R. v. Monty Chester TOTH, *2005 NWTTC 14*
File: T-3-CR-2005000244

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

MONTY CHESTER TOTH

REASONS FOR JUDGMENT
of the
HONOURABLE JUDGE Bernadette Schmaltz

Heard at:	Inuvik, Northwest Territories November 25, 2005 and Yellowknife, Northwest Territories December 1, 2005
Counsel for the Crown:	S. Hinkley B. LePage
Counsel for the Defendant :	M. Hansen

(Charged under s. 5(2) CDSA)

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[1] Monty TOTH has pleaded guilty to possession of cocaine for the purpose of trafficking. The matter had been set for trial last Friday in Inuvik however, there was a change of plea, and the matter proceeded to sentencing. On the sentencing hearing, Counsel recommended to the court a joint submission of 2 years imprisonment. At that time I told counsel that I considered a sentence of 2 years outside of the range of sentence for this offence and this offender. I asked counsel if they had any further submissions with respect to how the joint submission was arrived at, or if there were any other factors that I should consider. I gave counsel full opportunity to give reason for the joint submission, and the matter was then adjourned to today's date for decision.

I. FACTS:

[2] On March 10th, 2005, in the town of Inuvik, the RCMP executed a search warrant at Monty Toth's residence. In the residence, in an upstairs toilet, 48 grams of crack cocaine, and $2,000.00 cash was found; it appeared that attempts had been made to flush the crack cocaine and the cash down the toilet, but it had got stuck. Also during

the search, 1 gram of crack cocaine, packaged for resale, was found on the kitchen table; various drug paraphernalia including numerous crack pipes, steel wool, plastic tubing to make crack pipes, and documents were also found and seized.

[3] There were operating video cameras mounted outside both the front and back entrance, so that anyone attending to, or entering the residence could be monitored and seen from the monitor located inside the residence on the kitchen table. There was a police scanner in the residence tuned to the Inuvik RCMP frequency. There was also bear spray on the kitchen table.

[4] The home was “secured” or “fortified.” The two front doors were barricaded shut using numerous boards making access into or out of those doors impossible; the back door had six 4” x 4” posts keeping the door closed; the posts were marked to ensure that the posts could be removed when required and quickly put back in place. When the police arrived, they announced they had a search warrant, but no response was received; the RCMP used a chain saw to gain entry into this residence.

[5] Crack cocaine sells for $150 per gram in Inuvik. The value of the cocaine seized was $7,400.00.

[6] Inuvik is a community of approximately 3,500 people, located inside the Arctic Circle, in the western Arctic, the Beaufort Delta area.

II. CIRCUMSTANCES OF THE OFFENDER:

[7] Monty Toth is 41 years old. With regards to his personal circumstances, he is a single parent, though his son has not lived with him for the past 7 years; he has been battling a drug habit since 1987. I was told that he is a heavy user of cocaine, and was selling drugs to feed his habit as a heavy user. I was also told that he had a job working 7 days a week, 12 hours a day. When questioned as to how he could be working this much and using cocaine this much, I was told that he did not use crack cocaine on the job. I was then told that he quit his job, and was not employed at the time of this offence. When asked when he had last worked, counsel advised that Mr. Toth was not sure, he could not remember, but thought that he had quit his job 4 or 5 months before.

[8] Monty Toth has a criminal record dating from 1983. Between 1983 and April 2004, he has been convicted of 23 criminal offences; most notably he has been convicted 6 times of offences contrary to the *Controlled Drugs and Substances Act* (CDSA). In March 2001, he was convicted of simple possession of a schedule I substance, and fined $500.00; in May 2001, he was convicted of possession of a schedule I substance and received a sentence of 1 day; in July 2001, he was convicted of possession of a schedule III substance for the purpose of trafficking and sentenced to 3 months imprisonment; in February 2002, he was convicted of possession of a schedule I substance and sentenced to 14 days imprisonment; in July 2003, he was convicted of possession of a schedule I substance and sentenced to 3 months imprisonment; and finally in April 2004, he was convicted of possession of a scheduled

substance, and sentenced to 6 months imprisonment, by way of a conditional sentence order.

