

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Madam Justice Karen I. Simonsen
Mr. Justice James G. Edmond

BETWEEN:

<i>HIS MAJESTY THE KING</i>	)	<i>D. Manning and</i>
	)	<i>H. D. P. Crawley</i>
	)	<i>for the Appellant</i>
<i>Appellant</i>	)	
	)	<i>B. F. Bonney and</i>
	)	<i>F. Aiello</i>
<i>- and -</i>	)	<i>for the Respondent</i>
	)	
<i>DARNEL SCOTT ISAAC</i>	)	<i>Appeal heard:</i>
	)	<i>May 26, 2025</i>
	)	
<i>(Accused) Respondent</i>	)	<i>Judgment delivered:</i>
	)	<i>October 30, 2025</i>

On appeal from *R v Isaac*, 2024 MBPC 78 [*decision*]

EDMOND JA

Introduction

[1] This is a drug sentence appeal.

[2] After the accused's motion under sections 8 and 9 of the *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, was dismissed by a Provincial Court judge (see *R v Isaac*, 2023 MBPC 73), the accused called no evidence at the trial and he was convicted of (1) possessing

methamphetamine (meth) for the purpose of trafficking contrary to section 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 [the *CDSA*], and (2) possessing proceeds of crime under \$5,000 contrary to section 354(1) of the *Criminal Code*, RSC 1985, c C-46 [the *Code*].

[3] In a comprehensive sentencing decision released on October 2, 2024, the trial judge imposed a conditional sentence order (CSO) of two years less a day, followed by three years of supervised probation.

[4] The Crown seeks leave to appeal the sentence imposed and, if granted, appeals the sentence. Prior to the appeal, the Crown moved to suspend the CSO pursuant to section 683(5) of the *Code*. On November 1, 2024, a judge of this Court granted the motion and suspended the accused's CSO until the appeal was heard and determined. The judge also granted judicial interim release (release) to the accused on conditions similar to those imposed as part of the CSO. One of the conditions was that the accused was required to live at the Behavioural Health Foundation (the BHF), which is a well-recognized, long-term residential addiction treatment centre for those experiencing a variety of substance use and co-occurring mental health disorders.

[5] The Crown submits that the trial judge committed three errors in principle that contributed to the imposition of a sentence that is demonstrably unfit by:

- (a) failing to sentence the accused based upon his uncontested status as a mid-level drug trafficker and failing to engage the applicable five-to-eight-year *Rocha* sentencing range (see *R v Rocha*, 2009 MBCA 26 [*Rocha*]);

- (b) failing to apply the appropriate framework for the imposition of a CSO as set out in *R v Proulx*, 2000 SCC 5 [*Proulx*] and *R v Fice*, 2005 SCC 32 [*Fice*]; and
- (c) failing to give sufficient weight to the aggravating factors from the accused's background, including prior convictions for drug offences.

[6] In my view, the trial judge erred in principle by failing to apply the appropriate framework for the imposition of the CSO, specifically, by failing to address the pre-sentence custody when determining a fit and appropriate sentence in the circumstances. As I will explain, the trial judge erred in the application of the principles established in *Proulx* and *Fice*, which had a material impact on the sentence imposed. As a result of this material error, it falls to this Court to re-sentence the accused and determine a fit sentence (see *R v JW*, 2025 SCC 16 at paras 51-52 [*JW*], quoting *R v Friesen*, 2020 SCC 9 at paras 27-29 [*Friesen*]).

[7] For the reasons that follow, I would grant leave to appeal, allow the appeal and conclude that, at the time of sentencing, a fit sentence for the offence of possession of meth for the purpose of trafficking was a penitentiary term of three years (thirty-six months). Taking into account that the accused has been subject to strict release conditions since the suspension of the CSO, I would determine that a fit sentence is thirty-two months. After allowing a credit of eight months for pre-sentence custody, I would impose a go-forward sentence of twenty-four months' incarceration for that offence. Additionally, I would allow a further credit of one month for the time served on the CSO before it was suspended, resulting in a go-forward sentence of

twenty-three months' incarceration. For the offence of possession of proceeds of crime, I would impose a concurrent jail sentence of six months. I would stay both custodial sentences. I would confirm the period of supervised probation and its conditions, as well as the ancillary orders imposed by the trial judge.

Background

The Offences

[8] On November 4, 2021, the accused was arrested in a taxi by the Winnipeg Police Service, based on a tip received from a confidential informant. At the time of arrest, the accused had in his possession 891.32 grams of bulk meth and \$2,315 in cash. He also had two additional small bags of meth weighing approximately 1/8 and 1/2 of an ounce.

[9] For the purpose of sentencing, the Crown, in submissions before the trial judge, addressed the issue of the accused's level of trafficking as follows:

Just for the purpose of sentencing in terms of requiring an expert, I believe I had canvassed with my learned friend that there is an agreement being made to the level of trafficking that [the accused] is convicted of in the expert report and that would be at mid-level range, just for the purpose of whether or not you need to have the expert attend for the sentencing.

[10] This characterization of his involvement was accepted by the accused and, as a result, no expert was called to testify at the sentencing hearing.

The Offender and the Pre-Sentence Report

[11] The accused is thirty-nine years of age (thirty-eight at the time of sentencing). He was raised by his parents on a farm in Manitoba and comes from a financially stable background. He had a good childhood, attended school regularly and also worked on his parents' farm. In his teenage years, the accused struggled with school and became associated with people who used alcohol and drugs. He was eventually expelled from school for poor attendance.

[12] The accused began using meth on a regular basis when he was twenty years old, which led to his criminal involvement and the breakdown of his relationship with his family.

[13] He has two prior convictions for possession of a controlled substance for the purpose of trafficking, including one most recently in 2019, for which he received an effective sentence of two years' imprisonment and probation. On an earlier conviction for possession of meth for the purpose trafficking, again at the street level, he received a three-year suspended sentence because he had successfully spent two years at the BHF.

[14] It is not disputed that the accused has had long-standing addiction issues that contributed to his offending. The trial judge found that the accused's record is entirely related to his addiction issues.

[15] At the time of his arrest on the present charges, the accused was bound by a probation order from his most recent meth trafficking conviction and was on release for another allegation of the same offence. He remained in custody for 158 days before being released to the BHF to address his

addictions; he stayed there until sentencing. The parties agree that he is entitled to an enhanced credit of 237 days, being almost eight months (at 1.5:1), for the time served in pre-sentence custody.

[16] This was the accused's third admission to the BHF program, which was in addition to earlier addiction programming at Teen Challenge and in a twelve-step program.

[17] The accused graduated from the BHF and completed a number of additional programs and courses beyond what was required for graduation. A letter from the BHF court communicator dated May 13, 2025, describes the significant strides the accused made in the BHF program, as well as his being a role model for others in the BHF community. He is currently residing in the BHF transitional housing and is a peer advisor to participants in the BHF program. He leads and speaks to support groups, chaperones other program members in the community and manages the house where he lives. He completed a welding course at the Manitoba Institute of Trades and Technology and is now employed as a welder.

[18] By all accounts, the accused has made a remarkable recovery and has remained sober since his arrest in November 2021. He is gainfully employed, he has reunited with his family who now provides him strong support, and he no longer associates with people in the drug trade or whose lifestyles include using drugs.

