. Its potency for an individual is thus often unpredictable. And so, Dr. Woodall concludes, a lot of deaths have been associated with the abuse of fentanyl patches.

[122] The fact that the fentanyl was in “patch” form did *not* lessen the seriousness of the offence or distinguish it from other circumstances where offenders possessed fentanyl in a different form.

[123] The distinction between the harm to be prevented by the offence of possession of a Schedule I substance for the purpose of trafficking and the offence of break and enter into a commercial premises, is not to diminish seriousness of break and enters into pharmacies. The seriousness of the break and enters was recognized by Justice McGrath when she sentenced Mr. Summers in April of 2018. However, Justice McGrath did not and could not account for the new and more serious aspect that the possession for the purposes of trafficking offences added to the circumstances now on appeal. As stated in *R. v. Suter*, 2018 SCC 34, [2018] 2 S.C.R. 496:

[35] As a general rule, courts cannot sentence an offender in respect of a crime for which he or she has not been convicted: see *R. v. Angelillo*, 2006 SCC 55, [2006] 2 S.C.R. 728, at paras. 23 and 32; *R. v. Larche*, 2006 SCC 56, [2006] 2 S.C.R. 762, at para.1¹. To do so would run counter to the presumption of innocence. ...

[124] Unlike the circumstances before Justice McGrath, the sentencing judge in these circumstance *was* faced with the potential for even further harm with the offence of possession for the purpose of trafficking. The sentencing judge was obliged to account for this difference, and the difference was not lost on the sentencing judge. My colleague comments (at paragraph 60) that the sentencing judge referred to the two sets of offences as the “same activity”, while ignoring that he goes on to clearly distinguish the possession for the purposes of trafficking offences: (Transcript, at page 86):

Although related to the same activity, the *Controlled Drugs and Substances Act* offences are fundamentally distinct and different offence[s] than those for which Mr. Summers is currently serving a period of imprisonment. Possession for the purpose of trafficking schedule 1 drug opioid drugs, especially fentanyl, is extremely serious. Punishment for it involves different considerations than punishment for breaking into pharmacies to steal those drugs.

[125] The difference between the offences supported that the sentence for the possession of the Schedule I substances for the purposes of trafficking ought to have been consecutive to Justice McGrath’s sentence for the earlier break and enters.

[126] Further, there were aggravating circumstances that warranted a penitentiary sentence that was consecutive to the time being served.

[127] Apart from the seriousness of the substances found in Mr. Summers' possession, the quantity and value of the drugs for which Mr. Summers was sentenced was significant. The total estimated street value of all of the drugs was over 100,000 dollars, with more than half of that value being comprised of the Schedule I drugs.

[128] Although Mr. Summers' level of moral blameworthiness was high for both sets of offences as the mastermind of the group of individuals committing the offences, unlike the previous offences before Justice McGrath, the arrest of Mr. Summers for these offences involved "a high risk" takedown by the police.

[129] The offences involved a high degree of planning, and were committed solely for profit. As stated by the sentencing judge (Transcript, at page 92):

The offences here and the role which Mr. Summers played in this organized criminal operation point to a high degree of moral blameworthiness and a high degree of responsibility in carrying out a commercial deadly drug trafficking operation solely for profit. It is evident to me that this group would have continued in its illicit operations were it not for the forceful intervention of the RCMP.

[130] The differences and aggravating features supported making the sentence consecutive, lest Mr. Summers be given a "free ride" for these different and serious offences. The primary emphasis of sentencing for such offences is deterrence and denunciation. The circumstances called for a sentence that adequately reflected these principles. This supported making the sentence consecutive.

[131] Further, while the possession for the purposes of trafficking was his first such offence, Mr. Summers possesses a serious and lengthy criminal history dating back to 2005, for offences such as: armed robbery, disguised with intent, impaired driving, fraud, breaches of court orders, resisting arrest, possession of stolen credits cards, possession of stolen property, and carrying a concealed weapon. His life in crime well predates committing break and enters into pharmacies; including the break and enters for which he was sentenced by Justice McGrath in 2018.

[132] In these circumstances, the sentencing judge properly recognized that Mr. Summers' prospects for rehabilitation merited less emphasis. This supported making the sentence consecutive.

