NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Kiley*, 2024 NSCA 29

Date: 20240307
Docket: CAC 515304
Registry: Halifax

Between:

Ben Colten Kiley

Appellant

v.

His Majesty the King

Respondent

Judge:	The Honourable Justice Carole A. Beaton
Appeal Heard:	January 22, 2024, in Halifax, Nova Scotia
Statutes Considered:	*Criminal Code*, R.S.C. 1985, c. C-46, ss. 84(1) and 718.3(8); *Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted* (SOR 198 – 462), Part 3, s. 9.
Cases Considered:	*R. v. Fifield*, [1978] N.S.J. No. 42; *R. v. Adams*, 2010 NSCA 42; *R. v. S.T.P.*, 2009 NSCA 86; *R. v. Chaisson*, 2024 NSCA 11; *R. v. Hann*, 2024 NSCA 19; *R. v. Palmer*, [1980] 1 S.C.R. 759; *Barendregt v. Grebliunas*, 2022 SCC 22; *R. v. A.W.H.*, 2019 NSCA 40; *R. v. Kobylanski*, 2019 NSCA 57; *R. v. Finck*, 2019 NSCA 60; *R. v. P.C.H.*, 2019 NSCA 63; *R. v. Snow*, 2019 NSCA 76; *R. v. West*, 2020 NSCA 16; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Chase*, 2019 NSCA 36; *R. v. Larche*, 2006 SCC 56; *R. v. Aalbers*, 2022 SKCA 105; *R. v. Friesen*, 2020 SCC 9; *R. v. Kleykens*, 2020 NSCA 49; *R. v. Lacasse*, 2015 SCC 64; *R. v. Khan*, 2023

ONCA 553; *R. v. Anthony-Cook*, 2016 SCC 43; *R. v. Nahanee*, 2022 SCC 37.

Subject: Appeal; Appeal – fresh evidence motion; Appeal – leave to appeal sentence; Criminal; Criminal – drug offences; Criminal – threats; Criminal – prohibited weapon; Criminal – sentence; Evidence – fresh evidence motion; Motion – fresh evidence; Motion - ineffective assistance of counsel; Sentence – excessive or unfit; Sentence – leave to appeal.

Summary: The appellant pled guilty to 17 offences including possession of cocaine (576 grams) and possession of Ritalin (100 pills) for the purpose of trafficking, possession of a prohibited weapon, and 10 charges of uttering threats to cause death or bodily harm. At sentencing, the Crown called expert evidence to categorize the appellant's drug offences on the *Fifield* continuum (*R. v. Fifield*, [1978] N.S.J. No. 42). The judge described the appellant as a "major player" in the local drug trade. He imposed an aggregate sentence of 11.3 years, reduced to nine years on application of the principle of totality.

The appellant seeks to adduce fresh evidence in support of his argument of ineffective assistance of counsel, and in relation to his appeal of conviction for possession of a prohibited weapon. He argues that he was forced by counsel to plead guilty to that offence, and furthermore, that the weapon he possessed does not meet the definition of a "prohibited" weapon. The appellant also seeks leave to appeal sentence and if granted, appeals his sentence on the basis it was improper in three discrete ways:

(i) the sentence of seven years imposed for the offence of possession of cocaine for the purpose of trafficking is excessive;

(ii) the judge failed to recognize or accept a joint submission put forward on the threats charges;

(iii) before his application of the principle of totality, the judge's original calculation of a sentence of three years for the threats charges exceeded the maximum allowable custodial sentence.

Issues:

(1) Should the fresh evidence be admitted?

(2) Did the trial judge err in concluding the knife possessed by the Appellant meets the definition of a prohibited weapon?

(3) Was the sentence imposed unfit?

Result:

(1) The affidavit fresh evidence, provisionally admitted does not support that there was ineffective assistance of counsel or a miscarriage of justice. The video fresh evidence going to the Appellant's assertion he was improperly convicted of possession of a prohibited weapon does not meet the *Palmer* criteria and is not admissible.

(2) The knife possessed by the Appellant fits the definition of a prohibited weapon by operation of s. 84(1) of the *Criminal Code* when read in conjunction with Part 3, s. 9 of *Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted*. There was no error on conviction.

(3) Leave to appeal sentence is granted. The sentence imposed is not unfit:

(a) the seven year sentence imposed for possession of cocaine for the purpose of trafficking is not excessive or outside the range, nor did the judge consider unproven facts and then incorporate them into his sentencing analysis.

(b) there is a distinction between a joint submission and a joint recommendation. Here, the judge did not improperly reject a joint submission in relation to

the threats charges because there was no proper joint submission before him.

(c) the judge did not exceed the maximum allowable sentence for the threats charges. Section 718.3(8) of the *Code* permitted a sentence beyond the limit prescribed in the *Criminal Code* due to the aggravating intimate partner violence aspects of the offences. The judge subsequently applied the principle of totality to the entire sentence, which reduced the three years to two years.

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His Majesty the King

Respondent

Judges:	Farrar, Bourgeois and Beaton JJ.A.
Appeal Heard:	January 22, 2024, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Beaton J.A.; Farrar and Bourgeois JJ.A. concurring
Counsel:	Ben Colten Kiley, appellant (on conviction) Zeb Brown, for the appellant (on sentence) Mark Scott, K.C., for the Provincial Crown Mark Covan, for the Federal Crown

Reasons for judgment:

[1] The appellant Mr. Kiley pled guilty to seventeen offences stemming from his involvement in drug trafficking. Mr. Kiley now appeals from conviction for one of those offences, possession of a prohibited weapon. He says the judge erred in concluding the device he possessed met the legal definition of a prohibited weapon. He also alleges ineffective assistance of trial counsel regarding that conviction, and seeks to introduce fresh evidence in support of both arguments. Finally, Mr. Kiley seeks leave to appeal his sentence on the basis it is excessive, and that the judge committed several errors in imposing it.

[2] For the reasons that follow, I would dismiss the motion to adduce fresh evidence. I would dismiss the appeal against conviction. I would grant leave to appeal the sentence and dismiss that appeal.

[3] Mr. Kiley was to be tried on all charges before the Honourable Judge Daniel MacRury ("the judge") in the Provincial Court. At the commencement of trial on October 21, 2021, with the assistance of his counsel Mr. Kiley changed his plea to guilty in relation to seven offences prosecuted by the Federal Crown. Those offences consisted of possession of both cocaine and methylphenidate ("Ritalin") for the purposes of trafficking, and various charges stemming from those activities, including weapons offences. He also pled guilty to ten counts of uttering threats; those charges were prosecuted by the Provincial Crown.

