

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**IN THE MATTER OF:**

**HER MAJESTY THE QUEEN**

- v -

**DEVON HERBACK**

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Transcript of the Sentencing Decision held before The Honourable Justice S.H. Smallwood, sitting in Yellowknife, in the Northwest Territories, on the 16th day of February, 2018.

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**APPEARANCES:**

Ms. M. Zimmer:	Counsel for the Crown
Mr. J. Bran:	Counsel for the Accused

(Charges under s. 5(1) of the *Criminal Code*)

1 THE COURT: Devon Herback has pleaded  
2 guilty to trafficking in cocaine, contrary to  
3 section 5(1) of the Controlled Drugs and  
4 Substances Act. A guilty plea was entered on  
5 October 30th, 2017, and the matter was adjourned  
6 for sentencing to February 7th, 2018. The  
7 preparation of a presentence report was also  
8 ordered. It is now my task to sentence  
9 Mr. Herback for this offence.

10 The facts of the offence were included in  
11 the Agreed Statement of Facts. Briefly, they  
12 are: The charges arise from a major  
13 investigation conducted by the RCMP into drug  
14 trafficking activities in Yellowknife and in the  
15 Northwest Territories. The objective of Project  
16 Green Manalishi was to disrupt and dismantle  
17 networks responsible for high level drug  
18 trafficking in the Northwest Territories.

19 As part of the investigation, the RCMP were  
20 granted a judicial authorization to monitor the  
21 private communications of multiple individuals.  
22 A number of telephone calls and text messages  
23 were intercepted suggesting that Mr. Herback was  
24 coordinating the transport of drugs into the  
25 Northwest Territories and trafficking drugs  
26 throughout the territory.

27 Between February 24th and April 13th, 2016,

1 Mr. Herback conspired with Norman Hache, Michael  
2 Lapierre, Bonita Bohnet, Dolapo Bode-Harrison,  
3 Mike Dunn, Lacey Forrest and Adam Lee to traffic  
4 and possess, for the purpose of trafficking,  
5 cocaine in Yellowknife and other places in the  
6 Northwest Territories.

7 Mr. Hache, Mr. Bode-Harrison and Mr. Dunn  
8 arranged to transport cocaine to the Northwest  
9 Territories. Mr. Herback was then involved in  
10 transporting cocaine within the Northwest  
11 Territories and selling cocaine at the street  
12 level in Yellowknife.

13 Mr. Herback was supplied cocaine from Mr.  
14 Hache and acted under Mr. Hache's direction. He  
15 transported cocaine to supply street-level  
16 traffickers in the network and also trafficked  
17 directly to users themselves.

18 Mr. Herback, along with two others, were the  
19 primary operators of several dial-a-dope phones  
20 in Yellowknife. The dial-a-dope phones were  
21 operated 24 hours a day every day. Several  
22 ounces of cocaine a day were sold through the  
23 dial-a-dope operation.

24 On March 11, 2016, the RCMP used undercover  
25 officers to buy crack cocaine using a phone  
26 number that was associated with the dial-a-dope  
27 operation. An officer called a number and

1 requested to purchase crack cocaine. Mr. Herback  
2 met the officers in an alley in Yellowknife and  
3 sold them four pieces of crack cocaine (total  
4 weight of 1.9 grams) for \$320.

5 Between March 15th and 16th, 2016, Ms.  
6 Forrest and Mr. Hache arranged to deliver cocaine  
7 to the residence of Ms. Forrest in Fort  
8 Resolution, and Ms. Forrest was to send back  
9 money that had been collected. Mr. Herback's  
10 role was to transport the cocaine to Fort  
11 Resolution.

12 The RCMP performed surveillance on the  
13 vehicle as it travelled from Yellowknife to Fort  
14 Resolution. When Mr. Herback arrived at Ms.  
15 Forrest's residence, the RCMP moved in and  
16 arrested them.

17 Mr. Herback was located in the truck parked  
18 in the driveway, and the police found 362.5 grams  
19 of cocaine lying on the ground next to the  
20 vehicle, \$5,980 in cash, a knife, a cutting  
21 agent, a cellular phone and a digital scale.

