

**IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**- and -**

**MATTHEW JAGER**

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**REASONS FOR SENTENCE**  
**of the**  
**HONOURABLE JUDGE GARTH MALAKOE**

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Heard at: Yellowknife, Northwest Territories

Date of Decision: July 18, 2014

Date of Submissions: May 29, 2014 and July 4, 2014

Counsel for the Crown: Brad Demone

Counsel for the Accused: Peter Harte

[Section 354(1)(b) *CC* and Section 4(5) *CDSA*]

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**A. INTRODUCTION**

[1] Matthew Jager has entered guilty pleas to the following two charges:

- (a) on or about the 6<sup>th</sup> day of December in the year 2013 at or near the City of Yellowknife in the Northwest Territories, he did have in his possession property to wit: Canadian Currency of a value exceeding five thousand dollars knowing that all of the property was obtained by the commission in Canada of an offence punishable by indictment contrary to Section 354(1)(b) of the *Criminal Code*;
- (b) on or about the 6<sup>th</sup> day of December in the year 2013 at or near the City of Yellowknife in the Northwest Territories, he did unlawfully possess a substance included in Schedule II to wit cannabis marihuana in an amount not exceeding thirty grams contrary to Section 4(5) of the *Controlled Drugs and Substances Act*.

[2] The section 354(1)(b) charge is indictable by law with a maximum penalty of 10 years imprisonment. The accused elected to have it dealt with in Territorial Court. The section 4(5) *CDSA* charge is a summary offence with a maximum penalty of a \$1,000 fine or six months imprisonment.

[3] At the sentencing hearing, the Crown and counsel for Mr. Jager provided the Court with an Agreed Statement of Facts. Mr. Jager admits to possessing 28 grams of cannabis marihuana and \$22,005 in Canadian currency. Of this cash, \$21,000 is from the sale of crack cocaine in Yellowknife.

[4] Crown and defence have jointly suggested that the Court impose a sentence of 15 months in prison. From this sentence would be deducted credit for pre-

sentence custody at a rate of 1.5 days for each day spent in custody. Mr. Jager would also provide a sample of his DNA.

[5] I must decide whether or not to accept counsels' joint submission.

[6] In the reasons that follow, a reference to a section number without reference to specific legislation is a reference to the *Criminal Code of Canada*.

## **B. CIRCUMSTANCES SURROUNDING THE FINDINGS OF GUILT**

[7] As I indicated earlier, the Court was provided with an Agreed Statement of Facts. Much of the statement recited descriptions of the investigation of the RCMP. Based on these descriptions, the actual facts contained in the statement and the admissions of counsel during the sentencing hearing, I take the relevant facts to be as follows.

[8] The "856 gang" is involved in drug trafficking activities in Yellowknife, Northwest Territories. Matthew Jager is a junior member of the "856 gang". Whereas a full member has the three digits, "8", "5" and "6" tattooed on the inside of his or her lip, Matthew Jager only has the "8".

[9] During the period, December 3<sup>rd</sup> to December 5<sup>th</sup>, 2013, the RCMP engaged in an undercover operation whereby they bought 47 individually wrapped packages of crack cocaine from five different individuals on thirteen different occasions weighing a total of 29 grams. These drugs were paid for with Canadian currency. The RCMP recorded the serial numbers of the bills used to pay for the drugs.

[10] On December 6, 2013, the RCMP executed a search warrant on 99 Taltheilei Drive in Yellowknife, NT. Matthew Jager and two other individuals were located and arrested inside the residence.

[11] Matthew Jager admits to possessing \$22,005 in Canadian currency, over \$21,000 of which was found in five bundles in a floor vent. Included in this money were the 100 bills which had been used to purchase crack cocaine by the RCMP.

[12] Matthew Jager also admits to possessing three separate baggies of cannabis marihuana with a combined weight of 28 grams.

[13] Matthew Jager admits that \$21,000 of the \$22,005 is proceeds from the trafficking of crack cocaine in Yellowknife.