[4] All the offences to which Mr. Kiley entered guilty pleas had their genesis in his involvement in the trafficking charges. In the course of their investigation, police had executed a search warrant for Mr. Kiley's home and a neighbouring location used by him. Among the items seized were 578 grams of cocaine, 100 Ritalin pills, approximately $9,000 in cash, scales, and a knife. When arrested on the drugs and weapons charges on September 25, 2020, Mr. Kiley was already subject to both a release order (for other charges) and a weapons prohibition order (owing to prior convictions). Both orders prohibited him from possessing anything defined as a prohibited weapon.

[5] Once arrested, Mr. Kiley was transported to the police department and lodged in a cell. While there, he clogged the cell toilet and then repeatedly flushed it, creating a flood. This resulted in the mischief charge.

[6] Mr. Kiley was remanded into custody. While awaiting trial he placed multiple phone calls to his former common law partner, her mother and her friends. Despite those calls being monitored, Mr. Kiley made graphic threats of bodily harm or of death to his partner and her pets.

[7] Mr. Kiley's sentence hearing was adjourned to February 25, 2022 to allow for preparation of a Pre-Sentence Report. During the sentencing hearing, the Federal Crown led expert evidence regarding Mr. Kiley's pre-charge activities, and the significance of certain items seized from him during the police investigation. This was done to assist the judge in categorizing Mr. Kiley's drug offences along the range identified in *R. v. Fifield*, [1978] N.S.J. No. 42. As will be seen, the introduction of this evidence became a point of contention during the sentencing hearing.

[8] The sentencing submissions provided to the judge by both the Federal and the Provincial Crowns revealed Mr. Kiley possessed a not insignificant prior record which included convictions for drug possession and a number of offences of violence. His counsel acknowledged Mr. Kiley was "a player" in the drug trade, evidenced by the nature and quantity of drugs, money and drug paraphernalia seized by the police. More will be said later about the sentencing submissions put before the judge, and his interpretation of them.

[9] The judge reserved his decision on sentence until May 27, 2022. He delivered an unreported oral decision which discussed in detail the facts of Mr. Kiley's offences, the contents of the Pre-Sentence Report, and the mitigating and aggravating factors present. The judge also reviewed the principles of sentencing, and applicable caselaw, including sentences meted out in similar cases. At the conclusion of his analysis, as he was required to do, the judge then conducted a "last look" (*R. v. Adams*, 2010 NSCA 42 at paras. 23-25). In applying the principle of totality, the judge came to the recognition the aggregate sentence he had crafted - 11.3 years – was excessive on the whole and should be reduced. He reduced the total sentence to nine years, as follows:

(a) possession of cocaine for the purpose of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act,* S.C 1996, c.19 ("the *Act*") – seven years' custody;

(b) possession of methylphenidate for the purpose of trafficking, contrary to s. 5(2) of the *Act* – one year custody (concurrent);

(c) possession of proceeds of crime contrary to s. 354(2)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46 ("the *Code*") – one year custody (concurrent);

(d) possession of a prohibited weapon, a push dagger contrary to s. 91(2) of the *Code* – one year custody (concurrent);

(e) possession of a prohibited weapon, a push dagger, while prohibited from doing so, contrary to s. 117.01(1) of the *Code* – one year custody (concurrent);

(f) mischief (to property) contrary to s. 430(4) of the *Code* – three months' custody (concurrent);

(g) failure to comply with a condition of a Release Order (to not possess a prohibited weapon) contrary to s. 145(5) of the *Code* – six months' custody (concurrent);

(h) six counts of uttering threats contrary to s. 264.1(1)(a) of the *Code* – two years' custody (consecutive) on first count, two years concurrent on remaining counts;

(i) four counts of uttering threats contrary to s. 264.1(1)(b) of the *Code* – two years' custody (concurrent) on each count (and concurrent to the other s. 264.1(1) sentences above).

[10] Mr. Kiley's appeal from conviction raises a question of law, assessed on a correctness standard. Did the judge err in concluding the knife found in Mr. Kiley's possession met the definition of a prohibited weapon? The judge was required to correctly apply the legal principles in play to the facts he found (*R. v. S.T.P.*, 2009 NSCA 86 at para. 13).

[11] Mr. Kiley's appeal from sentence requires him to seek leave. If leave to appeal sentence is granted, the standard of review requires the Court to show deference to the sentencing judge. Intervention in the sentencing judge's decision is permitted only where it has been established there was an error in principle, or where the sentence imposed is manifestly unfit (*R. v. Chaisson*, 2024 NSCA 11 at para. 66; *R. v. Hann*, 2024 NSCA 19 at para. 50).

[12] Before turning to the issues of conviction and sentence, I will discuss the motion to adduce fresh evidence.

Should the fresh evidence be admitted ?

[13] Mr. Kiley's motion to introduce fresh evidence goes to two aspects of his arguments on appeal – an error on conviction, and ineffective assistance of counsel. Regarding an error on conviction, this Court must be satisfied the fresh evidence can meet the four part test set out in the seminal decision *R. v. Palmer*, [1980] 1 S.C.R. 759: whether the proposed evidence could have been available at trial – "due diligence", whether the proposed evidence is relevant, whether the proposed evidence is credible, and finally, whether the proposed evidence could have affected the trial result had it then been available (see also *Barendregt v. Grebliunas*, 2022 SCC 22 at para. 34).

[14] The fresh evidence proffered by Mr. Kiley was provisionally admitted pursuant to s. 683(1) of the *Code*. The evidence was in two formats – his affidavit and a thumb drive containing a video. The affidavit concerns Mr. Kiley's assertion of ineffective assistance of counsel. It embraces two themes: he and his trial counsel disagreed about his wish to contest the prohibited weapon charge and therefore he was "forced" to plead guilty, and he was erroneously convicted of possession of a prohibited weapon. The video goes to the second theme of an error on conviction.

[15] Mr. Kiley was cross-examined on his affidavit by the Federal Crown. Mr. Kiley's trial counsel had filed an affidavit in response to Mr. Kiley's assertion of ineffective assistance of counsel. He was cross-examined by Mr. Kiley. In light of my conclusions on the fresh evidence motion, it will not be necessary to consider counsel's evidence.

[16] A series of 2019 decisions of this Court outline the approach to be taken on an allegation of ineffective assistance of counsel leading to a miscarriage of justice: see *R. v. A.W.H.*, 2019 NSCA 40 at paras. 32-33; *R. v. Kobylanski*, 2019 NSCA 57 at para. 10; *R. v. Finck*, 2019 NSCA 60 at para. 25; *R. v. P.C.H.*, 2019 NSCA 63 at para. 4; *R. v. Snow*, 2019 NSCA 76 at para. 25-27. We must first consider whether the appellant has demonstrated the prejudice component – that counsel's representation of Mr. Kiley contributed to an unfair trial, resulting in a

miscarriage of justice. Only if the prejudice component has been established does consideration then turn to the question of counsel's competence.