[19] The probation officer who prepared the pre-sentence report (the PSR) assessed the accused as a high risk to reoffend. That said, the accused was candid during his interview, took responsibility for his actions and expressed genuine remorse for all of his life choices. He admitted that the

reason he trafficked meth was to support his drug addiction, and he refused to minimize his responsibility.

The Sentencing Hearing

[20] The Crown relied upon the agreement made for the purpose of sentencing to argue that the accused's conduct engaged the sentencing range for mid-level drug trafficking of five to eight years' incarceration, as established by this Court in *Rocha*, and recommended a six-year sentence with a credit of eight months for pre-sentence custody.

[21] Anticipating that the accused would request a CSO, the Crown referred to *Proulx* and argued that a CSO would not adequately protect the public or satisfy the sentencing objectives of denunciation and deterrence, taking into account the accused's pattern of repeated and escalating trafficking activity while bound by court orders. The Crown cited several cases from this Court, including *R v Alcera*, 2024 MBCA 32 [*Alcera*]; *R v Cerezo-Brennan*, 2023 MBCA 17; *R v Johnson*, 2020 MBCA 10 [*Johnson*]; *R v Racca*, 2015 MBCA 121; and *Rocha*, respecting the principles of sentencing for mid-level drug traffickers, warranting the imposition of a penitentiary sentence.

[22] In addressing the appropriate sentence, the Crown stressed the large quantity of meth and its pernicious nature as aggravating factors, together with the accused's recent and related record.

[23] The Crown agreed that there were mitigating factors, most notably the accused's struggles with addiction and his steps toward rehabilitation. However, it submitted that he had previously received the benefit of his past

“exceptional circumstances” when his previous drug trafficking sentence was suspended.

[24] The accused focussed primarily on his rehabilitation efforts and argued for a two-year-less-a-day CSO, followed by three years of supervised probation. The accused made no reference to his accrued time in custody. He did not dispute the aggravating factors raised by the Crown. Instead, he emphasized his efforts at rehabilitation since his arrest, as outlined in the PSR and letters of support which, in his view, justified the imposition of the CSO.

The Sentencing Decision

[25] The trial judge carefully reviewed the governing sentencing principles, including the fact that deterrence and denunciation are the paramount sentencing principles.

[26] The trial judge considered the circumstances of the offences and of the accused. She recognized that, while the parties agreed that the accused was a mid-level drug trafficker, a deeper analysis was required, taking into consideration his moral culpability by examining the magnitude of his participation in the illicit activity as a whole and in light of the criminal burden of proof (see *Alcera* at para 31). She emphasized that the accused’s specific role in the mid-level drug trade was unclear, and the only information provided about his role was in the PSR (see *decision* at para 12).

[27] After reviewing the evidence, she concluded that the accused had limited decision-making power and, given the circumstances of the offences, his role was to transport the meth from point A to point B in the back of a taxi.

Aside from that, she was unable to make any other findings respecting his role (see *ibid* at para 38).

[28] The trial judge reviewed the accused's circumstances and his rehabilitation efforts and found that he had taken every step to mitigate the risk factors that led to Probation Services labelling him as a high risk to reoffend. She pointed out that he was almost three years sober, had positive supports and was gainfully employed. She was satisfied that specific deterrence was not required as the accused had demonstrated significant insight into his offending behaviour and its effect on the community. She acknowledged that general deterrence and denunciation must still be considered in sentencing the accused (see *ibid* at paras 40-41).

[29] The trial judge concluded that, in the unique circumstances of this case, a penitentiary sentence was not required to meet the principles of deterrence and denunciation. In her view, a significantly reduced sentence could still serve to achieve these objectives; hence, she imposed a CSO of two years less a day with strict conditions. To ensure ongoing public safety by way of the accused's continued sobriety and rehabilitation, she imposed three years of supervised probation following the CSO (see *ibid* at paras 42, 48).

[30] It is not disputed that the trial judge incorrectly indicated that the accused had been on release and residing at the BHF since December 2021 without incident (see *ibid* at para 11). In fact, although the accused was granted release to the BHF in December 2021, he was only released when a place became available for him, which occurred on April 19, 2022. The

enhanced credit for pre-sentence custody of approximately eight months was not referenced or taken into account in the *decision*.

Issues

[31] In my view, this appeal raises the following issues:

1. Did the trial judge err in her findings regarding the accused's level of involvement in the trafficking, given the agreement that the accused was a mid-level trafficker?
2. Did the trial judge fail to apply the appropriate framework for the imposition of a CSO as set out in *Proulx* and *Fice*?
3. Did the trial judge err in not addressing the pre-sentence custody when determining the sentence in accordance with the stage two analysis described in *Proulx* and *Fice*?
4. If the trial judge erred in granting the CSO and that error had a material impact on the sentence, what would be a fit sentence?
5. If this Court imposes a period of incarceration, should all or part of the sentence be stayed?

[32] Because of my conclusion that the trial judge erred in her application of *Proulx* and *Fice*, I need not specifically address the Crown's third ground of appeal, at paragraph 5 herein, regarding the weight given to aggravating factors. However, that will be considered when I re-sentence the accused.

Standard of Review

[33] A sentencing decision is entitled to a high degree of deference on appeal. Absent the sentence being demonstrably unfit or the sentencing judge making an error in principle that had a material impact on the sentence, an appellate court should not intervene and vary the sentence (see *JW* at para 51; *R v Hanna*, 2025 MBCA 47 at para 24; *Friesen* at para 26; *R v Lacasse*, 2015 SCC 64 at paras 11, 67 [*Lacasse*]).

[34] In *Friesen*, the Supreme Court of Canada explained that “[e]rrors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor” (at para 26). The weighing of relevant factors amounts to an error in principle only where the judge’s exercise of discretion is unreasonable (see *ibid*).

[35] The trial judge’s finding as to the accused’s level of involvement in drug trafficking involves a finding of fact that is reviewable on a standard of palpable and overriding error (see *Alcera* at para 34; see also *R v Brown (C)*, 2016 MBCA 115 at para 5; *R v Kunicki*, 2014 MBCA 22 at para 17; *R v Brown (TC)*, 2012 MBCA 60 at para 2).

[36] If the trial judge made an error in principle or an error of fact that had a material impact on the sentence, this Court must intervene and determine a fit sentence without deference to the existing sentence, provided that deference must still be shown to the trial judge’s findings of fact and the identification of aggravating and mitigating factors, to the extent that they are not affected by an error (see *JW* at para 52, quoting *Friesen* at paras 27-28).

[37] With these standards in mind, I now turn to a review of the issues.

Discussion and Analysis

1. Did the Trial Judge Err in Her Findings Regarding the Accused's Level of Involvement in the Trafficking, Given the Agreement That the Accused Was a Mid-Level Trafficker?

[38] The Crown's position is that the parties had an agreement that the accused was a mid-level trafficker and that, because of that agreement, it did not call an expert witness on that issue at the sentencing hearing. During the sentencing submissions, the Crown referenced the agreement and submitted that trafficking at the mid-level engaged the five-to-eight-year range of incarceration set out in *Rocha*. The accused did not object to that characterization. Notwithstanding the ranges of sentence set out in *Rocha*, the accused advanced the position that a CSO was fit and appropriate in the circumstances.

