
CANADA / JUDGMENT

R. v. Edwardsen

2018 BCSC 1013

COURT

Supreme Court of British Columbia

DECIDED

13 February 2018

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2018 BCSC 1013 R. v. Edwardsen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Edwardsen,

2018 BCSC 1013

Date: 20180213

Docket: 30870-2

Registry: Terrace

Regina

v.

David Harry Edwardsen

Before: The Honourable Mr. Justice Punnett

Oral Reasons for Sentence

Counsel for the Crown:

J. Walker

A. Switzer

Counsel for the Accused appearing by teleconference:

B. Anderson

Place and Date of Hearing:

Terrace, B.C.

February 13, 2018

Place and Date of Judgment:

Terrace, B.C.

February 13, 2018

INTRODUCTION

- [1] On October 2, 2017, Mr. Edwardsen was found guilty of 14 drug and firearms offences. Reasons are reported at [2017] B.C.J. No. 2478.

Circumstances of the Offences

- [2] The circumstances of the offences are reported in the reasons for judgment referred to. A summary follows:

Counts 1 to 4

- [3] Counts 1 to 4 relate to trafficking in cocaine and procuring marihuana and involve sales by the offender to an undercover RCMP officer at two locations. One, a "crack shack" as described by the offender, at 3324 River Drive in Terrace, B.C., and the other the home of the offender at 604 Old Lakelse Lake Drive.
- [4] The undercover officer left a local bar in Terrace and took a cab to 3324 River Drive after simply asking the driver to take him to River Drive. The notoriety of that location is indicated by the fact the officer provided no address, simply telling the driver he knew the place. The officer then purchased cocaine from a Steven Maier on the first day and did so again on the next day. On May 18, 2012, he returned to the River Drive property and the offender was present counting money. The officer again purchased drugs from Mr. Maier. The offender directed Mr. Maier to retrieve the cocaine, noting when he dropped it in his lap, "he almost paid for it". It is clear the cocaine was the offender's and that Mr. Maier was in a subordinate role. Mr. Edwardsen confirmed to the officer that 3324 River Drive was his place, that it had been for 22 years, and that it was a crack shack. He told the officer he usually sold three and a half grams of cocaine for \$250 and that he had just "loaded the house".
- [5] The undercover officer also attended at 604 Old Lakelse Lake Drive where he further discussed with Mr. Edwardsen the price of drugs being sold by him. The officer purchased cocaine and marihuana from Mr. Edwardsen.

Counts 5-11

- [6] Counts 5 to 11 relate to offences of possession of cocaine and marihuana for the purpose of trafficking and unlawful firearms offences at 604 Old Lakelse Lake Drive. As noted in my reasons for judgment, the evidence that 604 Old Lakelse Lake Drive was Mr. Edwardsen's residence was overwhelming and I repeat my findings respecting the evidence relating to that address as follows:
- [16] The home has two stories. It has three bedrooms, a living room area, kitchen and a lower basement level. It is located in a rural area on a large property that has been cleared of trees. Execution of a search warrant resulted in the seizure of evidence from various locations in the home.
- [17] What has been described as the master bedroom contained sheets, pillows and blankets on the bed, and fairly large men's T-shirts in the closet. Also in the closet were a 12-gauge pump-action shotgun and four rounds of buckshot. Located on the bedside table was a passport in the name of the accused along with prescription bottles and medical papers in Mr. Edwardsen's name.
- [18] On a dresser at the end of the bed was a large, yellow industrial type of scale, a second, smaller scale, a blue hammer with cocaine residue on it, large ziploc baggies with cocaine residue on them, and opened vacuum sealed baggies on the yellow scale. In addition there was a box of sandwich baggies, gram or apple seed baggies, scissors with residue on them, a calculator, numerous razor blades, keno papers and a "Trimbox" brochure. Next to the dresser was a suitcase full of empty large ziploc baggies with white residue on them.
- [19] Under the bed were two loaded firearms and a hatchet. One firearm was a 12 gauge pistol grip Winchester Defender shotgun (a restricted firearm), loaded with 7 rounds of ammunition and the other was a .44 Magnum Interarms revolver loaded with 6 rounds of ammunition.
- [20] In his statement Mr. Edwardsen said that he was having problems with wolves and had the guns loaded and ready to shoot the wolves if necessary.
- [21] None of the other bedrooms had any personal documents or identification belonging to Mr. Edwardsen. One had basic furniture and the wallet of a Kenneth Dye and a commemorative or "Centennial" rifle in a box under the bed. Another bedroom had bunk beds and the final bedroom contained some documents in the name of Dustin Edwardsen (Mr. Edwardsen's son) relating to the "car lot" property at Plan 9106B and some tax documents for Hanna McCrae. There were very few clothes in the closet.
- [22] The home office had a lock on the door controlled by a keypad. Inside the office drug and personal items were found on, in and under the desk, including:
- a) A stack of 20 dollar bills located in a grey plastic bag on top of the desk with a total amount of \$10,600;

- b) A bag of cocaine that weighed 27.6 grams found on the desk near the 20 dollar bills noted above;
- c) A large bag of marihuana that weighed 195.3 grams;
- d) \$360 in cash loose on top of the desk between the marihuana and the cocaine in front of the computer monitor;
- e) An empty ziploc baggie with white residue on it on top of the desk beside the large bag of marihuana;
- f) Documents in Mr. Edwardsen's name located on top of the desk beneath the empty ziploc baggie with white residue in it;
- g) A box of plastic sandwich bags;
- h) A money counter located on top of the desk to its left side;
- i) A stack of 20 dollar bills totalling \$5,000 located in the upper right hand desk drawer with a yellow sticky note with a "5" on it;
- j) A silver scale in the top right hand drawer of the desk;
- k) Keys located in the upper right hand drawer of the desk that opened the padlock to the grow at Plan 9106B;
- l) An expired marihuana growing permit, that permitted David Edwardsen to grow and possess marihuana at that location, which was found in the upper right hand drawer in the office with the keys and the \$5,000 cash;
- m) Four prescription bottles dating from 2008 to 2009 for prescriptions in Mr. Edwardsen's name in the upper right corner of the desk;
- n) 15 dime baggies that each contained .4 grams of cocaine located inside a ziploc baggie in the bottom right hand drawer of the desk;
- o) \$1,500 USD and \$443 CAD located in the locked left hand side drawer of the desk;
- p) A ziploc baggie containing 747 grams of cocaine located underneath the desk by boxes of alcohol;
- q) A white pill bottle that held empty capsules located on the desk near the money counter;
- r) An envelope located on top of the desk addressed to "The Surveyor of Taxes" with the words "Dustin's Property" handwritten on it and a 2008 Rural Property Tax Notice for "Lot B: 9106" addressed to Dustin Edwardsen at 3504 King Street, Terrace, B.C.;
- s) A grocery bag with gel caps and dime baggies located in the left hand side drawer of the desk.

- [23] Other items in the office included a Winchester .338 and a 12-gauge Browning shotgun behind the door, CRA documents from March and April 2012 and September and July 2010 addressed to David Edwardsen at 604 Old Lakelse Lake Drive. Two boxes of Captain Morgan's bottles were found along with boxes and bottles of Crown Royal, Smirnoff Vodka and five forty-ounce bottles of Gibson's.
- [24] In addition, in a fridge in the office were six bags of marihuana, weighing a total of 612.6 grams. There was also a scale with white powder residue on it. In a safe were three bags of cocaine: one bag of powder cocaine weighting 394.7 grams, one of crack cocaine and one bag that contained 23 baggies of cocaine that each weighed approximately .6 grams.
- [25] On a bookcase shelf behind some magazines were three packs of cash each with a "10" noted on them totalling \$29,923.
- [26] In his statement, Mr. Edwardsen, when told there was \$50,000 cash in his office, stated: "I know there was quite a bit there, but I didn't think it was no fifty grand". He also said, "oh so they took so what they took all prescription pills outta my office Cause I had three bottles of prescription pill my prescription." When questioned about the US dollars he stated: "that rings a bell that's why you guys uh had a whole bunch of old money, right" and "That was all money going to the RIS SRI or whatever the hell you call it."
- [27] When the officer referred to cancelled cheques relating to Dustin's property Mr. Edwardsen said "I think what you're talking about is receipts There's no cheques, I've never had a chequing account in my life."
- [28] A number of other admissions were made.
- [29] Mr. Edwardsen sold 6 grams of cocaine to Cst. Cheung on May 18, 2012, 33.4 grams on July 13, 2012, and 29.4 grams on September 7, 2012. On September 7, 2012 Mr. Edwardsen also sold 231.9 grams (approximately one-half pound) of marihuana to Cst. Cheung.
- [30] Mr. Edwardsen admits that the cocaine and marihuana seized from 604 Old Lakelse Lake Drive are consistent with possession for the purpose of trafficking.
- [31] In his statement he says the office at 604 Old Lakelse Lake Road was "my office" and his prescriptions.
- [7] The seized evidence included close to 3,300 rounds of ammunition for calibres of all size. The value of the cocaine, if sold at the gram level, was approximately \$146,000.

Counts 12-13

- [8] Count 12 is a charge of unlawfully producing a controlled substance, cannabis marihuana contrary to s. 7(1) of the CDSA, and Count 13 is a charge of unlawfully possessing a controlled substance, cannabis marihuana, for the purpose of trafficking contrary to s. 5(2) of Controlled Drugs and Substances Act. The two offences occurred at a third property called the Plan 9106B property, registered in the name of Mr. Edwardsen's son.
- [9] It is not in dispute that Plan 9106B was the site of a grow operation with the raised beds and lighting required. 164 plants were seized, all at the same stage of growth. In a new building on that property the police located the grow op equipment that Mr. Edwardsen had exchanged for the drugs supplied to the undercover officer.

Count 17

- [10] Count 17 relates to unlawful possession of 55 non-restricted firearms, at a shop rented by the offender at 4410 Bohler Road, without being the holder of a licence for their possession contrary to s. 91(1) of the Code.

