File No. 38300

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA)

BETWEEN:

HER MAJESTY THE QUEEN,

APPELLANT,

- and -

JUSTYN KYLE NAPOLEON FRIESEN

RESPONDENT.

FACTUM OF THE APPELLANT
ATTORNEY GENERAL OF MANITOBA

MANITOBA JUSTICE
Prosecution Service
510 – 405 Broadway
Winnipeg, Manitoba R3C 3L6

Rekha Malaviya
Renée Lagimodière
Tel: 204-945-2852
Fax: 204-948-1260
E-mail: rekha.malaviya@gov.mb.ca
E-mail: renee.lagimodiere2@gov.mb.ca

Counsel for the Appellant

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
2600 – 160 Elgin Street
Ottawa, Ontario K1P 1C3

D. Lynne Watt
Tel: 613-786-8695
Fax: 613-788-3509
E-mail**:** lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Appellant

BUETI WASYLIW WIEBE
1710 – 330 Portage Avenue
Winnipeg, Manitoba R3C 0C4

Ryan McElhoes
Tel: 204-989-0037
Fax: 204-989-0100
E-mail: Ryan@bwwlaw.ca

Counsel for the Respondent

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, Ontario K2P 0R3

Marie-France Major
Tel: 613-695-8855
Fax: 613-695-8580
E-mail: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Respondent

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Part I – Overview and Statement of Facts

A. Overview

1. Over the last 30 years, Parliament and courts have clearly identified the need to increase sentences for sexual assaults against children. They have also increasingly recognized the significant and potentially lifelong damage experienced by victims of these crimes. Yet, sentences for sexual assaults against children have nevertheless remained virtually stagnant. With respect, the outdated sentences no longer reflect society's understanding and abhorrence of these crimes and have not curtailed them.

2. For at least three reasons, sentences for child sexual abuse are not consistent across the country, except that they remain low:

i) Courts which use a starting point approach continue to rely on precedents which are decades old;

ii) Further to that, these courts often resort to the same starting point applied where the victim is an adult because there is no generally-accepted starting point for cases where the offender is not in a position of trust;

iii) Whether or not they use starting points, courts lack meaningful guidance especially for cases where the offender is not in a position of trust. A common approach – distinguishing precedents wherein a position of trust is present and therefore an aggravating factor – consistently results in low sentences when that factor is absent.

3. At the Respondent's direction, the victim's mother made her four-year old daughter available for his sexual gratification. After the child's clothes and diaper were removed, the Respondent directed the mother to bring the child's mouth to his penis. The child was physically forced to fellate him until her screams attracted the attention of another adult elsewhere in the residence. After the child was removed from the bedroom, the Respondent threatened the mother in an effort to have the child brought back so that he could continue his violation of her.

4. The Respondent pled guilty to sexual interference and attempted extortion. The sentencing judge observed that there were virtually no precedents available where the offender was not in a position of trust. He sentenced the Respondent to six years, less pre-sentence custody. The Manitoba Court of Appeal held that the sentencing judge had used a wrong starting point and reduced the Respondent's sentence to four and one-half years.

5. With respect, even if the choice of a starting point could constitute an error of law, there was no available starting point for this situation. As noted above, such guidance is available where the victim of a sexual assault is an adult or where the offender is in a position of trust. There is nothing "in between" to guide sentencing courts when there is no trust relationship between a child victim and her/his abuser.

6. Moreover, the Manitoba Court of Appeal's emphasis on the lack of such a relationship ignored the serious nature of the Respondent's crime, position of trust notwithstanding. Parliament has repeatedly increased its focus on the seriousness of sexual crimes against children and their lifelong – often inter-generational – impact. These impacts are no less present where the offender was not in a trust relationship with the victim. To the extent that current sentencing ranges fail to reflect this focus, they must be updated.

B. Facts and Procedural History

7. Immediately after meeting on an online dating website, on June 29, 2016, the victim's 31-year old mother (co-accused in this matter) picked up the 28-year old Respondent and brought him back to her residence where they engaged in sexual activity.[1]

> Transcript of Proceedings ["Transcript"], January 4, 2017, Appellant's Record, Tab 7, p. 37; Arrest Summary (appended to Pre-Sentence Report), Appellant's Record, Tab 9, p. 95.

[1] The mother's charges arising out of this incident and an earlier one involving her son are scheduled for trial in May 2019.

8. After this encounter, the two continued exchanging communications. On July 16, 2016, the Respondent texted the mother from a bar and asked her to buy wine coolers and suppository spray, the latter so that she could defecate on him in the course of sexual activity. She obliged.

Ibid.

9. At approximately 1:00 a.m. on July 17, 2016, the Respondent and the mother returned to her residence. The mother's four-year old daughter and two-year old son were being cared for by the mother's friend.