[9] Monty Toth is not an immature or inexperienced offender. On the contrary, in consideration of his criminal record, it would seem that he is incorrigible as far as drug offences are concerned, being now convicted for the seventh time of an offence contrary to the CDSA, and on five occasions receiving various forms of custodial sentences.

[10] Monty Toth has been in custody since March 10th, 2005, just over 8.5 months.

III. PRINCIPLES OF SENTENCING:

[11] Sections 718 through 718.2 set out the purpose and fundamental principles of sentencing. When sentencing any offender for any offence, a court strives to impose a sentence that will contribute to respect for the law, to impose sentences that all informed members of the community will see as fair and just. A sentence also has to contribute to a just, peaceful, and safe community.

[12] A sentence has to condemn illegal conduct; it has to deter or discourage both Monty Toth and others from committing offences; when necessary, a sentence may have to separate offenders from society. A sentence should also attempt to be rehabilitative, and should also recognize and, if possible, provide reparations for the

harm done to victims or, perhaps more appropriate in this case, to the community. A sentence must also promote a sense of responsibility in offenders, an acknowledgment of the harm done.

[13] A sentence has to be proportional to the gravity, the seriousness, of the offence, and the degree of responsibility of the offender.

[14] A sentence should also be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. This is often referred to as the principle of parity. It is sometimes difficult to achieve parity, because the unique circumstances of each offence and each offender have to be considered. Nevertheless, parity is a goal that the court strives for in balancing aggravating and mitigating factors that may relate to either an offence or an offender, and in imposing sentences.

IV. AGGRAVATING FACTORS:

A. Harm Caused

[15] Trafficking in cocaine, or possession of cocaine for the purpose of trafficking, is a very serious offence. So serious, in fact, that the maximum sentence for that offence is imprisonment for life. That maximum sentence reflects the gravity of the offence.

[16] It is sometimes said that drug offences are victimless crimes, that those who commit offences against the CDSA are only hurting themselves or, in the case of

trafficking, those who choose to use the drug. This attitude belies the terrible harm caused by trafficking in cocaine. It belies the fact that trafficking in illicit substances is a parasitic lifestyle, and that those who choose to traffic in cocaine or other illicit substances are living off the addictions of those they traffic to, are making a profit off people who are slowly destroying their lives.

[17] Many Courts have recognized the harm done by those who traffic in cocaine. I will refer to only some of the statements that have been made about the evils, and I use that word advisedly, of trafficking in cocaine.

> This [trafficking in cocaine] is not a victimless crime; it cripples many, and spawns other serious crimes. … It is a crime of greed, not of poverty.
> *R*. v. *Thompson* (1989), 98 A.R. 348 (C.A.)
>
> Cocaine is a very dangerous drug, it is highly addictive, and its use has significant direct and indirect harmful effects on society. … It causes social devastation.
> *R.* v. *Overacker*, [2005] A.J. No. 855 (C.A.)
>
> Cocaine is a very powerful drug. It is a narcotic drug. Its non-medical use can lead to many undesirable results. The trafficking in it is highly undesirable. Trafficking in the drug must be deterred. It is a very expensive drug so that huge profits can be made from its illegal sale. It is our duty to deter people from using it and from trafficking in it. Deterrence is and remains the most important element in the sentencing process. It calls for imprisonment and not a short, nominal term.
> …
>
> It is a very expensive drug. Very large profits can be realized from its illegal sale. It is therefore much more attractive to handle than amphetamines. It seems to me that the profits from its sale will keep it on the market unless it is dealt with sternly. It is our duty to deter these activities.
> *R*. v. *Maskell* (1981), 58 C.C.C. (2d) 408 (Alta. C.A.)
>
> [C]rack cocaine is a highly powerful and dangerously-addictive drug. Its proliferation in the Northern communities is notorious. Indeed, the expert witness