[133] Mr. Summers' defiance of the criminal justice system has not abated since he appeared before the sentencing judge. Pending the hearing of this appeal, Mr. Summers was unlawfully at large for several months. The appeal hearing had to be adjourned *sine die* until he could be located.

[134] My colleague repeatedly suggests that the circumstances here are unique in that Mr. Summers' matters on appeal proceeded separately from the matters for which he was sentenced by Justice McGrath. I disagree. There was nothing unique about the circumstances because Mr. Summers chose to proceed with the possession for the purposes of trafficking charges independently from the earlier break and enter charges.

[135] That an offender may have multiple matters proceed at different times before different sentencing judges is not unusual. To the contrary, it is the "meat and potatoes" of the day to day operation of the criminal justices system.

[136] While parties may consolidate multiple proceedings from time to time for the benefit of an accused, there is no rule that requires such an approach, and as often as not, an accused may prefer to deal with multiple charges independently. This means that an offender with multiple charges resulting in multiple proceedings may also have multiple sentencing proceedings.

[137] It was Mr. Summers' decision and fundamental right to pursue a trial for the possession for the purposes of trafficking charges. That he was ultimately unsuccessful did not make the circumstances unique. It only meant that upon pleading guilty, he now would be sentenced for those matters.

[138] The sentencing judge was sensitive to Mr. Summers' circumstances, and considered that the matters had not proceeded before Justice McGrath. The sentencing judge specifically commented that Mr. Summers should not be faulted because he exercised his right to a trial (Transcript, at page 37):

Judge: But it shouldn't be that if you exercise your right to a trial and you're found guilty that somehow the punishment -- a longer period of punishment is appropriate.

Crown: No, it shouldn't. Absolutely not.

Judge: Just because of the way the timing and the charges.

In other words, the sentencing judge was attuned to the "timing" of the sentencing and took this factor into account as part of his duty to consider all the circumstances.

[139] For the above reasons, even if it could be said that it was an error to fail to specifically describe what remained of the unexpired sentence, that failure had no impact on the fitness of sentence. Applying the principles of sentencing, a consecutive sentence was the proper outcome. I would dismiss this ground of appeal.

2) The sentencing judge gave full consideration to the principle of proportionality in sentencing Mr. Summers

[140] The proportionality principle is codified under section 718.1 of the *Criminal Code* and states:

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[141] This is a cornerstone of sentencing and the goal of every sentencing decision.

[142] It is evident from a review of not only the decision, but from the sentencing judge's repeated references to the principle during the sentencing hearing, that he considered this fundamental principle. While he did not always use the words "proportionality principle", he referred to the express components of the principle, or established synonyms for "proportional" such as the "fit" or "appropriate" sentence.

[143] For example, in response to part of the federal crown's submissions, the sentencing judge stated (Transcript, at page 33):

Well, it's not just whether it's crushing now it's whether it's otherwise appropriate to the degree of responsibility of the offender and the seriousness of the offence.

[144] The sentencing judge's reference that the sentence had to be "appropriate" to the "seriousness of the offence" and "the degree of responsibility of the offender", is an explicit reference to the two components of the proportionality principle as codified under section 718.1.

[145] During the hearing, the sentencing judge also referred to the need to arrive at the "right" sentence (Transcript, at page 31) and the "overall proper and just sentence" (Transcript, at page 45) where he stated:

Well, it probably doesn't matter in a sense that, like I said earlier, if concurrency as opposed to consecutive sentences is simply one of the mechanisms by which totality in the overall proper and just sentence is achieved.

[146] In his decision, the sentencing judge again referred to the proportionality principle (Transcript, at page 87):

The principles of sentenc[ing] are outlined in the *Criminal Code* at sections 718, 718.1, as well as 718.3 to which I will refer in more detail later.

[147] The sentencing judge explicitly addressed whether a consecutive sentence combined with the unexpired sentence would impact the proportionality of the overall sentence. The sentencing judge stated (Transcript, at pages 90-91):

That Court [in *Roberts*] decided that it is appropriate in a totality analysis when sentencing for current offences to take account of, and to factor into the analysis, the existence of a prior unexpired sentence when applying the factors listed in the analytical framework or outline in its earlier decision in *Hutchings*. The Court of Appeal made it clear that, in the end, in reacting to the perception that a long sentence would be crushing or otherwise harsh with respect to its impact on rehabilitative prospects, the sentencing court cannot completely turn a blind eye to the other sentencing goals when trying to arrive at an overall proportionate sentence.