### C. CRIMINAL RECORD

[14] Matthew Jager has the following criminal record:

	<b>Date and Place</b>	<b>Offence</b>	<b>Sentence</b>
1.	2002-Aug-22 Kelowna, BC	Possession of a Schedule Substance for the purpose of trafficking s. 5 (2) CDSA	2 months
2.	2002-Sep-26 Kelowna, BC	Robbery s. 344(b) CC	4 months & 18 months probation & mandatory firearms prohibition order s. 109 CC
3.	2004-Jun-16 Calgary, Alta	Carrying concealed weapon s.90(1) CC	1 day & mandatory prohibition order s. 109 CC
4.		Fail to attend court s. 145(2)(a) CC	1 day
5.		Fail to comply with probation order 733.1(1) CC	1 day
6.		Theft under \$5,000 s. 334(b) CC	1 day
7.	2005-Aug-30 Calgary, Alta	Fail to comply with conditions of undertaking given by officer in charge s. 145(5.1) CC	1 day
8.		Obstruct peace officer s. 129(a) CC	\$150 in default 3 days
9.		Obstruct peace officer s. 129(a) CC	\$150 in default 3 days
10.	2007-Jan-10 Ottawa	Possession of a Schedule II substance for the purpose of trafficking s. 5(2) CDSA	Suspended sentence & probation 1 day & 3 months pre-sentence custody

### D. THE OFFENDER'S CIRCUMSTANCES

[15] Matthew Jager is 30 years old. He turned 30 while imprisoned at the North Slave Correctional Centre on January 22, 2014. He would have been 23 years old when he was last sentenced for possession of drugs for the purpose of trafficking and 18 years old the time before that.

[16] Mr. Jager is from British Columbia. His childhood was difficult. He was diagnosed with attention deficit disorders at an early age and began taking Ritalin in grade 5. He was placed in foster care at the age of 10 and only returned to the home of his natural parents a couple of weekends a month. At age 12, he was placed in a foster home where he lived until he was 18 years of age.

[17] Mr. Jager was in trouble at school consistently from the age of 10. He has finished high school, but did not receive the type of high school diploma which would entitle him to attend college or university. At 18, he left school and was involved in a motor vehicle accident for which he received insurance funds. He moved to Alberta for the purpose of doing construction work but ended up becoming addicted to cocaine. He lost his job and was caught selling drugs to pay for his own habit. It appears that Mr. Jager has been involved in this drug culture until he was arrested on December 6, 2013.

[18] Mr. Jager has been in Yellowknife for approximately a year. A relationship of some five years duration appears to have come to an end. Upon release, Mr. Jager intends to move back to British Columbia and live with his brother, who will provide him employment operating a light excavator.

#### **E. PURPOSE, PRINCIPLES AND OBJECTIVES OF SENTENCING**

[19] In determining a fit sentence, I am guided by the purpose, principles and objectives set out in the *Criminal Code*, the circumstances of the offences and Mr. Jager, and the case law.

[20] The fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparation for harm done to victims or to the community;  
and
- (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.

[21] I must start with the fundamental principle of sentencing and that is the principle of proportionality, i.e., a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[22] Then the sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances.

[23] I must also be guided by the principle of totality which states that where multiple sentences are imposed, the combined sentence should not be unduly long or harsh; and the principle of parity which states that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[24] Finally, all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders.

#### **F. CASE LAW INVOLVING POSSESSION OF PROCEEDS OF CRIME**

[25] The Crown has provided me with four cases to assist in determining the appropriate sentence for the possession of the \$22,005 which are proceeds of crime. They are: *R. v. Ngo*, 2010 ABPC 161, *R. v. Heidarian*, 2007 BCCA 288, *R. v. Huynh*, 2009 ABQB 49 and *R. v. Pavao*, 102 Man R. (2d) 210 (Man. CA). I have also reviewed *R. v. Daschner*, 2013 ABQB 103.

[26] The following are taken from paragraph 7 of *R. v. Ngo* and provide a useful summary of the factors which should be considered in sentencing a case involving the proceeds of drug trafficking:

- (a) degree of responsibility of the accused, active or passive role in the commission of the offence, whether he acted alone or with other individuals, and his placement in the hierarchy;
- (b) the degree of commerciality, and actual amount of money involved in the offence;
- (c) the nature of the operation, and whether it is an ongoing enterprise;
- (d) if the drugs are the source of the proceeds, the nature of the drug involved;
- (e) the motivation of the accused in the commission of the offence, greed, profit, other reason; and
- (f) whether the accused, in fact, made a profit.

[27] In *Ngo*, Judge Semenuk also identified a sentencing range, based on his review of the case law, of between 18 months and 2 years imprisonment for offences involving possession of the proceeds of drug trafficking.

[28] In *Pavao*, the accused was carrying \$80,000 from the proceeds of cocaine trafficking with the intent of converting it to money orders. He was 28 years old, had no criminal record and was sentenced to 20 months imprisonment for the offence of money laundering under the *Narcotic Control Act*.