> in this case, whose police experience comes from Yellowknife, described it as a scourge in that city, affecting both young and old.
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> *R.* v. *Whitford*, (2004) NWTSC 36 (CanLII)
>
> We have cases come into court all the time of people whose lives have been devastated by cocaine, either because they are users themselves or because they have suffered violence or family breakdown because of someone else using it. The only people who want cocaine here in the north are the people who want to make money from it, which really means making money off other people's tragedy and misfortune.
> …
> The community as a whole suffers from this activity.
> *R*. v. *Woledge*, (2005) NWTSC 55 (CanLII)
>
> One might add that trafficking in cocaine (and methamphetamine and ecstasy) is a scourge in our society. The toxic affects of these highly addictive drugs ruins the lives of people from all backgrounds, particularly the young, many permanently. The seriousness of such crimes cannot be minimized and must be reflected in the sentence imposed. Drug trafficking of the kind found in this case is not an impulsive act, neither was it the result of a momentary lapse of judgment. …
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> *R.* v. *Chan*, [2005] A.J. No. 443 (Q.B.)
>
> There is a cost in trafficking of drugs to thousands of members of society, both to individuals and to society as a whole. The cost in human dignity, in medical costs, in the effect on individuals who have nothing -- have never been involved in this situation directly creates a colossal problem in our society today. In my opinion drug traffickers are the scourge of society.
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> *R*. v. *Andrews*, [1996] M.J. No. 127 (C.A.)

[18] In 1990, 15 years ago, the Alberta Court of Appeal said in *R*. v. *Getty* (1990), 104 A.R. 180 (C.A.): "It is well known that the distribution of cocaine has grown and reached alarming proportions in North America, even since the decision in *Maskell*. The time has not yet come for relaxation of the guideline in that case."

B. Criminal Record

[19] Monty Toth's criminal record is aggravating. The fact that he has previously been convicted of possession for the purpose of trafficking cannot be ignored. The fact that just over one year before this offence, in April 2004, he received a 6 month conditional sentence for simple possession under the CDSA, and less than a year before that had received a 3 month actual jail sentence for the same offence, shows that previous sentences have not had a deterrent effect on Monty Toth. Something has to get through to Monty Toth that this criminal activity will not be tolerated. The harm being done by Monty Toth, and those like him who choose to exploit the addictions of others, has to be deterred, has to be stopped.

C. Illicit Drugs in Small Communities

[20] All of Monty Toth's previous CDSA convictions have been from Kamloops, B.C. The offence for which he is to be sentenced for today is from Inuvik – a much smaller Northern community. I find trafficking drugs in small Northern communities an aggravating factor. The cultures are different, some might say more fragile, the social problems in small communities are different, perhaps worse. Often alcohol is a more serious problem in small communities than it might be in larger southern centres. In any event the last thing we need in the North is the introduction of illicit substances, especially highly addictive, dangerous, and expensive substances like crack cocaine. As the Alberta Court of Appeal said in 1981 in *Maskell*, supra, it is our duty to deter

these activities. And so it seems these activities are spreading to the North, and it is now our duty to deter these activities here as well.

[21] In reviewing the law to date, one wonders whether sentences are having the deterrent effect that courts strive for when imposing harsh sentences. Perhaps. But I fear that this activity, especially in the North, is becoming a booming business, and growing right along with the economy. Again, the last thing we need in the North is more illicit substances. The problems associated with substance abuse in the North are notorious. I think it is still likely the case that it is alcohol that is abused most frequently, but sadly, cases involving cocaine are becoming more and more frequent in our courts. And the problems arising from the powerful addiction that users of cocaine have, can be seen daily in the criminal court, in youth court, in child welfare matters – this drug destroys individuals, it destroys futures, it destroys families. We often hear that the addiction is responsible for many secondary crimes – crimes of violence and property crimes. Cocaine users build up a tolerance, and require more and more of the drug to get and keep a given level of euphoria. The habit's cost leads many users to crime and prostitution. (see *R*. v. *Trinh*, [2000] A.J. No. 964, at para 5). Cocaine addiction is destructive of so much – as deWeerdt, J. said in *R*. v. *Findlay*, [1989] N.W.T.R. 239 (S.C.), over 16 years ago, it is a pervasive evil. It is not an understatement to say that drug traffickers are the scourge of society.

