SCC Court File No. 38300

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

B E T W E E N:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

- and –

JUSTYN KYLE NAPOLEON FRIESEN

RESPONDENT
(Appellant)

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

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PART I – OVERVIEW & FACTS

A) Overview of Position

1. The Appellant raises two issues on this appeal. The first issue relates to whether or not the existing sentencing ranges and starting points for sexual offences against children are still consistent with parliamentary and judicial recognition of the severity of these crimes. The Respondent submits that they are.

2. The Appellant asserts that because the starting point for a major sexual assault/interference of a child by a person in a position of trust has not increased, despite legislative changes intended to reflect society's growing understanding of the impact of these crimes on the victims, the sentences for these offences currently being imposed must necessarily be unfit.

3. Contrary to the assertion of the Appellant, it is widely recognized by appellate courts across the country that judicial recognition of the impact of these types of offences has increased over time. It is also widely recognized that sentences for sexual interference have increased over the same period of time. The jurisprudence demonstrates that sentencing courts are acutely aware of both the will of Parliament and the appropriate principles of sentencing, including consideration of the harm done to victims and the paramountcy of denunciation, when imposing sentences for these types of offences.

4. The Appellant also asserts that there exists a gap in the sentencing regime because there is no established starting point for the major sexual assault/interference of a child by a person who is not in a position of trust. The Appellant says that because of the three year starting point for a major sexual assault of an adult, and the four to five year starting point for the major sexual assault/interference of a child by a person in a position of trust, sentence ranges for non-position of trust situations are artificially forced downwards, resulting in disproportionate sentences.

5. The Respondent submits that if there is a gap in the sentencing regime, it is intentional. Appellate courts have repeatedly declined to impose starting points in this area for good reason. Sexual Interference is a highly variable offence that is not amenable to narrow classification. The courts currently have the tools to deal with egregious offences by imposing proportionately

lengthy custodial sentences. A higher benchmark in this area will only serve to limit downward deviation and may result in a loss of individualization and therefore disproportionate sentences in situations that do not call for lengthy periods of incarceration. For the foregoing reasons, a change in this area of the law is neither necessary nor desirable.

6. The Respondent also submits that the existing starting points in sexual assault sentencing jurisprudence in no way constrain sentencing judges in determining an appropriate sentence for a major sexual assault of a child by a person not in a position of trust. Judges are free, and mandated to consider the circumstances of the offence and offender, and craft a sentence accordingly.

7. The second issue raised by the Appellant relates to whether or not the Manitoba Court of Appeal erred by interfering with the decision of the sentencing judge in the present case. The Respondent submits that the sentencing judge made an error in principle that mandated appellate intervention and ultimately the re-sentencing of the Respondent.

8. It is clear on a plain reading of the reasons of the sentencing judge that he utilized a four to five year starting point that did not apply to the facts before him as the starting point incorporated a highly aggravating factor – a position of trust – that was not present. By relying on this factor to commence his analysis, he committed an error of principle which heavily impacted the final disposition. The presence of an error of principle that impacts the sentence in a material way requires the imposition of a new sentence.

B) Response to the Appellant's Statement of Facts

9. The majority of the facts as outlined by the Appellant in the overview and facts section of their factum are not disputed with the exception of the following:

10. The Appellant states that during the commission of the offence, the child was physically forced to fellate the Respondent for a period of time. Forced fellatio for any period of time was not part of the agreed facts presented to the court. The basis for the guilty plea was that it was an attempt at fellatio, and this was made clear in the submissions made by counsel for the Respondent:

> I think the inferences from the transcript to be drawn are clear that there was, thankfully, no penetration or actual attempt at penetration that occurred but there was an attempt to essentially forcibly force the four-year-old girl to perform cunnilingus on the the, or to perform oral sex on my client. That's essentially the facts that we're talking about here. And I don't dispute that constitutes a major sexual assault.[1]

The Respondent is not taking the position that this has a material bearing on the final disposition: the issue is being raised for accuracy of the record.[2]

11. The Appellant states that the position taken by the Respondent at the sentencing was that the three-year starting point applied. In fact, the position taken by the Respondent at sentencing was that the four to five year starting point did not apply and that a reasonable sentence in the circumstances using a principled approach would be three years. The Respondent did not argue that any starting point applied in the circumstances.[3]

12. The Appellant states that "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."[4] The Respondent disputes this characterization of the proceedings. The sentencing judge was provided with a number of cases in addition to *Sidwell*. Reference to those cases is notably absent from his reasons for decision. At no point did the sentencing judge state that he found them to be of little assistance, and the Appellant's assertion on this point is pure speculation.