[29] The accused in *Daschner* was 28 years old and had a criminal record with related drug offences. She was charged with possession of methamphetamine and over \$60,000 in cash, knowing the monies were obtained from drug trafficking. After a guilty plea and a positive PSR, she received 18 months imprisonment followed by 18 months probation. In *Daschner*, the Judge adopted the statement of Nash J. in *R. v. Matthiesson*, [1996] A.J. No. 1419 (QB):

In my view, the major concern is to impose a sentence that will deter others who might be tempted to participate in this less-tainted aspect of the drug trade. The fundamental purpose of any sentence is the protection of society. In order to protect society, consideration must be given to prevention which is effected by deterrence and by reformation. The paramount consideration must be deterrence on both its general and specific aspect and in its denunciatory aspect.

[30] In *Heidarian*, the accused entered a guilty plea for possessing 80 pounds of marihuana for the purpose of trafficking and \$700,000 in cash. He was 37 years old and had one previous conviction for the possession of pot. He received a term of imprisonment of 2 years less 1 day.

[31] The accused in *Huynh* had jewelry and cash in excess of \$750,000 which were proceeds of crime. Only \$1,000 in Canadian funds and \$3,000 in U.S. funds were clearly linked to any drug-related offence. She was 52 years old and had no criminal record. The conviction came after trial. She received a conditional sentence of 2 years less 1 day. The Alberta Court of Queen's Bench Judge in *Huynh* said that the British Columbia Court of Appeal sentence in *Heidarian* was either an anomaly or inapplicable in Alberta "due to the direction of the Alberta Court of Appeal that significant periods of incarceration must be imposed where the accused is involved in commercial or wholesale trafficking of drugs."

[32] *Huynh* also refers to the Manitoba Court of Appeal case of *R. v. Castillo*, 2005 MBCA 28. In *Castillo*, the accused, after trial, was found to be in joint possession of \$37,000 which were the proceeds of cocaine trafficking. The Court of Appeal found the sentence of 28 months incarceration to be "on the high side of the range", but not unfit.

[33] Finally, in *Ngo*, the accused pleaded guilty to possessing approximately \$107,000 which was derived from cocaine trafficking. He had a criminal record related to drug offences. He received 15 months imprisonment.

## **G. AGGRAVATING AND MITIGATING CIRCUMSTANCES**

[34] Mr. Jager has entered guilty pleas to both of these charges before the court. The effect of these guilty pleas will be to reduce the sentence which I would otherwise give him. The guilty pleas indicate that he has accepted responsibility for the offences and that he is remorseful. It also means that he has given up his constitutional right to a trial and has saved the witnesses and the state the time and money of proving the offences against him.

[35] There are a number of aggravating circumstances with respect to the s. 354 offence and the offender:

- (a) the nature of Mr. Jager's criminal record;
- (b) the accused's connection with an organized gang;
- (c) there were multiple crack cocaine transactions taking place which are the source of the \$21,000;
- (d) Mr. Jager is not at the lowest level of the drug operation. It is clear that the money from a number of drug transactions is flowing back to him; and
- (e) the drug involved is crack cocaine.

## **H. ANALYSIS**

[36] I am obliged to consider the joint submission of counsel very carefully and deviate from it only if I find it outside of a range of sentences which I consider to be fit and reasonable. Otherwise stated by Charbonneau, J. in *R. v. Taggart*, [2012] N.W.T.J. No. 10:

23. One of the principles in sentencing law is that a joint submission has to be given serious considerations by the sentencing Court and should be followed unless the sentencing Judge finds that it is clearly unreasonable or unfit. This was decided by our Court of Appeal in *R. v. Wong* 2007 NWTCA 5 which essentially incorporated the principles set out in *R. v. G.W.C.* 2000 ABCA 333.

[37] If I start with the basic principle of proportionality, I must look at the seriousness of the offence and the degree of responsibility of the offender.



[38] In assessing the gravity of the s. 354 offence, I must take into consideration the fact that the proceeds are derived from the sale of crack cocaine. Mr. Jager was a participant in a major drug operation in Yellowknife, NT. The agreed facts directly tie part of the money that was in Mr. Jager's possession to 13 transactions involving the sale of crack cocaine by 5 different traffickers occurring over three days. The remaining portion of the \$21,000 also came from crack cocaine trafficking.