D. Fortified Houses

[22] In this case it is also aggravating that the home that the accused was marketing his ware out of, was secured, what is often referred to in drug cases, was a fortified house. That is often how these houses are referred to in the court room; on the street, such houses are known as crack houses. Because of the high level of security and surveillance in these houses, both dealers and users have a sense of refuge or safety in using drugs there or in selling drugs out of them. The police cannot easily enter. As was the case here, the police had to use a chain saw to enter the house – all entrances were boarded up or secured – were fortified. The police could not enter, or attempt to enter, Monty Toth's house without him knowing or being warned because of the video surveillance. The set up of crack houses, the fortification of them, the video surveillance, make those who choose to deal in illicit drugs by this method very difficult to apprehend. Often even if police have the grounds and the warrant, by the time they are able to get into these houses, the evidence is destroyed, often flushed. Notably in this case, the cocaine seized was seized from the toilet. This results in a highly lucrative illegal business, with minimal risk – incredible profits can be made from the sale of cocaine, and there is very little likelihood of the police being able to seize any illicit substances, to seize evidence to substantiate criminal charges.

V. MITIGATING FACTOR

[23] Monty Toth has entered a guilty plea, he has accepted responsibility for this offence. He has saved the state the time and resources necessary to run a trial, and for that he has to be given credit.

VI. STARTING POINT – COMMERCIAL TRAFFICKING IN COCAINE:

[24] Sentencing cases from the appellate courts are often helpful, in that appellate cases attempt to offer guidance and direction through starting points. I have heard it argued, and it was suggested in this case by defence, that starting points are treated as minimum sentences, and therefore frowned upon. I find this a very inaccurate statement of the law. Starting points are not minimum sentences. A starting point is a point from which a sentencing court can decrease or increase a sentence depending on mitigating or aggravating factors. In *R*. v. *McDonnell*, [1997] 1 S.C.R. 948, the Supreme Court of Canada goes through a very detailed analysis of the development and principles behind the starting point approach to sentencing. I do not intend to set out the Court's entire analysis of the starting point approach to sentencing in this decision, but do recommend the case to counsel. The Supreme Court of Canada did not hold that starting points were not appropriate, but to the contrary. Both the majority decision and the dissenting opinion in *McDonnell* agree that starting points are appropriate. All nine justices confirmed that starting points can offer guidance to lower courts. As McLachlin, J. (as she then was) stated:

> A properly chosen starting point does not fetter discretion, but confines it to legitimate considerations. The fact that judges must give reasons for departing upward or downward from the starting point helps to ensure that all relevant personal considerations are canvassed. Judicial discretion remains, but it is less susceptible to exercise on irrelevant or ill-thought-out factors. In short, the starting-point approach does not prevent the judge from considering all relevant personal factors. Rather, it provides a structure which helps to ensure that they are considered and given their proper weight. (at para. 80)
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> …
>
> … [T]he starting point, appropriately selected, is the least punishment for the circumstances which usually attend a particular type of offence, on the assumption that the accused is a person of good character with no criminal record. If the accused's character is even better than might be supposed or if there are other factors supporting a lesser sentence, the accused will receive a lesser sentence. On the other hand, if the Crown proves that the accused's character is worse than might be supposed, that he has a significant criminal record, or that other exacerbating facts exist, it may be increased. In all cases, the final sentence will be the least that is appropriate in the circumstances. (at para. 83)
>
> …
>
> I conclude that the starting-point approach, properly understood and applied, is theoretically sound and marks an advance in the need to find a principled approach to the dual goals of individualization of sentences and the need for uniformity and consistency. (at para. 107)