Ibid.

10. While the Respondent and the mother were engaged in sexual activity, the Respondent asked her to get her daughter. She did so. She brought the child upstairs to the bedroom, removed her diaper, and set her down naked on the bed where the Respondent was masturbating.

Ibid.

11. What subsequently occurred was recorded by the mother. The Respondent is heard to say the following:

> No, you ain't gonna run you fucker. ([The child] begins crying.)
>
> Put her pussy on here (…Child is in distress as [the Respondent] talks and it is difficult to hear what he is saying).
>
> You put her mouth on my cock.
>
> Put her mouth down there.
>
> …
>
> Put her mouth on my cock.
>
> Force it down there.
>
> (inaudible as [the child] is screaming)
>
> Transcript, January 4, 2017, Appellant's Record, Tab 7, p. 37; Transcript of Audio Recording, Appellant's Record, Tab 10, pp. 96-97. (Emphasis added.)

12. The friend, who was awoken by the child's screams, entered the bedroom. She initially assumed she had walked in on consensual sexual activity. When she realized that the two had involved the child, she immediately removed her.

Transcript, January 4, 2017, Appellant's Record, Tab 7, p. 37.

13. The Respondent, not yet finished with the child, demanded that the mother get her back. He told her:

> You're gonna go downstairs, tell your friend if you don't agree to fuck your daughter, that shit's going to come out and she's gonna be cool with it.
>
> …
>
> You go downstairs, tell your daughter, tell your friend, you fucked, you sucked your daughter's your son's cock listen to me.
>
> …
>
> You're gonna go downstairs tell your friend you[r] son, you sucked your son's cock.
>
> …
>
> and me and you are going to mess around with your daughter even though she's crying.
>
> …
>
> …I haven't fucked your daughter yet, you just played with my tool…
>
> Transcript of Audio Recording, Appellant's Record, Tab 10, pp. 100, 101. (Emphasis added.)

14. The Respondent continued to tell the mother that he was going to rape her daughter and threatened that if she did not get the child, he would tell the friend about the incident referred to above where the mother allegedly fellated her two-year old son.

Transcript, January 4, 2017, Appellant's Record, Tab 7, p. 37.

15. Soon after, the friend kicked the Respondent out of the residence and told him that she was calling police despite his threat that he was associated with the Hell's Angels. He left and the police were contacted.

Ibid, pp. 37-38.

16. The Respondent entered guilty pleas to sexual interference and attempted extortion. According to a pre-sentence report, the Respondent claimed that he had "blacked out" as a result of alcohol and drug use. Despite this and a prior conviction for a drug-related offence (for which he received a discharge and probation), the Respondent asserted that drugs and alcohol had not been problems for him. He did admit to ongoing steroid use to support his bodybuilding efforts.

Pre-Sentence Report, Appellant's Record, Tab 9, pp. 74, 84.

17. The Respondent described having a difficult time in pre-sentence custody. While he engaged in institutional employment and completed a program, he also "admitted he manipulated the institutional phone system." He did this in order to contact his girlfriend, Mandi Nagy, who was protected by a condition prohibiting contact.

Ibid, p. 76.

18. She and the Respondent's former girlfriend, Maria Hrabarchuk, both of whom the Respondent met through an online dating site, were interviewed by the author of the pre-sentence report. Ms. Nagy believed that she was the Respondent's only source of support and denied that the Respondent was attracted to children. Ms. Hrabarchuk felt that the Respondent had "learned from this experience," and stated that she wanted the Respondent "to come home where he belongs." For his part, the Respondent indicated his intention to reside with Ms. Nagy when released from custody.

Ibid, pp. 81-83.

19. Through the pre-sentence report, the Respondent shared his hope to be a role model for other children and to be a Big Brother one day. He described his own experience having a Big

Brother. He stated that his Big Brother 'adopted him' and allowed him to reside in his home when he was in his mid-teens. He appeared to have left the residence after his Big Brother discovered that his wife and the Respondent had been engaged in sexual activity.

Ibid, pp. 78, 88.

20. The Respondent told the probation officer that for about one year beginning when he was 11 years old, he engaged in sexual activity with his brother and an immediate female family member. The activity stopped when the Respondent's grandmother told him to leave the residence.

Ibid, p. 77.

21. A risk assessment conducted for the purpose of the pre-sentence report evaluated the Respondent as a high risk to sexually re-offend. That is, approximately 92% of evaluated sexual offenders scored lower. Factors which caused the probation officer to endorse this assessment included "a history of prostitution, being unfaithful to romantic partners, and an unconventional sexual fetish. Furthermore, [the Respondent] shared that he has a history of requesting nude photographs and making sexually explicit videos." The probation officer was not confident that the Respondent's risk could be managed in the community in part as a result of his "essentially non-existent" insight.