[17] Fresh evidence on an assertion of a miscarriage of justice calls for a relaxation of the *Palmer* factors (*R. v. West*, 2010 NSCA 16 at para. 53), to facilitate analysis of Mr. Kiley's assertion his conviction was unfair. The burden is Mr. Kiley's to establish on a balance of probabilities that counsel's performance, whether by omission or commission, led to the alleged miscarriage of justice.

[18] The transcript of the proceedings captures various exchanges which took place over several court appearances, between Mr. Kiley's counsel and the judge in his presence, and directly between Mr. Kiley and the judge. Those discussions included multiple references to both the circumstances of his entering of guilty pleas and the categorization of the knife seized from him. The transcript confirms:

(i) Mr. Kiley entered a guilty plea to each offence while represented by counsel;

(ii) the judge directly inquired of Mr. Kiley, pursuant to s. 606.4 of the *Code*, and Mr. Kiley confirmed his guilty pleas were given freely and voluntarily;

(iii) there was no dispute raised by Mr. Kiley regarding the facts communicated to the court by the Federal Crown establishing the offence of possession of a prohibited weapon;

(iv) several months following his guilty pleas, at commencement of the sentencing hearing, Mr. Kiley suggested he wished to retract his guilty plea to possession of cocaine for the purpose of trafficking because he thought the court was misinformed about the quantity of cocaine he had possessed. The judge carefully explored with Mr. Kiley why he was attempting to do so, and offered some clarification to Mr. Kiley regarding the facts before the court. After an opportunity to engage in off the record consultation with his counsel, Mr. Kiley ended his discussion of that subject, but made no mention of any other concerns with respect to the facts of any of the other offences, including possession of a prohibited weapon[1];

[1] We are left to infer such discussions equipped Mr. Kiley with information that assisted him in then maintaining his guilty plea.

(v) following the off the record discussions noted above, counsel for Mr. Kiley inquired of the judge about the photo of the knife he had viewed. The judge advised the photo had satisfied him "the knife is a prohibited weapon by definition of the *Code*". Nothing further was raised by Mr. Kiley regarding his guilty plea to the charge of possession of a prohibited weapon, nor the facts surrounding that offence.

[19] The record lends no credence to Mr. Kiley's assertion he was somehow forced to plead guilty to possession of a prohibited weapon. Not only is it amply demonstrated that Mr. Kiley's plea to possession of a prohibited weapon was informed and voluntary, there is nothing in the record which would denote any circumstances during the proceedings before the judge to support an ineffective assistance of counsel claim, much less that a miscarriage of justice had occurred.

[20] With respect to Mr. Kiley's conviction for possession of a prohibited weapon, the proposed fresh evidence does not survive scrutiny of that which the record chronicles. I would not admit his affidavit as fresh evidence because it does not meet two of the *Palmer* criteria - the matter of credibility, and the evidence could not have impacted the outcome of the original proceeding.

[21] The unauthenticated copy of a "You Tube" video was submitted by Mr. Kiley to demonstrate the mechanism of the opening and closing of a knife ostensibly similar, if not identical, to the one he had possessed. I would not admit the video as fresh evidence. It is offered to support Mr. Kiley's argument about the configuration and operation of his knife, and whether his knife qualifies as a prohibited weapon (which will be discussed later). The video constitutes hearsay evidence and cannot meet the *Palmer* factors of relevancy and impact upon the conviction.

[22] In conclusion, Mr. Kiley's provisionally admitted affidavit evidence cannot support an assertion of ineffective assistance of counsel. In addition, I would dismiss Mr. Kiley's fresh evidence motion in relation to conviction.

Did the judge err in concluding the knife was a prohibited weapon?

[23] Section 84 (1) of the *Code* defines a "prohibited weapon" as:

> (a) a knife that has a blade that opens automatically by gravity or centrifugal force or by hand pressure applied to a button, spring or other device in or attached to the handle of the knife, or
>
> (b) any weapon, other than firearm, that is prescribed to be a "prohibited weapon".

[24] Mr. Kiley argues his knife, which he describes as a replica of a World War Two Nazi dagger, does not fit the definition of a prohibited weapon. To the extent Mr. Kiley could be correct in his assertion his knife is not one opened by "centrifugal force" or by "hand pressure applied to a button", the photo of the knife seized from him satisfied the judge it met the definition found in s. 84(1) of the *Code*. The Federal Crown submits the judge was correct, and further relies on Section 9 of Part 3 of the *Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted* (SOR 198 – 462 ("the *Regulations*"). That section sets out that a prohibited weapon includes:

> Any knife commonly known as a "push dagger" that is designed in such a fashion that the handle is placed perpendicular to the main cutting edge of the blade and any other similar device other than the aboriginal "ulu" knife.

[25] The Federal Crown argues Mr. Kiley's knife meets that definition as it is a device similar to a push dagger. The Federal Crown maintains the knife is a weapon as referenced in s. 84(1)(b) of the *Code*, because that section must be read in conjunction with the phrase "any other similar device" found in s. 9 of the *Regulation*.

[26] The Federal Crown maintains the link between s. 84(1) of the *Code* and s. 9 of the *Regulation* is justified and complete when the rule of statutory interpretation set out in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 is applied. In *Rizzo*, the Supreme Court of Canada reminded courts of Driedger's instruction to read the words of an Act "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament" (para. 31). The Federal Crown submits that reading the words "any similar device" found in s. 9 of the *Regulation* in the prescribed

manner leads to the conclusion the judge properly reached, that a knife such as Mr. Kiley's meets the definition of a prohibited weapon because it is "a similar device" to a push dagger.

[27] I agree with the Federal Crown that the implement depicted in the photo put before the judge fits within the definition of the category of items intended to be captured by the phrase "any similar device". Mr. Kiley's submission that his knife could not be opened quickly or stealthily, nor with centrifugal force, fades in the face of a contextual, ordinary sense reading of the phrase "any similar device". With respect, Mr. Kiley's view does not change the judge's correct interpretation that his knife constitutes a prohibited weapon.

[28] During oral submissions, Mr. Kiley acknowledged the knife "probably could" be used as a "punch or push dagger" despite that "not being the intended way to use this knife". There is no suggestion made to us by Mr. Kiley, nor was it put to the judge that he did not in fact possess the knife. Section 84(1) of the *Code* and s. 9 of the *Regulation* are silent regarding intended uses. Mr. Kiley may be a collector of memorabilia as he submitted to the Court he is, but such intent is irrelevant and ignores that the knife he possessed, for whatever reason he may have done so, meets the definition of a prohibited weapon because it is "any similar device".

[29] I am satisfied the judge was correct in his interpretation the knife depicted in the photo was a prohibited weapon. I am not persuaded there was any error committed in that regard and I would dismiss this ground of appeal.

Was the sentence improper?