[25] Sopinka, J. who wrote for the majority in *McDonnell* stated:

> I add that I do not disagree with McLachlin J. that appellate courts may set out starting-point sentences as guides to lower courts. (at para. 43)

[26] In the case of *R*. v. *Maskell* (1981), 58 C.C.C. (2d) 408, the Alberta Court of Appeal, whose members sit on the Northwest Territories Court of Appeal, set a starting point for commercial trafficking in cocaine on more than a minimal scale at three years. This case has been cited or applied in many, many cases since *Maskell* (for example, see *R*. v. *Ness* (1987), 77 A.R. 319 (C.A.); *R*. v. *Saulnier*, [1988] 2 W.W.R. 546

(B.C.C.A.); *R*. v. *Findlay*, [1989] N.W.T.R. 239 (S.C.); *R*. v. *Thompson*, [1989] A.J. No. 769 (C.A.); *R*. v. *Getty* (1990), 104 A.R. 180 (C.A.); *R*. v. *Chung* (1993), 135 A.R. 351 (C.A.); *R*. v. *Phun* (1997), 120 C.C.C. (3d) 560 (Alta. C.A.); *R*. v. *K.J.P.* [2002] 4 W.W.R. 648; *R.* v. *Lau* (2004) 193 C.C.C. (3d) 51 (Alta. C.A.); *R*. v. *Chan*, [2005] A.J. No. 443 (Q.B.).

[27] In the case of *Findlay*, from our Supreme Court, the accused was found in possession of approximately 214 grams of cocaine with a street value of between a minimum of $19,000.00 and a maximum of $134,000.00. Findlay was 27 years old at the time, and had a relatively short criminal record; the record was unrelated. Findlay pleaded guilty. The court found that Findlay trafficked in cocaine in part to sustain his own addiction. deWeerdt, J. found that Findlay's decision to traffic in cocaine was "a matter of business and not as some sort of youthful escapade." The court, giving Findlay credit for one year in consideration of pre-sentence custody, sentenced Findlay to a further 3 years imprisonment

VII. APPELLATE DIRECTION ON "FORTIFIED (CRACK) HOUSES"

[28] The circumstances of *Trinh*, *supra*, were very similar to this case. In *Trinh*, police executed a search warrant at the accused's home. Trinh was found in the bathroom crouching beside the toilet; the water in the toilet was running and four cocaine spit balls were floating in the water. Cocaine was also found inside a newspaper that was in the toilet. Other drug paraphernalia (indicative of both trafficking and using) was found in

the house. A canister of pepper spray was found. Trinh had $60.00 on his person, and more than $2,000.00 was found on the floor in the basement. A total of 16 grams of cocaine were found in the house. An expert testified at trial that the paraphernalia, the packaging, along with the cocaine, was all consistent with commercial trafficking in cocaine. Trinh was found guilty of possession for the purpose of trafficking, possession of proceeds, and obstruction. Trinh had a prior record including previous narcotics convictions for simple possession; he was 35 years old and was addicted to cocaine. Trinh was sentenced to 4 years for the possession for the purpose of trafficking and appealed his sentence.

[29] Trinh's sentence appeal was dismissed. Cote, J. (Fraser, C.J.A. and Veit, J. concurring) would have increased the sentence to 5 years, however the Crown had not asked that the sentence be increased. Comments made by Cote, J. in the *Trinh* case are relevant to this case (citations omitted):

> The present case involves a striking feature not found in the guideline sentencing decisions of this Court. The appellant was a key worker in a semi-fortified crack house. In other words, he did not rely upon stealth and peripatetic marketing. He was not a travelling salesman. He worked in, or managed, a retail cocaine shop. It was a more or less permanent establishment dedicated to cocaine sales, and even some modest processing of the cocaine to make it into crack and so easier to consume. A whole house was dedicated to these ends, and modified to suit them. Instead of stealth, it depended upon physical barriers to police entry, plus a man ready to flush away the evidence before the police could enter.
>
> …
>
> Counsel for the appellant sought to distinguish certain reported sentencing decisions as involving wholesale trafficking. It is true that the appellant here was not a middleman: the crack house obviously sold to ultimate users. But though this was not a bulk dealer, neither was it a small itinerant peddler with his wares in his pocket. By making this comment I am not diminishing the responsibility of those who traffic in cocaine through, for example, dial-a-doper schemes: see this