Ibid, pp. 93, 94.

C. The Sentencing Judge's Decision

22. At sentencing, the Respondent acknowledged that his offence against the child was a major sexual assault. He asserted that, as a result, the three-year starting point applied and was appropriate in the circumstances. He urged the sentencing judge to note his one-year in pre-sentence custody and to impose two years less a day going forward to keep him in a provincial institution. He suggested a lengthy period of probation to follow.

Transcript, March 9, 2017, Appellant's Record, Tab 8, pp. 45, 56, 61, 68.

23. The Crown sought a sentence of seven years taking into account both the sexual interference and attempted extortion charges. It suggested that the appropriate starting point for the sexual interference charge was four to five years on the basis that the mother was in a position of trust and that, as a party to the offence, the Respondent should be treated similarly. The sentencing judge rejected this suggestion.

> *Ibid*, p. 51; Reasons for Decision, Appellant's Record, Tab 1, p. 3.

24. Unable to find guidance respecting sentences for child sexual abuse absent a position of trust, the sentencing judge turned to *R. v. Sidwell*, a decision of the Manitoba Court of Appeal, for direction as to general principles applicable to child abuse sentencing.

> Reasons for Decision, Appellant's Record, Tab 1, pp. 3-4, referring to *R. v. Sidwell*, 2015 MBCA 56.

25. The sentencing judge acknowledged distinctions between the case at bar and *Sidwell* including the brief nature of the offence, the fact that it appeared not to have occurred before, and the fact that there was no prior relationship with the child. He also said:

> But it is a situation as well, there is an aggravating factor and that is the sexual violation was accompanied by a form of extortion to have the child brought back in to be misused by [the Respondent]…The nature of this particular circumstance is such that [it] is clearly one of the worst that I have seen and it is one in which there has to be denunciation made by the court.
>
> *Ibid*, pp. 4-5.

26. Taking into account the circumstances of the offence and the Respondent's background, he sentenced him to six years for sexual interference and attempted extortion, less his pre-sentence custody. Both sentences were to be served concurrently.

D. The Manitoba Court of Appeal's Decision

27. The Manitoba Court of Appeal held that by referring to *Sidwell*, the sentencing judge had effectively elevated the Respondent's conduct to one involving a position of trust despite his

express rejection of that suggestion. Notwithstanding this Honourable Court's decision in *R. v. Lacasse* that "the choice of range or starting point is a discretionary decision and "cannot in itself constitute reviewable error,"" it found that the sentencing judge had used the wrong starting point. As a result, no deference was given to the sentencing judge's decision.

> *R. v. Lacasse*, 2015 SCC 64 at para. 51.

28. In re-sentencing the Respondent, the Court relied on its decision in *R. v. Norton* which borrowed considerably from *Sidwell*. The Court acknowledged that given the unique facts in this case, "there are very few, if any, cases involving similar acts and circumstances."

> Reasons of the Manitoba Court of Appeal, Appellant's Record, Tab 2, pp. 14-15, citing *R. v. Norton*, 2016 MBCA 79 at para. 2.

29. Restricted by its ruling that a four to five year starting point set out in *Sidwell* could only be applied in cases involving trust or authority, it imposed a four-year sentence on the charge of sexually interfering with the victim and 18 months concurrent for the attempted extortion. In order to prevent a "free ride" in relation to the latter charge, the Court added six months making the total sentence four and one-half years.[2]

[2] The Crown agreed on appeal that a six-year sentence for the attempted extortion charge was not appropriate and does not take issue with the concurrent 18 months of incarceration substituted by the Manitoba Court of Appeal.

Part II – Issues

1. Are sentencing ranges for sexual offences against children still consistent with Parliamentary and judicial recognition of the severity of these crimes?

2. Did the Manitoba Court of Appeal err by interfering with the sentencing judge's decision?

The Attorney General of Manitoba was granted leave to appeal by Order of this Honourable Court dated February 14, 2019, pursuant to *Criminal Code* s. 693(1)(b).

Part III – Argument

A. Existing sentencing ranges and starting points are outdated and insufficient

30. For almost three decades, courts have decried the dearth of precedents for sentencing in matters such as this one, yet the problem continues. In 1992, in *R. v. S.(W.B.)*, the Alberta Court of Appeal stated:

> We leave for another day consideration of whether, in the case of an accused who is a total stranger to the child and picks the child up on the street and commits a major sexual assault upon the child, the considerations relevant to sentencing would justify a sentencing policy as stern as that in the cases which we have before us [involving positions of trust].
>
> *R. v. S.(W.B.)*, [1992] A.W.L.D. 599, [1992] A.J. No. 601 (Alta. C.A.) at para. 60. (Emphasis added.)