[30] Although leave to appeal sentence is required, the bar is modest. Mr. Kiley must establish there is an arguable or not frivolous issue to be considered. Given the nature of the arguments made by Mr. Kiley concerning his sentence, he has met that bar. I note the consent of both respondent counsel on the issue of leave, and I would grant leave to appeal the sentence.

[31] Mr. Kiley asserts there are three aspects of the sentencing decision which constitute an error in the judge's approach:

(i) the seven year sentence imposed by the judge for possession for the purpose of trafficking in cocaine is excessive;

(ii) the judge failed to recognize or accept a joint submission put forward on the threat charges;

(iii) before his application of the principle of totality, the judge's original calculation of three years exceeded the allowable custodial sentence for the threats charges.

(i) *The sentence for possession for the purpose of trafficking*

[32] Mr. Kiley maintains the seven year custodial sentence the judge imposed for possession of cocaine for the purpose of trafficking was excessive, as a sentence in the four to five year range would not only have met the principles of sentencing, but in particular would have been consistent with other sentences for that offence. He says the cases referenced by the judge, both during discussions with counsel and in his decision, represent shorter sentences than the one imposed. Thus, says Mr. Kiley, the judge failed to give proper consideration to the principle of parity, by exceeding the range of sentences meted out for similar offences.

[33] Sentencing ranges are to be taken into account in the manner of a guide, not a stricture. This is because, as courts have frequently been reminded, sentencing is not an exact science. As discussed in *R. v. Chase*, 2019 NSCA 36:

> [40] As noted earlier, part of the Crown's complaint is that the judge erred by giving little if any weight to the principle of parity. I respectfully disagree. The parity principle is not a straightjacket forcing trial judges to conduct a pointless search for a perfect facsimile or uniform sentence. Parity does not require that sentences handed down to persons who committed the same crime always be the same. In *Lacasse*, Wagner, J. said:
>
> > [54] The determination of whether a sentence is fit also requires that the sentencing objectives set out in s. 718 of the *Criminal Code* and the other sentencing principles set out in s. 718.2 be taken into account. Once again, however, it is up to the trial judge to properly weigh these various principles and objectives, whose relative importance will necessarily vary with the nature of the crime and the circumstances in which it was committed. The principle of parity of sentences, on which the Court of Appeal relied, is secondary to the fundamental principle of proportionality[…]
>
> [Emphasis added]

[34] In his reasons, the judge discussed a series of appellate decisions, from this Court and others, which he found instructive in animating the principles of sentencing. The judge then referenced several trial and appellate decisions from this province in analyzing what might be a fit sentence for Mr. Kiley in relation to the trafficking offences. He said:

> The first question I must ask, what is the appropriate sentence for the drug offences under schedule I and schedule III? In the case at bar, following the reasoning in *R. v. Knickle*, *supra*, and *R. v. LeBlanc*, *supra*, Mr. Kiley should be classified as a medium scale retailer/small wholesaler (distribution of more than 1/3 kilogram and up to lower digit kilograms).
>
> I agree with Justice Rosinski in *R. v. LeBlanc* at paragraph 22 when he stated, for medium scale retailers/small wholesalers (distribution of more than 1/3 kilogram and up to single digit kilograms), the range of sentence is from five years to eight years.
>
> Following the decisions of *R. v. Carvery*, *R. v. Smith*, *R. v. Stokes*, *R. v. Steeves*, *R. v. Knickle*, *Conway*, *R. v. LeBlanc and White*, a fit and proper sentence with respect to the drug charges Mr. Kiley is facing is seven years.

[35] The judge's reasons demonstrate he was cognizant of the range, both in terms of the facts of the offences, and in light of Mr. Kiley's submission to him that a four year sentence for possession for the purpose of trafficking cocaine, which was at the lowest end of the range, if not below, would be appropriate.

[36] The judge was also alive to the impact of drug trafficking on the community. He commented:

> The accused pled guilty to possession for the purpose of trafficking. This is a [S]chedule I substance. The substance that was involved, of course, was cocaine. In addition to being highly addictive, it is well known to destroy lives and rip communities apart. This highly potent poison has consistently been linked to violence, physical harm, property offences and homicides.
>
> Those who traffic in this drug take financial advantage of those who are addicted and vulnerable. They operate on the sad reality that individuals will keep coming back for more in what is an inevitably a never ending downward spiral.

[37] The Federal Crown responds to Mr. Kiley's argument by maintaining the sentence imposed for the drug offences is not excessive, because the judge applied the *Fifield* scale to classify Mr. Kiley in the third category of a medium-scale

retailer/small wholesaler. That classification was what all counsel, including Mr. Kiley's, had advocated before the judge.

[38] The Federal Crown asked the judge to impose a seven year sentence for possession of cocaine for the purpose of trafficking. The judge adopted that submission on the basis of what he explained in his decision was the need to place proper emphasis upon denunciation and deterrence, along with totality. These were themes the judge had distilled from the decisions he relied upon.

[39] Before continuing my analysis of whether the sentence was excessive under all of the circumstances, I pause here to consider an additional aspect of the argument made by Mr. Kiley that the sentence imposed on him for possession of cocaine for the purpose of trafficking is too harsh.

[40] In his decision the judge said:

> A strong message of denunciation and deterrence has to be sent to Mr. Kiley and like-minded individuals that if you choose to be a major player in the drug trade in Cape Breton, you can expect a major sentence.

[41] Mr. Kiley suggests the judge effectively elevated his role in the offence beyond the agreement of all counsel and the court that Mr. Kiley fit in the third *Fifield* category. Mr. Kiley objects to the judge's characterization of him as a "major player", saying it actually equates to the fourth and highest *Fifield* category of "big-time operator".

[42] Mr. Kiley says this inappropriate assessment came about because the judge was tainted by the improper evidence of drug expert Cst. Martell, who had recounted for the court some of Mr. Kiley's communications and activities in the weeks and months leading to the date of the drug charges.

[43] I am satisfied the judge appreciated Cst. Martell's evidence was curtailed by an objection raised by Mr. Kiley's counsel that such evidence was unnecessary, because Mr. Kiley took no quarrel with the conclusions set out in the witness's report filed with the court. There ensued a lengthy exchange among the Federal Crown, Mr. Kiley's counsel and the judge about:

- what Mr. Kiley and the Federal Crown agreed were the facts surrounding his drug offences;

- what Mr. Kiley and the Federal Crown agreed was the correct categorization of Mr. Kiley's activities on the *Fifield* scale;

- what additional assertions the Federal Crown was attempting to make about the significance of other of Mr. Kiley's activities, about which he was putting the Crown to the proof thereof;

- what the judge understood about the circumstances surrounding the drug offences to which Mr. Kiley had entered guilty pleas.