> Court's decision in *R*. v. *Chung*. But the appellant here was an established retailer with his own shop, a volume of trade, and some simple production capabilities.
>
> The present offences, trafficking from a crack house and resisting a search, involve more than a high degree of premeditation and sophistication. They also publicly flout the law. Publicly, for two reasons. First, because the crack house for some time remains fixed and known: it attracts customers off the street. Second, because it is partly fortified, to resist lawful entry by those enforcing the law. The challenge to the peace of the realm is blatant.
>
> There are few things which will breed more disrespect for the law than open, fixed, clearly visible, enduring facilities dedicated to crime and nothing else, and strengthened to ward off the law. To the neighbours, they must appear monuments to the strength of malefactors and to the impotence of Parliament and the Crown. This makes lack of respect for the law very concrete, and very real.
>
> Inadequate sanctions undermine respect for the law: *R*. v. *Proulx*.
>
> As one would expect with this type of operation, the evidence here is clear. No one could suggest that the appellant acted inadvertently, on the spur of the moment, because of mere emotion, ignorant of the law, or for pardonable motives.
>
> **...**
>
> Therefore, where someone is actively involved in more than completely trivial aspects of running or defending a more or less permanent fortified or semi-fortified establishment selling hard drugs to various members of the public, there should be a significant penitentiary sentence. In this particular case, I would have been inclined to give five years. The maximum sentence set by law for possession for the purpose of trafficking of cocaine is life imprisonment: *Controlled Drugs and Substances Act*, s. 6(2) and s. 6(3)(a).

[30] I agree with these comments. I see very little difference in the situation in Trinh, and the facts of this case. I do recognize that *Trinh* was a finding of guilt after trial, whereas Monty Toth has pleaded guilty. However, I also take into account that Month Toth's previous record is more aggravating, having been previously convicted of possession for the purpose of trafficking, whereas the accused in *Trinh* only had prior

simple possession convictions. I also find it an aggravating feature of this case that Toth was trafficking cocaine in the comparatively small community of Inuvik, whereas the *Trinh* case arose in Edmonton.

VIII. JOINT SUBMISSION:

[31] Counsel have jointly submitted that a sentence of 2 years would be a fit sentence in this case. In support of that submission, they have submitted two decisions from this jurisdiction, neither case being an appellate level case.

[32] One of the cases is *R*. v. *Whitford*, (2004) NWTSC 36 (CanLII). Whitford was found guilty of possession of cocaine for the purpose of trafficking after trial. The circumstances were that the RCMP acting on a tip, stopped a vehicle which was returning to Hay River from Alberta; Whitford was a passenger in the vehicle, and 48 grams of crack cocaine were found in her purse. Vertes, J. found that Whitford was the type of trafficker who saw it as an opportunity to make some money, i.e. she was driven due to economic circumstances. Notably, Vertes, J. found that Whitford was nowhere close to the category of traffickers who fit into criminal operations behind the whole trade in narcotics, the major distributors and dealers who are in it for big profit.

[33] Vertes, J. stated that: “The sentence that would normally be called for in this case must be moderated due to the personal circumstances of the accused.” Whitford was 30 years old with two children. She had significant medical problems, and

consequently was confined to her room while on remand, 8.5 months. Whereas she had a prior criminal record, there were no prior convictions under the CDSA.

[34] Vertes, J. found that “the absolute minimum sentence” that he could impose in *Whitford* was 2 years. The Crown had suggested 2 – 3 years, which Vertes, J. found was the minimum range for the offence, considering the type of drug and the quantity of it. Whitford was sentenced to 2 years, less 17 months credit for remand time, resulting in a further 7 month sentence, plus 1 year probation.

