Court of Appeal for Saskatchewan

Citation: *R v Neary*, 2017 SKCA 29

Date: 2017-04-25

Docket: CACR2815

Between:

Her Majesty the Queen

Appellant

And

Seamus John Neary

Respondent

Docket: CACR2828

Between:

Seamus John Neary

Appellant

And

Her Majesty the Queen

Respondent

Before:	Ottenbreit, Caldwell and Whitmore JJ.A.
Disposition:	CACR2815 - appeal allowed; CACR2828 - appeal dismissed
Written reasons by: In concurrence:	The Honourable Mr. Justice Ottenbreit The Honourable Mr. Justice Caldwell The Honourable Mr. Justice Whitmore
On Appeal From: Appeal Heard:	2016 SKQB 218, Saskatoon January 12, 2017
Counsel:	Wade E. McBride for Her Majesty the Queen John W. Conroy, Q.C., Chris Lavier and Matthew J. Jackson for Seamus John Neary

Ottenbreit J.A.

I. INTRODUCTION

[1] After a trial in the Court of Queen's Bench, Seamus John Neary was convicted of possession of marijuana for the purpose of trafficking under s. 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 [*CDSA*], trafficking in marijuana in an amount exceeding three kilograms contrary to s. 5(1) of the *CDSA*, and possession of proceeds obtained by a crime contrary to ss. 354(1) and 355(b) of the *Criminal Code*. As well, Mr. Neary pleaded guilty to possession of psilocybin contrary to s. 4(1) of the *CDSA*. As a result of these convictions, Mr. Neary received a suspended sentence of two years on all charges concurrent, as well as an ancillary firearms prohibition order and a DNA order (2016 SKQB 218).

[2] The Crown appeals the sentence in respect of all four offences. Mr. Neary appeals the decision of the trial judge made during the trial with respect to his application under ss. 7 and 12 of the *Charter* that the *Safe Streets and Communities Act*, SC 2012, c 1 [*Act*], is unconstitutional because it removed a conditional sentence order as a sentencing option for the trial judge.

[3] For the reasons hereinafter set forth, the appeal of the Crown is allowed and the appeal of Mr. Neary is dismissed.

II. FACTS AND BACKGROUND

[4] In early 2014, members of the Saskatoon Police Service investigating a suspected drug trafficker observed that person and a third party enter an apartment building in Saskatoon carrying backpacks and then saw them exit the building sometime after with what appeared to be full backpacks. The parties were arrested and searched. Found in the backpacks was approximately seven pounds of marijuana. The police determined that the individuals had received the marijuana from Mr. Neary's apartment. The police obtained a search warrant for Mr. Neary's apartment and found marijuana, psilocybin and $1,000 cash. They also located a rental agreement in Mr. Neary's name for a storage locker, which when searched contained 13 pounds of marijuana.

[5] Mr. Neary had no criminal record or history of violence. He had in the past volunteered his time at charitable and community organizations and also excelled in athletics. He had received a University of Saskatchewan Huskies Football Foundation Scholarship to play with the Huskies football team. He graduated from his high school class as valedictorian, received a University of Saskatchewan Academic Entrance Scholarship and maintained good grades throughout university. Mr. Neary had maintained steady employment as a research assistant, construction worker, assistant coach and personal trainer since 2007. He had a strong support network from family, friends and members of the community.

III. DECISION OF THE TRIAL JUDGE

[6] At trial, Mr. Neary argued that the *Act* was unconstitutional insofar as it put in place s. 742.1(c) and (e)(ii) of the *Criminal Code*. Section 742.1(c) eliminated the availability of conditional sentences for offenders convicted of an indictable offence for which the maximum term of imprisonment is 14 years or life. Section 742.1(e)(ii) precluded conditional sentences if the offender was convicted of an indictable offence which involved the import, export, trafficking or production of drugs and for which the maximum term of imprisonment is 10 years. He submitted that because he fell into the category of offender contemplated by the two provisions and the trial judge did not have available to him the option of sentencing him to a conditional sentence, this constituted a violation of fundamental justice under s. 7 of the *Charter* and cruel and unusual punishment under s. 12 of the *Charter*.

