*R v Herback*, 2018 NWTSC 17 **S-1-CR-2017-000065**

# IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

**IN THE MATTER OF:**

**HER MAJESTY THE QUEEN**

**- v -**

**DEVON HERBACK**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_** 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

1. for sentencing to February 7th, 2018. The
2. preparation of a presentence report was also
3. ordered. It is now my task to sentence
4. Mr. Herback for this offence.
5. The facts of the offence were included in
6. the Agreed Statement of Facts. Briefly, they
7. are: The charges arise from a major
8. investigation conducted by the RCMP into drug
9. trafficking activities in Yellowknife and in the
10. Northwest Territories. The objective of Project
11. Green Manalishi was to disrupt and dismantle
12. networks responsible for high level drug
13. trafficking in the Northwest Territories.
14. As part of the investigation, the RCMP were
15. granted a judicial authorization to monitor the
16. private communications of multiple individuals.
17. A number of telephone calls and text messages
18. were intercepted suggesting that Mr. Herback was
19. coordinating the transport of drugs into the
20. Northwest Territories and trafficking drugs
21. throughout the territory.
22. 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
23. requested to purchase crack cocaine. Mr. Herback
24. met the officers in an alley in Yellowknife and
25. sold them four pieces of crack cocaine (total
26. weight of 1.9 grams) for $320.
27. Between March 15th and 16th, 2016, Ms.
28. Forrest and Mr. Hache arranged to deliver cocaine
29. to the residence of Ms. Forrest in Fort
30. Resolution, and Ms. Forrest was to send back
31. money that had been collected. Mr. Herback's
32. role was to transport the cocaine to Fort
33. Resolution.
34. The RCMP performed surveillance on the
35. vehicle as it travelled from Yellowknife to Fort
36. Resolution. When Mr. Herback arrived at Ms.
37. Forrest's residence, the RCMP moved in and
38. arrested them.
39. Mr. Herback was located in the truck parked
40. in the driveway, and the police found 362.5 grams
41. of cocaine lying on the ground next to the
42. vehicle, $5,980 in cash, a knife, a cutting
43. agent, a cellular phone and a digital scale.
44. To maintain the integrity of the
45. investigation, Mr. Herback and Ms. Forrest were
46. released shortly after their arrest. Following
47. the arrest, Mr. Herback resumed working the
48. dial-a-dope phone.
49. 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