31. In *R. v. Deck*, released 14 years later, again the Alberta Court of Appeal noted that still, "There [were] relatively few sentencing cases of sexual assaults on children where there is *not* a position of trust."

> *R. v. Deck*, 2006 ABCA 92 at para. 23. (Italics in original; underlining added.)

32. A further 10 years passed before the same court repeated in *R. v. Hajar*:

> This case illustrates the imperative need for a starting point for serious acts of sexual interference. It also reveals a disconnect in this area between changing the law and changing attitudes.
>
> *R. v. Hajar*, 2016 ABCA 222 at para. 7. (Emphasis added.)

33. Despite this recurring theme for almost three decades, courts across the country are still left wanting. Although the court in *Hajar* attempted to address the issue, as discussed below, its conflicting result has mitigated any potential progress in identifying sentencing guidelines for sexual abuse where a position of trust is absent.

34. This problem is compounded by the general failure of sentences to evolve and reflect society's current awareness of both the prevalence and the impact of child sexual abuse. Instead, significant weight is still being placed on decisions which are decades old.

35. Starting points have long existed for various offences including sexual offending against both adults and children. The three-year starting point to be applied when a major sexual assault is perpetrated against an adult was established by the Alberta Court of Appeal in 1985 in *R. v. Sandercock*.

R. v. Sandercock (1985), 22 C.C.C. (3d) 79, 48 C.R. (3d) 154 (Alta. C.A.).

36. Even those courts which have resisted the use of starting points and sentencing ranges, regularly rely on the guidance provided by decisions such as *Sandercock* in determining appropriate sentences in sexual assault cases, including those involving child victims.

See, for example: *R. v. Revet*, 2010 SKCA 71 at paras. 16, 24.

37. The Saskatchewan Court of Appeal has repeatedly expressed such reluctance while noting that a three-year guideline has become a sort of "default" position when assessing appropriate sentences for any sexual assault offence whether committed against a child or an adult:

> …the Court established a three-year starting point sentence almost 25 years ago for sexual assaults against adults. Since that time, the three-year mark has been the standard reference point for sentencing judges when imposing sanctions on offenders who have sexually assaulted adults. Nonetheless, it has also sometimes served as a touchstone in sentencing for those who have assaulted children. In this latter context, sentences have not infrequently been imposed with little or no real analysis of the nature or the circumstances of the offence. In other words, <u>even though the Court has never formally endorsed a starting point sentence for sexual offences against children, sentencing decisions in relation to such offences have reasonably often simply defaulted to the three-year mark.</u>

R. v. V.(L.), 2016 SKCA 74 at para. 100. (Emphasis added.)

38. The unfortunate result of this combination of issues is a "gap" in the prescribed sentencing range that artificially caps sentences for child sexual assault where there is no trust relationship, leading to unfit sentences:

- A major sexual assault committed against an adult attracts a starting point of three years.

  R. v. Sandercock, supra.

- A major sexual interference or major sexual assault against a child where the offender is in a position of trust typically attracts a starting point of four to five years, depending on the jurisdiction.

  R. v. D.(C.), [1991] M.J. No. 480, [1991] 75 Man. R. (2d) 14 (Man. C.A.).

- A major sexual interference or major sexual assault against a child where the offender is not in a position of trust falls between these two points since offences against children are statutorily aggravating but not seen as being as egregious as, for example, familial sexual abuse.[3]

39. With respect, this is untenable. A starting point of, for example, three and one-half years for the major sexual assault of a four-year old, does not reflect Parliament's clear intentions or the extraordinary harm done to all children who are the victims of sexual violence, whether they are familiar with the offender or not. While, as discussed below, these ranges are not strictly binding, they carry significant persuasive weight. Where, as here, they are outdated and problematic, they must be addressed.

(i) Parliament has done what it can

40. The current state of the law no longer reflects Parliament's intent or societal values. For many years, it has attempted to stress the significance of the damage done to child victims of sexual offences by increasing punishments for these crimes. The first mandatory minimum sentences for child sexual offences were legislated in 2005. At the same time, sections 718.01

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[3] Adding to the paradox, the Alberta Court of Appeal appears to set all starting points for sexual assault, whether child or adult victims, at three years: *R. v. Hajar*, *supra* at para. 81.

and 718.2(a)(ii.1) of the *Criminal Code* were enacted emphasizing sentencing principles specific to the abuse of children.

> *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act* (Bill C-2), S.C. 2005, c. 32.

41. In 2012, Parliament passed Bill C-10 which enacted increased penalties for sexual offences against children. Two years later, the government was chagrined to learn that Bill C-10 had not led to any meaningful decrease in instances of child sexual abuse. In fact, the statistics showed that sexual offences against children were on the rise over the previous two years (2012-2014) despite the fact that instances of violent crime in general were decreasing.