Circumstances of the Offender

- [11] Neither the defence nor the Crown requested a pre-sentence report. All information respecting Mr. Edwardsen was provided by his counsel and from letters of reference. Mr. Edwardsen is 55 years of age. He was born in New Westminster, British Columbia. Both of his parents have addiction issues. His mother died when he was young and his father spent time in the B.C. Penitentiary. His maternal grandmother and various aunts and uncles raised him. His was not a stable upbringing.
- [12] He has a Grade 8 education. He started logging when he was 16. He became self-employed in the logging industry. In 1990, he was injured in a fall and was off work for two years and in a brace for a further year. He has had difficulty staying employed in that industry.
- [13] He had four sons, two of whom are employed in the construction industry. His son Duston was killed in a logging accident. His younger son Dillon is a steel fabricator in Terrace. Mr. Edwardsen has three grandchildren.
- [14] After his arrest in September 2012, he was remanded to the Prince George Regional Correctional Centre. He was released on bail June 4, 2014. Michael Hall and an aunt and uncle were his sureties. When released he worked for Mr. Hall but under his bail terms he could not return to Terrace for about a year. For the past three years he has worked as a longshoreman in Stewart, British Columbia.
- [15] The record of Mr. Edwardsen is admitted:

1980-03-31

TERRACE BC

WILFUL DAMAGE SEC 387 CC

SUSP SENT - PROBATION FOR 6 MOS

1980-05-08

TERRACE BC

(1) ASSAULT PEACE OFFICER WITH INTENT TO ESCAPE LAWFUL CUSTODY SEC 246(2)(B) CC

(2) ESCAPE LAWFUL CUSTODY SEC 133 CC

(1) 30 DAYS

(2) 14 DAYS CONC

1981-02-11

TERRACE BC

OBSTRUCTION SEC 118 CC

\$350 I-D 45 DAYS

1981-04-08

TERRACE BC

BE & COMMIT SEC 306(1)(B) CC

\$150 I-D 30 DAYS & PROBATION FOR 8 MOS

1983-01-26

TERRACE BC

(1) OBSTRUCTION SEC 118(C) CC

(2) CAUSE A DISTURBANCE SEC 171 CC

(1) \$350 I-D 21 DAYS

(2) \$100 I-D 4 DAYS

1984-08-21

TERRACE BC

(1) ASSAULT SEC 245 CC

(2) ESCAPE LAWFUL CUSTODY SEC 133(1) CC

(1-2) 6 M9OS ON EACH CHG CONC

1986-06-19

KITIMAT BC

THEFT SEC 294 CC

(RCMP TERRACE)

6 MOS

1998-05-20

PRINCE RUPERT BC

POSS OF NARCOTIC

SEC 3(1) NC ACT

(RCMP PRINCE RUPERT 88-756)

\$150. I-D 7 DAYS

1989-01-05

VANCOUVER BC

FAIL OR REFUSE TO PROVIDE SAMPLE SEC 238(5) CC

(RCMP Terrace 88-761)

28 DAYS

1989-06-08

VANCOUVER BC

POSS OF A NARCOTIC SEC 3(1) NC ACT

(RCMP TERRACE 88-4510)

\$75 I-D 1 DAY

1990-07-31

TERRACE BC

ASSAULT SEC 266 CC

(RCMP TERRACE 89-10452)

\$500. I-D 45 DAYS & PROBATION 1 YR

1992-02-13

TERRACE BC

ASSAULT SEC 266 CC

(RCMP TERRACE

91-4398)

\$300 I-D 30 DAYS & PROBATION

1 YR & RESTITUTION \$231.65

1993-11-18

TERRACE BC

POSS OF NARCOTIC

SEC 3(1) NC ACT

(RCMP TERRACE 93-5370)

\$200 I-D 30 DAYS

1994-01-21

TERRACE BC

Assault sec 266 CC

(RCMP Terrace 93-4950)

2 MOS

1996-05-03

TERRACE BC

(1) ASSAULT SEC 266 CC

(2) ASSAULT WITH INTENT TO RESIST ARREST

SEC 270(1)(B) CC

(3) POSS OF NARCOTIC SEC 3(1) NC ACT

(RCMP TERRACE

93-4351 95-2984)

(1) 90 DAYS INTERMITTENT & PROBATION

(2) 14 DAYS INTERMITTENT CONC

(3) 1 DAY CONC

1996-11-21

TERRACE BC

(1) FAIL TO COMPLY WITH RECOGNIZANCE

(2) UTTERING THREATS

SEC 264.1(1)(A) CC

(RCMP TERRACE 95-2984)

(1-2) 30 DAYS & PROBATION 6 MOS ON EACH CHG CONC

1997-12-02

TERRACE BC

ASSAULT SEC 266 CC

(RCMP TERRACE

97-1470)

3 MOS CONDITIONAL SENTENCE ORDER

2000-01-06

VANCOUVER BC

POSS OF A NARCOTIC FOR THE PURPOSE OF TRAFFICKING

SEC 4(2) NC ACT

(RCMP PRINCE RUPERT 96-4737)

6 MOS

2003-01-31

TERRACE BC

(1) CRIMINAL HARASSMENT SEC 264(2)(D) CC

(2) UTTERING THREATS SEC 264.1(1)(A) CC

(RCMP TERRACE 2002-3375)

(1-2) 60 DAYS ON EACH CHG CONC & (14 DAYS PRE-SENTENCE CUSTODY)

[16] Mr. Edwardsen tendered numerous letters of support. They state he is generous, helpful, hardworking, efficient, reliable, and a good employee. Several references called him a loving and dedicated father and expressed surprise he was involved in the matters before this court.

Position of the Crown

- [17] The Crown submits that Mr. Edwardsen was at the top of the pyramid of a drug distribution network and that, along with numerous convictions, the lack of mitigating circumstances, and the principle of deterrence require an exemplary sentence.
- [18] The Crown seeks sentences of 18 months for trafficking, nine years for the drugs and firearms in Mr. Edwardsen's residence, one year for the firearms seized from Bohler Road shop, and one year for the marihuana grow operation at Plan 9106B, for a total of 12.5 years which they submit be reduced in compliance with the totality principle to 10 years (achieved by making the trafficking counts concurrent). The specifics of the sentences sought are summarized as follows:

R. v. Edwardsen - Crown Sentence Position

Count

Nature of Charge

Crown Position

Maximum Sentence

Drug Trafficking: May 18, 2012 - September 7, 2012 - Total Sentence 18 months

1.

CDSA s. 5(1) - trafficking cocaine (6 grams of cocaine)

12 months concurrent

Life

2.

CDSA s. 5(1) - trafficking cocaine (1 ounce + 4.5 grams of cocaine)

18 months concurrent

Life

3.

CDSA s. 5(1) - trafficking cocaine (1 ounce)

18 months concurrent

Life

4.

CDSA s. 5(1) - trafficking marihuana (1/2 pound)

12 months concurrent

5 years

Drugs and Firearms Seized from Edwardsen's Residence (604 Lakelse) - Total Sentence 9 years

5.

CDSA s. 5(2) - PPT (cocaine)

4 years

Life

6.

CDSA s. 5(2) - PPT (marihuana)

2 years concurrent

Life

7.

Criminal Code s. 95(1) - unlawful possession of a loaded restricted firearm (.44 Magnum revolver)

5 years consecutive

10 years

8.-11.

Criminal Code s. 91(1) - unlawful possession of 40 firearms

2 years concurrent

5 years

Marihuana Grow Operation - Plan 9106B - Total Sentence 1 year

12.

CDSA s. 7(1) - Production of a controlled substance (Marihuana)

1 year concurrent

7 years

13.

CDSA s. 5(2) - PPT (Marihuana)

1 year concurrent

Life

Firearms Seized from Bohler Road - Total Sentence 1 year

17.

Criminal Code s. 91(1) - unlawful possession of 55 firearms

1 year

5 years

Total Sentence Sought: Trafficking 18 months

Evidence Seized from Residence 9 years

Firearms Seized from Bohler Road 1 year

Marihuana Grow Operation 1 year

12 ½ years

Reduced for totality to 10 years (trafficking counts concurrent)

DNA: Counts 1-6, 12, & 13

Firearms Prohibition: Pursuant to s. 109 Counts 1-13 & 17

[19] Counts 1 to 4 are trafficking offences in marihuana and cocaine. The Crown notes that such trafficking in cocaine was at the gram and ounce level and Mr. Edwardsen was the owner and directing mind of both properties. Given the level of Mr. Edwardsen's involvement, the Crown seeks a sentence of 18 months for Counts 2 and 3 and 12 months for Count 1 and 4, all to be served concurrently.

[20] The Crown advises that Mr. Maier, the individual dealt with by the undercover officer at the River Road property, pleaded guilty to trafficking, that he had a prior drug conviction, and pursuant to a joint sentencing submission, he was sentenced to 12 months' imprisonment.

Counts 5 to 6

[21] Counts 5 to 6 relate to the possession of cocaine and the possession of marihuana for the purpose of trafficking. The Crown seeks two years for the marihuana count and four years for the cocaine count with the marihuana count sentence being concurrent to the cocaine count.

Counts 7 and 8 to 11

[22] Count 7 relates to unlawful possession of a loaded restricted firearm - a .44 Magnum Interarms revolver without being the holder of a licence or authorization contrary to s. 95(1) of the Code, which was at 604 Old Lakelse Lake Drive. A sentence of five years consecutive is sought on this count.

- [23] Count 8 originally was a charge of unlawful possession of a restricted firearm at 604 Old Lakelse Drive, being a .22 calibre Ruger Single Six revolver with readily accessible ammunition for that firearm. However he was convicted of unlawful possession of a restricted firearm only.
- [24] Regarding the s. 95(1) offences in Counts 8 to 11, the Crown suggests two years is appropriate for a sentence for these offences to be served concurrent to the other offences.

Counts 12 to 13

- [25] These related to the grow operation. They submit a range of 10 to 15 months is appropriate for such offences and what is significant is that while not large, the operation was run for commercial purposes and they submit he was the principal or co-principal of the operation and as such is more culpable as he would reap the profits of its operation. The Crown seeks one year concurrent on each of Counts 12 and 13.

Count 17

- [26] Count 17 relates to the unlawful possession of 55 firearms at the rented shop on Bohler Road. The Crown seeks one year in prison for Count 17.

Position of the Defence

- [27] The defence seeks a total sentence of five to six years. They arrive at that submission by suggesting these sentences be imposed:

Sentence Proposed by the Defendant

A

Count 1-4

Trafficking Cocaine and Marijuana to undercover officer.

May 18, July 13, September 7, 2012

- sentence between 6 months and 2 years

- Concurrent to "B", "C", & "D"

B

Count 5 & 6

Possession of Cocaine for the Purpose of Trafficking

September 19, 2012

Possession of Marijuana for the Purpose of Trafficking

September 19, 2012

604 Old Lakelse Lake Drive

- sentence between 3 and 5 years

- Concurrent to "A", "C", & "D"

C

Count 7

Possession of a loaded handgun

September 19, 2012

604 Old Lakelse Lake Drive

- Sentence between 3-4 years

Concurrent to "A", "B", and "D"

D

Counts 8-11

Possession of unloaded restricted firearm

Possession of a loaded non-restricted firearm

Possession of a loaded non-restricted firearm

Possession of unloaded restricted firearms

September 19, 2012

604 Old Lakelse Lake Drive

- Sentences between 6 months and 2 years

Concurrent to "A", "B", and "C"

E

Counts 12 and 13

Possession of Marijuana for the Purpose of Trafficking

Production of Marijuana

September 19, 2012

Plan 9106B

- Sentence of six months

F

Count 17

Possession of Non Restricted or Prohibited Firearms

September 19, 2017

4410 Bohler Road

Sentence of six months

Total Sentence

5-6 years

- [28] With respect to the trafficking and possession for the purpose of trafficking charges the defence submits that three to five years in total is appropriate given it was not mid- or high-level or sophisticated nor were the amounts substantial. They note that the amount of marihuana was not large as it was about 800 grams of marihuana in total, and that had Mr. Edwardsen received his new medical marihuana licence, about 300 grams would have been for personal use. I note however, he was not in possession of that licence.
- [29] Regarding the trafficking operation generally, it is submitted it was not sophisticated and was not a dial-a-dope operation. The defence note that on July 13, 2012, the undercover officer asked for two ounces but only got one ounce and that while there was discussion about a purchase of a kilo of cocaine, that never occurred. Again on September 7, 2012, the undercover officer could only buy half the amount he sought. They note as well that Mr. Edwardsen was doing actual sales himself and not using an intermediary so it was low-level to mid-level trafficking. To support that they also observe that he was the person actually cutting and packaging the cocaine as evidenced by the seizures conducted at his home.
- [30] Regarding Counts 7, 9, and 10, they note that the firearms were in the offender's private residence in a rural area and in areas where they were only accessed by the owner as they were in the closet and under the bed in his bedroom. They submit that the guns were present not because they were related to the drug trade but because of problems with bears and wolves. They note that the accused told the officer on his arrest of the wolf problem and the offender produced photos of damage done to his door allegedly by bears.
- [31] For the grow operation, they suggest that a sentence of six months is appropriate because evidence does not place him as the principal, but rather that he was just there assisting. In addition, it was a relatively small grow op, was a single-stage grow, and was watered by hand. They noted it posed no danger to neighbours given it was in an isolated location.