1. were being sold through the dial-a-dope phones.
2. On April 14, 2016 the RCMP executed a number
3. of search warrants and made played several
4. arrests. Drugs, offence-related property and
5. proceeds of crime were seized.
6. On April 16, 2016, Mr. Herback turned
7. himself into the RCMP in Yellowknife.
8. The Crown is seeking a sentence of three
9. years imprisonment less credit for remand time.
10. The defence is seeking a sentence of 20 to 24
11. months imprisonment.
12. Mr. Herback is of Métis descent, and section
13. 718.2(e) of the *Criminal Code* requires me to
14. consider available sanctions other than
15. imprisonment that are reasonable in the
16. circumstances, which should be considered for all
17. offenders, and paying particular attention to the
18. circumstances of aboriginal offenders.
19. The Supreme Court of Canada in the cases of
20. *Gladue* and *Ipeelee* have said that sentencing
21. judges are to consider the unique systemic or
22. background factors which may have played a part
23. in bringing an aboriginal offender before the
24. Courts and the types of sentencing procedures and
25. sanctions which might be appropriate in the
26. circumstances because of their background.
27. In this case I have the benefit of a
28. presentence report, which provides information
29. about Mr. Herback's background and circumstances.
30. He is 36 years old and was born in Alberta.
31. His parents split up when he was two, and he
32. moved with his mother to Fort Smith. He lived
33. there for many years until moving to Yellowknife
34. when he was an adult. He reportedly had a good
35. childhood and became close with his step-father,
36. and he maintained a relationship with his
37. biological father as well.
38. Mr. Herback is part Lakota on his mother's
39. side. Growing up, he had some exposure to
40. aboriginal culture and traditions and was able to
41. take part in hunting, fishing and camping. These
42. activities were not a regular part of his life,
43. but he enjoyed them. None of Mr. Herback's
44. immediate family attended residential school,
45. although his grandfather and other relatives did.
46. Mr. Herback has a common-law spouse with
47. whom he has been together with for approximately
48. 15 years, and they have two children together.
49. Mr. Herback has another child from an earlier
50. relationship who also lives with him.
51. The presentence report indicate that
52. Mr. Herback has struggled with depression and has
53. been on medication to manage this in the past,
54. and, in terms of substance use, Mr. Herback has
55. used marijuana when he was a teenager but quit
56. that when he was 25. He first used cocaine at 20
57. years old and began to use it occasionally. In
58. 2014, due to stress surrounding his employment
59. situation, he began to use it more and became
60. addicted to the drug, and he became involved with
61. the drug trade to support his habit.
62. To his credit, since his arrest, Mr. Herback
63. has managed to maintain his sobriety, and despite
64. the issues that he has had, he has been able to
65. maintain employment throughout the years and has
66. been known as a hard worker. The letters that
67. have been filed on his behalf demonstrate that he
68. has been considered a hard worker. He has been
69. considered a valuable employee. Most recently,
70. he has been employed by a local business, and the
71. letter that has been filed has indicated that
72. they consider him to be a valuable worker and
73. hope to continue to work with him.
74. In terms of the sentencing principles, a
75. primary objective in sentencing for trafficking
76. in cocaine is deterrence and denunciation.
77. Denunciation meaning to denounce unlawful conduct
78. and the harm done to victims or the community
79. that is caused by the offender's conduct and to
80. deter the specific offender and other persons
81. from committing similar offences.
82. In trafficking cases, the focus is on
83. imposing sentences that send a message and deter
84. other persons who might be tempted to traffic.
85. Historically, the sentences that the courts have
86. imposed for trafficking in cocaine have been
87. harsh, designed to emphasize the sentencing
88. principles of denunciation and deterrence.
89. Both counsel, in their submissions, refer to
90. the starting point, which are applicable when
91. sentencing an offender for trafficking in
92. cocaine. Counsel for the Crown argued that the
93. applicable starting point was four and a half
94. years as this was trafficking in cocaine at the
95. wholesale level. Defence counsel argued that
96. this was commercial trafficking to which a
97. three-year starting point is applicable.
98. Over the years there have been many
99. sentencing decisions involving trafficking in
100. cocaine. These decisions and appellate decisions
101. from our Court of Appeal as well as the Alberta
102. Court of Appeal have established sentencing
103. ranges for these types of offences. They have
104. established starting points.
105. The Alberta Court of Appeal in *R. v.*
106. *Maskell*, 1981 ABCA 50 and *R. v. Lau*, 2004 ABCA