22 To maintain the integrity of the  
23 investigation, Mr. Herback and Ms. Forrest were  
24 released shortly after their arrest. Following  
25 the arrest, Mr. Herback resumed working the  
26 dial-a-dope phone.

27 From April 4th to 13th, 2016, following the

1           arrest of another group of drug traffickers on  
2           April 4th, eight to nine ounces of cocaine a day  
3           were being sold through the dial-a-dope phones.

4           On April 14, 2016 the RCMP executed a number  
5           of search warrants and made played several  
6           arrests. Drugs, offence-related property and  
7           proceeds of crime were seized.

8           On April 16, 2016, Mr. Herback turned  
9           himself into the RCMP in Yellowknife.

10          The Crown is seeking a sentence of three  
11          years imprisonment less credit for remand time.  
12          The defence is seeking a sentence of 20 to 24  
13          months imprisonment.

14          Mr. Herback is of Métis descent, and section  
15          718.2(e) of the *Criminal Code* requires me to  
16          consider available sanctions other than  
17          imprisonment that are reasonable in the  
18          circumstances, which should be considered for all  
19          offenders, and paying particular attention to the  
20          circumstances of aboriginal offenders.

21          The Supreme Court of Canada in the cases of  
22          *Gladue* and *Ipeelee* have said that sentencing  
23          judges are to consider the unique systemic or  
24          background factors which may have played a part  
25          in bringing an aboriginal offender before the  
26          Courts and the types of sentencing procedures and  
27          sanctions which might be appropriate in the

1           circumstances because of their background.

2           In this case I have the benefit of a  
3           presentence report, which provides information  
4           about Mr. Herback's background and circumstances.

5           He is 36 years old and was born in Alberta.  
6           His parents split up when he was two, and he  
7           moved with his mother to Fort Smith. He lived  
8           there for many years until moving to Yellowknife  
9           when he was an adult. He reportedly had a good  
10          childhood and became close with his step-father,  
11          and he maintained a relationship with his  
12          biological father as well.

13          Mr. Herback is part Lakota on his mother's  
14          side. Growing up, he had some exposure to  
15          aboriginal culture and traditions and was able to  
16          take part in hunting, fishing and camping. These  
17          activities were not a regular part of his life,  
18          but he enjoyed them. None of Mr. Herback's  
19          immediate family attended residential school,  
20          although his grandfather and other relatives did.

21          Mr. Herback has a common-law spouse with  
22          whom he has been together with for approximately  
23          15 years, and they have two children together.  
24          Mr. Herback has another child from an earlier  
25          relationship who also lives with him.

26          The presentence report indicate that  
27          Mr. Herback has struggled with depression and has

1           been on medication to manage this in the past,  
2           and, in terms of substance use, Mr. Herback has  
3           used marijuana when he was a teenager but quit  
4           that when he was 25. He first used cocaine at 20  
5           years old and began to use it occasionally. In  
6           2014, due to stress surrounding his employment  
7           situation, he began to use it more and became  
8           addicted to the drug, and he became involved with  
9           the drug trade to support his habit.

10           To his credit, since his arrest, Mr. Herback  
11           has managed to maintain his sobriety, and despite  
12           the issues that he has had, he has been able to  
13           maintain employment throughout the years and has  
14           been known as a hard worker. The letters that  
15           have been filed on his behalf demonstrate that he  
16           has been considered a hard worker. He has been  
17           considered a valuable employee. Most recently,  
18           he has been employed by a local business, and the  
19           letter that has been filed has indicated that  
20           they consider him to be a valuable worker and  
21           hope to continue to work with him.

22           In terms of the sentencing principles, a  
23           primary objective in sentencing for trafficking  
24           in cocaine is deterrence and denunciation.  
25           Denunciation meaning to denounce unlawful conduct  
26           and the harm done to victims or the community  
27           that is caused by the offender's conduct and to

1           deter the specific offender and other persons  
2           from committing similar offences.

3           In trafficking cases, the focus is on  
4           imposing sentences that send a message and deter  
5           other persons who might be tempted to traffic.  
6           Historically, the sentences that the courts have  
7           imposed for trafficking in cocaine have been  
8           harsh, designed to emphasize the sentencing  
9           principles of denunciation and deterrence.