[35] In considering only the circumstances of this offence, I find this case markedly different from the facts in *Whitford*. This case did not involve a low level trafficker who saw an opportunity to make some money driven by economic circumstances. I do not find the *Whitford* case particularly helpful due to the very different facts of the offence in that case; I find the facts in *Whitford* incomparable to the facts of this case. Further, the personal circumstances of Whitford were such that Vertes, J. remarked “the sentence that would normally be called for in this case must be moderated due to the personal circumstances of the accused.”

[36] The other case submitted by counsel was *R.* v. *Woledge*, (2005) NWTSC 55 (CanLII). Woledge was found guilty after trial of possession of cocaine for the purpose of trafficking, and possession of a weapon for a purpose dangerous to the public peace. The facts of that case are more comparable to this case. *Woledge* involved the police executing a search warrant at a residence that required them to use an axe and a

sledge hammer to enter. When the police were attempting to get into the residence, one of the officers made eye contact with Woledge who was inside the residence, and advised that he had a warrant; Woledge did not open the door. After gaining entry into the house, the police observed Woledge walking towards them carrying a shotgun. The police ordered Woledge to stop and get down, which he did immediately. The home had video monitors outside which provided surveillance of the main door and driveway area connected to a live feed monitor in the master bedroom of the home. Two grams of cocaine valued at $600.00 and $875.00 in cash were found in Woledge's pocket. Drug paraphernalia, but no other drugs were found in the house. An expert called in the Woledge case testified that the facts were indicative of Woledge being a user of crack cocaine and conducting a storefront selling operation from his residence. Schuler, J. accepted this evidence.

[37] Woledge was 63 years old. For approximately 5 months before his trial, he was employed, and his employer testified at Woledge's sentencing that he was a hard worker, did not miss any work, put in extra time and was dependable with excellent workmanship. His employer said the company would be glad to take him back on. Woledge had a dated criminal record, with two prior simple possession of narcotic charges, one from 1981, and one from 1989 – 24 years earlier, and 16 years earlier. Schuler, J. found it extremely aggravating that Woledge was selling cocaine out of his home where his teenage children resided with him. Woledge had 1 month pre-sentence custody, which Schuler, J. credited him 2 months for. Woledge was sentenced to a total sentence of 34 months, taking into account totality (2 years on the CDSA offence, and 1

year less 2 months credit, for the weapons offence). Schuler, J. stated that the range of sentence for a low to mid level trafficker is two to three years.

[38] Whereas the surrounding circumstances of *Woledge* are closer to the facts in this case, the case is also quite different in that the amount of cocaine found was two grams, whereas in this case it is 49 grams. Also, it has to be considered that totality was a consideration in that Woledge was found guilty of two offences, which Schuler, J. found should attract consecutive sentences. Further, the personal circumstances of Woledge were markedly different from the accused before the court today.

[39] Sentencing precedents are always difficult to gain much assistance from. Circumstances of offences and of offenders are always different to some extent, and quite often very, very different.

IX. CONCLUSION

[40] As I said earlier, appellate level sentencing cases offer more direction and guidance to sentencing judges. I find the reasoning, the guidance and direction from the Alberta Court of Appeal in *Maskell*, and the cases following it, and in *Trinh* highly persuasive. I see no reason not to follow those cases.

[41] In considering that guidance and direction, I find with respect, that a sentence of 2 years is not a fit sentence in this case, especially when the aggravating factors are

considered. When I consider the starting point as set out in the *Maskell* case and cases following it, and then take into account the aggravating factors, especially the fortification of the house and Monty Toth's criminal record, and even giving maximum credit for the guilty plea, a sentence of two years is not a fit sentence. A sentence of two years would not address the harm done to the community, would not instill any sense of responsibility. Nor would a sentence of two years deter Monty Toth from this activity. Nor would such a sentence achieve the goal of parity considering the circumstances of this offence and this offender. Inadequate sanctions undermine respect for the law, and thereby are contrary to the public interest. As such they cannot contribute to just, peaceful, and safe community.