> *Safe Streets and Communities Act* (Bill C-10), S.C. 2012, c. 1; House of Commons Debates, 41st Parl., 2nd Sess., No. 94 (June 2, 2014) at page 6064.

42. Parliament responded in 2014 by introducing two sister bills including Bill C-26. Some of the reasons for which Bill C-26 was necessary were described by the Honourable Justice Minister Peter MacKay during the House of Commons debates:

> The fact that we continue to see sex offences against children on the rise in and of itself is certainly the greatest motivation there could possibly be to do more and ensure that there is a greater deterrence and denunciation of these types of offences.

> *Ibid* at page 6048; *Tougher Penalties for Child Predators Act* (Bill C-26), S.C. 2015, c. 23.

43. Bill C-26 resulted in increased minimum sentences for offences against children. As well, consecutive sentences for multiple offences against more than one child victim became non-discretionary. The Justice Minister was clear in debate as to the relevance of the new minimum sentences: "Bill C-26 is not designed to establish mandatory minimum penalties or mandatory maximums, it is designed to increase both the minimum and maximum penalties."

> House of Commons Debates, *supra* at page 6051.

44. These amendments, when read in conjunction with the principles articulated in sections 718.01 and 718.2(a)(ii.1), reinforce the priority which Parliament has placed on the imposition of substantial sentences for sexual offences against all children (regardless of their relationships with the offenders), and the paramountcy of deterrence and denunciation.

45. Section 718.2(a)(ii.1) is particularly relevant in that it obliges sentencing judges to note that the abuse of children is in itself an aggravating factor. While other related subsections of section 718.2 may apply to offences in which the victim is an adult, the recognition of the harm done to children and their exceptional vulnerability, automatically sets the sexual abuse of children apart.

(ii) Courts have recognized both the harm and Parliament's efforts

46. The long-term harm done to children who are sexually victimized is undebatable. Oft-cited passages include: [4]

> - It would seem to us that clearer guidance to the sentencing courts will result from the recognition that the repeated sexual abuse of a child by a parent is a crime like no other and should be placed for sentencing purposes in a category of its own.
>
> *R. v. D.(C.), supra* at para. 14.
>
> - The harm occasioned by the appellant and others like him are cause for grave concern. Children are robbed of their youth and innocence, families are often torn apart or rendered dysfunctional, lives are irretrievably damaged and sometimes permanently destroyed.
>
> *R. v. D.(D.)* (2002), 58 O.R. (3d) 788, [2002] O.J. No. 1061 (Ont. C.A.) at para. 45.

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[4] Although these decisions concerned offenders in positions of trust, as argued below, the harm is not restricted to cases of that nature.

> - Three such consequences are now well-recognized: (i) children often suffer immediate physical and psychological harm; (ii) children who have been sexually abused may never be able, as an adult, to form a loving, caring relationship with another adult; (iii) and children who have been sexually abused are prone to become abusers themselves when they reach adulthood.
>
> *R. v. Woodward*, 2011 ONCA 610 at para. 72. *See also*: paras. 75-76.

47. Similarly, courts have acknowledged Parliament's intention to emphasize deterrence and denunciation in these cases. In *R. v. E.S.*, the British Columbia Court of Appeal noted that Parliament has "signalled" the importance of denouncing child abuse:

> As this Court stated in *Allen* at para. 60, "Parliament has made it very clear that the protection of children is a basic value of Canadian society which courts must defend."
>
> *R. v. E.S.*, 2017 BCCA 354 at para. 52, citing *R. v. Allen*, 2012 BCCA 377.

48. The Manitoba Court of Appeal recently made similar observations in *R. v. SJB*:

> The punishment for offenders committing sexual offences involving persons under age 18 has been steadily increasing over the last decade as there is greater understanding that, while the physical harm such offences cause is often transitory, the psychological harm is typically permanent and significant…
>
> *R. v. SJB*, 2019 MBCA 62 at para. 39 relying on *R. v. RJ*, 2017 MBCA 13.

49. Specific to the lifelong damage experienced by child victims, in *R. v. RJ*, the Manitoba Court of Appeal had noted:

> The harsh and grim reality of child sexual abuse is that the sentence of the victim is always longer than that of the perpetrator. <u>The consequences of the accused's crimes will affect his victims for the rest of their lives, well after the accused has completed any punishment that the courts can mete out.</u>
>
> *R. v. RJ*, *supra* at para. 11. (Emphasis added.)
>
> *See also*:
> *R. v. Hajar*, *supra* at paras. 61-70.
> *R. v. Norton*, *supra* at para. 43.

(iii) But because the relevant starting points have not evolved, sentences have not increased

50. Despite Parliament's repeated efforts to ensure sentences increase and pronouncements from numerous appellate courts supporting the increase of sentences in child sexual abuse cases, the starting points have remained static. As a result, the jurisprudence has failed to evolve.