[39] On appeal, the Crown submits that the trial judge erred when she found that the accused's specific role in the mid-level drug trade was unclear and that the accused had limited decision-making power, given the parties' agreement at sentencing. When the accused invited a conviction on both offences, the Crown says that amounted to an admission of the commercial nature of his activity and is inconsistent with the mere task of transporting meth from point A to point B, as found by the trial judge.

[40] The trial judge relied upon the PSR to determine the accused's role, and the Crown points to the fact that the accused admitted that he was selling meth to support his addiction. Further, the Crown submits that the quantity of meth (approximately 891 grams or almost a kilogram) is near the top of the mid-level range. Regardless of the label used to describe the accused's role,

the Crown argues that the quantity of the meth handled is incompatible with the bottom end of the lower three-to-six-year incarceration range set out in *Rocha*.

[41] The accused does not dispute that the sentencing ranges for mid-level drug traffickers were established in *Rocha*. However, he argues that a sentencing judge's finding as to an accused's level of involvement is reviewable on a standard of palpable and overriding error, and principled sentencing is far more nuanced than merely labelling an offender. He says that applying the principles in *Alcera* requires a deeper analysis of an accused's conduct to ascertain their moral culpability by looking at the magnitude of the individual's participation in the drug trafficking as a whole and in light of the criminal burden of proof.

[42] The accused also submits that starting points and sentencing ranges are not hard-and-fast rules or straitjackets. The sentencing ranges are useful to a sentencing judge in applying the principle of parity, but a court may deviate from a sentencing range or starting point to achieve the fundamental principle of proportionality (see *Alcera* at para 30; *R v Parranto*, 2021 SCC 46 at para 40 [*Parranto*]). The accused emphasizes that a sentencing judge deviating from a sentencing range does not, in itself, justify appellate intervention.

[43] The accused references the key principles summarized in *Parranto* at para 36 as follows:

1. Starting points and ranges are not and cannot be binding in theory or in practice;

2. Ranges and starting points are “guidelines, not hard and fast rules”, and a “departure from or failure to refer to a range of sentence or starting point” cannot be treated as an error in principle;
3. Sentencing judges have discretion to “individualize sentencing both in method and outcome”, and “[d]ifferent methods may even be required to account properly for relevant systemic and background factors”; and,
4. Appellate courts cannot “intervene simply because the sentence is different from the sentence that would have been reached had the range of sentence or starting point been applied”. The focus should be on whether the sentence was fit and whether the judge properly applied the principles of sentencing, not whether the judge chose the right starting point or category.

[citations omitted]

[44] Applying these principles to this case, the accused submits that the trial judge was exercising her discretion when she departed from the range of sentences and that she did so appropriately, which cannot be treated as an error in principle.

[45] As to the agreement that the accused was a mid-level trafficker, the accused argues that there was no agreement for him to be placed in the upper *Rocha* range. The accused’s position is that the trial judge followed the analysis referenced in *Alcera*, which requires more than simply labelling an offender. He states that the trial judge found that he had limited decision-making power and that, in doing so, she committed no error that would justify appellate intervention.

Analysis

[46] The determination of an accused's level of involvement, even where the quantity of drugs places the trafficking offence at the mid-level rather than at the street level, is important in order to apply the sentencing ranges that this Court adopted in *Rocha*. Where the Crown alleges an aggravating fact, such as an accused's level of involvement in an offence, to support a lengthier sentence, it must prove that fact beyond a reasonable doubt (see the *Code*, s 724(3)(e); *R v Gardiner*, 1982 CanLII 30 at 414-16 (SCC)). An appellate court's review of findings of fact is subject to a highly deferential standard of review, and appellate courts must generally defer to the reasonable exercise of a sentencing judge's discretion (see *Alcera* at paras 33-34, citing with approval *Friesen* at para 26).

[47] In *Rocha*, Chartier JA, for the Court, distinguished between an accused who was only involved as a courier at the mid-level to deliver drugs from one who was a supplier at the mid-level with decision-making responsibility (see para 63). He set out two different sentencing ranges that reflected the different levels of involvement in trafficking, being five to eight years' incarceration for "[t]hose that are trusted beyond a mere courier at the mid-level group" and three to six years' incarceration for "[t]hose who are mere couriers involved at the mid-level and whose sole purpose is to transport the drugs for their boss in order to prevent the latter from being detected" (*ibid* at para 64).

[48] As is clear from *Rocha* and as emphasized by this Court in *Alcera* and in *R v McLean*, 2022 MBCA 60 [*McLean*], assessing an offender's degree of moral culpability obligates a sentencing judge to determine the level of an

accused's involvement in the illicit activity. This evaluation requires a sentencing judge to weigh the proven facts in light of "typical markers of moral culpability: intentional risk-taking, consequential harm of the offender's actions and normative character of the offender's conduct" (*ibid* at para 62, quoted in *Alcera* at para 22).

[49] In *Rocha*, the accused was delivering twenty ounces of cocaine to a street-level dealer on one occasion. While there was evidence that the transaction represented a "mid-level drug transaction . . . , [there was] no evidence . . . called either at trial or at the sentencing hearing to differentiate the level of involvement the accused may have had" (*ibid* at para 62). This Court stated: "Without more evidence on the level of involvement [of the accused], it would be inappropriate to sentence him as someone with decision-making responsibility" when it was equally plausible that he was simply delivering the drugs on one occasion for a wholesaler (*ibid* at para 63, quoted in *Alcera* at para 21).

[50] This Court also assessed an offender's level of involvement in *McLean*. Both *McLean* and *Rocha* explain the jurisprudence related to drug sentencing policy in Manitoba, which generally views those exercising some decision-making authority or responsibility in the drug crime as having greater moral blameworthiness than an offender who, while performing an essential task to perpetuate a serious crime, is essentially acting under the direction of another for little remuneration (see *McLean* at paras 63-65; *Rocha* at paras 61, 64).

[51] The bottom line is that principled sentencing, as explained in *Alcera*, *McLean* and *Rocha*, is about more than labelling an offender. In order to

impose a proportionate sentence, a deeper analysis is required to determine an offender's level of involvement in light of the proven facts (see *Alcera* at para 31; *McLean* at para 66; *Rocha* at paras 61, 64).

[52] In the present case, the Crown submits that the trial judge erred in her characterization of the accused's involvement in the illicit activity. Its primary submission is based on the fact that the parties agreed that the "level of trafficking . . . would be at [the] mid-level range".

[53] While it is not disputed that the accused agreed with that characterization, the trial judge found that "[t]he Crown did not call any evidence to the contrary with respect to [the accused's] self-proclaimed role in the drug trade" (*decision* at para 14); that is, no evidence was led that proved exactly what the parties agreed to in terms of what the accused actually did and his role in the illicit activity. There was no agreed statement of facts or other evidence that set out the parameters of the agreement. The only evidence was the quantity of meth found at the time of arrest, the information contained in the PSR and the fact that the accused had the sum of \$2,315 in cash in his possession.