Crown Authorities

- [32] The Crown submits that because of the numerous convictions, the facts are unique and no directly comparable authority is available. They do however refer to several authorities regarding the proper approach to sentencing for multiple offences, consecutive or concurrent sentences, and the principle of totality.

Multiple Offences, Consecutive and Concurrent Sentences and Totality

- [33] The Crown relies on *R. v. Li*, 2009 BCCA 85, a sentence appeal for five drug-related offences, as authority for the approach to be taken on multiple conviction sentencing. That is, to determine the appropriate sentence for each count and then address totality. At paragraphs 26 to 28, Justice Smith for the court stated:

- [26] Whether sentences for multiple offences are made consecutive or concurrent, it is the task of the sentencing judge to fix an appropriate global sentence that reflects the specific circumstances of the offences and the unique circumstances of the offender. The importance of this balancing is reflected in the principle of proportionality, which has been codified in s. 718.1 of the Criminal Code under the heading "fundamental principle":

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

- [27] The principle of totality also factors into the imposition of an appropriate aggregate sentence for multiple offences. In *M.(C.A.)*, Lamer C.J.C. described the principle:
- [42] In the context of consecutive sentences, this general principle of proportionality expresses itself through the more particular form of the "totality principle". The totality principle, in short, requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. As D.A. Thomas describes the principle in *Principles of Sentencing* (2nd ed. 1979) at p. 56:

The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate sentence is "just and appropriate".

- [28] Thus, there is a two-stage approach to sentencing an offender convicted of multiple offences. The first stage is to determine the appropriate sentence for each offence, and decide whether the individual sentences should be made consecutive or concurrent. If consecutive sentences are imposed, then the second stage is to determine whether the sentences, in the aggregate, offend the totality principle. If the sentence, as a whole, is unduly harsh or disproportionate, then the length of the individual sentences should be adjusted in order to arrive at an appropriate global sentence. See *R. v. P.P.H.*, 2003 BCCA 591. [Emphasis added.]

[34] The Crown also relies on Li for the principle that "the existence of similar and overlapping evidence involving multiple offences does not necessarily lead to the conclusion that concurrent sentences are warranted" (para. 46).

[35] In *R. v. Borecky*, 2013 BCCA 163, at paragraph 19, the Crown notes that when the sentences may be consecutive or concurrent, "is determined by whether the acts constituting the offences required a linked series of acts within a single endeavour."

[36] Mr. Justice Hinkson for the court also noted:

[24] The sentencing judge declined to apply the reasoning of the Alberta Court of Appeal in *R. v. Chin*, 2009 ABCA 226 at para. 14, where the court stated:

As indicated, this type of offence often occurs where the accused is trafficking "hard" drugs, such as cocaine, ecstasy and methamphetamine, which alone will typically result in a sentence in the range of 3 to 4 1/2 years imprisonment. When combined with the mandatory minimum sentence for the firearm offence, which must be consecutive, the resulting global sentence will be significant.

[Emphasis by the sentencing judge.]

[25] I do not agree that sentences must be consecutive in all cases where an offender is convicted of both drug and weapons charges and see no error on the part of the sentencing judge in declining to apply such an imperative, which is not supported by legislation or case law.

[26] Section 85(4) of the Criminal Code mandates that a consecutive minimum sentence be imposed in the context of an offender using a firearm in the commission of an indictable offence. That section states that the sentence imposed on a person for an offence under s. 85 "shall be served consecutively to any other punishment imposed on the person for an offence arising out of the same event or series of events and to any other sentence to which the person is subject at the time the sentence is imposed". There is no similar statutory requirement set out in the context of the mandatory minimum sentence for possessing a prohibited or restricted firearm with ammunition under s. 95 of the Criminal Code. Thus, in my opinion, mandatory consecutive sentences cannot be the intention of Parliament for all offences involving possession of firearms and possession of drugs for the purpose of trafficking.

[27] The jurisprudence likewise does not require that sentences be consecutive in cases where an offender is convicted of both drug and firearms charges. While I accept the proposition from *R. v. Stauffer*, 2007 BCCA 7 at para. 40, that the principle of totality "should not 'operate to undo the instruction from Parliament'" by undermining statutory minimums, mandatory minimum sentences should not vitiate the other substantive principles of sentencing. Rather, mandatory minimum sentences must be understood in the full context of the sentencing system: *R. v. Wust*, 2000 SCC 18, [2000] 1 S.C.R. 455 at 466-468; *R. v. Morrissey*, 2000 SCC 39, [2000] 2 S.C.R. 90 at 132-133; *Stauffer* at paras. 32-45.

[28] In *Wust*, Madam Justice Arbour for the Court stated at 468:

.... mandatory minimum sentences must be understood in the full context of the sentencing scheme, including the management of sentences provided for in the Corrections and Conditional Release Act, S.C. 1992, c. 20. Several provisions of the Code, and of other federal statutes, provide for various forms of punishment upon conviction for an offence. Most enactments providing for the possibility of imprisonment do so by establishing a maximum term of imprisonment. In deciding on the appropriate sentence, the court is directed by Part XXIII of the Code to consider various purposes and principles of sentencing, such as denunciation, general and specific deterrence, public safety, rehabilitation, restoration, proportionality, disparity, totality and restraint, and to take into account both aggravating and mitigating factors. The case law provides additional guidelines, often in illustrating what an appropriate range of sentence might be in the circumstances of a particular case...

[Emphasis added.]

[29] At paras. 103-104, the sentencing judge found:

[103] In this case, the firearms offences and drug offences were clearly committed at the same time. Possession of drugs and possession of guns are obviously separate offences but I do not think that they are so unrelated that to impose concurrent sentences would be an error.

[104] I am satisfied that the very purpose for which the firearms were possessed was to provide weapons of defence in relation to the illegal drug operation. They formed a part of the equipment as it were, comprising the drug operation. In my view, the gravamen of both sets of offences is the unlawful possession of prescribed items...

[30] The sentencing judge was clearly aware of the principles discussed in *R. v. G.P.W.* He found that count 4 dealt with a different legally protected interest compared to the other firearms offences, and must be taken to have brought that appreciation to his analysis of the other categories of offences. He found that the gravamen of count 4 was a breach of an order of the court and concluded that the weight of authorities warranted a consecutive sentence with respect to that count.

[31] I am not persuaded that by imposing concurrent sentences for the drugs and the weapons charges, other than count 4, the sentencing judge committed any error in principle, failed to consider a relevant factor or overemphasised an appropriate factor. He determined that the drugs and firearms offences of which the appellant was found guilty, other than count 4, were part of a linked series of acts within a single endeavour, warranting concurrent sentences. His finding that they were so linked is entitled to deference, and there is thus no basis upon which we could interfere with his finding on that issue.

[37] In *R. v. Heathcote*, 2016 BCSC 1246, Madam Justice Arnold-Bailey summarized the law related to convictions for multiple offences:

- [34] Where an offender has been convicted of multiple offences, as is the case here, a two-stage sentencing process must be followed: *R. v. Li*, 2009 BCCA 85 at para. 28.
- [35] First, the court determines the appropriate sentence for each offence and decides whether the individual sentences should be made consecutive or concurrent to one another. Second, where consecutive sentences are imposed, then the court determines whether the sentences in the aggregate offend the totality principle. If the total sentence imposed is unduly harsh or disproportionate, then the court must adjust the length of the individual sentences in order to arrive at an appropriate global sentence.
- [36] In deciding whether to impose consecutive or concurrent sentences for multiple offences, the court must consider whether the acts constituting the offences were part of a linked series of acts within a single endeavour: *R. v. G.P.W.* (1998), 106 B.C.A.C. 239 at para. 35.
- [37] Consecutive sentences may also be imposed where offences constitute invasions of different societal interests: *R. v. McCrea*, 2008 BCCA 227 at paras. 7 and 8.
- [38] *R. v. Paterson*, 2013 BCSC 880, although the conviction was reversed on other grounds, contains a useful summary of the law of concurrent or consecutive sentences:

A. Concurrent or Consecutive Sentences

- [25] Considerable time was spent at the sentencing hearing about consecutive or concurrent sentences. In *R. v. Borecky*, 2013 BCCA 163, a sentence appeal where the offender was convicted of both drugs and weapons offences, the court said:
- [19] Whether consecutive or concurrent sentences are appropriate is determined by "whether the acts constituting the offence[s] were part of a linked series of acts within a single endeavour": *R. v. G.P.W.* (1998), 106 B.C.A.C. 239 (B.C.C.A.) at para. 35. This was described by Madam Justice D. Smith in *R. v. Li*, 2009 BCCA 85 at para. 47, as a factual assessment which ought to be afforded considerable deference, absent an error of principle by the sentencing judge.
- [26] In *Borecky*, the sentencing judge imposed concurrent sentences for firearms and drugs offences, treating the firearms and prohibited devices in the drugs as an aggravating factor to the drug offences. The sentencing judge declined to apply the reasoning of the Alberta Court of Appeal in *R. v. Chin*, 2008 ABCA 228, at para. 14, where that court indicated that mandatory minimum sentences for firearms offences must be consecutive. On that point, the Court of Appeal in *Borecky* said:
- [25] I do not agree that sentences must be consecutive where an offender is convicted of both drug and weapons charges and see no error by the sentencing judge in declining to apply such an imperative, which is not supported by legislation or case law.

- [27] In *Borecky* the sentencing judge noted that the firearms offences and the drug offences were committed and although the possession and the possession of guns were obviously separate offences, the judge did not consider them so unrelated that to impose concurrent sentences would be an error (2012 BCSC 1338, at para. 103). He held further:
- [104] I am satisfied that the very purpose for which the firearms were possessed was to provide weapons of defence in relation to the illegal drug operation. They formed a part of the equipment comprising the drug operation. The gravamen of both sets of offences is the unlawful possession of prescribed items. That the firearms and drugs were possessed combined with one another can be considered an aggravating factor in determining the appropriate length of sentences but it does not preclude the imposition of concurrent sentences.
- [28] the cases demonstrate that both sentencing approaches, concurrent and consecutive, have been adopted in cases involving the possession of both drugs and guns. Concurrent sentences were imposed in *Borecky*, where the Court of Appeal declined to disturb the sentencing judge's findings that the drugs and firearms offences were part of linked acts within a single endeavour. In *R. v. Turner*, 2010 BCSC 1690, Mr. Justice Ehrcke accepted a joint submission in a case involving guilty pleas for possession to traffic of cocaine and methamphetamine and for the possession of a loaded handgun, with the sentences to be concurrent. While Ehrcke J. accepted the joint submission, he also said the following at para. 25:
- [25] regarding Count 2, I am also satisfied that the proposed sentence of one year imprisonment is appropriate. I questioned counsel, however, on whether this sentence should be consecutive, rather than concurrent. A sentence of one year consecutive in these circumstances would not be unreasonable.
- [29] In contrast to the cases just referred to, consecutive sentences for drugs and guns offences were imposed in *R. v. Brown*, 2011 BCSC 1544, *R. v. Au*, 2006 BCCA 533, and *R. v. Fusaji*, 2005 BCSC 1944. In *Fusaji*, Madam Justice Baker said:
- [36] I have determined that the sentences should be consecutive. They did not differ in time in the sense that the weapon was found with the other evidence which resulted in the narcotics charges. However the offences are essentially different, and if I sentenced them concurrently it would mean that Mr. Fusaji would receive sentence no greater than a person who had merely committed the narcotics offences. His possession of this prohibited weapon, a very dangerous weapon, which was loaded when it was found, is an offence of a different nature and one which warrants a consecutive sentence to clarify the seriousness with which the Court regards that offence.