[44] During that exchange, the judge referenced the possession of cocaine for the purpose of trafficking charge and agreed with the Crown that "it's pretty obvious that it's an aggravating case". Following their discussions, questioning of Cst. Martell was discontinued. Mr. Kiley says that aborted process nonetheless resulted in inappropriate evidence concerning messages on Mr. Kiley's phone and his activities on other dates making its way into the narrative and ultimately, into the judge's analysis.

[45] Section 725(1)(c) of the *Code* offers a statutory exception to the rule that offenders are sentenced only for the offences they commit. While it permits a judge to consider "any facts forming part of the circumstances of the offence that could constitute the basis for a separate charge", the Crown must establish such facts beyond a reasonable doubt. Just as his counsel had argued before the judge, Mr. Kiley asserts that nothing about his activities other than on the date of the offences was proven beyond a reasonable doubt. And yet , says Mr. Kiley, Cst. Martell's evidence effectively boosted his sentence.

[46] Mr. Kiley is concerned the judge's reference to him as a "major player" belies each of Cst. Martell, the Federal Crown, Mr. Kiley's counsel and the judge having described him as a *Fifield* "mid-level trafficker". Mr. Kiley says that what unfolded in relation to the evidence of Cst. Martell ran afoul of the direction provided in *R. v. Larche*, 2006 SCC 56.

[47] In *Larche*, the Supreme Court of Canada recognized that because the effect of the application of s. 725(1)(c) "…is to increase punishment on the basis of an uncharged offence", the offender who disputes their guilt on the uncharged offence is entitled to the presumption of innocence (para. 44). The Court noted the wording of s. 725 reflects that "Parliament has made plain the need to establish a

nexus or ‘connexity’ between the uncharged criminal conduct and the offence for which the offender has been convicted” (para. 48). The Court explained:

> [55] “Facts” (or uncharged offences) of this sort that have occurred in various locations or at different times cannot properly be said to form part of the transaction covered by the charge for which the offender is to be sentenced. Recourse to s. 725(1)(*c*) may nevertheless be had where the facts in question bear so close a connection to the offence charged that they form part of the circumstances surrounding its commission. In determining whether they satisfy this requirement of connexity, the court should give appropriate weight to their proximity in time and to their probative worth as evidence of system or of an unbroken pattern of criminal conduct.

[48] Mr. Kiley’s counsel’s submissions to the judge about Cst. Martell’s evidence make plain that Mr. Kiley was disputing his guilt on any uncharged allegations related to any other date. Thus, the burden was on the Crown to prove them (see also *R. v. Aalbers*, 2022 SKCA 105 at para. 43).

[49] Regardless, I am not persuaded the judge erred in the manner Mr. Kiley suggests - by considering unproven facts and incorporating them into his conclusions on sentence. The judge’s response to Mr. Kiley’s objection brought an end to the questioning of Cst. Martell, but not before the judge reiterated to the Federal Crown that facts it sought to rely upon would require proof if disputed by Mr. Kiley:

> So what aggravating fact that you’re trying to allege that the defence are not agreeing to? I guess that’s the issue that I have to -- that’s -- talking about submissions, that’s really what we -- basically, the Crown outlines the facts. If there’s any aggravating factor that is disputed, then they have to prove it beyond a reasonable doubt. So what aggravating factor do you want to get that the Crown -- that the defence are not agreeing to?

[50] During his decision, the judge’s two brief references to information offered through Cst. Martell came when he spoke of Mr. Kiley’s motivation for involvement in the possession for the purpose of trafficking offences. He stated:

> It is clear from the testimony of Officer Martell that the accused made increased profits from the sale of cocaine during the pandemic.
>
> . . .
>
> It is clear even from his own comments that he was motivated by greed as opposed to addiction. Mr. Kiley was a major player and was well entrenched in the drug trade in Cape Breton. Mr. Kiley preyed on fellow Cape Bretoners during

> a pandemic and made more profit. This was supported by the evidence of Officer Martell.

[51] I am not persuaded the judge improperly or incorrectly applied the "major player" label he affixed to Mr. Kiley, nor that he improperly considered the evidence of Cst. Martell. The judge was cognizant of the facts in play, and recognized Mr. Kiley took no umbrage with the contents of Cst. Martell's report, nor any of his evidence up to the point when counsel raised his objection with the judge. Based on everything before the judge, his was a sound conclusion that Mr. Kiley was "deeply entrenched in the drug trafficking trade". The sheer volume of drugs identified could have led to the judge's observations about the scale of Mr. Kiley's involvement, even without Cst. Martell's evidence.

[52] Mr. Kiley's request for a four year sentence on the possession for the purpose of trafficking charges could not temper the realities of his prior record and his high degree of moral culpability in relation to the offences. The judge also noted Mr. Kiley had a weapons prohibition order and was on release conditions when the offences occurred, describing the "flagrant disregard" of court orders, not his first such convictions, as requiring denunciation and deterrence in relation to the weapons offences. The tenor of the judge's sentencing decision, taken as a whole, reveals his overall assessment of Mr. Kiley's offences was grounded in the context of the information which was properly before him.

[53] I return to Mr. Kiley's primary argument that the sentence imposed for possession for the purpose of trafficking was excessive. Mr. Kiley says all the cases put before the judge spoke to sentences in the five year range, yet the judge referred to the range as being five to eight years for a mid-level trafficker of slightly less than 600 grams of cocaine. Mr. Kiley objects that the judge exceeded the norm of five years, but did not identify any aggravating factors to justify the seven year sentence imposed, particularly in the absence of any of the enumerated statutorily aggravating factors found in s. 10(2) of the *Act*.

[54] Regardless of the lack of statutorily aggravating factors, I am satisfied the judge appreciated the range of prior sentences set out in the caselaw he referred to, and how those decisions could inform his assessment of a fit sentence for each of Mr. Kiley's offences. The judge's decision is replete with discussion of the various aspects of Mr. Kiley's offences that the judge was satisfied represented aggravating features.

[55] The requirement for proportionality, a fundamental principle of sentencing set out in s. 718 of the *Code*, finds expression in the notion of parity (*R. v. Friesen*, 2020 SCC 9 at para. 33). Immediately prior to outlining the lone mitigating factor of Mr. Kiley's guilty pleas, and the aggravating factors of his offences, the judge cautioned himself:

> The Ontario Court of Appeal in *R. v. Hamilton* noted that proportionality is a fundamental principle of sentencing. It takes into account the gravity of the offence and the degree of responsibility of the offender. In other words, the severity of the sanction for the crime should reflect the seriousness of the criminal conduct. A disproportionate sanction can never be a just sanction. Aggravating and mitigating factors and the principles of parity, totality, restraint, are also important principles that must be engaged in the sentencing process.