[148] The above illustrates that throughout the proceedings the sentencing judge was aware that whether the sentence imposed should run consecutively to the unexpired sentence, was subject to the ultimate goal of determining the proportionate or fit sentence. Contrary to my colleague's view of the sentencing judge's decision, achieving the proportionate sentence was at the forefront of the sentencing judge's concerns. The record could not be clearer.

[149] It being clear there was no legal error committed in this regard, there is no basis for this Court to interfere with his sentencing decision.

The sentence is fit.

[150] Finally, as the sentencing judge focused on imposing a sentence that achieved proportionality, the sentence imposed by the sentencing judge was also fit. There was no assertion that the individual lengths of the sentences were unfit and the fact that the sentence was consecutive to the unexpired sentence did not result in a sentence that was demonstrably unfit. The combined effect of the proposed 5 year sentence running consecutively to the unexpired sentence was a period of imprisonment of approximately 7 years, 1 month. The actual sentence was less.

[151] Both the proposed combined sentence of imprisonment of 7 years, 1 month and the actual combined sentence of 6 years, 7 months were well within range of similar sentences imposed for similar offenders. In considering the

sentences imposed for other offenders and their circumstances, it is important to keep in mind that, as stated in *Lacasse*, sentencing ranges are not “straitjackets” but guidelines in reaching the goal of a fit sentence. Through this lens, other sentencing decisions supported imposing a lengthy period of imprisonment on Mr. Summers, and that the combined sentence was neither unduly long or harsh.

[152] At the high end of the range, for large scale trafficking in fentanyl or other Schedule I drugs, as stated in *Parranto* at paragraph 68, one can expect a sentence of between 8 and 15 years imprisonment. The quantity of drugs in Mr. Summers’ circumstances was substantial, approaching the circumstances in *Parranto*, and the inclusion of fentanyl increased the gravity of the offence.

[153] At the low end of the range, the sale of only two patches of fentanyl at a value of 680 dollars, merited a penitentiary sentence (see *R. v. Gatfield*, 2015 ONCJ 526, where the offender was sentenced to 30 months imprisonment).

[154] In these circumstances, the sentencing judge reviewed all the sentencing decisions placed before him, and was satisfied that the proposed 5 years imprisonment was the fit sentence. I see no error in this conclusion.

[155] Neither the proposed combined sentence of 7 years, 1 month, nor the actual combined sentence of 6 years, 7 months was unduly harsh or crushing. Both are well within the range of sentences imposed for possession for the purposes of trafficking Schedule I drugs as illustrated in the jurisprudence.

[156] There being no basis to find that the sentence was demonstrably unfit, there is no basis for this Court to interfere with the sentencing judge’s decision.

CONCLUSION

[157] For the above reasons, while I would allow leave to appeal, I would dismiss the appeal. The sentencing judge made no errors in principle that impacted the sentence and the sentence was fit, including that the sentence for the possession of Schedule 1 substances for the purposes of trafficking should run consecutively to the sentence being served.

[158] The approach taken by my colleague in intervening in the sentence in these circumstances when neither error in principle that impacted sentence was established, nor was the sentence demonstrably unfit, runs counter to the clear direction from *Lacasse* to appellate courts.

[159] Not only has the majority intervened when there is no legal basis to so do, as per *Lacasse*, the majority has imposed a concurrent sentence without justification as to why a concurrent sentence is fit. Given the compelling reasons that the sentence should run consecutively, including the nature of the offence, the seriousness of the circumstances, that the offences were distinct and separate from the earlier offences, Mr. Summers' high level of moral blameworthiness, his lengthy and serious criminal history and that the nature of the offences merited an emphasis on deterrence and denunciation, it behooves the majority to explain how a concurrent sentence is fit.

[160] The absence of an explanation or principled basis for disturbing the sentencing judge's decision is to throw a monkey wrench into the machinery of the well established principles governing concurrent and consecutive sentences, particularly as they relate to a sentence being served by the offender.

[161] I would affirm the sentence imposed by the sentencing judge.

F.J. Knickle J.A.