[7] The trial judge held that the applicant's arguments fell squarely into s. 12 of the *Charter* and not under the more catchall s. 7 and, accordingly, with the concurrence of defence counsel, analyzed the *Charter* issue under s. 12 only.

[8] The trial judge in dealing with Mr. Neary's *Charter* argument first reviewed the applicable case law and portions of *Hansard* dealing with the *Act*. He determined that the court owed deference to the policy decisions of Parliament with respect to the imposition of punishment for criminal activities and the crafting of sentences that it deemed appropriate to balance the objectives of deterrence, denunciation, rehabilitation and protection of society, referring to *R v Lloyd*, 2016 SCC 13, [2016] 1 SCR 130. He noted that the gross disproportionality standard under s. 12 required something beyond "merely excessive" and that it

was only when the sentencing result reached “cruel and unusual” or “grossly disproportional” that the *Charter* remedy was triggered.

[9] He determined that the removal of a conditional sentence as a sentencing option did not create a minimum sentence in this case. He concluded that a full range of sentencing options was therefore available to him, save for the conditional sentence order. On this basis, he found that it was not reasonable to conclude that having a full set of options save for a conditional sentence was grossly disproportional to Mr. Neary’s crimes either looked at from the viewpoint of the circumstances of his offences or from any hypothetical alternative. Accordingly, he dismissed Mr. Neary’s s. 12 *Charter* application and proceeded to sentencing.

[10] The Crown acknowledged that Mr. Neary would but for the *Act* be a candidate for a conditional sentence order but took the position that in the specifics of Mr. Neary’s case a period of incarceration from 15–18 months was nevertheless appropriate. Mr. Neary argued that because it was the federal government’s intention to enact changes regarding the prohibition against possession of marijuana, the usual concerns about denunciation and deterrence were not applicable. Mr. Neary submitted it would in any event be intellectually dishonest to follow the sentencing regime of 15–18 months in light of those proposed changes.

[11] The trial judge went on to review the criminal record, community involvement, athletic history, academic pursuits, employment history and family and community support in relation to Mr. Neary. He also observed that Mr. Neary had not breached his conditions of release while on bail.

[12] The trial judge indicated that typically he would not hesitate to follow the guidance of the Court of Appeal respecting the range of sentences but he observed that in the circumstances there was “an *interregnum*, a time that exists between two governing regimes”.

[13] After observing that the federal government was taking steps to legalize marijuana, he proceeded to sentence Mr. Neary. The trial judge suspended the passing of sentence for two years subject to certain conditions concluding as follows:

> [37] No larger good is served sentencing Seamus John Neary to jail. He poses no danger to the community. He has conducted himself well as a citizen but for this single unfortunate foray in the mire of the drug world. To be certain, as he attempted to engage in a criminal enterprise, his crimes are deserving of denunciation and deterrence.

> However, facing the reality that the product in which he dealt is to become legal, it should be said that the decibel level of such denunciation and deterrence may be less than it otherwise would be.
>
> [38] After reflecting upon the excellent insights of both Crown and defence counsel, I conclude that it is appropriate to suspend the passing of sentence upon Seamus John Neary for two years. During that two years, Mr. Neary shall be subject to and must comply with the following conditions: …

[14] The conditions imposed by the trial judge included the usual conditions related to use of alcohol and drugs and the maintenance of a residence found in such orders. The only confinement imposed was the requirement that he be in his residence from 9:00 p.m. until 7:00 a.m. every day until August 31, 2016.

IV. STANDARD OF REVIEW

[15] The standard of review set forth in *R v Lacasse*, 2015 SCC 64, [2015] 3 SCR 1089 [*Lacasse*], has recently been summarized by this Court in *R v L.V.*, 2016 SKCA 74, [2017] 1 WWR 439:

> [72] *Lacasse* emphasizes the long-standing notion that, within the limits of the law, sentencing judges have a broad discretion to impose the sentences they consider appropriate. An appellate court may not intervene merely because it would have chosen a different sentence than did the sentencing judge.
>
> [73] The standard of review for sentence appeals is deferential. In *Lacasse*, the Supreme Court indicated that:
>
> > (a) an error in principle, a failure to consider a relevant sentencing factor or an erroneous consideration of an aggravating or mitigating factor will justify appellate intervention only when the trial judge's decision in that regard had an impact on the sentence (at para 44);
> >
> > (b) a court of appeal may not intervene simply because it would have weighed sentencing factors differently than the trial judge (at para 49);
> >
> > (c) a court of appeal may not intervene on the ground that it would have put the sentence in a different range or category. The choice of sentencing range or of a category within a range does not itself constitute a reviewable error (at para 51); and
> >
> > (d) a sentence may be demonstrably unfit even if the judge has made no error in imposing it (at para 52).