- [30] I digress for a moment to address defence counsel's argument that since s. 85 of the Criminal Code does not include PPT offences in its list of offences requiring consecutive sentences, Parliament must be taken to have intended that sentences in all other cases be concurrent. I disagree. I conclude that s. 85 merely removes an aspect of discretion that a sentencing judge has where firearms are involved for certain offences, but for those offences not mentioned that discretion remains.
- [31] The Court of Appeal in *R. v. Li*, 2009 BCCA 85, confirmed that the test for imposing a consecutive or concurrent sentence is "whether the acts constituting the offence were part of a linked series of acts within a single endeavour", citing *R. v. G.P.W.* (1998), 106 B.C.A.C. 239, at para. 35. In *Li* the court also said that concurrent versus consecutive sentences "involves a factual assessment of the degree to which the circumstances of the offences are interconnected or separate" (at para. 24).
- [32] In the case at bar there is little evidence on which to base factual conclusions about the drugs and guns other than they being present in the offender's apartment simultaneously. Perhaps the guns were merely tools of the drug trade and associated with drug trafficking to be part of an overall drug trafficking endeavour, but what is troubling here is the number of guns involved, three semi-automatic handguns and one revolver, much more than one would expect for enforcement or protection purposes.
- [33] that I am drawn to the reasoning of the Ontario Court of Appeal in *R. v. Gummer* (1983), 38 C.R. (3d) 46, cited with approval in *R. v. McCrea*, 2008 BCCA 227, where the court endorsed the following statement:
- We do not consider the rule that sentences for offences arising out of the same transaction or incident should normally be concurrent applies where the offences constitute invasions of different legally-protected interests although the principle of totality must be remembered.
- [34] Here, different societal interests are engaged with possession of drugs and the possession of guns. Drugs in the quantities, carry with them the potential for both human misery and violence because of the drug trade, but guns represent not merely the potential for violence, but the actual capacity for immediate and lethal violence.
- [35] I resolve the question as the Court resolved the issue in *R. v. Guha*, 2012 BCCA 423, a case involving both firearms possession offences and the offences of possessing firearms in breach of a prohibition order. The court concluded that the sentence imposed in the lower court was unfit, stating as follows, at paras. 38 to 42:
- [38] In arriving at this determination, I know I have considered Mr. Guha's concealment of the loaded gun on his person (an element of the count 6 offence) and his breaches of the lifetime firearms prohibition (an element of the s. 117 offences) as aggravating circumstances in count 1 (possession of a loaded handgun). However, I prefer to address the overlap in these offences through applying the proportionality principle as that principle is expressed either by imposing concurrent sentences or by applying the totality principle if

imposing consecutive sentences.

- [39] Proportionality of a sentence can be achieved in one of two ways: (1) by imposing concurrent sentences; or (2) by applying the totality principle to consecutive sentences.
- [40] The test for imposing concurrent sentences is "whether the acts constituting the offence[s] were part of a linked series of acts within a single endeavour": *R. v. Li*, 2009 BCCA 85 at para. 42. The circumstances encompass a single endeavor with different aspects of that endeavour causing multiple offences.
- [41] In considering the imposition of consecutive sentences, the purpose of the totality principle, as expressed in *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500 at para. 42, is applied to ensure that the cumulative effect of consecutive sentences for multiple offences does not exceed the overall culpability of the offender. This principle is further codified in s. 718.2(c), which provides that "where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh."
- [42] In this case, I am of the view that the proportionality principle is best addressed in the manner provided for by the trial judge, that is by concurrent sentences for counts 1, 3 and 6. Not that in making the sentences concurrent for these counts no sentence is imposed for count 3 (possession of an oversized magazine) as submitted by the Crown. Rather, it is a recognition that in these circumstances, where the offender is relatively young, has no extensive criminal record, and does not appear to have served a sentence of imprisonment, proportionality dictates either the imposition of concurrent sentences or applying the totality principle to consecutive sentences. Given the "single endeavour" nature of the offences, the trial judge correctly imposed concurrent sentences for counts 1, 3 and 6.
- [36] whether I impose concurrent sentences, treating the guns as an aggravating factor for the drug offences (or vice versa), which was the approach adopted in *Borecky*, or I impose consecutive sentences and ensure proportionality by applying the totality principle to consecutive sentences, in the circumstances of this case, the result is the same.

[Emphasis added.]

Crown Authorities Respecting Drug Offences

- [39] In *R. v. Schoenhals*, 2008 BCCA 380, the offender was convicted of possession of cocaine for the purpose of trafficking and trafficking in cocaine. He was sentenced to 18 months' imprisonment for each offence to be served consecutively. He was 66 years of age, an addict, in poor health, and had a criminal record. He was found in possession of 19 grams of cocaine, most of which was packaged for sale in quantities of .25 grams. The Court of Appeal found 18 months for the first offence was at the high end of the range but was not excessive. The same finding was made regarding the second offence. The court noted that the offences were distinct and warranted consecutive sentences. The sentence of three years was not found to be unfit and was upheld.

- [40] In *R. v. Fraser*, 2009 BCCA 179, the offender pleaded guilty to seven counts of possession of controlled substances for the purposes of trafficking. He appealed a sentence of five years in prison. In his home were found a variety of substances having a street value of approximately \$375,000. The trial judge found he was involved in more than an occasional one-time or small-time trafficking effort and that his operation had some sophistication to it given he offered a variety of drugs to a variety of consumers. The Court of Appeal upheld the sentence noting that while trafficking for profit is not an aggravating factor, it is properly considered as affecting the length of the sentence imposed: see paragraph 13. Unlike the case at bar, no firearms were involved and there was a guilty plea and it was a first offence but more drugs were involved.
- [41] In *R. v. Ziaee*, 2016 BCSC 1293, the accused pleaded guilty to three counts of possession of cocaine and GHB for the purpose of trafficking. A joint submission in support of 30 months was made. The sentencing judge accepted that Mr. Ziaee was a courier or employee for people above him in the drug hierarchy. Mr. Ziaee had no prior record and the Crown accepted he was involved at the lower end of the drug hierarchy and the Crown emphasized the significance of the guilty plea, which enabled it to focus on the trial of the co-accused, Mr. Matheson. The court noted as well there were no breaches since his arrest and that he had been working. While the Crown stated the 30-month sentence was relatively moderate, the court was satisfied the principles of sentencing were satisfied and imposed a 30-month sentence.
- [42] The Crown refers to this disposition in comparison to the co-accused's sentence to highlight the significance of a guilty plea. I turn now to the sentence of the co-accused, Mr. Matheson.
- [43] In *R. v. Matheson*, 2017 BCSC 569, Mr. Matheson was convicted of four counts of possession of cocaine, ecstasy, and methamphetamine for the purpose of trafficking. The Crown sought a sentence of six years and the defence three years or "slightly longer." Mr. Matheson was the principal of the enterprise and employed Mr. Ziaee. He was running the operation, it was relatively sophisticated and he attempted to insulate himself from detection. The value of the drugs was \$187,000 to \$307,000. Mr. Matheson had a not insignificant record despite it being relatively dated. A sentence of five years in total was imposed.
- [44] The Crown notes as well that a comparison of the two sentences shows the difference between a sentence where the offender is a principal operator and one where the offender is an employee.
- [45] In *R. v. Hendy*, 2014 BCCA 485, Mr. Hendy was convicted and sentenced to 18 months' imprisonment. He was an addicted low-level drug dealer. He had a criminal record for theft and failure to comply with court orders but no drug trafficking convictions. He was on probation at the time of the offence. The Court of Appeal noted at paragraph 27 that "[t]he range of sentence for an offender engaged in ongoing trafficking of cocaine in quantities ranging from the gram to multi-ounce level, who has a previous criminal record, and who has a drug addiction is 14 to 24 months in jail " The sentence was upheld. The Crown

submits that in comparison it is clear that Mr. Edwardsen was significantly above a low-level drug dealer.

- [46] In *R. v. Datt*, 2014 BCCA 484, the offender suffered from cognitive impairments and psychological fragility because of head injuries. He began to self-medicate with drugs. The headnote states that "while in a residential addiction recovery home where he was doing well, he was recruited by the owner/operator of the home to become a courier for a large drug-trafficking operation." He relapsed because of handling the drugs. He did not benefit financially. He was a low-level dealer acting on instructions. Over the two years prior to sentencing, he resided at a recovery house and maintained his sobriety. The trial judge imposed a sentence of 18 months incarceration. On appeal that sentence was varied to an 18-month conditional sentence because weight had not been given to the principle of rehabilitation and the offender's personal living circumstances.
- [47] The court then stated at paragraph 20 "[t]hat the appropriate range of sentence for an offender engaged in ongoing trafficking of Schedule I controlled substances in quantities ranging from the multi-ounce to the multi-gram level, with a previous criminal record (including but not limited to drug-related offences) and a drug addiction, is approximately 14 to 24 months in jail " The Crown submits the proposed 18-month sentence is within that range given Mr. Edwardsen was not an addict, was in the drug trade for profit, and engaged in multiple sales.
- [48] In *R. v. Davidson*, 2014 BCSC 269, Justice Baird noted the negative effects of the drug trafficking trade:
- [21] Included in the book of authorities relied upon by Crown counsel is a case called *Pushpanathan*, [1998] SCJ 46, which contains some pertinent observations about the poisonous and deleterious nature of the drug trafficking trade in this country. In sentencing Mr. Davidson, I consider this to be a useful starting point, and for emphasis, I propose to read directly from this judgment the following passages, starting at paragraph 83:
83. Illicit drug use and trafficking is a serious problem in Canada and those that traffic in dangerous drugs must be a very real concern for all Canadians ...
84. ... At the end of 1996 [which is getting to be a long time ago, I say parenthetically], there were 2,899 drug offenders incarcerated in federal institutions, constituting 21.3 percent of the federal prison population
85. Drug offences such as possession and trafficking are only part of the link between the drug trade and criminality. There is an established connection between heavy drug use and crimes motivated by the need to finance a drug habit . . . A Canadian survey of federal inmates showed that 40 percent of men were drug users and half of those had engaged in criminal activity to get drugs. For women, the ratio is even greater: 25 percent of female inmates in Canada committed their crimes solely to obtain drugs

86. In addition, the illegal drug trade is known to involve violence as a means of resolving disputes and maintaining discipline. In 1996, 56 homicides, that is to say one in ten, were reported by police to be drug-related ..
87. it is well established that the consumption of licit and illicit drugs increases the rate of criminality generally, not just offences directly related to drugs. Among a sample of federal male inmates, over half were under the influence of alcohol or other drugs when they committed at least one of their crimes . . . Seventy-one percent of those of those who had consumed drugs said they would not have committed the crime if they had not taken the drugs ... Thus, as might be expected, U.S. research indicates that drug abusers are more likely to be re-arrested than non-abusers. .. Furthermore, research indicates that from 30 to 50 percent of those convicted of drug offences re-offend
88. ... it is impossible to underestimate the harm that is done to Canadian society in the form of criminal activity, often violent, by the trafficking of illicit drugs. Unfortunately, there are also other costs associated with illicit drug trafficking and use, which reflect the widespread harm caused by these activities.
89. The costs to society of drug abuse and trafficking in illicit drugs are at least significant if not staggering. They include direct costs such as health care and law enforcement, and indirect costs of lost productivity.
90. In Canada, the total cost to society of substance abuse has been estimated to be \$18.45 billion annually ... Of this amount, the cost flowing from illicit drugs is \$1.4 billion ... In 1992 [which again is a long time ago] there were 732 deaths, 7,095 hospitalizations and 58,571 hospital days in Canada attributable to illicit drugs ... Mortality from illicit drugs is less than for alcohol and tobacco, but tends to involve younger victims
91. These significant and often tragic consequences serve to emphasize that the harm caused by trafficking in illicit drugs is very properly a matter of grave concern in Canada, as it is throughout the world.
- [22] I want you to know, Mr. Davidson, that I agree with and endorse every single syllable of the passage that I have just read, and I have read it here to you today to emphasize that this sentencing is not exclusively about you. In an important way, it is about all of us.