51. In *R. v. Norton*, notwithstanding the elevated culpability and egregiousness attached to offences against children, the Manitoba Court of Appeal stated:

> …regardless of whether offences of this nature [involving ostensible consent] are labelled as major sexual assaults (or major sexual interferences), or not, the above analysis, which is consistent with the approach advocated in *Sidwell*, shows that cases involving similar sexual acts and circumstances [sexual offences against children] suggest a starting point in the range of three years.
>
> *R. v. Norton*, *supra* at para. 44. (Emphasis added.)

52. The Manitoba Court of Appeal relied on *R. v. Hajar* for this proposition. As noted above, the Court in *Hajar* suggested that "[p]erpetrators who sexually abuse children are more culpable than perpetrators who sexually abuse adults, not less." Yet, confoundingly, it then observed:

> Accordingly, in *R. v. S.(W.B.)*…this Court set a starting point of four years imprisonment for a major sexual assault committed on a child by an adult offender in a position of trust. We identify later in these reasons a number of circumstances that would aggravate the three-year starting point for major sexual interference, including breach of trust, and additional violence beyond that intrinsic to the conduct itself. Seen in this light, there is a logical fit between the three-year starting point for major sexual interference and the four-year starting point in S.(W.B.).
>
> *R. v. Hajar*, *supra* at para. 12. (Emphasis added.)[5]

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[5] While it has been suggested that *R. v. Gashikanyi* overruled *Hajar*, subsequent decisions confirm that this is not the case: *R. v. Gashikanyi*, 2017 ABCA 194. *See, for example*: *R. v. DSC*, 2018 ABCA 335 at paras. 40-45.

> *See also*: *R. v. Hammermeister*, 2016 ABCA 302 in which, at para. 27, the Court commented that the three-year starting point where the victim is an adult cannot be reconciled with those wherein the victim is a child, yet later states at para. 30, "…a three-year starting point for major sexual interference is entirely reasonable…"

(iv) This Honourable Court can provide assistance

53. This Honourable Court has regularly reinforced the role of starting points and sentencing ranges in imposing sentences. While they do not restrain, they provide useful direction and are often instructive.

> *See*: *R. v. Lacasse, supra* at para. 57.

54. Inasmuch as courts value and benefit from guidance, an overabundance of categories would be unhelpful notwithstanding the potential factual variables. In cases of sexual assault, there are at most two categories: those involving adult victims and those involving child victims.

55. As discussed above, the three-year starting point for a major sexual assault of an adult victim is well-established. Whether that is appropriate or sufficient is well beyond the scope of this appeal. However that same three-year starting point is wholly inappropriate for major sexual interference/major sexual assaults of child victims, having regard to the unique factors inherent in these offences:

a) <u>Increased harm:</u>

Without minimizing the devastating effect of sexual assaults on adults, as described above, the harm experienced by child sexual assault victims is greater, although its degree and the way in which it manifests will vary in each case.

> *See*:
> *R. v. DC*, 2016 MBCA 49.
> *R. v. D.(D.), supra*.
> *R. v. SJB, supra*.

In *R. v. DC*, the Manitoba Court of Appeal recognized that the young victims "suffered significant psychological harm and would require long-term treatment for their abuse." Expert evidence regarding the consequences of what are commonly described within the professional community as a "myriad of adverse childhood experiences" revealed that, like most children with such experiences, one of the victims:

> …remains at 300 to 400% greater risk of future pathology related to mood and anxiety, trauma, self-harm/suicidality, substance abuse/dependence, school-related struggles and failure, relational and parenting challenges, sexual deviances/challenges, personality dysfunction, underemployment, living a marginal lifestyle, and the possibility of contact with the system [i.e., Justice; Child Welfare] as an adolescent and adult.
>
> *R. v. DC, supra* at para. 14.

b) <u>Increased vulnerability:</u>

Children are more vulnerable than adults by virtue of their lack of power, their inability to articulate the nature of their victimization (if they are old enough to be verbal at all), and their immaturity and resulting lack of insight and awareness.

This vulnerability is heightened with increasing technology. Courts have observed that the internet has opened a "new window" into the easy access to children who can and do communicate with predators directly. "Modern" jurisprudence needs to reflect this new development.

> *R. v. Deck, supra* at para. 23.
>
> *See also*: House of Commons Debates, 37th Parl., 1st Sess., No. 054 (May 3, 2001) at page 3581.