> [74] In the end, therefore, *Lacasse* indicates that an appellate court may substitute its own sense of an appropriate sentence for the one imposed by a trial level court in only two circumstances. The first is when the sentence imposed by the trial level court is demonstrably unfit. The second is when the trial level court made an error in principle, failed to consider a relevant factor, or gave erroneous consideration to an aggravating or mitigating factor *and* that error had an impact on the sentence.
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> (Emphasis in original)

[16] The standard of review on the appeal of the dismissal of the *Charter* application is correctness as agreed by the parties.

V. ANALYSIS

[17] I propose to deal first with Mr. Neary's appeal respecting the dismissal of his *Charter* application. Mr. Neary appeals against the trial judge's decision on s. 12 of the *Charter* and argues that the *Act* also offends s. 7 of the *Charter*. He argues the trial judge was wrong not to consider imposing a conditional sentence.

(a) Did the trial judge err in dismissing Mr. Neary's *Charter* application?

[18] As a preliminary matter, the Crown argues that Mr. Neary has failed to serve and file in this Court the requisite notice under *The Constitutional Questions Act, 2012*, SS 2012, c C-29.01. Mr. Neary submits that the notice was filed in the court below and although admittedly an additional notice was not filed in this Court, argues there was no prejudice to the Crown since the *Charter* matters were fully argued before the trial judge and in this Court the Crown has fully responded to all the *Charter* issues.

[19] It is common ground that ss. 13, 14 and 15 of *The Constitutional Questions Act* require a notice to be served on the Attorney General of Canada and the Attorney General of Saskatchewan if any *Charter* remedy is requested. It is also common ground that although Mr. Neary gave the appropriate notice prior to trial, there was no notice given prior to argument in this Court. Section 12 defines "court" to include the Court of Appeal.

[20] In *R v Nome*, 2010 SKCA 147, 362 Sask R 241, this Court determined that a court can proceed if the equivalent of notice was given:

> [39] The trial judge may alternatively be able to proceed to decide the issue in the absence of notice if "the equivalent of notice" has been given. In *R. v. Kortje*, 2005 SKCA 122, [2006] 3 W.W.R. 460 at para. 15, Gerwing J.A. stated:
>
> > [15] The appellants and the intervenant rely principally on *Eaton v. Brant County Board of Education* where Sopinka J. held that s. 109 of the Courts of Justice Act, a parallel section, was mandatory and there must be notice or the equivalent of notice. Also several Saskatchewan decisions in the Court of Queen's Bench and Provincial Court were cited to us. See also the decision of this Court in *Gladstone Petroleum Ltd. v. Husky Oil (Alberta) Ltd*.
>
> [40] The notice requirement under s. 8(4) of the *Act* is therefore mandatory unless (a) the Crown waives it, (b) there is a *de facto* notice equivalent to a written notice, or (c) the Court abridges the notice requirements.

[21] In the circumstances of this case, where the Crown has in its factum robustly argued the s. 7 and s. 12 *Charter* issues, the equivalent of notice has been given for the purposes of the appeal to this Court by the notice given in the court below. There is no prejudice to the Crown in this case. The *Charter* issues raised by Mr. Neary are well known and, apart from s. 7 of the *Charter*, were fully argued in the court below. The s. 7 argument is new. However, the Crown has nevertheless responded to it. I turn now to the merits of the *Charter* arguments.

[22] In March 2012, the *Act* came into force. It amended legislation related to criminal law including s. 742.1 of the *Criminal Code* replacing it with the following:

> **34.** Section 742.1 of the Act is replaced by the following:
>
> > **742.1** If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if
> >
> > …
> >
> > (c) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life;
> >
> > …
> >
> > (e) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years, that
> >
> > (i) resulted in bodily harm,
> >
> > (ii) involved the import, export, trafficking or production of drugs, or
> >
> > (iii) involved the use of a weapon; and
> >
> > …

The addition of subsections (c) and (e)(ii) of s. 742.1 removed a conditional sentence as an option for sentencing of trafficking and possession for the purpose of trafficking offences.