[39] The effects of the sale of cocaine and crack cocaine in Yellowknife have been dealt with in a number of cases in the Northwest Territories. In *R. v. Gosselin*, [2009] N.W.T.J. No. 25 (N.W.T. S.C.) at paragraph 29, Charbonneau, J. stated:

People would have bought it. They may have broken into homes to get money to buy it [cocaine]. They may have assaulted someone on the street if they were desperate enough to get it. They might have, as some did in Yellowknife just a few years ago, tied people up in their own homes terrorizing them to get their bank cards and pin numbers to access money to buy the drugs. Some of these people are the ones who would allow long-time respectable business to be destroyed or allow their families to be destroyed or neglect their own children to the point that those children have to be apprehended by Social Services and put in foster care. Or someone may have ended up dead and their half-burned body left at the Yellowknife River; because that too has happened in this city in circumstances involving the use and sale of cocaine. Those are the types of consequences that might have come from those 146.5 grams of cocaine hitting the Yellowknife streets.

[40] Richard J. in *R. v. Turner*, 2006 NWTSC 64 at paragraphs 6 and 7 stated:

6. The illegal trade in cocaine and crack cocaine in Yellowknife has had a devastating effect on the people and on the social life of our community. We know this because of the many cases that come before the courts where we see the snowball effect on the commission of crimes in this community. We see thefts, break and enters, assaults, domestic violence, and we have seen homicides – all related to cocaine addiction. We have seen broken families and we have seen destroyed lives.

7. It has been said many times in this courtroom that the illegal crack cocaine trade is like a plague which has infested the social fabric of our community. Those who are involved in the supply and sale and trafficking of cocaine are like vultures or predators who are preying upon those who are addicted to this drug. The traffickers are doing this presumably for profit, or money. They apparently have no scruples about preying upon vulnerable people. For this reason alone, they ought to be punished. They are doing so even though there is a risk that they will end up in jail for a substantial period of time.

[41] The maximum penalty for the trafficking of crack cocaine is life imprisonment. The maximum penalty for the possession of over \$5,000 in proceeds of an indictable offence is 10 years. Parliament has made a distinction between the seriousness of these two offences. However, in the context of the possession of \$21,000 in this situation, I am not able to make a large distinction

between the role of the seller of the crack cocaine and the person through whom the sale proceeds are funneled. They are each cogs in the wheel of an organization selling crack cocaine in Yellowknife. Without either the trafficker or the money handler, the organization is unable to function.

[42] With respect to Mr. Jager's degree of responsibility, he is someone who has on two previous occasions been convicted for the possession of drugs for the purpose of trafficking. Self-admittedly, he has been involved in the drug culture since the age of 18 and is a junior member of a gang whose presence in Yellowknife is for the purpose of trafficking in crack cocaine. His role in the organization is such that proceeds from the trafficking for at least some period of time ended up in his possession.

[43] Sentencing Courts in the Northwest Territories (see for example, *R. v. Gellenbeck*, [2007] N.W.T.J. No. 76 at paragraph 27) have recognized and affirmed the influence of the Alberta Court of Appeal case of *R. v. Maskell* (1981), 58 C.C.C. (2d) 408 which established a starting point sentence of three years imprisonment for offences involving trafficking in cocaine on more than a minimum scale. This three-year starting point has been re-affirmed in a number of cases reported as *R. v. Rahime*, [2001] A.J. No. 988. The Alberta Court of Appeal also endorsed a starting point sentence of four and half years in cases involving wholesale commercial trafficking in *R. v. Honish*, [1989] A.J. No. 863.

[44] Having established that the money in Mr. Jager's possession came from the proceeds of the trafficking of crack cocaine, is there any reason why he should not be treated, for sentencing purposes, in the same manner as a drug trafficker? The simple answer is yes. Parliament and the Courts make a distinction between the trafficker and the person holding the proceeds from trafficking. For example, in *R. v. Naglingniq*, [1991] N.W.T.J. No. 135 (N.W.T.S.C.), the accused pleaded guilty to possessing \$5,500 from the sale of hashish. Ms. Naglingniq was sentenced to 90 days. The Court stated:

It is now my difficult task to impose a sentence on Ms. Naglingniq for the crime that she has committed. Sentencing is the most difficult part of a judge's responsibility. The courts of this jurisdiction have been saying for many, many years that people who are involved in the illegal trafficking of drugs should expect to be sentenced to a jail term unless there are very exceptional circumstances. This is the case even when the person is a young, first time offender.

The crime that Ms. Naglingniq committed in November of last year is not as serious as trafficking itself. This is reflected in the fact that for trafficking a person can be sentenced to life imprisonment, whereas for this offence, knowingly being in possession of the proceeds of drug trafficking, the maximum sentence is ten years imprisonment in a penitentiary. However, in my view, for a Section 19.1 [of the *Narcotic Control Act*] offender, the court should not depart from its policy of assessing a period of incarceration

unless there are extenuating circumstances. For if the mercenary trafficker does not have a mule or a courier, like Ms. Naglingniq, to carry the illicit drugs or the illicit profits for him, it would not be so easy for him to carry on his illicit trade without the police detecting him. The trafficker, once discovered and convicted, would, of course, receive a greater sentence than any sentence imposed on his courier.