The present case makes evident that the "pool" of child victims continues to expand through opportunistic sexual predators' ability to contact adults – in this case, the victim's mother – to target children who may not previously have been available to her/him.

c) <u>Resulting increase in moral blameworthiness:</u>

This harm and vulnerability contribute to significantly higher moral blameworthiness attributable to offenders who target child victims. Salient factors for sentencing courts to consider in any child sexual abuse situation include such things as the relative age difference and relationship between the child and the offender, the nature of the conduct, the length and frequency of the offending, additional violence or threats, etc.

> *R. v. Sidwell, supra* at para. 53.
> *See also*: *R. v. B.(A.)*, 2015 NLCA 19 at para. 27.

56. A principled analysis will ensure that a sentence is proportionate to the offender and her/his moral blameworthiness. For example, the presence of a trust relationship will exacerbate the damage done, the moral blameworthiness and, therefore, the appropriate sentence. However, sentences for any/all offenders who sexually violate children, even where no position of trust is present, must also properly reflect the harm done to these victims and the importance of denouncing and deterring such behaviour. In *R. v. M.(C.A.)*, this Honourable Court described the purpose of denunciation:

> In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law.
>
> *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, 105 C.C.C. (3d) 327 at para. 81.

57. This principled approach was encouraged by Moldaver, J.A. (as he then was) in *R. v. D.(D.)*:

> To summarize, I am of the view that as a general rule, when adult offenders, in a position of trust, sexually abuse innocent young children on a regular and persistent basis over substantial periods of time, they can expect to receive mid to upper single digit penitentiary terms. When the abuse involves full intercourse, anal or vaginal, and it is accompanied by other acts of physical violence, threats of physical violence, or other forms of extortion, upper single digit to low double digit penitentiary terms will generally be appropriate.
>
> *R. v. D.(D.)*, *supra* at para. 44.

58. The Crown respectfully submits that current sentences for the sexual abuse of children do not represent "society's basic code of values." The present case provides this Honourable Court with an opportunity to provide guidance and direction in this regard.

B. Did the Manitoba Court of Appeal err by interfering with the sentencing judge's decision?

59. The Manitoba Court of Appeal misapprehended an error that did not exist. It characterized the sentencing judge's error in principle as follows:

> …the four to five year starting point approach in *Sidwell* presumes "a trust relationship" (at para 38). Abuse of a position of trust is an aggravating factor (see section 718.2(a)(iii) of the *Code*). Therefore, by applying the starting-point approach in *Sidwell*, the sentencing judge relied upon an aggravating factor that he had found did not exist in this case. In my view, the sentencing judge committed an error in principle in doing so and the error is material because it impacted on his analysis in a meaningful way.
>
> Reasons of the Manitoba Court of Appeal, Appellant's Record, Tab 2, p. 14. (Emphasis added.)

60. With respect, while the sentencing judge declined to find a trust relationship, his consideration of *Sidwell* – the leading Manitoba authority in the area child sexual abuse sentencing – did not mean that he was impliedly relying upon one.

61. On the contrary, the sentencing judge recognized the gap in the jurisprudence relating to child sexual abuse where there is no position of trust – "…not being in a position of trust I do not think changes the message that *Sidwell* gives us," – and then he relied on the general principles in *Sidwell* to determine an appropriate sentence.

> Reasons for Decision, Appellant's Record, Tab 1, p. 4.

62. In fact, the Manitoba Court of Appeal, after criticizing the sentencing judge's reliance on *Sidwell*, proceeded to rely on exactly the same jurisprudence.

> Reasons of the Manitoba Court of Appeal, Appellant's Record, Tab 2, pp. 14, 17.

63. Both the sentencing judge and the Manitoba Court of Appeal relied on the most comparable local precedent on child sexual abuse to guide them toward relevant objectives and principles. The sentencing judge did precisely what sentencing judges are tasked to do. He committed no error and the Manitoba Court of Appeal, with respect, should not have intervened:

> …sentencing judges are in the best position to determine, having regard to the circumstances, a just and appropriate sentence that is consistent with the objectives and principles set out in the *Criminal Code*. The fact that a judge deviates from the proper sentencing range does not in itself justify appellate intervention.
>
> *R. v. Lacasse*, *supra* at para. 11.
>
> *See also*: *R. v. M.(C.A.)*, *supra* at para. 92.

(i) The Manitoba Court of Appeal overlooked the deference owed to sentencing judges

64. Even if the Court properly found that the sentencing judge committed an error, not every error of law or error in principle will warrant intervention. Rather, it will "open the door" into a consideration of the fitness of the sentence. It is trite that appellate courts must only intervene if a sentence is demonstrably unfit:

> A sentence was not demonstrably unfit simply because another judge might have imposed a different sentence. Factually similar cases, sentencing ranges, and starting points all provide trial courts with some guidance when imposing sentence. They are not straightjackets, however: *Lacasse* at para. 57.
>
> *R. v. SLW*, 2018 ABCA 235 at para. 51.
>
> *See also*: *R. v. Lacasse*, *supra* at paras. 11, 42-44, 57.