[23] With respect to s. 742.1(c) and (e)(ii), Mr. Neary makes essentially the same s. 12 arguments as in the court below. With regard to s. 7, he relies on *R v Nur*, 2015 SCC 15 at para 10, [2015] 1 SCR 773 [*Nur*], where the Court stated that despite the sentencing jurisprudence under s. 12 of the *Charter*, there may be situations regarding sentencing requiring recourse to s. 7. He argues that the impugned provisions are overbroad and infringe his life, liberty or security interests and thereby violate the principles of fundamental justice and that such violation is not saved by s. 1 of the *Charter*.

[24] The Crown submits that Mr. Neary's complaint is basically about the perceived harshness of the unavailability of a conditional sentence and therefore should be properly analyzed under s. 12 rather than s. 7 of the *Charter*. The Crown argues that even if it is appropriate to analyze the issue under s. 7, the constitutional standard is still gross disproportionality.

[25] Of note is that Mr. Neary accepted in the court below that his arguments respecting the unavailability of a conditional sentence fell squarely within s. 12 of the *Charter*. It has long been the law that in such a case, the matter should be analyzed on the basis of s. 12 rather than s. 7 (*R v Malmo-Levine; R v Caine*, 2003 SCC 74 at para 161, [2003] 3 SCR 571; *R v Rodgers*, 2006 SCC 15, [2006] 1 SCR 554). This approach was generally reconfirmed in *R v Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 SCR 180 [*Safarzadeh-Markhali*], to the extent that the s. 7 argument involves a disproportionality aspect (see paras 71–73).

[26] Mr. Neary's s. 7 argument looks very much like a s. 12 disproportionality submission dressed up as an "overbreadth" argument. The Crown has fully responded to it as a s. 7 argument. I will therefore deal with it on the basis that the impugned sections of the *Criminal Code* are overbroad. Mr. Neary argues that the effect of s. 742.1(c) and (e)(ii) is that offenders who are convicted for trafficking must now be sentenced to institutional prison if the court finds that a sentence of imprisonment of any length is determined to be fit thus making institutional prison sentences mandatory for all such offences assuming the normal sentencing range applies and that such an effect is not in accord with the law's purpose.

[27] In *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101, with respect to s. 7, the Court stated that laws that curtail liberty in a way that is arbitrary, overbroad or grossly disproportional do not conform to the principles of fundamental justice. It made it clear that, though there was significant overlap between these three principles, arbitrariness, overbreadth and gross disproportionality remain distinct (para 107).

[28] With respect to the principle of overbreadth, the Court stated as follows:

> [112] Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose. In this sense, the law is arbitrary *in part*. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts. For instance, the law at issue in *Demers* required unfit accused to attend repeated review board hearings. The law was only disconnected from its purpose insofar as it applied to permanently unfit accused; for temporarily unfit accused, the effects were related to the purpose.
>
> [113] Overbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effect in others. Despite this recognition of the scope of the law as a whole, the focus remains on the individual and whether the effect on the individual is rationally connected to the law's purpose. For example, where a law is drawn broadly and targets some conduct that bears no relation to its purpose in order to make enforcement more practical, there is still no connection between the purpose of the law and its effect on the *specific individual*. Enforcement practicality may be a justification for an overbroad law, to be analyzed under s. 1 of the *Charter*.
>
> (Emphasis in original)

[29] In *Safarzadeh-Markhali*, the Court articulated the approach to be taken when analyzing whether a law is overbroad within the meaning of s. 7 of the *Charter*:

> [24] Whether a law is overbroad within the meaning of s. 7 turns on the relationship between the law's purpose and its effect: *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485, at para. 24. It is critically important, therefore, to identify the purpose of the challenged law at the outset of the s. 7 inquiry.

[30] To determine the purpose of a law for an analysis for overbreadth under s. 7 of the *Charter*, regard must be had to (1) statements of purpose in the legislation, (2) the text, context, and scheme of the legislation, and (3) extrinsic evidence such as legislative history and evolution (*Safarzadeh-Markhali* at para 31). Accordingly, I now turn to these factors.