10          Both counsel, in their submissions, refer to  
11          the starting point, which are applicable when  
12          sentencing an offender for trafficking in  
13          cocaine. Counsel for the Crown argued that the  
14          applicable starting point was four and a half  
15          years as this was trafficking in cocaine at the  
16          wholesale level. Defence counsel argued that  
17          this was commercial trafficking to which a  
18          three-year starting point is applicable.

19          Over the years there have been many  
20          sentencing decisions involving trafficking in  
21          cocaine. These decisions and appellate decisions  
22          from our Court of Appeal as well as the Alberta  
23          Court of Appeal have established sentencing  
24          ranges for these types of offences. They have  
25          established starting points.

26          The Alberta Court of Appeal in *R. v.*  
27          *Maskell*, 1981 ABCA 50 and *R. v. Lau*, 2004 ABCA



1 408, set the starting point for trafficking in  
2 cocaine at the commercial level and for  
3 trafficking at the wholesale level. *Lau* has been  
4 applied in this jurisdiction in cases like *R. v.*  
5 *Castro*, 2016 NWTSC 8, which endorse the four and  
6 a half year starting point for wholesale  
7 commercial trafficking in cocaine.

8 A starting point is not a minimum sentence  
9 or a set sentence, but it is a guideline where  
10 the Court begins by considering what the  
11 appropriate starting point sentence is and then  
12 adjusting the sentence to reflect the mitigating  
13 and aggravating factors of each case, taking into  
14 account the circumstances of that offence and of  
15 that offender.

16 A starting point sentence reflects the  
17 seriousness of the crime and its prevalence in  
18 this jurisdiction and the need to impose  
19 deterrent sanctions. It also reflects the moral  
20 blameworthiness of those who traffic in illegal  
21 substances on a significant scale.

22 The starting point for commercial cocaine  
23 trafficking on more than a minimal level is three  
24 years, whereas wholesale cocaine trafficking has  
25 a four-and-a-half-year starting point. The  
26 maximum penalty for trafficking in cocaine is  
27 life imprisonment. Life imprisonment is reserved

1 for the most serious offences in Canadian  
2 criminal law. That trafficking in cocaine  
3 carries this possible punishment demonstrates how  
4 seriously Parliament considers this problem, and  
5 the sentences that are imposed reflect the  
6 seriousness with which courts consider  
7 trafficking in cocaine.

8 The devastating effects of cocaine have been  
9 referred to for years by the courts in this  
10 jurisdiction, and cocaine continues to be a  
11 problem, destroying people's lives and tearing  
12 apart families. People continue to traffic in  
13 cocaine partly, I expect, because it is a  
14 lucrative enterprise.

15 Those that traffic in cocaine contribute  
16 directly to the social problems that exist in  
17 this community. The moral blameworthiness of  
18 those who traffic in cocaine is high.

19 In determining whether a case falls into the  
20 commercial level of trafficking on more than a  
21 minimal scale or whether it is a case of  
22 wholesale drug trafficking, there is no set  
23 amount of cocaine which establishes this. The  
24 Alberta Court of Appeal in *Lau* acknowledged that  
25 there was no clear distinction as to where  
26 commercial trafficking on more than a minimal  
27 scale ends and where wholesale commercial

1 trafficking begins.

2 After reviewing some of the cases, the Court  
3 stated at paragraph 27:

4 "The commercial cases that attracted  
5 a 3 year starting point, therefore,  
6 typically involved a few grams of  
7 cocaine with 2 ounces (about 57  
8 grams) at the high end of the scale.  
9 This is significantly less cocaine  
10 than the wholesale cases cited, where  
11 amounts of the drug were in the range  
12 of hundreds of grams."

13 The determination of whether someone is  
14 engaged in trafficking at the commercial level or  
15 the wholesale level does not just come down to a  
16 question of the amount of drugs, other factors  
17 need to be considered such as the role of the  
18 person in the organization.

19 In *Lau*, the Alberta Court of Appeal referred  
20 to the case of the *R. v. Mah*, 2003 ABCA 220,  
21 where the offender had 238.2 grams of cocaine in  
22 his possession divided into 10 plastic bags. The  
23 value was said to be over \$23,000. The offender  
24 was considered to be a middle man, higher than a  
25 dial-a-dope dealer and in a position of  
26 responsibility in the continuing criminal  
27 enterprise. In *Mah*, the offender was sentenced

1 on the basis that he was engaged in wholesale  
2 commercial trafficking.