Crown Authorities Respecting Firearms Offences

- [49] R. v. Nur, 2015 SCC 15, is cited for its determination that the mandatory minimum sentences imposed for s. 95(2)(a)(i) and (ii) of the Criminal Code violate s. 12 of the Charter and are null and void under s. 52 of the Constitution Act. The Crown also relies on Nur for the principle that just because such mandatory minimums are contrary to the Charter does not mean sentences of that length are not justified. As the court noted at paragraph 82:

- [82] Section 95(1) casts its net over a wide range of potential conduct. Most cases within the range may well merit a sentence of three years or more, but conduct at the far end of the range may not. At one end of the range, as Doherty J.A. observed, "stands the outlaw who carries a loaded prohibited or restricted firearm in public places as a tool of his or her criminal trade . [T]his person is engaged in truly criminal conduct and poses a real and immediate danger to the public": para. 51. At this end of the range -- indeed for the vast majority of offences -- a three-year sentence may be appropriate. A little further along the spectrum stands the person whose conduct is less serious and poses less danger; for these offenders three years' imprisonment may be disproportionate, but not grossly so. At the far end of the range, stands the licensed and responsible gun owner who stores his unloaded firearm safely with ammunition nearby, but makes a mistake as to where it can be stored. For this offender, a three-year sentence is grossly disproportionate to the sentence the conduct would otherwise merit under the sentencing provisions of the Criminal Code.
- [50] In *R. v. Holt*, 2015 BCCA 302, the Crown appealed a sentence of 18 months' imprisonment for possession of a loaded restricted firearm without an authorization or licence, contrary to s. 95(1) of the Criminal Code. Mr. Holt had been stopped for a driving infraction and upon his arrest for possession of drugs the officer also carried out a search incidental to arrest and found a backpack containing a loaded .22-calibre revolver and a box of 43 cartridges for that firearm.
- [51] At the time of sentencing Mr. Holt was 66 years of age and unemployed. He lived on CPP payments and social assistance and was a heavy drug user with no criminal record. The Court in allowing the appeal said this:
- [17] The defence in the case at bar also contended that a sentence of 18 months was not insignificant and would be sufficient to send a message of denunciation and deterrence to Mr. Holt, and that such a sentence lay within the range, once the "inflationary floor" that existed from 2008 until the decision in *Nur* is removed.
- [18] With respect, I am unable to accept the defence's arguments. In my view, the possession of a loaded firearm does pose a serious threat, and a growing one, to communities across Canada. There is no reason why British Columbia courts should take this threat less seriously than other Canadian courts now do. As Mr. Justice Code stated in *Nur*:
- ... social norms and judicial responses to them, have changed since the 1980s and 1990s. The proliferation of handguns has increased, homicides involving handguns have increased, and the justice system has responded to public alarm by stiffening its approach to sentencing in cases involving handguns. It is a common phenomenon, in the law of sentencing, for sentences to increase and decrease as societal and judicial knowledge and attitudes about certain offences change. In its seminal decision setting out the modern principles of sentencing, *R. v. Willaert* (1953), 105 C.C.C. 172 at 176 (Ont. C.A.), the Court of Appeal made it clear that appropriate sentences will change over time as the "needs of society" change:

I am respectfully of opinion that the true function of criminal law in regard to punishment is in a wise blending of the deterrent and the reformative, with retribution not entirely disregarded, and with a constant appreciation that the matter concerns not merely the Court and the offender but also the public and society as a going concern. Punishment is, therefore, an art - a very difficult art - essentially practical, and directly related to the existing needs of society. A punishment appropriate today might have been quite unacceptable two hundred years ago and probably would be absurd two hundred years hence. It is therefore impossible to lay down hard and fast and permanent rules. [Emphasis added.] [At para. 49.]

- [19] In my view, the fact a 40-month sentence was upheld almost without challenge in the Nur appeals, the comments of courts in other recent appellate decisions, but most especially the proliferation of guns in the Lower Mainland generally, indicate that a re-alignment of the "range" is in order in British Columbia. I would say that Mr. Holt falls at the bottom end of the "criminal" range, and that a sentence of close to three years is called for. I am also persuaded that the sentence of 18 months' imprisonment was unfit given the seriousness of the offence.
- [20] In the result, I would grant leave to appeal, allow the Crown's appeal and, placing this case at the bottom of the range, I would increase the sentence to 30 months' imprisonment, before credit for time served of 24 days.
- [52] In *R. v. Kachuol*, 2017 BCCA 292, the Crown appealed a conditional sentence imposed for possession of a loaded prohibited weapon. The appeal was allowed and a sentence of three years' imprisonment was imposed. The offender was stopped in downtown Vancouver during an impaired investigation and a loaded handgun was found in the console of the vehicle. It was a prohibited firearm and in addition the offender was prohibited from possessing any firearm by virtue of a prior drug conviction. The court stated:
- [24] I cannot agree. In my view, as the Crown submits, the judge erred by mischaracterizing Mr. Kachuol's conduct as something less than "truly criminal". She also erred by placing insufficient weight on the principles of denunciation, deterrence and public protection, given the circumstances of the offence, and undue emphasis on his personal circumstances, which were, while positive, not exceptional. In cumulative consequence, she departed markedly from the customary sentencing range for a "true crime" s. 95(1) offence, which this manifestly was, and imposed a sentence which is clearly inadequate and thus unfit. This is apparent when the prevailing social and legal context is taken into account.
- [25] In recent years, Canadian courts have become increasingly concerned by the proliferation of handguns, gun violence and the dire consequences for our society. Guns are inherently, often lethally, dangerous, all the more so when they are possessed for an illicit purpose. As a result, their possession and use is highly regulated and, if unlawful, criminalized to ensure public safety, express society's condemnation and punish offenders. To the extent possible, courts strive to achieve these goals when imposing sentences for firearms-related offences by prioritizing deterrence and denunciation, following customary sentencing ranges in all

but exceptional cases and fully accounting for aggravating factors where they exist.

- [26] As Madam Justice Smith recognised in *Guha* at para. 30, when an offender possesses a firearm, particularly a handgun, for an illicit purpose, that purpose can only be to threaten or inflict serious bodily harm or death, if and when considered necessary. Common sense and human experience suggest no other reasonable explanation or lesser risk posed by possession of this sort. As Crown counsel aptly put it, most unlawful possession of loaded firearms represents nothing short of "tragedy in gestation". By criminalizing such conduct via s. 95(1), the law intervenes before someone is actually harmed or some other crime actually committed. By imposing severe exemplary sentences for possession simpliciter, courts support and advance the goals of this intervention.
- [27] Mr. Kachuol's offence must be characterized and addressed within this context. Considered thus, it is apparent that he was engaged in "truly criminal" conduct when the law interceded before the immediate danger posed ripened into actual harm. In my view, the judge erred in concluding otherwise.
- [28] There was nothing in the evidence to indicate that Mr. Kachuol's possession of the loaded, prohibited "crime gun" was for anything other than a criminal purpose. Nor did he even suggest it. There was simply no possible benign reason for his unlawful possession of the loaded gun apparent on the evidence. In such circumstances, proof of a direct connection with other criminal activity was unnecessary to situate the offence at the "true crime" end of the s. 95(1) spectrum. In my view, requiring such proof would tend to defeat the purpose of the provision.
- [29] Mr. Kachuol's possession of the loaded prohibited handgun in a moving car, strategically placed for ready access and entirely outside of the regulatory framework, posed a real and immediate danger to those in his orbit. The risk was increased by his consumption of alcohol and the urban environment in which he possessed the "crime gun". Other aggravating factors, such as his prior criminal record and firearms prohibition, were also present. Given the serious nature of his offence, his degree of moral culpability and the paramountcy of deterrence and denunciation, and despite his positive personal attributes and rehabilitative prospects, a sentence below the bottom end of the "criminal range" established in *Holt* cannot be justified. Mr. Kachuol's case was not exceptionally unique or even favourably distinguishable from *Nur* or *Holt* in any material sense. It follows that the conditional sentence the judge imposed is unfit. It also follows that the proposed new evidence is not admissible under the *Palmer* criteria because its admission could not be expected to affect the result of the appeal.
- [53] The Crown also relies on *R. v. Chin*, 2009 ABCA 226, which, while overruled by the B.C. Court of Appeal in *Borecky* on the issue that sentences must be consecutive where an offender is convicted of both drug and weapons charges, in other respects it was not overruled. The Crown refers to the following respecting the collection of guns and drugs:

[10] Mere possession of loaded firearms is inherently dangerous. When such weapons are allowed in the community, death and serious injury are literally at hand, only an impulse and trigger-pull away. The case of *R. v. Wharry*, 2008 ABCA 293, 437 A.R. 148 offers a tragic illustration. There, the accused responded to what he believed to be a slight from a group of passing pedestrians by shooting his loaded handgun at them, killing a woman celebrating her 18th birthday. It was reported at trial that the offender's lifestyle involved street-level cocaine trafficking and that he carried the gun for "protection".

[11] This problem is not unique to Alberta; it has become a nationwide phenomenon. The situation was fairly described in *R. v. Danvers* (2005), 201 O.A.C. 138, (sub nom. *R. v. D.(Q.)*), 199 C.C.C. (3d) 490 at para. 77, where the Ontario Court of Appeal cited with approval Ewaschuk J.'s comments, in reference to the Toronto experience:

Death by firearms in public places in Toronto plague this city and must be deterred, denounced and stopped. Only the imposition of exemplary sentences will serve to deter criminals from arming themselves with handguns.

[12] These crimes present a particularly serious threat to the safety and security of the community. Like drug trafficking, they also require forethought and planning. The weapon must be obtained, which is in itself a serious offence. Keeping it loaded, or with ammunition nearby, means that it is to be used for more than intimidation. Simply put, carrying a loaded restricted or prohibited firearm is an extremely dangerous act for which there is absolutely no justification.

Crown Authorities Respecting Grow-operations

[54] The Crown also refers to these authorities respecting sentences for marihuana grow operations.