[54] The trial judge carefully considered the evidence and found that the accused was a heavy user of meth, consuming two grams per day for three years; was selling meth to support his own use; and did not make much money as he was being paid in both money and product by those he worked for (see *ibid* at para 13).

[55] In my view, those findings of fact were reasonable and open to the trial judge based on the evidence. They support her finding that the accused "had limited decision making power", that he was "transporting the [meth]

from point A to point B in the back of a taxi” and that, aside from that, she was “not able to make any other findings with respect to his role” (*ibid* at para 38).

[56] Further, while the accused admitted in the PSR that he was selling meth, there was no evidence as to the quantity that he sold, or at what level he was selling. The trial judge noted the meth that was seized was in one large quantity and two small baggies. She accepted that he took payment in meth to support his addiction and received a small amount of money, and she was clearly of the view that this did not indicate that he had decision-making responsibility at the mid-level.

[57] While these facts could arguably engage the higher *Rocha* range of five to eight years, the trial judge conducted a deeper analysis and was satisfied on the accused’s level of involvement. Given the Crown’s burden to prove the accused’s level of involvement beyond a reasonable doubt and the standard of review for the trial judge’s finding, I am not persuaded that the trial judge made a palpable and overriding error in her assessment of the evidence that would justify appellate intervention.

[58] The more difficult issue is the basis upon which the trial judge departed from the *Rocha* sentencing ranges altogether and how she applied the principles enunciated in *Proulx* and *Fice* to impose a CSO. I now turn to consider the second and third issues.

2. *Did the Trial Judge Fail to Apply the Appropriate Framework for the Imposition of a CSO Set Out in Proulx and Fice?*

3. *Did the Trial Judge Err in Not Addressing the Pre-Sentence Custody When Determining the Sentence in Accordance with the Stage Two Analysis Described in Proulx and Fice?*

[59] The second and third issues address the proper application of the framework for imposing a CSO and are interconnected. As a result, I propose to address them together.

[60] The Crown's position is that, although the trial judge was aware that the accused was entitled to a credit of approximately eight months for pre-sentence custody, she failed to consider it when imposing the CSO of two years less a day. The Crown submits that this amounts to an error in principle and is contrary to the leading authorities of *Proulx* and *Fice*, which held that a CSO is only available where a total sentence of less than two years, before considering pre-trial custody, is appropriate. The Crown states that this Court has concluded that, when imposing a CSO, the failure to correctly apply *Fice* is an error in principle (see *R v Giesbrecht*, 2019 MBCA 35 at para 214; *R v MacDonald*, 2009 MBCA 36 at paras 5, 29 [*MacDonald*]; *R v Lagimodiere*, 2008 MBCA 137 at para 32).

[61] The accused submits that the trial judge correctly followed the approach established in those authorities—that she first determined that a penitentiary sentence was not required to meet the principles of deterrence and denunciation. His position is that, by imposing a CSO of two years less a day, the trial judge implicitly determined that probationary measures alone

were not appropriate. Therefore, she excluded both the possibility of probationary measures alone and a penitentiary term.

[62] Further, the accused submits that *Fice* does not stand for the proposition that pre-sentence custody must be considered when imposing a CSO. Rather, he says it stands for the proposition that pre-sentence custody cannot be considered when determining the availability of a CSO; that is, to reduce an otherwise appropriate penitentiary sentence to a provincial one by deducting time served in pre-sentence custody.

[63] The accused acknowledges that the trial judge did not account for pre-sentence custody. His position is that the trial judge clearly determined that a penitentiary sentence was not required and that finding is entitled to deference. If the trial judge erred by failing to take into account the pre-sentence custody, he argues that it is a calculation error and that the pre-sentence custody time should be deducted from the duration of the CSO.

Analysis

[64] The analytical starting point is to review the approach adopted by the Supreme Court in *Proulx* and *Fice* regarding the proper interpretation and application of section 742.1(a) of the *Code* to determine whether a CSO is available. In *Fice*, Bastarache J, for the majority, reviewed *Proulx* and noted that, in that case, Lamer CJC declined to interpret section 742.1(a) literally and, instead, proposed a purposive interpretation. Justice Bastarache referenced Lamer CJC's concerns and stated as follows regarding the two-stage approach in *Proulx* (*Fice* at para 13):

Of course, the overall approach to s. 742.1 suggested by Lamer C.J. still requires a sentencing judge to proceed in two stages: first, the judge must determine if a conditional sentence is available; if it is, the judge must then determine if it is appropriate. However, at the first stage of this analysis, Lamer C.J. made it clear that the judge need not impose a term of imprisonment of a fixed duration; rather, the judge need only exclude two possibilities: (i) probationary measures, and (ii) a penitentiary term. Lamer C.J. explained that “[i]f either of these sentences is appropriate, then a conditional sentence should not be imposed” (para. 58). In making this preliminary determination, he noted that “the judge need only consider the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2 to the extent necessary to narrow the range of sentence for the offender” (para. 59).

[emphasis in original]

[65] The accused in *Fice* pleaded guilty to aggravated assault, fraud over \$5,000, personation, forgery and breach of recognizance. Defence counsel conceded that a penitentiary sentence was otherwise warranted, but urged a CSO be imposed because of the time spent in pre-sentence custody. The accused had spent approximately sixteen months in pre-sentence custody and six months in a circumstance of house arrest at the time of sentencing. The sentencing judge did not address the Crown’s argument that it was illegal to impose a CSO. Instead, the sentencing judge considered the pre-sentence custody to be equivalent to almost three years of incarceration and concluded the accused should serve an additional fourteen months by way of a CSO (see *ibid* at para 3).

[66] The accused in *Fice* argued that the actual sentence imposed by the sentencing judge was less than two years and that a conditional sentence was therefore available. Justice Bastarache rejected that argument as not being

consistent with the conditional sentencing regime, as defined in *Proulx*, for three reasons:

- (i) A CSO “is only available for those offenders who would have otherwise received a sentence of imprisonment of less than two years. Offenders for whom probation or a penitentiary sentence would be appropriate are barred from receiving” a CSO (*Fice* at para 15; citing with approval *Proulx* at paras 49, 55).
- (ii) Pre-sentence custody should not be taken into account in determining the availability of a CSO under the stage one analysis because the time spent in pre-sentence custody is part of the total punishment imposed and it is not a mitigating factor that can affect the range of sentence and, therefore, the availability of a CSO (see *Fice* at para 18).
- (iii) Based on a purposive reading of section 742.1(a) of the *Code*, the sentencing judge is required to “impos[e] a sentence of imprisonment of less than two years” (*Fice* at para 28), which should be fulfilled by a preliminary determination of the appropriate range of available sentences. It is only after the preliminary determination is made and all other statutory prerequisites are met that the judge should proceed to the second stage of the analysis where the duration, venue and, if a conditional sentence is imposed, the conditions of the sentence are determined (see *ibid*; citing with approval *Proulx* at para 60).

[67] *Fice* made it clear that time spent in pre-sentence custody ought to be considered at the second stage of the analysis with respect to the duration of the sentence, rather than at the first stage with respect to the appropriate sentence range.