3 Looking at the circumstances of the offence,  
4 Mr. Herback was involved in the transportation,  
5 distribution and sale of cocaine in Yellowknife  
6 in the Northwest Territories. He operated a  
7 dial-a-dope phone, which was part of an operation  
8 which sold up to 8 to 9 ounces of cocaine a day.  
9 This is a significant amount of cocaine to move  
10 in the city of Yellowknife in terms of quantity  
11 and the value.

12 Mr. Herback helped to distribute the drugs.  
13 He was involved in collecting money from people.  
14 He transported the 362 grams of cocaine from  
15 Yellowknife to Fort Resolution. So while  
16 Mr. Herback was not the head of this drug  
17 trafficking group, he was not just a street-level  
18 dealer. He was trusted and played a significant  
19 part in this organization. It is clear that he  
20 understood what he was doing and the  
21 consequences, stating in a conversation that was  
22 intercepted with Norman Hache and Dolapo  
23 Bode-Harrison: "I fully accept I know what I do,  
24 and I know the fucking consequences, and it's  
25 like I will -- I will do the dirt work and the  
26 shit work that people don't want to do, and it's  
27 because it just needed to be done, right?"

1 Mr. Herback was the guy you went to when you  
2 wanted things done.

3 The amount of cocaine, which was seized in  
4 Fort Resolution, was significant, 362.5 grams of  
5 cocaine. This amount is sufficient to indicate  
6 that the offender might be engaged in wholesale,  
7 commercial trafficking, but when you also  
8 consider his ongoing involvement in a dial-a-dope  
9 operation, which trafficked anywhere from 8 to 9  
10 ounces of cocaine a day, that his involvement  
11 continued unabated after his arrest, and his role  
12 in the organization as something more than a  
13 street level dealer, I am satisfied that  
14 Mr. Herback was engaged in wholesale, commercial  
15 trafficking in cocaine.

16 Mr. Herback does have a criminal record with  
17 three convictions for possession of counterfeit  
18 money in 2003; for that he received a fine and  
19 probation. The criminal record is limited, dated  
20 and unrelated, and all it really does is  
21 demonstrate that Mr. Herback does not come before  
22 this court as a first time offender.

23 Mr. Herback was arrested in Fort Resolution  
24 for the purpose of trafficking during the course  
25 of the investigation. He was released on a  
26 recognizance on March 16, 2016 with a number of  
27 conditions and continued on with his activities

1 completely disregarding those conditions.

2 Mr. Herback continued with his drug  
3 trafficking activities, and he showed no  
4 hesitation in continuing with these activities,  
5 and, as I stated, it was clear that he understood  
6 what he was doing and the consequences. So that  
7 is aggravating in my view.

8 There are mitigating factors as well.  
9 Mr. Herback has entered a guilty plea. It was  
10 not at the earliest opportunity, but this was a  
11 complicated matter with significant disclosure  
12 and a number of co accused. Mr. Herback waived  
13 his preliminary inquiry in this matter, and this  
14 matter was never set for trial. If this matter  
15 had proceeded to trial, it would have taken some  
16 time and required significant resources. So  
17 Mr. Herback will receive full credit for his  
18 guilty plea.

19 As well, a guilty plea can be considered an  
20 expression of remorse and taking responsibility,  
21 and from what I have heard today from  
22 Mr. Herback, it is clear that he understands what  
23 he has done and has taken responsibility, and, as  
24 well, that is clear from the presentence report  
25 in what he had told the preparer of the  
26 presentence report.

27 In determining a fit sentence for

1 Mr. Herback, it is also important to consider the  
2 principle of parity and what sentences were  
3 imposed on others who were involved in the  
4 criminal organization. Dolapo Bode-Harrison  
5 pleaded guilty to a charge of having conspired  
6 with others to traffic cocaine and possess  
7 cocaine for the purpose of trafficking.