[31] The legislation, apart from its title, does not explicitly state a purpose.

[32] Prior to March 2012, when the *Act* came into force, judges had the option to impose a conditional sentence for any offence regardless of maximum penalty, including for the

trafficking of marijuana and possession for the purpose offences as long as the other requirements of s. 742 were met. Those other requirements included that the offence did not carry a mandatory minimum, the sentence imposed be less than two years in length, the serving of the sentence in the community would not pose a danger to the community and the other principles of sentencing would be served by the imposition of a conditional sentence (*R v Proulx*, 2000 SCC 5, [2000] 1 SCR 61 [*Proulx*]).

[33] The text of the *Act* and its scheme, among other provisions, increases mandatory minimum penalties and maximum penalties for certain sexual offences, restricts the availability of conditional sentences for all offences for which the maximum term of imprisonment is 14 years or life and for specified offences for which the maximum term of imprisonment is 10 years, including importing, exporting, trafficking or production of drugs.

[34] Excerpts from *Hansard* related to the *Act* as referenced in the trial judge's decision and additional excerpts of the comments of the Parliamentary Secretary to the Minister of Justice cited by Mr. Neary in his factum fairly disclose that the purpose of the *Act* is to:

(a) provide consistency and clarity to the sentencing regime;

(b) ensure certain non-violent serious offences will be treated as serious offences thus avoiding the use of conditional sentencing for those offences;

(c) protect Canadians from violent offenders;

(d) emphasize the objectives of denunciation and deterrence as sentencing principles for importing, exporting, trafficking and production of drugs, and eliminate the possibility of conditional sentences for these types of offences; and

(e) ensure conditional sentences are used for less serious offences and provide consistent benchmarks regarding the use of such sentences.

[35] On this basis, I conclude that the *Act* reflects at least the following broad purposes:

(a) providing consistency and clarity to the sentencing regime;

(b) promoting of public safety and security;

(c) establishing paramountcy of the secondary principles of denunciation and deterrence in sentencing for the identified offences; and

(d) treating of non-violent serious offences as serious offences for sentencing purposes.

[36] Parliament, by passing the *Act*, has emphasized the need for denunciation and deterrence as it is entitled to do. Drug trafficking is a serious offence that warrants social deterrence and sanction (*R v Pearson*, [1992] 3 SCR 665 at 694–695; *R v Silveira*, [1995] 2 SCR 297 at para 168). It is a crime of enormous social consequence which causes a great deal of societal harm (*R v Benedetti*, 1997 ABCA 169 at para 13, [1997] 7 WWR 330). It is trite that trafficking and possession for the purpose offences are serious by their very nature.

[37] In *Proulx*, although the Court rejected the argument that the fundamental principles of sentencing supported a presumption against conditional sentences for certain offences, the Court nevertheless said:

> [114] Where punitive objectives such as denunciation and deterrence are particularly pressing, such as cases in which there are aggravating circumstances, incarceration will generally be the preferable sanction. This may be so notwithstanding the fact that restorative goals might be achieved by a conditional sentence. Conversely, a conditional sentence may provide sufficient denunciation and deterrence, even in cases in which restorative objectives are of diminished importance, depending on the nature of the conditions imposed, the duration of the conditional sentence, and the circumstances of the offender and the community in which the conditional sentence is to be served.

[38] Mr. Neary submits that the legislative objectives of deterring serious crimes and protecting Canadians from serious offenders are not engaged where there are no aggravating factors as in his case. He argues that because he has no record, no history of violence and is a candidate for rehabilitation, the amendment is overbroad in that the purposes of the *Act* bear no rational connection to his situation. As well, he argues that, with the potential future legalization of possession of marijuana, his offences do not fall at the high level of seriousness as would offences regarding hard drugs. These arguments cannot succeed. I will explain.

[39] The premise of Mr. Neary's argument is that the offences of which he has been convicted should not be treated as serious offences where favourable personal circumstances such as his exist. He submits in such cases institutional incarceration is not required. This is a false premise.

The gravity and seriousness of the offences are not attenuated by the personal circumstances of the accused.