[68] In the present case, the accused argues that *Fice* stands for the proposition that pre-sentence custody cannot be considered when determining the availability of a CSO. In other words, it would be an error to deduct the time served to make a CSO available at the first stage, as the sentencing judge did in *Fice*. I would agree.

[69] In *MacDonald*, this Court found that the sentencing judge erred by giving credit for eighteen months of enhanced pre-sentence custody and then imposing an eighteen-month CSO without considering their combined effect. It accepted the parties' concession that "the sentencing judge must have commenced his sentencing analysis by first making a preliminary determination that the appropriate sentence was one of three years [and that, as] a matter of law, . . . the initial imposition of a 36-month sentence, barred the accused from receiving a conditional sentence" (*ibid* at para 4). The result was that the sentencing judge committed an error in principle and that no deference was owed to the sentencing judge's sentence (see *ibid* at paras 22-26).

[70] Before dealing with the alleged *Proulx* and *Fice* errors, I will address the accused's argument that, by using the words "may take into account", section 719(3) of the *Code* gives a judge discretion to account for pre-sentence custody, and *Fice* does not place any obligation on a judge to consider pre-sentence custody at all when imposing a CSO.

[71] I would note first that, although section 719(3) provides that a court *may* take into account any time spent in custody by the accused, virtually all authorities deduct time for pre-sentence custody when determining the final sentence, typically on a 1.5:1 basis. In *R v Summers*, 2014 SCC 26 [*Summers*], the Supreme Court was required to interpret sections 719(3) and 719(3.1) of the *Code*. Justice Karakatsanis, for the Court, stated that “it would be unfair if a day spent in custody, prior to sentencing, were not counted towards an offender’s ultimate sentence” (*Summers* at para 21). Sections 719(3) to 719(3.4) of the *Code* are attached as an appendix to these reasons.

[72] Justice Karakatsanis emphasized that taking into account the time served in pre-sentence custody, whether a credit is ultimately granted, is an important aspect of the proportionality and parity principles (see *Summers* at paras 21, 60-69). This highlights the relevance and importance of pre-sentence custody as a factor in determining a fit sentence. Consistent with *JW*, the failure to consider a relevant factor in sentencing is an error in principle.

[73] I would note that, to provide transparency in sentencing, section 719(3.2) places an obligation on a sentencing judge to give reasons for their treatment of pre-sentence custody, and the jurisprudence holds that that obligation applies whether or not credit is ultimately given (see Clayton C Ruby, *Sentencing*, 10th ed (Toronto: LexisNexis, 2020) at ch 13, s 13.99; *R v Evans*, 2019 ONCA 715 at para 290). Despite that obligation, the failure to provide reasons does not, in itself, affect the validity of the sentence (see the *Code*, s 719(3.4)).

[74] In the present case, although both the Crown and the defence referred to the time spent in pre-sentence custody in their submissions to the trial judge, she made no reference to that factor at all in her reasons. If she considered it in determining the availability of a CSO at the first stage, that would be an error in law because, as explained in *Fice*, pre-sentence custody is not to be considered at that stage.

[75] Further, the trial judge gave no indication that she was considering the pre-sentence custody at the second stage and that inference is not available on the facts of this case. As noted above, time spent in pre-sentence custody is a relevant factor in sentencing and, in my view, the trial judge's failure to consider it as part of the stage two analysis when she determined the sentence to be imposed constituted an error in principle.

[76] In addition, the trial judge incorrectly stated that the accused had been released to the BHF in December 2021 when, in fact, he was not released until April 19, 2022. This meant he served the equivalent of eight months in pre-sentence custody.

[77] I am of the view that the trial judge's errors in the application of the principles in *Proulx* and *Fice* impacted the sentence she imposed. As noted, the relevant credit for pre-sentence custody was approximately eight months. If it could be inferred that she took that into account at the first stage, that would have impacted her determination that a penitentiary sentence was not required. I say this because the ultimate sentence she imposed was the maximum CSO available—two years less a day. If, at stage one, she concluded that a high-end, non-penitentiary sentence was appropriate (as she ultimately found) after allowing a credit for pre-sentence custody, then she

must also have concluded that the available sentence, before allowing a credit for pre-sentence custody of eight months, was over two years, which would result in a penitentiary sentence. This would make a CSO unavailable.

[78] If the trial judge did not take the pre-sentence custody into account at stage one, then I am still of the view that she erred in finding that a penitentiary sentence was not required for the reasons set out in the next section addressing a fit sentence. This error had an impact on the sentence as, again, it led her to find that a penitentiary sentence was not required and that a CSO was available.

[79] The trial judge's failure to take into account the pre-sentence custody at the second stage clearly had an impact on the final sentence. There is nothing in the facts of this case that indicates that credit for pre-sentence custody would not have been granted. In fact, the Crown's position at sentencing was that pre-sentence custody should be deducted from the final sentence imposed.

[80] As stated in *Friesen*, and recently confirmed in *JW*, "if a sentencing judge made an error in principle that had an impact on the sentence, an appellate court must perform its own sentencing analysis to determine a fit sentence" (*Friesen* at para 27) and it is not necessary to also find that the sentence is "demonstrably unfit or falls outside the range of sentences imposed in the past" (*ibid*). Having found such an error, it falls to this Court to re-sentence the accused.

4. *If the Trial Judge Erred in Granting the CSO and That Error Had an Impact on the Sentence, What Would a Fit Sentence Be?*

[81] Relying on *R v Lea*, 2010 MBCA 37 [*Lea*] and *R v Ploumis*, 2000 CanLII 17033 (ONCA), leave to appeal to SCC refused, 28411 (3 May 2001) [*Ploumis*], the accused submits that, if this Court agrees that the trial judge was in error in neglecting to account for the accused's pre-sentence custody in her stage two analysis, then it is merely a calculation error and the time in custody of eight months should be deducted from the duration of the CSO. This would leave a CSO of sixteen months' duration. Since approximately one month of the CSO was served before it was suspended, this should also be deducted, so the remaining CSO would be fifteen months in duration.

[82] The Crown, on the other hand, seeks a sentence of fifty-seven months' incarceration, comprised of four years' custody going forward, with a credit of eight months for pre-sentence custody and one month for the time spent on the CSO before it was suspended, for a total credit of nine months.

Analysis

[83] In determining an appropriate sentence in this case, I would, as noted above, defer to the trial judge's finding on the accused's level of involvement in the illicit activity.

[84] Considering the circumstances of the accused as found by the trial judge, I note that the accused has prior drug-related convictions, including one in 2019 for which he received an effective sentence of two years' incarceration and probation. On an earlier conviction for possession of meth for the purpose trafficking, he received a three-year suspended sentence because he had

successfully spent two years at the BHF. His current involvement with the BHF is his third time in the BHF programming. He was on probation and on release for another allegation of a similar offence when he committed the offences at issue here.

[85] The trial judge reviewed the aggravating and mitigating factors and I would not disagree with her identification of those factors. The accused's recent and related prior criminal convictions and involvement in trafficking meth are significant aggravating factors requiring denunciation and deterrence.