107. 408, set the starting point for trafficking in
108. cocaine at the commercial level and for
109. trafficking at the wholesale level. *Lau* has been
110. applied in this jurisdiction in cases like *R. v.*
111. *Castro*, 2016 NWTSC 8, which endorse the four and
112. a half year starting point for wholesale
113. commercial trafficking in cocaine.
114. A starting point in not a minimum sentence
115. or a set sentence, but it is a guideline where
116. the Court begins by considering what the
117. appropriate starting point sentence is and then
118. adjusting the sentence to reflect the mitigating
119. and aggravating factors of each case, taking into
120. account the circumstances of that offence and of
121. that offender.
122. A starting point sentence reflects the
123. seriousness of the crime and its prevalence in
124. this jurisdiction and the need to impose
125. deterrent sanctions. It also reflects the moral
126. blameworthiness of those who traffic in illegal
127. substances on a significant scale.
128. The starting point for commercial cocaine
129. trafficking on more than a minimal level is three
130. years, whereas wholesale cocaine trafficking has
131. a four-and-a-half-year starting point. The
132. maximum penalty for trafficking in cocaine is
133. life imprisonment. Life imprisonment is reserved
134. for the most serious offences in Canadian
135. criminal law. That trafficking in cocaine
136. carries this possible punishment demonstrates how
137. seriously Parliament considers this problem, and
138. the sentences that are imposed reflect the
139. seriousness with which courts consider
140. trafficking in cocaine.
141. The devastating effects of cocaine have been
142. referred to for years by the courts in this
143. jurisdiction, and cocaine continues to be a
144. problem, destroying people's lives and tearing
145. apart families. People continue to traffic in
146. cocaine partly, I expect, because it is a
147. lucrative enterprise.
148. Those that traffic in cocaine contribute
149. directly to the social problems that exist in
150. this community. The moral blameworthiness of
151. those who traffic in cocaine is high.
152. In determining whether a case falls into the
153. commercial level of trafficking on more than a
154. minimal scale or whether it is a case of
155. wholesale drug trafficking, there is no set
156. amount of cocaine which establishes this. The
157. Alberta Court of Appeal in *Lau* acknowledged that
158. there was no clear distinction as to where
159. commercial trafficking on more than a minimal
160. scale ends and where wholesale commercial
161. trafficking begins.
162. After reviewing some of the cases, the Court
163. stated at paragraph 27:
164. "The commercial cases that attracted
165. a 3 year starting point, therefore,
166. typically involved a few grams of
167. cocaine with 2 ounces (about 57
168. grams) at the high end of the scale.
169. This is significantly less cocaine
170. than the wholesale cases cited, where
171. amounts of the drug were in the range
172. of hundreds of grams."
173. The determination of whether someone is
174. engaged in trafficking at the commercial level or
175. the wholesale level does not just come down to a
176. question of the amount of drugs, other factors
177. need to be considered such as the role of the
178. person in the organization.
179. In *Lau*, the Alberta Court of Appeal referred
180. to the case of the *R. v. Mah*, 2003 ABCA 220,
181. where the offender had 238.2 grams of cocaine in
182. his possession divided into 10 plastic bags. The
183. value was said to be over $23,000. The offender
184. was considered to be a middle man, higher than a
185. dial-a-dope dealer and in a position of
186. responsibility in the continuing criminal
187. enterprise. In *Mah*, the offender was sentenced
188. on the basis that he was engaged in wholesale
189. commercial trafficking.
190. Looking at the circumstances of the offence,
191. Mr. Herback was involved in the transportation,
192. distribution and sale of cocaine in Yellowknife
193. in the Northwest Territories. He operated a
194. dial-a-dope phone, which was part of an operation
195. which sold up to 8 to 9 ounces of cocaine a day.
196. This is a significant amount of cocaine to move
197. in the city of Yellowknife in terms of quantity
198. and the value.
199. Mr. Herback helped to distribute the drugs.
200. He was involved in collecting money from people.
201. He transported the 362 grams of cocaine from
202. Yellowknife to Fort Resolution. So while
203. Mr. Herback was not the head of this drug
204. trafficking group, he was not just a street-level
205. dealer. He was trusted and played a significant
206. part in this organization. It is clear that he
207. understood what he was doing and the
208. consequences, stating in a conversation that was
209. intercepted with Norman Hache and Dolapo
210. Bode-Harrison: "I fully accept I know what I do,
211. and I know the fucking consequences, and it's
212. like I will -- I will do the dirt work and the
213. shit work that people don't want to do, and it's
214. because it just needed to be done, right?"