[45] The Manitoba Court of Appeal in *Pavao* made a similar distinction between drug trafficking and money laundering:

Crown counsel argued, both at the original sentencing hearing and in this Court, that the sentence imposed for money laundering should be similar in severity for the crime of trafficking in narcotics.

But however serious the crime may be, Parliament itself has drawn a distinction between trafficking in drugs and laundering the proceeds, the maximum sentence for trafficking is life imprisonment, while the maximum sentence for an offence under s. 19.2 [of the *Narcotic Control Act*] is ten years.

[46] Although this distinction exists, the distinction becomes less evident when the holder of the proceeds of a criminal offence is involved in assisting the continuation of the offence itself. Mr. Jager was holding the \$21,000 for others in the organization. The money was the proceeds from the sale of crack cocaine. With Mr. Jager's assistance, the money was retained in the organization and the organization could continue, among other things, with the sale of crack cocaine. This embrace between Mr. Jager and the organization and the organization's illegal activity makes his offence of possession of the cash closer, in blameworthiness, to the trafficking itself.

[47] The primary sentencing objectives in drug trafficking cases are deterrence and denunciation. As stated at paragraph 8 of *Ngo* and the previous quote from *Matthiesson*, these are also the primary sentencing objectives involving possession of proceeds of crime exceeding \$5,000.

[48] Even taking into account the distinction between the offence of drug trafficking and that of possession of the proceeds of drug trafficking and considering the guilty plea and giving it the maximum credit, my initial reaction after the sentencing hearing on May 29, 2014 was that the lowest sentence I could see as being fit and reasonable was two years less 1 day. Having identified this discrepancy with the sentence of 15 months being jointly proposed by Crown and defence, I asked counsel to provide further submissions on the reasons for the joint sentence submission. These additional submissions were provided on July 4, 2014.

[49] I was advised that the joint submission reflects recognition by the Crown that there were a number of issues had the matter gone to trial and therefore, some uncertainty as to the trial's outcome. Most significantly, the case against Mr. Jager

was based on the admissibility of his warned statement to police. This admissibility was not without some hurdles from the Crown's point of view. In addition, counsel for Mr. Jager encouraged the Court to recognize the distinction between trafficking and possession of the proceeds of trafficking and to not import a starting-point type of analysis from *Maskell* to this case.

[50] In the end, I must remind myself that this joint submission has been proposed by two experienced counsel who have provided me with their thought processes and justification. Given the factors that I am now aware of, I find that the proposal of 15 months is extremely lenient and not the sentence I would be giving in the absence of the joint submission. However, it is not so low, given the factors, to be unfit or unreasonable.

## **I. PRE-TRIAL CUSTODY**

[51] Mr. Jager has been in custody since December 6, 2013, a total of 225 days as of July 18, 2014. In accordance with *R. v. Summers*, [2014] S.C.J. No. 26 and *R. v. Carvery*, [2014] S.C.J. No. 27, Mr. Jager is entitled to credit for his pretrial custody at the rate of 1.5 to 1 or 338 days.

## **J. ANCILLIARY ORDERS**

[52] The Crown has requested a DNA order. Section 354(1)(b) is a secondary designated offence. Section 487.051(3) directs that the Court shall consider the person's criminal record, the nature of the offence, the circumstances surrounding its commission and the impact such an order would have on the person's privacy and security of the person and shall give reasons for its decision. Mr. Jager has provided a DNA sample in the past. Given the nature of the offence before the Court, there is little if any effect of a further sample on Mr. Jager's privacy and the usefulness of DNA in the investigation of crimes outweighs, in this case, his privacy interest. He shall provide a DNA sample.

[53] The Crown also requests an Order for Disposition of Property in the form presented in Court. That Order shall be granted with the modification that I made regarding the 28 grams of marihuana belonging to the accused.

**K. CONCLUSION**

[54] Mr. Jager is sentenced to a term of imprisonment of fifteen (15) months for the section 354(1)(b) offence. He is sentenced to one month of imprisonment for the section 4(5) *CDSA* offence. This one month shall be served concurrent to the other sentence. He shall be given 338 days credit for his pre-trial custody which is to be deducted from the fifteen months. The victim of crime surcharge totals \$300. The time to pay is determined by section 737(4) of the *Criminal Code*.

Garth Malakoe  
T.C.J.

Dated at Yellowknife, Northwest  
Territories, this 18<sup>th</sup> day of July, 2014.

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