[86] The circumstances in this case are similar to those reviewed by this Court in *Johnson*, where the accused pled guilty to possessing over 600 grams of cocaine for the purpose of trafficking. The Crown sought a four-year period of incarceration, while the accused argued that "exceptional circumstances" existed that warranted a non-custodial sentence" (*ibid* at para 2). The sentencing judge suspended the passing of sentence and imposed three years of supervised probation. At the time of arrest, the accused had a little over sixty grams of cocaine in his jacket pocket and \$3,120 in cash. The police also found cocaine in his home, such that the total amount of cocaine in his possession and under his control was over 600 grams. The accused agreed that the amount of cocaine he was holding for the traffickers was significant and consistent with mid-level trafficking. The accused was using cocaine on a daily basis and was being paid with cocaine.

[87] After the accused in *Johnson* was released, he completed a ten-week Alcoholics Anonymous program and advised that he had remained sober ever since. He also had a positive PSR; was assessed as a low risk to reoffend; was

employed full-time; and had custody of his four children, remaining their sole provider. He submitted five letters of reference with positive reports about him for consideration.

[88] The sentencing judge in *Johnson* found that there existed exceptional circumstances that justified a suspended sentence. A CSO was not available as a sentence at that time, which was prior to amendments made to the *Code* in 2022 (see *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, SC 2022, c 15).

[89] In allowing the appeal in *Johnson* and sentencing that accused to thirty months' incarceration (less a credit for pre-sentence custody), this Court emphasized that denunciation and general deterrence are paramount sentencing considerations and went on to say at para 13:

The objective of denunciation and general deterrence is that the sentence should communicate society's condemnation of that conduct and generally deter others who might consider engaging in such conduct (see *M (CA)* at para 81; and *R v BWP*; *R v BVN*, 2006 SCC 27 at para 2). When the principles of denunciation and general deterrence are paramount, the focus of the sentencing judge is more on the offence committed (the conduct), than on the offender (the personal circumstances of the accused). Put another way, while factors personal to the accused remain relevant, they necessarily take on a lesser role. See *R v McMillan (BW)*, 2016 MBCA 12; and Clayton C Ruby et al, *Sentencing*, 9th ed (Toronto: LexisNexis, 2017) at para 1.18.

[emphasis in original]

[90] The present case deals with the imposition of a CSO, rather than a suspended sentence. That said, the sentencing principles to be considered are similar. In *Johnson*, this Court reviewed two aspects of the sentencing judge's

findings, which also apply here. The sentencing judge found that the accused's moral culpability was on the low side because he was stashing the drugs in exchange for cocaine and he was not a part of a commercial enterprise. The sentencing judge also found that the accused had made significant changes in his life since his arrest. This Court reviewed both findings. As to moral culpability, it was emphasized that "due regard must be given not only to the normative character of the offender's conduct, but also to the intentional risk-taking of the offender and to the consequential harm caused by the offender" (*ibid* at para 16).

[91] As pointed out in *Johnson*, it is unfortunate that many people traffic drugs to feed their drug addiction and, while the moral blameworthiness of an accused who commits a crime to feed an addiction is lower than one who does so only for greed, that does not end the sentencing judge's moral culpability assessment. An assessment of the accused's intentional risk-taking and the consequential harm is also required.

[92] Similar to *Johnson*, the trial judge in this case emphasized the normative character of the accused's conduct. It is significant that the accused was not only committing a crime to feed his addiction, as the evidence was that he was paid in both drugs and money.

[93] As with *Johnson*, the intentional risk-taking by the accused in this case was significant, given the quantity of drugs involved. He was also arrested with \$2,315 on his person that was found to be proceeds of crime.

[94] In terms of the consequential harm, the trial judge pointed out as follows (*decision* at para 39):

Methamphetamine is a scourge upon our communities. It is too often the prime mover for all other criminal activity in Manitoba. [The accused's] moral culpability is high. The value of the drugs he was carrying was significant implying some level of trust by those paying him to move it about the city. The quantity of the drug was also significant making [the accused's] role in its distribution reprehensible. However, all of this is tempered by the fact that his singular motivation was to support his decades long addiction to methamphetamine.

[95] I would agree with trial judge's identification of the consequential harm and her assessment that the accused's moral culpability was high, but tempered by his decades-long addiction to meth.

[96] Given that denunciation and deterrence are the primary sentencing principles, the accused's personal circumstances take on a lesser role in crafting a fit sentence (see *R v Chief*, 2024 MBCA 67 at para 51 [*Chief*]; *R v KNDW*, 2020 MBCA 52 at para 21).

[97] I would agree with the accused, however, that deference should be afforded to the trial judge's findings on rehabilitation to temper the weight of denunciation and general deterrence, given the accused's long addiction to meth. As pointed out by the trial judge (*decision* at para 46):

I am satisfied by the contents of the PSR, and other sentencing materials submitted by counsel that [the accused] is not a risk to the community. In fact, as of late he has been a contributing member of society not only by way of lawful employment, but through his work with BHF. He is not just sober and carrying on with his life as if nothing happened. Despite carrying significant shame and regret, [the accused] speaks and leads groups at BHF. He finds himself in a new, more positive position of trust as he chaperones and is a mentor to other residents. He is dedicated to setting an example to others who are still living a life of addiction and crime. [The accused] recognizes that sobriety is a process and

not an achievement. He continues to work on his own sobriety by attending programs and therapy. He continues to live in transitional housing recognizing that he needs a slow reintegration into unsupported living in the community.

[98] This Court has previously stated that “drug traffickers should receive a term of imprisonment absent ‘exceptional circumstances’” (*R v Sass*, 2018 MBCA 46 at para 2 [*Sass*]). The sentencing objectives of denunciation and deterrence are the paramount considerations when sentencing offenders trafficking “hard drugs” (*R v Grant (IM)*, 2009 MBCA 9 at para 108, leave to appeal to SCC refused, 33065 (11 June 2009)). However, as Mainella JA noted in *Sass*, section 10(1) of the *CDSA* also permits sentences to “encourage rehabilitation and treatment of drug offenders” (at para 4).

[99] The trial judge made no finding of exceptional circumstances in this case, nor were exceptional circumstances argued on appeal. That said, the principles related to exceptional circumstances were reviewed by this Court in *R v Burnett*, 2017 MBCA 122, and, in that decision, Mainella JA made it clear that the law does not require a sentencing judge to find exceptional circumstances to justify imposing a sentence that merely departs downward from a starting point or sentencing range (see para 25).

[100] Justice Mainella described the factors considered to determine exceptional circumstances as follows (*ibid* at paras 28-30):

While there are an infinite variety of offenders, as well as ways in which offences can be committed, such that the application of the exceptional-circumstances principle cannot easily be predicted, there are a few core features to it. Exceptional circumstances can arise from the way in which an offence is committed or from the circumstances of the offender or a combination thereof (see *R v Gutoski*, 1990 CarswellMan 1 at para 12 (CA); and *Scanlon* at

para 13). A sentencing judge's assessment of whether there are exceptional circumstances is a holistic exercise based on an evaluation of the totality of the circumstances and all of the relevant sentencing objectives and principles (see *Tran* at para 20). Ensuring the overall proportionality of a sentence when considering if an offender has demonstrated exceptional circumstances is important because, if a sentence does not reconcile in a principled fashion the interests of the individual and parity, it cannot be proportional (see *Lacasse* at para 53). Prior decisions provide guidance as to what factors may, or may not, form the basis of a finding of exceptional circumstances (see *R v Henderson*, 2012 MBCA 9 at para 47; and *Tran* at para 24).