[40] Mr. Neary argues that the amendment is overbroad because institutional incarceration will not deter drug traffickers like him who have no record. I disagree. In *Lacasse*, the Court said the following about the principle of deterrence and its application to otherwise law-abiding citizens:

> [73] While it is true that the objectives of deterrence and denunciation apply in most cases, they are particularly relevant to offences that might be committed by ordinarily law-abiding people. It is such people, more than chronic offenders, who will be sensitive to harsh sentences. Impaired driving offences are an obvious example of this type of offence, as this Court noted in *Proulx*:
>
> > . . . dangerous driving and impaired driving may be offences for which harsh sentences plausibly provide general deterrence. These crimes are often committed by otherwise law-abiding persons, with good employment records and families. Arguably, such persons are the ones most likely to be deterred by the threat of severe penalties: see *R. v. McVeigh* (1985), 22 C.C.C. (3d) 145 (Ont. C.A.), at p. 150; *R. v. Biancofiore* (1997), 119 C.C.C. (3d) 344 (Ont. C.A.), at paras. 18-24; *R. v. Blakeley* (1998), 40 O.R. (3d) 541 (C.A.), at pp. 542-43. [para. 129]

[41] The principles of denunciation and deterrence are paramount in the sentencing of offences such as the ones committed by Mr. Neary. He clearly trafficked drugs for profit. It is otherwise law-abiding citizens like Mr. Neary who must be deterred from engaging in illegal activities which appear to generate quick and easy money.

[42] The legislative objectives of deterring serious crime and, in particular, serious violent and property crime and protecting Canadians from serious offenders are engaged in Mr. Neary's case. The offences he has committed are serious. The Canadian public must be protected from the conduct in which Mr. Neary was engaged. His offences, even though non-violent, must be dealt with as serious offences for sentencing purposes. The removal of a conditional sentence as an alternative to institutional incarceration serves the legislative objectives of the impugned law, i.e., to deter serious crime and, in particular, violent and property crime, and to protect Canadians from serious offenders. Mr. Neary clearly falls within the law's intended scope.

[43] Mr. Neary argues that if his circumstances do not give rise to a finding that the impugned provisions are overbroad that the reasonable hypothetical circumstances more particularly set out by him in his factum in relation to his s. 12 arguments do so. *Charter* jurisprudence generally

and s. 12 jurisprudence specifically with regard to the second stage of that analysis allow consideration of such reasonable hypothetical circumstances in determining whether a law is unconstitutional (*Nur* at paras 51–58; see *R v Heywood*, [1994] 3 SCR 761 at 799 re application to s. 7). Having reviewed Mr. Neary's reasonable hypothetical, I am not satisfied it demonstrates that the impugned provisions are overbroad.

[44] Mr. Neary also argues that his offences are less serious on the basis that the government has proposed in the future to fulfill its election promise to make simple *possession* of marijuana legal. He asks the Court to place less weight on the principles of denunciation and deterrence mandated by the *Act*. Such an argument cannot succeed. This Court cannot give less effect to the existing law because of the possibility or even the probability of a future law that has been promised but which is not law at the moment. This Court is bound to apply the law as it stands at the present time and, in any event, the government has not proposed the decriminalization of *trafficking* in marijuana.

[45] In this case the provisions are not overbroad. Mr. Neary has been convicted of serious drug offences. While, admittedly, he poses a reduced threat to the public, the purpose of the *Act* is to address serious crimes and Mr. Neary has been found to have committed those serious crimes.

[46] Accordingly, Mr. Neary's s. 7 argument cannot succeed. The *Act* as it affects s. 742.1(c) and (e)(ii) is not overbroad.

[47] Mr. Neary also makes the argument that the *Act* is disproportionate under s. 12. He essentially reiterates his argument before the court below. The trial judge dealt with this issue appropriately and I would dismiss this argument for the reasons given by the trial judge.

(b) Was the sentence imposed unfit?

[48] The Crown points to three errors made by the trial judge that make the sentence unfit:

(a) placing inordinate emphasis on Mr. Neary's personal circumstances;

(b) placing significant emphasis on the current government's promise to "legalize marijuana"; and

(c) imposing a sentence that was so lenient it failed to accord with the principle of proportionality.

[49] The Crown argues the sentence imposed was well below the usual sentencing range and was demonstrably unfit. It submits that the sentence failed to reflect Mr. Neary's moral culpability for the serious offences.