[56] Later in his remarks, on his way to the *Adams* reconfiguration of the sentence, the judge characterized Mr. Kiley's offences, and recognized a need for denunciation and deterrence:

> Although this is a significant sentence, the Court is of the view that this is a fit and proper sentence in this case. Mr. Kiley's actions are highly culpable. Mr. Kiley is a major player in the drug trade in Cape Breton. He was in possession of 578 grams of cocaine and 100 Ritalin pills, $10,000 cash, and also a prohibited weapon. While in custody, he terrorized an intimate partner, threatening her on 10 occasions. He threatened to kill and assault his former common-law partner multiple times while the calls were being recorded at a correctional centre. He also threatened to kill her dogs and made threats to her mother and made threats to her through other individuals. Mr. Kiley was also on a court order not to possess prohibited weapons. He violated two orders.
>
> The present charges before the Court demonstrate a continuing pattern by Mr. Kiley not to have any respect for rule of law. While courts should never lose sight of rehabilitation, Mr. Kiley continues to demonstrate no desire for rehabilitation. Mr. Kiley's actions have to be denounced and deterred in the strongest terms. That's why a nine-year sentence, less remand, is appropriate. I will now reconfigure the sentence to comply with the totality principle.
>
> (Emphasis added)

[57] I read the judge's decision as consistent with the direction provided by this Court in *R. v. Kleykens*, 2020 NSCA 49 regarding application of the sentencing principles of proportionality and parity in cases involving circumstances such as those before the judge here:

> [101] A proper application of those principles in sentencing those convicted of participating in the trafficking of "hard drugs" requires as its principal objective the protection of society, such that the primary emphasis must always be placed on the principles of deterrence and denunciation.

[58] I return again to the often expressed notion that appellate courts must not take the opportunity to intervene in a sentence "simply because it would have weighed the relevant factors differently" (*R. v. Lacasse*, 2015 SCC 64 at para. 49). In that vein, a recent statement in *R. v. Khan*, 2023 ONCA 553 is also instructive, reminding us that deference to the weighing of mitigating and aggravating factors is done in a "holistic manner," not by "analyzing the relevant factors in isolation" (para. 9).

[59] In my view, the need for deference discussed in *Lacasse*, and repeated in *Chase*, responds to Mr. Kiley's complaint:

> [49] . . . an appellate court may not intervene simply because it would have weighed the relevant factors differently. In *Nasogaluak*, LeBel J. referred to *R. v. McKnight* (1999), 1999 CanLII 3717 (ON CA), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, in this regard:
>
> > To suggest that a trial judge commits an error in principle because in an appellate court's opinion the trial judge gave too much weight to one relevant factor or not enough weight to another is to abandon deference altogether. The weighing of relevant factors, the balancing process is what the exercise of discretion is all about. To maintain deference to the trial judge's exercise of discretion, the weighing or balancing of relevant factors must be assessed against the reasonableness standard of review. Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should an appellate court interfere with the sentence on the ground the trial judge erred in principle. [para. 46]
>
> [Emphasis added]

[60] As was the situation in *Chase*, the judge's remarks demonstrate he was "well aware of the realities" in his community (para. 58). As in *Friesen*, the judge had "regular front-line experience" and awareness of "the particular circumstances and needs of the community" where the offences took place (para. 25).

[61] The judge's reasons read as a whole allow for the conclusion his determinations about an appropriate sentence for Mr. Kiley were supported by the

circumstances of the offender and the offences, along with reference to the ranges developed in the caselaw. While his conclusions may have carried the judge to the outer ends of the sentence ranges chronicled in those cases, I am not persuaded the sentence imposed on Mr. Kiley for possession for the purpose of trafficking was unfit under all the circumstances.

(ii) *The joint submission*

[62] Mr. Kiley argues that in concert with the Provincial Crown, he offered to the judge a joint submission seeking a sentence of two years concurrent on the ten threats charges. He now objects to the judge having questioned counsel about whether there truly was a joint submission placed before the court, before proceeding to impose a three year sentence for the threats, rather than the two years sought.

[63] As argued before us by the Provincial Crown, there is a difference between a joint submission and a joint recommendation. A joint submission requires a *quid pro quo*, a benefit that flows to both parties to it. A joint recommendation is limited to the Crown's position being supported or adopted by the defence, for whatever its own reasons might be. This distinction employs a common-sense interpretation of both phrases – a submission made by both parties, versus a recommendation by one party which is joined in by the other party. Although earlier caselaw sometimes reveals the use of both terms interchangeably (which, as will be seen, also occurred in this case) more recent authorities appear to reflect an evolution to the use of the term joint submission when discussing an identical argument or submission that is advanced to the court by both parties to an agreement on sentence.

[64] Joint submissions possess an inherent strength and value that makes them integral to the proper functioning of the criminal justice system; thus they are deserving of deference. A judge should not lightly or easily depart from a joint submission, and only after application of the public interest test endorsed in *R. v. Anthony-Cook*, 2016 SCC 43:

> [32] Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. But, what does this threshold mean? Two decisions from the Newfoundland and Labrador Court of Appeal are helpful in this regard.

> [33] In *Druken*, at para. 29, the court held that a joint submission will bring the administration of justice into disrepute or be contrary to the public interest if, despite the public interest considerations that support imposing it, it is so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system". And, as stated by the same court in *R. v. B.O.2*, 2010 NLCA 19, at para. 56 (CanLII), when assessing a joint submission, trial judges should "avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts".

[65] What took place before the judge warrants examination closer examination of the submissions made to him. The Provincial Crown and Mr. Kiley's counsel addressed the court first on the threats charges. They were to be followed by the Federal Crown, who would discuss its recommendations in relation to the balance of the charges. A protracted discussion unfolded among the Provincial Crown, Mr. Kiley's counsel and the judge. It reveals no small amount of confusion about exactly what was being suggested to the court in relation to the threat charges, and not surprisingly generated questions by the judge about what was being recommended. That exchange is reproduced below, despite its length, to provide context:

> **MR. MOZVIK**: Thank you, Your Honour. Just to touch on the last point there, my friend and I and Mr. Russell, as he then was, had extensive negotiations in this matter pertaining to some of the issues, and most of the issues, that my friend has suggested. And it was by that – I guess, that *quid pro quo* that was going on in terms of the witnesses and their reluctance that we arrived at the number that we put before Your Honour, and that is a joint recommendation[2] with respect to the provincial offences.
>
> **THE COURT**: But that would be consecutive, two years consecutive, right?
>
> **MR. MOZVIK**: It was concurrent, Your Honour. We knew what the federal Crown was asking for. And when we negotiated our sentencing...
>
> **THE COURT**: So is yours two years concurrent?
>
> **MR. HARRISON**: In the...
>
> **THE COURT**: That doesn't make...
> (Counsel confer.)

[2] Although the terms "joint recommendation" and "joint submission" are used interchangeably, it is clear from the nature of what was being put forward that counsel and the judge were discussing a joint submission.

MR. HARRISON: Yes. In the brief -- when Mr. Mozvik and I spoke, I indicated to Mr. Mozvik that the Crown would be seeking two years, just to be clear, two years consecutive with respect to the drug matters.