Findings of exceptional circumstances occur only in the clearest of cases when there are “multiple mitigating factors” of significance (*Tran* at para 24) or the offender’s motive for committing the offence is highly unusual. In terms of motive, I agree with the comments of the New Brunswick Court of Appeal in *R v Chaulk*, 2005 NBCA 86, that exceptional circumstances likely will not exist where the offender was “driven solely by greed” and his or her conduct occurred over “a considerable period of time” (at para 8). See also *Regina v Holt* (1983), 4 CCC (3d) 32 at 51 (Ont CA), leave to appeal to SCC refused [1983] SCCA No 474.

Where there is an arguable case of exceptional circumstances, two themes are common in the case law that sentencing courts focus on: has the accused concretely demonstrated that he or she has turned his or her life around since his or her arrest, and would the fundamental purpose of sentencing (see section 718 of the *Code*) be better served by a custodial or non-custodial sentence for someone who has proven to have turned his or her life around since his or her arrest (see *Peters* at para 28).

[emphasis added]

[101] In the present case, while the accused has demonstrated that he has indeed turned his life around since his arrest, I am not satisfied that the evidence, in total, meets the high threshold of establishing that a non-custodial

sentence would be proportionate, particularly having regard to his past record of offending.

[102] I pause here to address *Lea* and *Ploumis*, where the appellate courts found illegal CSOs and remedied that by imposing CSOs of shorter duration. In *Lea*, this Court found that, despite the sentencing judge's error, a sentence served in the community, that is, a CSO, was within the range of sentences for those offences and for that offender (see paras 9, 24, 27). In the present case, unlike *Lea*, a non-penitentiary sentence before deducting time served in pre-sentence custody is not appropriate, so a CSO is not available. Nor is it appropriate given that exceptional circumstances have not been demonstrated.

[103] Considering the circumstances of the offence and of the offender as discussed above, and applying the principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender, I conclude that, at the time of sentencing, a fit sentence for the offence of possession of meth for the purpose of trafficking would have been a three-year period of incarceration, before allowing a credit for pre-sentence custody. This takes into account the mitigating fact that, prior to sentencing, the accused had been on release under strict conditions for many months.

[104] Sentencing the accused on the basis that a fit sentence would have been thirty-six months, I would take into account the fact that, once the CSO was suspended, the accused was again subject to strict release conditions that required him to continue to reside at the BHF and follow its conditions for a further period of many months. Taking this into account, I would conclude that the appropriate sentence is thirty-two months.

[105] Allowing a credit of eight months for time served in pre-sentence custody, I would impose a sentence going forward of twenty-four months' incarceration for the offence of possession of meth for the purpose of trafficking. From this, I would allow a further credit of one month for the period that he served on the CSO, so that the time yet to be served is twenty-three months. No submissions were made at the sentencing hearing or on the appeal about an appropriate sentence for the offence of possession of proceeds of crime. In the absence of submissions, I would conclude that a fit sentence for that offence is six months' incarceration, concurrent to the sentence for the possession of meth for the purpose of trafficking.

[106] This raises the question of the availability of a probation order to follow the incarceration. The *Code* permits a judge to make a probation order in addition to any custodial sentence, so long as the term of the imprisonment does not exceed two years (see the *Code*, s 731(1)).

[107] In *R v Mathieu*, 2008 SCC 21, the Supreme Court stated that the sentence that determines the availability of a probation order is the final sentence, after giving credit for time served in pre-sentence custody. Thus, although I would sentence the accused to a period of incarceration of three years (thirty-six months), the relevant sentence for determining the availability of a probation order is the final sentence, which I would find to be twenty-four months' incarceration. As the final sentence does not exceed two years' incarceration, this permits the addition of a period of probation as part of a legal sentence.

[108] In my view, the three-year period of probation and the conditions imposed by the trial judge remain appropriate for the reasons she identified.

[109] This leads to the final issue of whether it is in the interests of justice to stay all or part of the sentence imposed.

5. *If This Court Imposes a Period of Incarceration, Should All or Part of the Sentence Be Stayed?*

[110] The parties disagree as to whether a stay is appropriate in the circumstances of this case.

[111] The paramount consideration on the question of whether to incarcerate or reincarcerate an offender whose sentence has been increased on appeal is whether it is in the interests of justice to do so (see *R v Daniels*, 2023 MBCA 86 at para 20 [*Daniels*]; *R v MacLean*, 2021 NLCA 24 at para 78). For offences where denunciation and deterrence are the primary sentencing considerations, one factor to consider is whether those objectives can be adequately served without incarcerating the offender (see *Chief* at para 58; *R v Kleykens*, 2020 NSCA 49 at para 87).

[112] In *Daniels*, Steel JA, writing for this Court, summarized the factors that have been considered in the analysis of whether to reincarcerate an offender based on an increased custodial sentence imposed on appeal. The factors include (*ibid* at para 21):

- (a) the elapsed time since the offender was released from custody and the date when the appellate court hears and decides the appeal;
- (b) the potential for injustice if the new sentence is served;
- (c) the length of time since the offence occurred or the original sentence was imposed (see *R v Clouthier*, 2016 ONCA 197 at para 63);

- (d) rehabilitation issues, including the impact of reincarceration on the rehabilitation of the offender; whether there has been evidence of progress in rehabilitation or evidence of rehabilitative efforts since the original sentencing; and the behaviour and conduct of the offender in the ensuing period since sentencing (see *JED* at paras 115, 144; and *R v Veysey*, 2006 NBCA 55 at paras 17-40);
- (e) the reasons for any delay between the date of arrest and the date the appeal sentence was imposed (see *R c Clarke*, 2015 QCCA 1995);
- (f) the gravity of the offence (see *McMillan* at para 37); and
- (g) the length of sentence remaining to be served (i.e., the difference between the new sentence and the original sentence) (see *Anderson* at para 32(5)).

[113] A recent decision that is similar to this case is *R v Glynn*, 2025 ONCA 310 [*Glynn*]. The respondent pleaded guilty to trafficking cocaine and meth over a four-month period and to trafficking for the benefit of a criminal organization. The sentencing judge reduced the initial sentence of forty-two months' imprisonment to a CSO of 729 days after giving credit for time served in pre-sentence custody and for compliance with strict bail conditions. The Ontario Court of Appeal concluded that, in doing so, the sentencing judge erred pursuant to *Fice*. It set aside the CSO and imposed a global sentence of three-and-one-half years' incarceration, less credit for time served, as agreed to by the parties (see *Glynn* at para 12). The parties also agreed that the remainder of the sentence should be stayed—476 days' incarceration (1,277 days less 86 days for pre-sentence custody, less a further 707 days for the 471 days served pursuant to the CSO) (see *ibid* at para 13).