[50] There is no question that the trial judge focussed on Mr. Neary's lack of any criminal record and impressive personal circumstances. The trial judge, despite these very favourable sentencing factors, indicated that he typically would not hesitate to follow the guidance of this Court respecting sentencing. However, he determined not to follow that guidance in large part because of the federal government's statement of intent to "legalize marijuana". He then went on to hold that the proposed legalization of marijuana had an effect on the principles of denunciation and deterrence and that on this basis, together with Mr. Neary's favourable personal circumstances, a suspended sentence could be imposed.

[51] Judges are bound to apply the law as it exists not as it might be in the future especially when, as here, it is unknown when the law will be changed, what the terms of it will be and how it will affect the offences of trafficking drugs or possession for the purpose. If judges refuse to apply the law or fail to do so substantially, based on their impressions of the likelihood of reform, the rule of law would be seriously undermined. As the Ontario Court of Appeal said in *R v Song*, 2009 ONCA 896, 249 CCC (3d) 289:

> [10] Judges are entitled to hold personal and political opinions as much as anyone else. But they are not free to permit those views to colour or frame their trial and sentencing decisions. They are bound to apply the law as it stands. …

[52] It appears that the trial judge accepted defence counsel's argument that as a result of the pending change to the law denunciation and deterrence are attenuated. As a result, he said he would not follow the sentencing precedents set forth by this Court. Despite paying lip service to the necessity of giving priority to denunciation and deterrence, the trial judge did not implement the objectives of the *Act*. The possible future legalization of possession of marijuana can have no legal effect on the sentencing regime at this time as explained earlier. It is an irrelevant extraneous factor that could, in this case, play no part in sentencing considerations. The trial

judge's reliance on this factor was an error of law which resulted in the imposition of a suspended sentence.

[53] The trial judge overemphasized Mr. Neary's personal circumstances and failed to take into account the seriousness of the offences and the level of his moral culpability. Mr. Neary trafficked a substantial amount of marijuana. This was noted by the trial judge in his decision. There was some evidence that this was not Mr. Neary's first incursion into marijuana trafficking in that he had in smaller ways been trafficking drugs in the past. This undercuts the trial judge's intimation that given Mr. Neary's favourable background these offences are a one-off situation.

[54] While marijuana is considered a soft drug, the trafficking of which is less serious than the trafficking of hard drugs, Mr. Neary, because he was in possession of or able to traffic 20 pounds of marijuana, is above a mere street level trafficker and holds a higher position in the distribution system. Moreover, the trafficking was a commercial operation. There is no evidence here that Mr. Neary is addicted in any way. He did it for the money. This aspect was underemphasized by the trial judge and as a result diminished his view of the moral culpability of Mr. Neary. All these errors resulted in the suspended sentence imposed on Mr. Neary being unfit.

[55] Accordingly, it falls to this Court to determine the proper and fit sentence for Mr. Neary. Given the seriousness of trafficking and possession for the purpose offences, this Court has consistently indicated that with a few exceptions an incarceral sentence is fit. This Court in *R v Neufield* (1999), 180 Sask R 96 (CA), stated:

> [12] Possession of comparatively large amounts of marijuana for the purpose of trafficking commercially, which is what the first of the offences amounted to in this case, has long been regarded as an offence of considerable gravity, as demonstrated by such cases as *R.* v. *Enden* (1988), 66 Sask R. 239 (C.A.); *R.* v. *Debrowney* (1992), 97 Sask. R. 262; and *R.* v. *Collins* (1997) (Sask. C.A., February 6th 1997, unreported). This is but a sample of such cases, cited to make the point that this court has consistently treated trafficking on a commercial scale, even in the soft drugs, as a serious offence, to be treated as such. In this instance, the gravity of the first of the offences, having regard for the circumstances attending its commission, was more or less that of the offences dealt with in these cases, and there was clearly a commercial element to the offence, elevating the gravity of it beyond that of other forms of trafficking. This cannot be glossed over.

See also *R v Le*, 2010 SKCA 22, 350 Sask R 107; *R v McKenzie*, 2012 SKCA 92, 399 Sask R 246; and *R v Chinh Le*, 2013 SKCA 9, 405 Sask R 244.