[42] I find I reach the same conclusion if I start from the guidance offered in the *Trinh* case, that is, "where someone is actively involved in running or defending a more or less permanent fortified or semi-fortified establishment selling hard drugs to various members of the public, there should be a significant penitentiary sentence." The Alberta Court of Appeal found that an appropriate sentence in *Trinh* would have been 5 years. Those circumstances were very similar to the case at bar. A sentence of 2 years is simply not a fit sentence.

[43] A sentence of 2 years would not address the principles of deterrence and denunciation which I find to be the paramount sentencing objectives in this case.

[44] In considering the circumstances of this offence, I find that a sentence in the range of 3.5 to 4.5 years would be appropriate. This would be an appropriate range of sentence after trial assuming an accused of previous good character. Monty Toth must be given credit for his guilty plea – he has accepted responsibility for this offence, and has saved the state the time and resources required to run a trial. However, he is not of previous good character. He has a persistent, recent, and related record. He has not been deterred, but has persevered in his involvement in the drug world, and indeed, his involvement is becoming more serious, and more harmful to the community. This record is extremely aggravating. Further, he has moved his drug dealings to Inuvik – perhaps attracted by the booming economy there, looking for customers, as deWeerdt, J. said in *Findlay*, "with money to burn" (not to mention others ready to steal for it). Inuvik cannot afford the horrendous problems associated with crack cocaine trafficking and addiction. Monty Toth has to recognize the incredible harm he has caused to the community.

[45] In the circumstances of this offence and this offender, I find the very minimum sentence that could be imposed is 3.5 years.

[46] With respect to the 8.5 months pre-sentence custody, defence has argued that I should give up to 3 for 1 credit for time spent in Inuvik, as this was very hard time. I accept that the time in Inuvik cells is likely harder time than time in the North Slave Correctional Centre. However, it is for that reason ("hard" time) that credit is usually 2 for 1. The arguments I have often heard for giving 2 for 1 credit is that remand

prisoners do not have access to programs, to recreation facilities, and are confined to their cells for 23 hours per day. This is not the situation at NSCC. Remand prisoners have access to many programs. I accept that remand prisoners are not allowed to leave the institution, are not given day passes, or allowed out in the community, as serving prisoners may be. I do not accept that this in and of itself makes remand time "hard time". As I heard it described once by a witness called to provide the court with information on the conditions at North Slave Correctional Centre while on remand, remand time is not necessarily hard time, but different time. Indeed in this case, I was told that Monty Toth has taken the opportunity while in custody to participate in programs available to him. I do take into account however, that no remission is earned while a person is remanded.

[47] All things considered I will give the usual credit of 2 for 1 for the time Monty Toth has spent in pre-sentence custody; I see no reason to depart from the usual credit. Again, the time in Inuvik cells is likely more difficult than that at North Slave Correctional Centre; however, there was no evidence before me that the time at North Slave Correctional Centre is particularly "hard", but to the contrary, Monty Toth was able to partake in various programs available to him. He had access to television, to exercise equipment, to recreational facilities, to showers etc. Giving 18 months credit for the remand time, Monty Toth will be sentenced to a further two years jail.

[48] There will also be a firearms prohibition as such is mandatory under s. 109(1)(c) of the Code. For a period commencing today, and expiring 10 years after your release

from prison, you are prohibited from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance.

[49] All exhibits and money seized are forfeited to the Crown.

[50] The victim of crime surcharge is waived on the ground of hardship.

Bernadette Schmaltz
J.T.C.

Dated this 2nd day of December, 2005, at
The City of Yellowknife, in the Northwest
Territories.

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF

HER MAJESTY THE QUEEN

- and -

MONTY CHESTER TOTH

REASONS FOR JUDGMENT
of the
HONOURABLE JUDGE Bernadette Schmaltz