[114] The Court agreed with the parties' joint recommendation to stay the remainder of the sentence and held that numerous factors weighed in favour of granting a stay. These included the "highly unusual circumstances of [the] case", the time spent in pre-trial custody, the time spent on bail involving house arrest, the credit allocated for the time the respondent already served under the CSO, the respondent's progress toward rehabilitation and the likelihood that he would be eligible for parole (*ibid* at para 13; see also *R v Sauvé*, 2023 ONCA 310 at paras 8-9, 12 [*Sauvé*]).

[115] In *Sauvé*, the Court stayed a global eighteen-month custodial sentence imposed by the sentencing judge for several counts of possession of six different controlled substances for the purpose of trafficking. The appellant did not argue that the sentence was unfit but, rather, sought a stay of execution of the sentence, or that a sentence of time served or a CSO be substituted for the custodial sentence, based on fresh evidence of "the extraordinarily successful rehabilitative steps that she ha[d] taken to turn her life around" (*ibid* at para 5). The Crown did not oppose the stay, "given the appellant's remarkable and highly unusual degree of rehabilitation since her convictions and sentencing" (*ibid* at para 6).

[116] The Court agreed that the custodial sentence should be stayed, finding that the case was "one of those exceptional cases that warrant[ed] appellate intervention to respond to the appellant's significant positive transformation" (*ibid* at para 8). The Court detailed the appellant's rehabilitative transformation, including evidence she had turned her life around, was a devoted mother to her young child, was supporting her disabled mother and had achieved extraordinary academic success.

[117] The Court held that it was not in the interests of justice to reincarcerate the appellant, finding that a stay would not undermine general deterrence or denunciation. The impact of a stay on sentencing objectives would be outweighed by the impact of reincarceration on the appellant's rehabilitation (see *ibid* at para 9).

[118] Applying the analyses from *Daniels*, *Glynn* and *Sauvé* to this case, I have considered the following:

- a) The accused was arrested in November 2021 and remained in custody until he was released to the BHF on April 19, 2022 (equivalent to eight months in custody).
- b) He was found guilty of two offences on December 18, 2023, and was sentenced on October 2, 2024.
- c) There is no question that the accused has made remarkable progress in rehabilitation. His efforts are exemplary and were emphasized in a letter from the BHF confirming that he is a role model for others suffering from the adverse effects of drug addiction. He continues to attend outreach meetings offered by the BHF and is described as “a valuable member of the BHF Community.”
- d) The accused has regained the support of his family, has trained to become a welder and is now gainfully employed.

- e) Since April 19, 2022, he has remained at the BHF and is subject to curfews. There is no evidence that he breached any of the rules of the BHF program or any conditions of his release.
- f) The accused has been convicted of serious offences that would ordinarily result in a penitentiary term.
- g) The length of sentence remaining to be served is twenty-three months.

[119] After considering these factors, I am of the view that the accused has not only been truly remorseful, but has become a productive member of society and in his community. He has managed to upgrade his education, secure gainful employment and comply with all the conditions of his release since April 2022. He has rekindled his relationship with his family who now provides him strong support.

[120] The accused has become, and continues to be, a role model for others suffering from drug addiction and mental health issues in the BHF program. He is currently residing in the BHF transitional housing and is a peer advisor to participants in the program. He leads and speaks to support groups. He chaperones other program members in the community and manages the house where he lives. He is distancing himself from those who use drugs or have that lifestyle.

[121] The probation officer interviewed the accused's father and reported that he had a concern that, should the accused go into custody, it would ruin what he has accomplished regarding his sobriety to date.

[122] Finally, the probation officer indicated that the accused no longer talks to people who use drugs or are “living that lifestyle.” He remains focussed on associating with people who are sober in the BHF programs. Obviously, that would change if he were incarcerated.

[123] I am of the view that, in the unique circumstances of this case and given the progress that has been made by the accused, which has continued since he was sentenced, there would be an injustice if the custodial sentence was not stayed. In my view, sending the accused to jail would be counterproductive and work an injustice, even in this case where the gravity of the offences is serious.

[124] Balancing all the factors and, particularly, the potential impact of incarceration on the accused’s rehabilitation, I am satisfied that it is in the interests of justice to stay the custodial portion of the accused’s sentence.

[125] The answer to the question of whether an appellate court can grant a stay of part of a sentence is clear. It is, in my view, uncontroversial that this Court has the discretion to stay the custodial portion of the sentence and order that the probationary and ancillary orders remain in place, so long as the final sentence does not exceed two years’ incarceration after giving credit for time served in pre-sentence custody (see *R v Basso*, 2024 ONCA 168; *Sauvé*; *R v Anderson*, 2017 MBCA 31). I would not stay the probation order or the ancillary orders.

Disposition

[126] For the foregoing reasons, I would grant leave to appeal the sentence, allow the sentence appeal, set aside the CSO of two years less a day

and impose a sentence of thirty-six months' imprisonment for possession of meth for the purpose of trafficking. Taking into account that the accused has since been subject to strict release conditions after the suspension of the CSO, I would determine that a fit sentence is thirty-two months. After credit for pre-sentence custody, I would impose a go-forward sentence of twenty-four months' incarceration for that offence. From this, I would grant a credit of one month for the time served on the CSO, so that the time yet to be served on the sentence for possession of meth for the purpose of trafficking is twenty-three months. I would also impose a concurrent jail sentence of six months' incarceration for possession of proceeds of crime. I would stay both custodial sentences. I would confirm the three-year supervised probation order and related conditions, as well as the ancillary orders imposed by the trial judge.

Edmond JA

I agree: _____
Beard JA

I agree: _____
Simonsen JA

APPENDIX

Sections 719(3) to 719(3.4) of the *Criminal Code*, RSC 1985, c C-46, provide:

Determination of sentence

719(3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.

Exception

719(3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody.

Reasons

719(3.2) The court shall give reasons for any credit granted and shall cause those reasons to be stated in the record.

Record of proceedings

719(3.3) The court shall cause to be stated in the record and on the warrant of committal the offence, the amount of time spent in custody, the term of imprisonment that would have been imposed before any credit was granted, the amount of time credited, if any, and the sentence imposed.

Infliction de la peine

719(3) Pour fixer la peine à infliger à une personne déclarée coupable d'une infraction, le tribunal peut prendre en compte toute période que la personne a passée sous garde par suite de l'infraction; il doit, le cas échéant, restreindre le temps alloué pour cette période à un maximum d'un jour pour chaque jour passé sous garde.

Exception

719(3.1) Malgré le paragraphe (3), si les circonstances le justifient, le maximum est d'un jour et demi pour chaque jour passé sous garde.

Motivation obligatoire

719(3.2) Le tribunal motive toute décision d'allouer du temps pour la période passée sous garde et fait inscrire les motifs au dossier de l'instance.

Inscription obligatoire

719(3.3) Il fait inscrire au dossier de l'instance et sur le mandat de dépôt l'infraction en cause, le temps passé sous garde, la période d'emprisonnement qui aurait été infligée n'eût été tout temps alloué, le temps alloué, le cas échéant, et la peine infligée.

Validity not affected

719(3.4) Failure to comply with subsection (3.2) or (3.3) does not affect the validity of the sentence imposed by the court.

Validité de la peine

719(3.4) L'inobservation des paragraphes (3.2) ou (3.3) n'entache pas la validité de la peine infligée.