[56] The case law setting out a range of 15–18 months incarceration for the drug offences was canvassed by Crown counsel in his submissions to the trial judge. This range was accepted by the trial judge as being proper. Mr. Neary has tacitly acknowledged on appeal that the sentencing range was 15–18 months. Based on the sentencing ranges set forth by this Court for this type of offence, a fit sentence would be 15–18 months incarceration.

[57] I take into account the circumstances of the offence, Mr. Neary's personal circumstances and the aggravating and mitigating circumstances, all of which have been outlined in the trial judge's decision. I also note that Mr. Neary has successfully complied with stringent release conditions for two years while awaiting trial. Given all of this, I conclude that a fit sentence for each of the trafficking and possession for the purpose offences in this case is 15 months incarceration. The 15-month sentence for the s. 5(2) offence will be concurrent to all other sentences. With respect to the remaining two charges, the drugs and money involved were relatively minor.

[58] Psilocybin is a drug under Schedule III of the *CDSA*. Where the Crown proceeds by indictment, as in this case, the maximum punishment is three years imprisonment (s. 4(6)(a)). This is less than the five year less a day maximum prescribed for indictable convictions for possession of Schedule II substances (s. 4(4)(a)). This Court does not appear to have considered any sentence imposed for possession of psilocybin.

[59] In *R v Paryniuk*, 2013 ONCJ 443, Mr. Paryniuk was charged with several drug offences including possession of psilocybin as well as a possession of proceeds charge. As part of a substantial global sentence, the Court apportioned 15 days concurrent to possession of psilocybin and 30 days concurrent to possession of proceeds of crime (at para 34).

[60] Possession of proceeds of crime is a hybrid offence. Where the value of the subject matter of the possession of proceeds offence pursuant to s. 354(1)(a) of the *Criminal Code* is less than $5,000, this offence carries a two year maximum term of imprisonment on indictment (s. 355(b)(i)).

[61] In *R v Ahmed*, 2016 SKCA (SentDig) 7, this Court dismissed an appeal from sentence by an offender convicted of simple possession of crack cocaine and methamphetamine after a series

of stops by police. On each occasion the offender was also in possession of cash and cellphones with messages relating to drug trafficking. Mr. Ahmed was a heavily addicted user with a prior criminal record. He received a sentence of 6 months imprisonment on the s. 355(b) charge concurrent to the sentences of 32 months on the drug possession charges.

[62] In *R v Roxburgh*, 2014 SKCA (SentDig) 33, Mr. Roxburgh was stopped by police for a traffic infraction. When Mr. Roxburgh was arrested, $2,100 was discovered in his pocket, and a small amount of marijuana was found in the car along with five cell phones. Additional money and marijuana were found in Mr. Roxburgh's hotel room. This Court dismissed an appeal from sentence imposed after a joint submission. Mr. Roxburgh received an 18-month conditional sentence on the s. 355(b) charge with 6 months conditional concurrent for simple possession of marijuana.

[63] On the basis of the foregoing jurisprudence, a fit sentence for the offence of simple possession of psilocybin is 30 days incarceration concurrent to the sentences for the s. 5(1) and s. 5(2) *CDSA* offences. With respect to the ss. 354 and 355(b) offences, a fit sentence is six months incarceration concurrent to all other sentences.

VI. CONCLUSION

[64] The appeal of Mr. Neary is dismissed. The appeal of the Crown is allowed. The sentence of Mr. Neary will be:

(a) s. 5(1) of the *CDSA* - trafficking in marijuana - 15 months incarceration;

(b) s. 5(2) of the *CDSA* - possession of marijuana for the purposes of trafficking - 15 months concurrent to all other convictions;

(c) s. 4(1) of the *CDSA* - possession of psilocybin - 30 days concurrent to all other convictions; and

(d) ss. 354(1) and 355(b) of the *Criminal Code* - possession of proceeds obtained by crime - 6 months concurrent to all other convictions.

[65] Accordingly, Mr. Neary is to surrender himself forthwith to the nearest detachment of the RCMP in accordance with this decision to serve his sentence. All incidental orders made by the trial judge remain unchanged.

"Ottenbreit J.A."

Ottenbreit J.A.

I concur. "Caldwell J.A."

Caldwell J.A.

I concur. "Whitmore J.A."

Whitmore J.A.