THE COURT: Yeah.

MR. HARRISON: But rolled into the principle of totality, the global sentence would be eight years.

THE COURT: Yeah.

MR. HARRISON: Yes.

THE COURT: But that's not a joint -- if he's not agreeing to the eight years, it's not a joint recommendation.

MR. HARRISON: Well, that's where I was kind of a little confused, at that part.

THE COURT: So you can't -- you can't have it both ways.

MR. HARRISON: Yeah.

THE COURT: Either -- either it's a joint submission or it's not.

MR. HARRISON: Yeah.

MR. MOZVIK: Yeah, the joint submission was concurrent though.

THE COURT: And the reality is I don't know how you get to -- I don't know how you get, in law, two years concurrent on -- that's a separate offence. Obviously totality will come into it at some point.

MR. HARRISON: Yes.

THE COURT: But obviously at the end of the sentence.

MR. HARRISON: Yeah.

THE COURT: But two years concurrent in terms of the calculation, to me, that's a separate -- that's a separate offence. That's not -- in my view, that's not a joint recommendation.

MR. HARRISON: Okay.

THE COURT: So -- unless -- unless counsel can point out how that is.

MR. HARRISON: Okay.

MR. MOZVIK: Well, the recommendation was that it was going to be concurrent time to whatever the Crown was asking for.

MR. HARRISON: Yes.

MR. MOZVIK: And that's what we were going to ask Your Honour to impose.

MR. HARRISON: Yes.

MR. MOZVIK: To my mind, that's a joint recommendation.

MR. HARRISON: Yes.

THE COURT: So the -- so the provincial Crown is saying that that should be two years concurrent?

MR. HARRISON: Yes, Your Honour.

THE COURT: Okay.

MR. HARRISON: Yes.

THE COURT: Okay. I don't know how you get the two years concurrent in relation to the matter. So – and how that becomes fit and proper.

MR. HARRISON: I guess, Your Honour, what – when Mr. Russell and I and Mr. Mozvik spoke about this, we had been -- we had been aware of the substantial nature of the custodial term recommended by the federal Crown.

THE COURT: Yeah. Yeah.

MR. HARRISON: And based on that substantial nature of the federal Crown...

THE COURT: Yeah.

MR. HARRISON: ...the provincial Crown was of the view that, in the sentence -- and I understand what Your Honour is saying about the principle of totality.

THE COURT: Yeah. But here's the problem with that logic.

MR. HARRISON: Yeah.

THE COURT: Here's the difficulty, okay. If that was the recommendation and he said, "Yeah, I agree with the federal Crown's recommendation"...

MR. HARRISON: Yeah.

THE COURT: But he's not agreeing with the federal Crown's recommendation.

MR. HARRISON: Yeah.

THE COURT: So, you know, that's the concern I have here. So basically, the sentence, if you're saying because he's getting an eight-year sentence, if I were to accept that -- I haven't accepted anything yet.

MR. HARRISON: Yes. Correct.

THE COURT: Okay? And then basically the provincial Crown says, "In light of that, we're agreeing that it should be concurrent."

MR. HARRISON: Yes.

THE COURT: Okay? But he's saying four years total.

MR. HARRISON: Yes.

THE COURT: So how -- how does that become a joint recommendation at that point?

MR. HARRISON: Well, I'm...

THE COURT: How is that -- how is that a true joint recommendation?

. . .

THE COURT: ...on that. I mean, a joint recommendation is a joint recommendation.

MR. HARRISON: Yeah.

THE COURT: "We agreed to a term of a sentence."

MR. HARRISON: Yes. Yes.

THE COURT: "And we negotiated, and that's what it is." But the concern I have is, you know, if the provincial Crown is saying, "In light of the fact that the feds are -- you know, or the court -- because it's such a long sentence..."

MR. HARRISON: Yes.

THE COURT: "...we believe it should be concurrent."

MR. HARRISON: Yeah.

THE COURT: But the defence is saying it should be a four-year sentence. So how is that...

MR. HARRISON: I guess...

THE COURT: How -- how do I treat that?

MR. HARRISON: I guess my understanding of it, Your Honour -- and I apologize if I -- if I misspoke, and I apologize to Mr. Mozvik if I misspoke. But my – in speaking with Ms. Conrad, in speaking, we were to calculate the entire number.

THE COURT: Yeah.

MR. HARRISON: Which was at -- which was at nine and a half years.

THE COURT: Yeah.

MR. HARRISON: And then with totality, the Crown would roll its recommendation in with the federal Crown's recommendation of eight years.

THE COURT: Yeah.

MR. HARRISON: That's what I...

THE COURT: But based on your calc -- yeah, if I accept...

MR. HARRISON: Yes. If you accept...

THE COURT: If the court accepts the totality.

MR. HARRISON: If the court accepts the totality, exactly.

THE COURT: But, I mean, the reality is you're saying it should be a two-year consecutive sentence in your brief.

. . .

THE COURT: So, you know, and Mr. Mozvik is not agreeing to that.

MR. HARRISON: No.

THE COURT: And that's -- you know, but that's fine. But that's -- I just want to make it clear, to me, that's not -- I don't think that's the same in *R. v. [Anthony-]Cook*e...

MR. HARRISON: No.

THE COURT: ...in my view, you know.

MR. HARRISON: No. Well, as the court -- and as the court is aware, when you're calculating the totality principle...

. . .

MR. MOZVIK: That's okay. No, no. In essence, Your Honour, you've got the gist of what and how we arrived at that recommendation.

THE COURT: Yeah.

MR. MOZVIK: It was a *quid pro quo*...

THE COURT: Yeah.

MR. MOZVIK: ...based upon certain things. And if you don't consider it a joint recommendation, I would ask that you factor that into your...

THE COURT: Yeah.

MR. MOZVIK: ...deliberations, Your Honour.

[66] These passages establish the judge had legitimate concerns about the sufficiency of what counsel were putting forward, in terms of whether it properly addressed the circumstances of the threat offences. Furthermore, the judge could not accept that what was being proposed was actually in the nature of a joint submission.

[67] When the judge passed sentence at a later date and imposed three years (before a reduction upon application of *Adams*) instead of the two years counsel had discussed, he did not identify anywhere in his reasons the representations of the Provincial Crown and Mr. Kiley on the threats charges as having been in the nature of a joint submission. Thus, says Mr. Kiley, the judge violated the instructions set out in *R. v. Nahanee,* 2022 SCC 37, decided by the Supreme Court of Canada five months after his sentencing took place. He says it was not open to the judge to scrutinize whether the submission being offered was ill-advised on the part of the Provincial Crown, unless both parties were afforded the steps of notice and reply identified in that decision.