[55] In *R. v. Serban*, 2017 BCSC 1443, the offender was sentenced for the offences of production of marihuana and possession of marihuana for the purpose of trafficking. The marihuana grow operation at issue was discovered in the basement of a residence. It was a three-stage grow op, there were 9,738 plants and about 780 were mature flowering plants. Mr. Justice Verhoeven found the operation to be large and potentially very lucrative. It was of medium to high sophistication and was of commercial scale. A sentence of nine months on each of two counts was imposed to be served concurrently followed by one year of probation.

[56] In *R. v. McGee*, 2016 BCSC 2175, the offender's rental house had a marihuana grow operation in the home's crawl space where 302 flowering plants and 299 plants in a vegetative state were found. The crawl space had plant nutrients, a plant watering system, electrical system to light the plants and an electrical bypass. After reviewing the authorities Justice Schultes made these comments in addressing the defence submissions in favour of a suspended sentence:

- [79] I accept that the gravity of the offence of commercial production of marihuana at the scale pursued by Mr. McGee, with the additional statutory aggravating feature of using a third party's real property, is significant. These are harmful offences, both to the specific properties they utilize and the larger neighbourhoods and communities in which they are situated.
- [80] I am also not persuaded that the licensed growing of marihuana for medical purposes, the current lack of enforcement of its sale to the public in some cities, or its legalization in other jurisdictions, necessarily indicate, in themselves, that the previous emphasis on deterring and denouncing grow operations does not reflect current societal attitudes.
- [81] Madam Justice Warren dealt with this issue very helpfully in *R. v. Hofer*, 2016 BCSC 1442, at paras. 56 and 57:
- [56] Counsel for Mr. Hofer observed that the law concerning marihuana is in a state of flux in Canada. I accept that in recent years there has been a softening of attitudes concerning personal marihuana use, but that does not equate to a softening of attitudes about large-scale illicit production. However, not only has a tolerance for personal use developed, but also a policy has been adopted by the Vancouver Police of non-enforcement of the criminal law against many marihuana retail dispensaries in Vancouver. This is condoned by the City of Vancouver. The question this raises is whether it is possible or appropriate to draw an inference about societal attitudes concerning sentences for large-scale illicit marihuana production from the fact that the criminal law is not being enforced against some large-scale retailers of the same product. In other words, can I conclude that society would find a sentence of two years' imprisonment for a large-scale producer of marihuana to be abhorrent or intolerable, or so excessive as to outrage standards of decency, because some large-scale retailers are carrying on business with impunity?
- [57] While I accept that this situation on its face creates a perception of unfairness, I have concluded that this is not enough to support a conclusion that a two-year sentence for a large-scale producer meets the high threshold of gross disproportionality. While I consider it appropriate to take judicial notice of the prevalence of unlawful retail dispensaries in Vancouver, there is no evidence about the societal response. As already noted, gross disproportionality is a legal standard that does not depend on an individual judge's subjective perception of the potential public reaction to a particular sentence. Rather, it is grounded in identified factors drawn from legal sources, including the gravity of the offence and the principles and objectives of sentencing. For the reasons already expressed, irrespective of the existence of unlawful retail dispensaries in Vancouver, the large-scale production of marihuana gives rise to serious risks to the community and remains illegal.

I adopt those comments here.

[82] Mr. McGee's actions in committing the offence also have a meaningful degree of moral blameworthiness. One cannot carry on a grow operation as an isolated, impulsive act. As Madam Justice Ryan put it aptly in *Koenders*, at para. 21:

The person who becomes involved in the commercial production of marihuana, solely for profit, makes a deliberate decision to operate outside the laws of this country. Unlike most other offences, the production of marihuana is not situational: no one can operate a grow operation without a large amount of planning, deliberation and organization.

[83] And, while there is no reason to doubt that Mr. McGee engaged in this offence to replace income from his legitimate employment following an injury, not as a free-standing illicitly profitable career choice, I return to the comments that the Crown has cited from *R. v. Budd*, to the effect that it is the pursuit of easy money in itself, by running these illegal operations, that calls for deterrence, not the ultimate underlying purpose of the money earned. I also have in mind that his role as a principal of this operation carries with it a greater level of blameworthiness than a less centrally involved participant.

[84] I accept that the goals of this legislation are to deter large-scale grow operations and the abuses of rental properties as locations for them, with all of the attendant property damage and dangers that result, and to do so more forcefully than the previous sentencing regime. These are perfectly legitimate goals. Even as he expressed concerns about the negative effects of mandatory minimum sentences, the late Justice Rosenberg of the Ontario Court of Appeal pointed out, in remarks to the Ontario Criminal Lawyers Association in 2009, that "[i]t is Parliament's right to be prescriptive [a]nd, subject to the limits of cruel and unusual punishment, it is also their right, and indeed their responsibility to respond to public anxiety about crime."

[57] Mr. McGee pled guilty, had no criminal record, and had been law-abiding for the three and a half years since the search warrant was executed and had gainful employment and strong support from family and friends. A sentence of 10 months was imposed. On appeal, the B.C. Court of Appeal at 2017 BCCA 457 dismissed the appeal noting that Mr. McGee had completed his sentence, but they said at paragraph 30:

[30] Mr. McGee has successfully completed his 10-month sentence. In my view this sentence is at the very low end of the range suggested in the case authorities. At a very minimum a 12- to 15-month sentence should have been imposed in the circumstances of this case, where Mr. McGee, a principal in an illegal grow operation with more than 500 plants, rendered a rental house uninhabitable in order to profit from the illegal production of marihuana and has made no restitution to the innocent property owners. These are aggravating factors which, in my view, the sentencing judge acknowledged, but failed to give sufficient weight. However, as I have noted, the Crown has not argued the sentence is unfit beyond that the mandatory minimum should have been imposed.

- [58] I note that in *R. v Lotfy*, 2016 BCSC 2617, affirmed at 2017 BCCA 449, Mr. Justice Macintosh stated:
- [28] The Court suspended Mr. Neary's sentence for two years. With great respect, I decline to follow the guidance, or at least the suggestion, found in *Neary* that denunciation and deterrence are now to be downplayed to at least some extent for the possession of 10 or 20 pounds of marihuana for the purpose of trafficking. My reluctance to adopt what is said in *Neary* is partly because s. 5(1), (2) and (3) of the CDSA remain today as part of the law of Canada. Parliament has not spoken further on the question of possession for the purpose of trafficking or with respect to trafficking directly. My other concern is that the shifting of the political winds, resulting from the increased social acceptance of smoking marihuana, assuming I can take judicial notice of them, have not yet revealed tolerance or sympathy for professional drug trafficking. I do not believe the time has come when s. 5 of the CDSA is to be given less weight through lighter sentencing. No matter what one's own views are about marihuana itself, trafficking in marihuana is a separate matter, attracting, as it does, violence and corruption.
- [59] In *R. v. Heathcote*, 2016 BCSC 1246, the offender was convicted amongst other charges of unlawfully producing a controlled substance, cannabis marihuana contrary to s. 7(1) of the CDSA. The police had found an indoor grow operation of the three-stage nature. The court noted that sentences for commercial production have been more severe than for non-commercial production as denunciation and deterrence are paramount given the for-profit nature and the need for planning, deliberation and organization. After a review of the authorities a sentence of 12 months was imposed concurrent with other sentences.
- [60] From these authorities, the range for marihuana grow operation offences similar to those of Mr. Edwardsen is 10 to 15 months.
- [61] The Crown also relies on *R. v. Massey*, 2012 BCSC 935, factually similar. In *Massey*, the accused, a 45-year-old man, pleaded guilty to several drug and firearms charges. His criminal record was somewhat similar to Mr. Edwardsen, but with fewer convictions. He had letters of support from his community. Mr. Justice Romilly imposed a sentence of 10 years. Five years were imposed for possession of a controlled substance for the purpose of trafficking, five years for the possession of prohibited weapons and ammunition and three years on each of two counts relating to unlawful possession of firearms and prohibited devices and cash from the proceeds of trafficking. The latter were to be served concurrently to the trafficking charge.

Defence Authorities

- [62] In *Borecky* the accused was convicted of 13 firearm offences, including three separate loaded handguns in his backpack in a residential area, along with other restricted weapons while under a firearms prohibition. He was also convicted of three counts of possession of controlled substances for the purpose of trafficking in heroin, cocaine, and

methamphetamine respectively. The sentencing judge imposed concurrent sentences of three years on each of the three drug charges and effective sentences of four years on each of the three s. 95(1) counts and effective sentences of two years on each of the s. 91(2) counts, all to be served concurrently with a consecutive sentence of one year for possession of a firearm while prohibited contrary to s. 117.01 of the Code.

- [63] The defence notes that the circumstances in Borecky were more serious as the offender had the handguns in a backpack in a residential area, \$100,000 worth of drugs were seized, the offender had a more significant and recent criminal record and had former sentences related to firearms and a firearm prohibition was in place. They also note that where there are convictions for both drug and weapons charges, there is no requirement that the sentences be consecutive. The Court of Appeal found that an appropriate sentence for the drug offences in Borecky was at least five years and that, combined with the firearms and ammunition, a sentence of seven years was appropriate. The defence submits that seven years is higher than is warranted here given the facts noted above and the fact that in Borecky there was no prospect of rehabilitation.
- [64] In *R. v. Learning*, 2017 BCSC 1594, Mr. Learning was convicted of 21 offences relating to the possession of restricted handguns, prohibited ammunition, false identification and various illicit drugs for the purpose of trafficking. Mr. Learning was 34 years of age. He was on bail for offences in Saskatchewan when he committed the offences in British Columbia. He had multiple firearms, three of which were loaded, one of which was stored under a mattress ready for use. The guns were in his possession as part of his illicit drug business for financial gain. He was a mid- to high-level drug trafficker. The guns were stored in his basement suite in a residential neighbourhood, putting the neighbourhood at risk. He was sentenced to five years on the firearms and drug charges and one year on the breach related to possession of firearms and ammunition while prohibited by a recognizance, to be served consecutive to the other offences for a total of six years.
- [65] The defence submits that the circumstances in Learning were also more aggravated than the case before the court today.
- [66] In *R. v. Heathcote*, a search of a large acreage in Langley resulted in the seizure of four long guns, 17 kilograms of marihuana, a loaded handgun, and various documents referencing a marihuana grow operation. The value of the marihuana was between \$63,000 and \$322,000 depending on how it was sold. The grow-operation was a three-stage operation. The hydro meter had been tampered with. The accused was convicted of possession for the purpose of trafficking, in possession of firearms and was guilty of fraudulently diverting electricity. He was 50 years of age with no criminal record. After an extensive review of the authorities, the court imposed concurrent sentences treating the drug offences as an aggravating factor on the firearms offences. Mr. Heathcote was sentenced to 26 months' imprisonment for possession of a loaded restricted firearm contrary to s. 95(1) of the Code. Regarding the unlicensed long guns contrary to s. 91(1), he was sentenced to 12 months on each count to be served concurrently. For possession of marihuana for the purpose of trafficking, he was

sentenced to 12 months concurrent and for the unlawful production of marihuana, 12 months as well, and three months for fraudulent diversion of electricity, all concurrent. The total sentence was 26 months.