8 Mr. Bode-Harrison was the supplier for  
9 Mr. Hache's drug trafficking network, and he  
10 coordinated and sent shipments of cocaine to the  
11 Northwest Territories. His role was  
12 characterized as being the supplier in the  
13 organization, and Mr. Hache was in charge of  
14 controlling the distribution of the drugs. They  
15 were considered equals in the organization in the  
16 sense that neither directed the other.

17 Mr. Bode-Harrison was sentenced to four  
18 years imprisonment. Mr. Hache also pleaded  
19 guilty and was sentenced to five years  
20 imprisonment. Both of those individuals were  
21 higher up in the organization than Mr. Herback  
22 was, but it also has to be noted that both of  
23 their sentences were joint submissions, which the  
24 Court accepted, but also, in each case, the Court  
25 stated that the joint submission was at the low  
26 end of the spectrum.

27 First, I will deal with the ancillary orders

1 requested by the Crown. Defence counsel has not  
2 taken any issue with them. Section 51 of the  
3 CDSA is a secondary designated offence pursuant  
4 to section 487.04, and there will be an order  
5 pursuant to section 487.051 for the taking of  
6 Mr. Herback's DNA for the DNA data bank.

7 Pursuant to section 109, a firearms  
8 prohibition order is mandatory, and Mr. Herback  
9 will be prohibited from possessing firearms for a  
10 period of 10 years following his release from  
11 imprisonment.

12 There will also be a victim of crime  
13 surcharge of \$200, payable in accordance with the  
14 regulations. There will be also a forfeiture  
15 order. The items referred to in Appendix B of  
16 the Agreed Statement of Facts are offence-related  
17 property and will be forfeited to the Crown  
18 pursuant to section 490.1 of the *Criminal Code*,  
19 and the money that is referred to in Appendix C  
20 of the Agreed Statement of Facts is proceeds of  
21 crime and will be forfeited to the crime pursuant  
22 to section 462.37 of the *Criminal Code*.

23 Mr. Herback was in custody on this matter  
24 for a period of time. He was arrested on April  
25 16th, 2016 and was in custody until June 23rd,  
26 2016 when he was released on a recognizance.  
27 This amounts to 69 days, which, at one and a half



1 days credit for each day spent in presentence  
2 custody, amounts to 103 and a half days or just  
3 over three months of remand credit, which will be  
4 deducted from Mr. Herback's sentence.

5 I have given some consideration to the  
6 sentence that should be imposed, taking into  
7 account the circumstances of the offence,  
8 Mr. Herback's personal circumstances and the  
9 applicable sentencing principles.

10 Mr. Herback, please stand. For the offence  
11 of trafficking in cocaine, in count 9 on the  
12 Indictment, I sentence you to a period of  
13 imprisonment of 36 months. You will receive  
14 credit for three months of pretrial custody,  
15 leaving a sentence of 33 more months to be  
16 served. You may have a seat.

17 Thank you. Counsel, is there anything else?

18 MS. ZIMMER: Yes, Your Honour. I do just  
19 have a stay of proceedings here for the remaining  
20 counts on the Indictment.

21 THE COURT: Okay. That will be filed, and  
22 the remaining counts will be stayed. Mr. Bran?

23 MR. BRAN: Thank you. I know the Court  
24 does not have jurisdiction in placement of  
25 Mr. Herback once he is sentenced and is in the  
26 authority of the Corrections, but what I would be  
27 asking for on behalf of my client is for a

1 jurisdiction recommendation that he be allowed to  
2 serve his sentence here in the Northwest  
3 Territories so that he can be close to family and  
4 also have the opportunity for a possibility of  
5 work release once he is eligible for that.

6 THE COURT: Okay. There will be a  
7 judicial recommendation on the warrant of  
8 committal that the authorities give consideration  
9 to allowing Mr. Herback to serve his sentence in  
10 the Northwest Territories.

11 MR. BRAN: Thank you.

12 THE COURT: Counsel, that's everything.  
13 We will adjourn court. Thank you.

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**CERTIFICATE OF TRANSCRIPT**

I, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings taken down by me in shorthand and transcribed from my shorthand notes to the best of my skill and ability.

Dated at the City of Edmonton, Province of Alberta, this 3rd day of March, 2018.

Certified Pursuant to Rule 723  
of the Rules of Court



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Colleen Rea  
Court Reporter