65. The Manitoba Court of Appeal did not provide any actual analysis as to fitness. It offered a conclusory statement attributing the need for its interference to its view of the sentencing judge's error. With respect, even if intervention were warranted, an explanation as to what made a six-year sentence unfit in the circumstances of the case was still required. That is, as stated in *Lacasse*, how was the error material?

66. The Manitoba Court of Appeal conceded that there "are very few, if any, cases involving similar sexual acts and circumstances." After identifying similar aggravating and mitigating

factors as the sentencing judge did, it concluded that four years was an appropriate sentence. It provided no analysis or guidance as to why six years was "clearly unreasonable" or "manifestly excessive." Again, intervention was not supported by the Court's reasons.

Reasons of the Manitoba Court of Appeal, Appellant's Record, Tab 2, pp. 15, 17-19.

(ii) The six-year sentence imposed by the sentencing judge was fit

67. Parliament has directed that denunciation and deterrence are to be given primary consideration when a child is abused. A sentence must also reflect the fundamental principle of proportionality, *i.e.*, the gravity of the offence and the moral culpability of the offender.

Sections 718.01, 718.1 of the *Criminal Code.*

68. Characterizing an offence as a major sexual assault involves consideration of the nature of the act and the foreseeable harm associated with it. The offender's blameworthiness is "reflected in the extent to which the [his/her] actions demonstrated a "contemptuous disregard for the feelings and personal integrity of the victim."" In the present case, the Respondent conceded that he had committed a major sexual assault.

R. v. M.(T.E.), [1997] 1 S.C.R. 948, [1997] 7 W.W.R. 44 (*McDonnell*) at para. 18 adopting *R. v. Sandercock*, *supra*; Transcript, March 9, 2017, Appellant's Record, Tab 8, pp. 45, 56, 61.

69. The mitigating factors were few. The Respondent had little record to speak of and had pled guilty.

70. The aggravating factors, on the other hand, were significant. The Respondent's moral blameworthiness was extraordinarily high:

- The victim was a four-year old child.
- The act was pre-planned and not spontaneous. <u>The Respondent had identified the mother through social media as someone who would make her child available to him for sex.</u>

- The victim was ganged up on by two adults.

- The harm done to the child was made worse by the active involvement of her mother, who physically forced her child to comply with the Respondent's demands. The callous indifference to the child's suffering was reprehensible.

- This level of violence and cruelty distinguishes the case at bar from the majority of sexual assaults against children in which courts more commonly hear of their commission through coercion or acquiescence.

- The sexual assault of the child stopped only because a third-party interrupted it.

- The Respondent made clear in his attempt at extortion that he was not finished. He explicitly stated that his intention was to rape the child – even if he had to resort to threats to accomplish this.

71. A further significant consideration when sentencing an offender who sexually violates a child is protection of the public. In this regard, the following factors were important:

- According to the probation officer, the Respondent's insight into his behaviour was virtually non-existent.

- The Respondent was assessed as a high risk to re-offend sexually, even far more so than most other sexual offenders.

- The Respondent's comments that he "likes to be around children" and wants to be a role model for them, along with his high risk to offend and the obliviousness of the women in his life, make protection of the public paramount.

72. The sentencing judge, who had over two decades on the Bench, described the facts as "clearly one of the worst that I have seen." The sentence imposed reflected the Respondent's high moral culpability and society's abhorrence of acts of this nature. It was entirely reasonable in the circumstances and there was no basis for appellate intervention.

Part IV – Costs

73. The Appellant does not seek costs and requests that no costs be ordered against it.

Part V – Order Sought

74. Sexual abuse of a child is a crime like no other. It causes irreparable and often inter-generational harm. Children are exceptionally vulnerable and courts must send a strong message to deter those who prey on them. The present case demonstrates that the current approach is outdated and ineffective.

75. This Honourable Court is respectfully called upon to update it. Sentences for sexual violence against children must reflect Parliamentary intention and increasing awareness of the harm these offences cause. This Honourable Court's guidance can further the goals of deterrence and denunciation, keeping the children in our communities safe from sexual predators.

76. For the reasons set out above, the Crown respectfully submits that the appeal should be allowed and the sentence imposed at the Respondent's sentencing restored.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

REKHA MALAVIYA
Counsel for the Appellant
Attorney General for Manitoba

RENÉE LAGIMODIÈRE
Counsel for the Appellant
Attorney General for Manitoba

Part VI – Impact of any Order, Restriction or Ban

77. The victim's identity is subject to a ban on publication pursuant to s. 486.4 of the *Criminal Code*.

78. The Appellant's materials do not include any information which identify the victim.

Part VII – Table of Authorities

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