- [67] In *R. v. Paterson*, 2013 BCSC 880, the accused was convicted of nine offences involving the possession for the purposes of trafficking various drugs, simple possession of two other types of drugs and possession of four loaded handguns. As well as the drugs, which included MDMA, cocaine, methamphetamine, and marihuana and oxycodone, cash of approximately \$35,000 was found. The value of the drugs was \$44,516. The accused possessed a bullet-proof vest. The accused had a dated and unrelated record. A sentence of four and a half years for the firearms and drug charges was imposed, excluding the marihuana and oxycodone charges, all concurrent and 30 days on each count, also concurrent.
- [68] The defence submits that Paterson was also more serious than the case at bar and that the Crown is seeking far in excess of the sentence imposed in Paterson.
- [69] In *R. v. Davidson*, 2014 BCSC 269, the accused changed his plea after the close of the Crown case, pleading guilty to two counts of trafficking cocaine, one count of possession of cocaine to traffic, and one count of possession of a prohibited weapon. The accused was a mid-level cocaine dealer operating out of his home. He sold four ounces, two ounces and six ounces of cocaine to an undercover officer over two and a half weeks. A search of his home revealed another 26 ounces of cocaine, \$60,000 in cash and other accessories of the drug trade and in addition the prohibited weapon. He was 42 years of age with no previous convictions related to drugs. Mr. Davidson was sentenced to 12 and 20 and 36 months on the drug charges, all to be served concurrently. On the firearms charge, a sentence of six months was imposed concurrent to the other charges. The accused was remorseful and had substantial community support.
- [70] Finally, the defence refers to *R. v. Brereton*, 2015 BCSC 1553. The accused was convicted of unlawful possession of cocaine, unlawful possession of a firearm without a licence or registration certificate, unlawful possession of a loaded restricted firearm and accessible ammunition, also again without authorization. The drugs and firearms were found in his home. He was not convicted of possession of cocaine for the purpose of trafficking. He was 33 years of age. He had letters of support from friends and family. He had a tragic upbringing. He had a criminal record including drug charges, and he was released on other charges when these offences were committed. It was his first firearms offence. The firearms were not loaded, were in the accused's closet, and as a result his conduct was less serious and posed less of a danger compared to offences where a firearm is in a public place however they were found to be there to further criminal activity. A sentence of 26 months was imposed on the firearms charge.

Purpose and Principles of Sentencing

- [71] The fundamental purpose of a sentence is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful, and safe society by imposing just sanctions. A sentence must be proportionate both to the gravity of the offence and the degree of responsibility of the offender.
- [72] Section 718 of the Criminal Code sets out several objectives that a sentencing judge must consider. Those objectives are: (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 reparations for harm done to victims or the community; and (f) to promote a sense of responsibility in offenders and acknowledgment of the harm done to victims and to the community.

Aggravating and Mitigating Circumstances

- [73] A sentencing judge is to be guided as well by the principles set out in s. 718.2, that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

Aggravating Factors

- [74] The aggravating factors in this case include:
- (a) The running of a trafficking operation out of two locations as established by the undercover officer's purchases;
 - (b) The offences were planned and deliberate and engaged in for profit;
 - (c) There were a large number of unauthorized firearms and ammunition possessed by Mr. Edwardsen;
 - (d) A loaded firearm was present at his residence where drugs were packaged and sold;
 - (e) He abused his medical marihuana licence;
 - (f) He was the principal and guiding mind behind the drug operation; and
 - (g) He has a criminal record.

Mitigating Factors

- [75] The mitigating factors are limited to the fact that while awaiting trial Mr. Edwardsen sought and obtained employment and has complied with his bail conditions. The defence also raises the issue of the time that has passed since the charges arose and how Mr. Edwardsen has taken steps to rehabilitate himself and they note his attempts to obtain employment have been significant because he sought and obtained seven to 10 certifications to do so.

[76] The defence also relies on Heathcote, where Justice Arnold-Bailey stated at paragraphs 113 to 117:

[113] The support Mr. Heathcote has from his family and the community is also a mitigating factor. Since his arrest and subsequent release on a promise to appear without conditions in 2010, Mr. Heathcote has seemingly resumed the legitimate lifestyle he led before the commission of these offences. He is not engaged in any further criminal conduct that has come to the attention of the authorities. Instead, he has maintained gainful employment and currently runs his own construction business. He has also begun employment at Sky-King Communications Inc., where he has been a key contributor to a business that has brought cellular technology to First Nations persons through Western Canada. This behaviour demonstrates Mr. Heathcote's willingness to earn a living within the boundaries of the law, as he has done previously.

[114] As Mr. Justice Chiasson wrote for the majority of the B.C. Court of Appeal in *R. v. Nesbitt*, 2012 BCCA 243:

Mr. Nesbitt's descent into the underworld of illegal drug activity was stopped by his arrest. It was a descent to a world from which he would have been unlikely to have been able or permitted to escape. Since his arrest, he has walked firmly on a path away from the illegal activities in which he was engaged. The sentence imposed in the unique circumstances of this case was designed to keep him on that path while making it clear that his transgression was unacceptable for him and for others.

[115] In that case, the Court of Appeal upheld a conditional sentence for an individual who pled guilty to possessing 17 kilograms of cocaine for the purpose of trafficking, which fell outside the usual sentencing range for that offence, noting that by the time of sentencing, the offender was rehabilitated: *Nesbitt* at para. 30.

[116] Six years have elapsed between the date of the offence and sentencing, and rehabilitation over a long period of time prior to sentencing is therefore a relevant consideration that is applicable to Mr. Heathcote.

[117] On a related note, the length of time that has passed since the offences were committed and Mr. Heathcote was arrested can be considered a mitigating factor, and references to the cases of *R. v. Adams*, 2007 BCSC 110 and *R. v. Bath and Khangura*, 2012 BCSC 645. The passage of time has prolonged the onerous effects of the court proceedings and the charges that preceded them on Mr. Heathcote. The pre-sentence report and the letters of reference amply support this conclusion. They describe the stress and uncertainty that Mr. Heathcote has experienced waiting for a conclusion of this matter. As his daughter Tania wrote in her letter:

I know the impact these years of limbo have had on my father are trying, at times I don't hear from him for periods as long as four months. I know this is when it becomes hard for him to stay strong. I am aware his health, physically and mentally have been affected immensely by living a life in waiting. His business endeavors have suffered greatly for his fear of instability due to not knowing the course this case may take.

- [77] The Crown acknowledges that Mr. Edwardsen has used the delay to obtain and maintain legitimate employment so he is in a better position now than he was when arrested. They submit, however the weight to be given to such a mitigating factor is limited because the delay arose substantially from a litigation strategy employed by Mr. Edwardsen, details of which are found at my reasons at 2017 BCSC 1578. The Crown submits it would be perverse for an offender to benefit as a result. They note as well that the delay resulted in the return to Mr. Edwardsen of a seized truck as the cost of the storage became excessive, hence he received a tangible benefit from the delay of his trial and its completion. They note as well that Heathcote was not clear what link there may have been between the offender's conduct in the litigation and the delay.
- [78] The defence submits that to treat such a factor essentially as aggravating would not be appropriate given a significant factor is that Mr. Edwardsen has used the time to rehabilitate himself and live a pro-social life. In addition, Mr. Anderson notes that some of the delay related to a refusal by the Crown to give disclosure and the withdrawal of one counsel for personal reasons. The defence further notes that Mr. Edwardsen made admissions for the trial proper and that reduced actual trial time.
- [79] Neither counsel knew of any authorities specifically addressing the issue of an accused potentially benefiting from a delay caused or contributed to by them.
- [80] In my view the societal benefits of Mr. Edwardsen reforming his ways and becoming a productive member of society are to be considered. I am not convinced his litigation strategy should negate the importance of rehabilitation nor that it is an aggravating factor. To do so would be contrary to the principles of sentencing.

Sentencing Principles

- [81] In imposing sentence the court must consider several factors, including:
- a) the age of the offender;
 - b) his previous criminal actions;
 - c) the level of violence used;
 - d) the level of premeditation;
 - e) the possibility of rehabilitation;
 - f) the requirement of deterrence in the community.

[82] These factors are not closed.

Other Sentencing Principles

[83] Other important principles that a court is to consider include that:

- a) A sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (b) Where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- (c) An offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances.

[84] Also, in this case to be considered is s. 10(2) of the Controlled Drugs and Substances Act which states a previous conviction for a designated substance offence is an aggravating factor.

Discussion

[85] Here the principles of deterrence, denunciation and protecting the public are significant factors.

[86] Mr. Edwardsen was at the top of the pyramid of a Terrace, B.C., drug distribution network. He was the operating and controlling mind and directed others lower down as well as selling in quantities that would be further distributed by others. He had sought to distance himself from that activity by operating a "crack shack" out of rented premises. While his was not as sophisticated as some drug distribution networks or as large, it was apparently a well-known source of drugs in the Terrace area. The trafficking in cocaine and marihuana at 604 Old Lakelse Lake Road by the undercover officer illustrated the offender was in the business of actively selling both drugs. The undercover officer and the offender discussed drug trafficking and pricing of drugs. It is also clear that trafficking was occurring at both the street and wholesale level given the evidence seized and the discussions they had respecting the price of kilos of cocaine.

[87] The Crown emphasizes that violence and drugs are all too often linked. They note this is illustrated by an earlier incident at the River Drive property where a stabbing occurred amongst evidence of drugs being trafficked.

[88] Mr. Edwardsen knowingly and voluntarily engaged in the trafficking of cocaine and marihuana at least at a mid-level. The evidence is he was the directing mind. He apparently was of the view he could do so with impunity operating out of firstly rented premises and then his own home after the lease of the rental property was terminated during the investigation for reasons unrelated to the investigation. From the sales to the undercover officer it is apparent that he continued to traffic from his home. I do not accept that this indicates a lack of sophistication. Rather, it indicates a willingness to take risks in the

conducting of his drug operations.

- [89] As noted earlier from the summary of my decision at trial, the police found a scale, unused baggies, and a hammer to break down cocaine, a safe, and a money counter in the premises of Mr. Edwardsen, all clearly related to and used in the trafficking of cocaine.
- [90] While the grow operation at 9106B was not as sophisticated or as large as some, the number of plants and the potential yield of those plants was such that they were clearly not for personal use but rather being grown for trafficking.
- [91] I do not accept that the defendant was merely working there, given he had a key to the premises, the fact there was evidence at his home of him having an interest in buying grow operation equipment, and that a new building was being built and the grow operation equipment he had acquired from the undercover agent was stored there indicating at the very least it was a joint venture. Hence he was at a minimum a co-principal in that operation. As a result, it too was a source of potential profit to him and as I noted from Heathcote sentences for such commercial production will be more severe than for non-commercial production.
- [92] Mr. Edwardsen's moral blameworthiness is high. He willingly engaged in a mid-level drug operation for profit. In addition, the presence of firearms, and particularly the loaded handgun, along with a number of other firearms and substantial ammunition is aggravating. Mr. Edwardsen has a record of violence and a lack of respect for authority and court orders, and while his last offence dates to 2003, it was up until that time ongoing and consistent and was not all that significantly dated as the offences now before the court arose in 2012.
- [93] The number of guns and the amount of ammunition fit the definition of an arsenal. Substantially fewer have been so described in Heathcote at paragraph 100. Their presence and their numbers in his home show a significant potential for violence.
- [94] People were coming and going from the home. Mr. Edwardsen was not a hermit. Overall, the fact of drug trafficking, many firearms and ammunition create the kind of dangerous situation referred to in the authorities. Although the firearms were not found with the offender outside of his home, in his vehicle, or in more populated areas, the presence of others coming and going and the sale of drugs undermines the defence submission that the remote residential property is a significant factor in finding a lesser danger to society. The fact they were in his residence, while not a mitigating factor, is absence of an aggravating factor (R. v. Paterson, 2013 BCSC 880 at para. 39).
- [95] Regarding the non-restricted firearms in the shop at 4410 Bohler Road, the defence notes that the firearms were kept in boxes in a locked shop. They submit the offence in Count 17 is more of a regulatory offence. The difficulty with that submission is that Mr. Edwardsen had repeatedly applied for a Firearms Acquisition Certificate and had been refused, yet he retained the weapons. While that indicates efforts to comply, at the same time he knew they were unlawfully in his possession. In addition, this is not a case of simply a matter of one or

two firearms, but rather a total of 55.