215. Mr. Herback was the guy you went to when you
216. wanted things done.
217. The amount of cocaine, which was seized in
218. Fort Resolution, was significant, 362.5 grams of
219. cocaine. This amount is sufficient to indicate
220. that the offender might be engaged in wholesale,
221. commercial trafficking, but when you also
222. consider his ongoing involvement in a dial-a-dope
223. operation, which trafficked anywhere from 8 to 9
224. ounces of cocaine a day, that his involvement
225. continued unabated after his arrest, and his role
226. in the organization as something more than a
227. street level dealer, I am satisfied that
228. Mr. Herback was engaged in wholesale, commercial
229. trafficking in cocaine.
230. Mr. Herback does have a criminal record with
231. three convictions for possession of counterfeit
232. money in 2003; for that he received a fine and
233. probation. The criminal record is limited, dated
234. and unrelated, and all it really does is
235. demonstrate that Mr. Herback does not come before
236. this court as a first time offender.
237. Mr. Herback was arrested in Fort Resolution
238. for the purpose of trafficking during the course
239. of the investigation. He was released on a
240. recognizance on March 16, 2016 with a number of
241. conditions and continued on with his activities
242. completely disregarding those conditions.
243. Mr. Herback continued with his drug
244. trafficking activities, and he showed no
245. hesitation in continuing with these activities,
246. and, as I stated, it was clear that he understood
247. what he was doing and the consequences. So that
248. is aggravating in my view.
249. There are mitigating factors as well.
250. Mr. Herback has entered a guilty plea. It was
251. not at the earliest opportunity, but this was a
252. complicated matter with significant disclosure
253. and a number of co accused. Mr. Herback waived
254. his preliminary inquiry in this matter, and this
255. matter was never set for trial. If this matter
256. had proceeded to trial, it would have taken some
257. time and required significant resources. So
258. Mr. Herback will receive full credit for his
259. guilty plea.
260. As well, a guilty plea can be considered an
261. expression of remorse and taking responsibility,
262. and from what I have heard today from
263. Mr. Herback, it is clear that he understands what
264. he has done and has taken responsibility, and, as
265. well, that is clear from the presentence report
266. in what he had told the preparer of the
267. presentence report.
268. 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
269. days credit for each day spent in presentence
270. custody, amounts to 103 and a half days or just
271. over three months of remand credit, which will be
272. deducted from Mr. Herback's sentence.
273. I have given some consideration to the
274. sentence that should be imposed, taking into
275. account the circumstances of the offence,
276. Mr. Herback's personal circumstances and the
277. applicable sentencing principles.
278. Mr. Herback, please stand. For the offence
279. of trafficking in cocaine, in count 9 on the
280. Indictment, I sentence you to a period of
281. imprisonment of 36 months. You will receive
282. credit for three months of pretrial custody,
283. leaving a sentence of 33 more months to be
284. served. You may have a seat.
285. Thank you. Counsel, is there anything else?
286. MS. ZIMMER: Yes, Your Honour. I do just
287. have a stay of proceedings here for the remaining
288. counts on the Indictment.
289. THE COURT: Okay. That will be filed, and
290. the remaining counts will be stayed. Mr. Bran?
291. MR. BRAN: Thank you. I know the Court
292. does not have jurisdiction in placement of
293. Mr. Herback once he is sentenced and is in the
294. authority of the Corrections, but what I would be
295. asking for on behalf of my client is for a
296. jurisdiction recommendation that he be allowed to
297. serve his sentence here in the Northwest
298. Territories so that he can be close to family and
299. also have the opportunity for a possibility of
300. work release once he is eligible for that.
301. THE COURT: Okay. There will be a
302. judicial recommendation on the warrant of
303. committal that the authorities give consideration
304. to allowing Mr. Herback to serve his sentence in
305. the Northwest Territories.
306. MR. BRAN: Thank you.
307. THE COURT: Counsel, that's everything.
308. We will adjourn court. Thank you.

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# 2 CERTIFICATE OF TRANSCRIPT

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1. I, the undersigned, hereby certify that the
2. foregoing pages are a complete and accurate
3. transcript of the proceedings taken down by me in
4. shorthand and transcribed from my shorthand notes
5. to the best of my skill and ability.
6. Dated at the City of Edmonton, Province of
7. Alberta, this 3rd day of March, 2018.
8. Certified Pursuant to Rule 723
9. of the Rules of Court

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1. Colleen Rea
2. Court Reporter

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