[68] *Nahanee* confirms when a judge intends to impose a sentence higher than that recommended by the Crown, the parties must as soon as possible be given notice, and provided a reasonable opportunity to respond:

> [45] Adequate notice does not require the judge to set out in detail, or with exactitude, what it is that they find troublesome with the Crown's proposed sentence; they should, however, do so whenever possible. It is enough for a judge to advise the parties that, in their view, the sentence proposed by the Crown appears too lenient, having regard to the seriousness of the offence and/or the degree of responsibility of the accused. Providing comprehensive reasons for this concern may, and often will, prove impossible since the judge's position at this point is unlikely to be fixed. As indicated, the purpose is simply to put the parties on notice that the judge is considering exceeding the Crown's proposed sentence. Notifying the parties can be as simple as saying: I am considering imposing a higher sentence than the Crown is seeking due to the seriousness of this offence (see, e.g., *R. v. Scott*, 2016 NLCA 16, 376 Nfld. & P.E.I.R. 167, at para. 37). While notice need not take a particular form, it must be more than simply asking questions or expressing vague concerns about the parties' sentencing proposals.
>
> . . .
>
> [48] It is critical that both the Crown and the accused initially provide as much relevant information as possible at the contested sentencing hearing in support of their respective positions. The opportunity for further submissions should not be relied on as a chance to pull a rabbit out of the hat. Additional submissions should respond to the concerns raised, including matters that the parties considered irrelevant or simply overlooked in their initial submissions. For example, this will be the case where the parties propose differing non-custodial options and the judge signals that they are considering a period of incarceration. Further argument and pertinent authorities will likely be necessary.
>
> . . .

> [50] Where the parties are put on notice and given an opportunity to make further submissions, the format for doing so rests with the judge in consultation with the parties. The judge may seek oral or written submissions, or both. The parties must be allowed a reasonable time to prepare additional submissions, if needed.

[69] Courts are instructed by *Nahanee* that even when there is no notice provided by the judge, and therefore no opportunity for the parties to provide further submissions, appellate intervention will still only be warranted (i) when that absence of notice and an opportunity for response are shown to have impacted the sentence, (ii) when the judge failed to provide reasons (or sufficient reasons), or (iii) when the judge's reasons were erroneous (para. 59). It is the second of those mis-steps, the absence of reasons, which forms the basis for Mr. Kiley's complaint. He says not only did the judge err in not advising the parties he was considering imposing a longer sentence for the threats charges than was being suggested, more critically, his reasons did not explain, or at least not sufficiently, why he chose to impose a higher sentence than had been recommended.

[70] The lengthy exchange reproduced earlier demonstrates the judge clearly made his concerns known to counsel and they responded "on their feet" so to speak. With respect, Mr. Kiley's reliance on *Nahanee* is misplaced, as it avoids the underlying problem, as pointed out by the Provincial Crown, that there was not a true joint submission placed before the judge. This was because what was submitted by both counsel was wholly tethered to and entirely contingent on a prediction that a very specific sentence would be meted out on the Federal Crown's charges.

[71] *Nahanee* makes plain that a joint submission cannot include contingencies:

> [27] To be clear, a joint submission covers off every aspect of the sentence proposed. To the extent that the parties may agree to most, but not all, aspects of the sentence — be it the length or type of the sentence, or conditions, terms, or ancillary orders attached to it — the submission will not constitute a joint submission. The public interest test does not apply to bits and pieces of a sentence upon which the parties are in agreement; it applies across the board, or not at all. Apart from the logistical problems of applying two different tests to parts of the same proposed sentence, at the end of the day, there is only one composite sentence. Arriving at a sentence involves an assessment of all of its component parts. Isolating one or two parts of the sentence and subjecting them to a different test is antithetical to this determination, and may well undermine it.
>
> (Emphasis added)

[72] Mr. Kiley responds that the fact the joint submission on the threats charges was linked to the separate sentence on the Federal Crown's charges is irrelevant, because the parties' intention was for the judge to impose concurrent time for the threat charges knowing full well there would be some length of custodial time on the drug charges. Mr. Kiley says in that way the joint submission was not, to use the language of *Anthony-Cook*, "unhinged" from the bigger picture of what was occurring.

[73] I am not persuaded by this argument. Before the judge, counsel predicated their positions on an unknown sentence that they could only anticipate. At that stage, the most they were "guaranteed" was that Mr. Kiley would more than likely receive a custodial sentence. Critically, the Federal Crown and Mr. Kiley had differing submissions about what the length of the sentence for the Federal Crown's matters should be.

[74] Mr. Kiley and the Provincial Crown could not possibly agree to every aspect of that which they proposed, because it was a proposal based on an unknown - how much time Mr. Kiley would receive for all of the offences being prosecuted by the Federal Crown. They could agree to nothing more than that the judge impose a period of concurrent custody, but concurrent to what duration of sentence on the Federal Crown's matters? It was an attempt to have a mere contingency provide the scaffolding for the Provincial Crown and Mr. Kiley's proposal.

[75] The judge did not err in the manner Mr. Kiley suggests. What was done by the judge in imposing three years custody for the threats charges, was done in the context of counsel being given virtually immediate notice and an opportunity to respond, albeit brief. The judge did not reject a joint submission, because there was none before him. When the judge eventually passed sentence at a later time, he did not need to furnish reasons for rejecting what counsel had put forward because he had earlier correctly concluded there was no joint submission before him.

(iii) *The judge exceeded the allowable custodial sentence for the threat charges*

[76] Mr. Kiley also argues that prior to the reduction in the sentences necessitated by the application of the totality principle, the judge had erroneously calculated a three-year sentence concurrent in relation to each of the threat charges. Mr. Kiley

says the judge could not have imposed that sentence, because the maximum sentence allowable for certain of those charges was two years. As the Provincial Crown notes in its factum, s. 718.3(8) of the *Code* recognizes that where the offence is an indictable one, involving intimate partner violence and for which the offender has a prior conviction for intimate partner violence, then the sentence may be increased. Mr. Kiley's threat charges met all of those criteria, thus justifying the judge's original imposition of a sentence of three years, then reduced to two years on the basis of totality. I see no error in him having done so.

[77] In conclusion, I am satisfied the judge properly exercised his discretion in performing the sentencing task before him. His reasons permit an understanding of the context for his conclusions and how he arrived at the sentences he imposed. The sentence for possession for the purpose of trafficking is not excessive under all of the circumstances of the offence and the offender. Whether this Court might have imposed a different sentence is immaterial. Further, I do not see the judge committed any error in principle in imposing the sentences he did for the offences before him, nor is there any other basis upon which this Court could interfere.

[78] To summarize, I would dismiss both the fresh evidence motion and the appeal from conviction. I would grant leave on the sentence appeal but dismiss that appeal.

Beaton, J.A.

Concurred in:

Farrar, J.A.

Bourgeois, J.A.