- [96] I must consider the circumstances of the offences and the aggravating and mitigating circumstances, and the authorities to which counsel have referred me, as well as the principles of deterrence and denunciation on the one hand and the principles of restraint in any sentence and the potential for rehabilitation on the other.
- [97] Crown and defence, besides disagreeing on the length of sentences for each count, disagree on whether the sentence under Count 7, unlawful possession of a loaded restricted firearm (.44 Magnum revolver) at Mr. Edwardsen's residence contrary to s. 9t5(1) of the Code, should be concurrent or consecutive to Counts 5, 6 and 8 to 11.
- [98] As the defence has noted, the Crown authorities involve more serious offences such as firearms in public places, upper-level not low- or mid-level drug trafficking, more sophisticated drug operations, existing prohibitions respecting firearms, more significant criminal records, more substantial three-stage grow operations, larger quantities of drugs and money and little chance for rehabilitation. The defence authorities are not surprisingly examples of lower sentences.
- [99] However, each case turns on its facts.
- [100] I am satisfied in this case the principles of deterrence and denunciation must be emphasized. Mr. Edwardsen was involved initially in trafficking in drugs in two locations plus operation of a third location for production of marihuana. He was motivated by profit. His moral culpability is high and his actions preyed on those dependent on drugs with all of the social costs and human misery that entails.
- [101] The loaded firearm, the significant number of other firearms as well as the amount of ammunition is concerning. As I noted earlier, it was an arsenal of weapons. This was not simply a case of one or two firearms for protection. Combined with the drug trade, their presence provided the capacity to raise the violence inherent in the drug trade to lethal levels, putting at risk not only those in the drug trade but the public.
- [102] Regarding the proposed consecutive sentences for the offences at Mr. Edwardsen's residence (Counts 5, 6, 7 and 8-11), in my view consecutive sentences are appropriate. As noted by Mr. Justice Blok in Paterson, both concurrent and consecutive sentences are open to the court. In this case, I prefer the reasoning of Madam Justice Baker quoted by Mr. Justice Block where she said, in *R. v. Fusaji* that a concurrent sentence would simply impose a sentence for the narcotics offence with no greater sentence arising from the possession of a prohibited weapon, "an offence of a completely different nature and one which warrants a consecutive sentence so as to make clear the seriousness with which the Court regards that offence."

[103] The seriousness of illegal firearms and the dangers they impose is self-evident in this province. They are a serious problem, they are a danger to the public and they must be denounced.

[104] After considering the submissions of counsel, the authorities provided and the various circumstances, both mitigating and aggravating, and considering and balancing the competing principles of sentence, I impose the following sentences.

[105] Firstly, with regards to Counts 1 to 4:

- a) Count 1, 12 months concurrent;
- b) Count 2, 18 months concurrent;
- c) Count 3, 18 months concurrent;
- d) Count 4, 12 months concurrent.

[106] Secondly with respect to Counts 5 to 7 and 8 to 11, the drugs and firearms seized from Mr. Edwardsen's home, a total of eight years as follows:

- a) Count 5, four years;
- b) Count 6, two years concurrent;
- c) Count 7, four years consecutive;
- d) Counts 8 to 11, two years concurrent.

Regarding the marihuana grow operation at Plan 9106B, Counts 12 to 13:

- a) Count 12, one year concurrent;
- b) Count 13, one year concurrent.

[107] Finally, regarding Count 17, the firearms seized from Bohler Road, the unlawful possession of 55 firearms, a sentence of one year.

[108] The total, counsel, is 11.5 years.

[109] However, I now have to turn to the totality principle.

Totality Principle

[110] As noted earlier circumstances such as this require that the court determine whether the sentences imposed in the aggregate offend the totality principle. That is, "if the sentence as a whole is unduly harsh or disproportionate, then the length of the individual sentences should be adjusted in order to arrive at an appropriate global sentence" (Li, para. 28).

- [111] As noted in Li at paragraph 28 and then at paragraph 52, "it is the principle of proportionality as applied through the totality principle which governs the imposition of a 'just and appropriate' sentence. That requires an overall consideration of the gravity of the offence and the culpability of the offender."
- [112] In summary, the Crown suggested a total sentence of 10 years would satisfy the totality principle, less time served. The defence suggests a sentence of five to six years less time served.
- [113] Mr. Edwardsen, if you would please stand. Taking into account the circumstances of this case, the need for denunciation and deterrence, your high moral blameworthiness, along with his personal circumstances, in my view a sentence of 11.5 years is disproportionate as is the 10 years suggested by the Crown. I therefore impose in total a sentence of eight years less time served, to which I now turn. You may be seated, Mr. Edwardsen.

Time in Custody

- [114] Mr. Edwardsen was arrested on September 19, 2012, and initially was detained by the Provincial Court. Eventually he was granted bail in this court and released on June 4, 2013. As a result, he was in custody for eight and a half months or 259 days. I understand counsel are agreed that he is entitled to credit at 1.5 which equals 389 days of credit.
- [115] Count 5 shall be reduced by those 389 days.

DNA

- [116] Under s. 487.051, there will be an order authorizing the taking of a sample or samples as reasonably required for forensic DNA analysis. Mr. Edwardsen will have to provide a sample of bodily substance reasonably required for forensic DNA analysis because of being convicted of the primary designated offences. That analysis will go into the database.

FIREARMS

- [117] Pursuant to s. 109 of the Criminal Code, there will be an order to be in effect for a period of 10 years following Mr. Edwardsen's release from prison, prohibiting him from possessing any firearm, other than a prohibited firearm or restricted firearm, and any crossbow, restricted weapon, ammunition and explosive substance. He will be further prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition for life.

FORFEITURE

- [118] The Crown seeks forfeiture of many items. The requests for forfeiture are made under s. 491(1) of the Criminal Code. The Crown has drafted and provided eight forfeiture orders. The Criminal Code states:

490.1 ORDER OF FORFEITURE OF PROPERTY ON CONVICTION -- (1) Subject to sections 490.3 to 490.41, if a person is convicted of an indictable offence under this Act or the Corruption of Foreign Public Officials Act and, on application of the Attorney General, the court is satisfied, on a balance of probabilities, that any property is offence-related property and that the offence was committed in relation to that property, the court shall

- (a) where the prosecution of the offence was commenced at the instance of the government of a province and conducted by or on behalf of that government, order that the property be forfeited to Her Majesty in right of that province and disposed of by the Attorney General or Solicitor General of that province in accordance with the law; and
- (b) in any other case, order that the property be forfeited to Her Majesty in right of Canada and disposed of by the member of the Queen's Privy Council for Canada that may be designated for the purpose of this paragraph in accordance with the law.

[119] Counsel, with respect to the matter of the various forfeiture applications, it is my suggestion that we wait until all of the submissions are completed in March for the two outstanding applications, because the various draft orders that were prepared by Crown overlap with those applications, unless you have some submission on that. It seems to me to make more sense to deal with them all at the same time because the orders all require revision.

[SUBMISSIONS AT 3:37:34 PM TO 3:39:20 P.M.]

[120] THE COURT: I will order forfeiture of the seized firearms, unless they are shown by the applicant not to be the property of Mr. Edwardsen. The real property is an issue that will remain outstanding to be dealt with in March.

[121] The other forfeitures will be granted with respect to -- now, part of the problem, counsel, is some of these include firearms, some include them by reference to items on flowcharts and that sort of thing. So perhaps the easiest -- and I suppose, counsel, there may be an argument over the ammunition, if the firearms are lawfully the property of someone else.

[SUBMISSIONS CONTINUING AT 3:40:22 TO 3:45:23 P.M.]

[122] THE COURT: Under s. 743.2 of the Criminal Code, a copy of these reasons is to be prepared and then they should be forwarded to Corrections Services of Canada.

[SUBMISSIONS AT 3:45:38 TO 3:48:20 P.M.]

[123] THE COURT: All right, so Madam Clerk, I had indicated that Count 5 would be reduced by 389 days. What I will provide instead is that the sentence of eight years on the totality principle will be reduced by 389 days.

[124] Now, if I do that, does that allow you time to fill in the form you are required in reporting to Corrections Canada?

- [125] THE CLERK: Not quite. They do like to have the days associated to a particular count. If we indicate that it is a global sentence being reduced by a certain amount, they want -- they still want a specific count.
- [126] THE COURT: That is what I was trying to avoid because I have run into this before.
- [127] MR. WALKER: Well, I think if it is required by a count, then we go back to what Your Lordship did, but you are providing direction that the total sentence is eight years minus 389. That is the effect of reducing Count 5 by 389 days. So that whether it is clear in the computer or not, the record is crystal clear.
- [128] THE COURT: Well, we will do it on that basis, counsel. If Corrections comes back, we may have to address it on the 19th, but all right, Madam Clerk, so it will be eight years less 389 days to be accomplished by Count 5 being reduced by the 389. Does that permit you time to complete the report to Corrections Canada?
- [129] THE CLERK: Yes, My Lord.
- [130] THE COURT: All right.
- [131] THE CLERK: My Lord, may I inquire whether the firearms prohibition is in relation to a particular count or to all counts?
- [132] MR. WALKER: I can address that if you wish?
- [133] THE COURT: Yes, go ahead.
- [134] MR. WALKER: My Lord, the firearms prohibition does not relate to each count, because it is mandatory only in relation to some, so the counts they apply to is Counts 1 to 13, and 17, and that was included on the document I filed that was marked as Exhibit 3.
- [135] THE COURT: Yes, I do not have that with me at the moment.
- [136] MR. WALKER: And --
- [137] THE COURT: So Counts 1 to 13 and 17, Madam Clerk.
- [138] MR. WALKER: Correct. The next question will be the DNA, right?
- [139] THE CLERK: Yes.
- [140] MR. WALKER: And My Lord, the DNA applies to Counts 1 to 6, Count 12, and Count 13.
- [141] THE COURT: Mr. Anderson, any difficulty with that?
- [142] MR. ANDERSON: No, My Lord.
- [143] MR. WALKER: There is going to be one more question, I believe, and it is going to be in relation to the victim fine surcharge which --
- [144] THE COURT: These offences are 2012.

[145] MR. WALKER: -- predate the change in the law which made it mandatory.

[146] THE COURT: Any submissions on that?

[147] MR. WALKER: No submissions.

[148] MR. ANDERSON, My Lord, obviously I have made plain my submissions to the court, in terms of appearing by telephone, he has significant financial difficulties at the present and obviously will not be earning money while he is serving his sentence.

[149] THE COURT: I agree, Mr. Anderson. It will be waived.

"R.D. Punnett, J."

The Honourable Mr. Justice Punnett

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