13. The Appellant states that "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." With respect, this is another mischaracterization of the proceedings. The Manitoba Court of Appeal held that by using the starting point in *Sidwell* the judge had erred in principle by using a starting point that included an

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[1] Transcript of Proceedings, Appellant's Record, Tab 8, Pg 56, line 7-15.
[2] Factum of the Appellant at para 3.
[3] Factum of the Appellant at para 22; Transcript of Proceedings, Appellant's Record, Tab 8, page 62, lines 15-34.
[4] Factum of the Appellant at para 24

aggravating factor that he had specifically found not to exist. The Manitoba Court of Appeal did NOT hold that it was an error to refer to *Sidwell*, or otherwise rely on that case as a sentencing precedent or for its principles.[5]

14. The Appellant states that "notwithstanding this Honourable Court's decision in *R. v. Lacasse*, the Manitoba Court of Appeal found that the sentencing judge had used the wrong starting point. As a result, no deference was given to the sentencing judge's decision." The Respondent respectfully submits that the Manitoba Court of Appeal did not simply overturn the decision of the sentencing judge because he used the wrong starting point. The appellate court found an error in principal as a result of the use of a starting point that necessarily incorporated an aggravating factor that the sentencing judge has expressly found not to exist. Additionally, the Manitoba Court of Appeal concluded that this error was meaningful because it impacted the sentencing judge's analysis in a material way.[6]

15. Finally, although not under the heading of "Facts and Procedural History", the Respondent states that this incident was pre-planned and not spontaneous when listing the aggravating features of the present case.[7]

16. This aggravating factor was not contained in the agreed facts presented to the court at the original sentencing hearing, nor has it been previously argued at any level of court. At the original sentencing hearing, counsel for the Respondent made it clear that this was <u>not</u> a pre-planned incident, and the Crown did not call evidence to prove this aggravating factor:

> This is not a situation where my client sought out mothers with children in order to victimize their children. In fact, the evidence in this case seems to be that the co-accused, it's not an isolated incident where she has offered up her children as essentially party favours in sexual trysts with individuals. This doesn't appear to have been my client's idea to involve the children, this seems to have been something that was somewhat habitual with the co-accused.[8]

C) Additional Relevant Facts

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[5] Factum of the Appellant at para 27.
[6] Factum of the Appellant at para 27.
[7] Factum of the Appellant at para 70.
[8] Transcript of Proceedings, Appellant's Record, Tab 8, Pg 60, line 27-34.

17. In addition to the facts stated by the Appellant, the following additional facts are relevant, specifically as it pertains to the issue of fitness of the ultimate sentence raised by the Appellant.[9]

18. The pre-sentence report prepared prior to sentencing indicated the personal circumstances and background of the Respondent, and included:

a) The Respondent's mother struggled with alcoholism throughout his childhood and had five children with four different men. The Respondent was apprehended by Child and Family Services at the age of three because his sister was being abused by his mother; [10]

b) Following his apprehension the Respondent resided with his maternal grandmother, who was physically and verbally abusive. He continued living with her until he was fifteen years old; [11]

c) At the age of eleven the Respondent was directed by a female immediate family member to engage in sexual intercourse with both her and his brother. This abuse continued for a period of one year. At the time, the Respondent was too young to understand what he was being told to participate in. This sexual abuse was a traumatic experience, and it has affected the Respondent throughout his life;[12]

d) When the Respondent was fifteen years old, he was connected with a Big Brother who took him in when his grandmother "needed a break from caring for him." The Respondent described this point in time as the first time in his life that he felt like he had a father and mother figure. He reported, however, that the Big Brother had a problem with alcohol and that the Big Brother's wife was sexually abusing him;[13]

e) After the sexual abuse was discovered, the Respondent was apprehended by Child and Family Services a second time and placed with foster parents. He was physically abused and neglected while in care. He lived in what he described as a shack with no running water, and was told by his foster parents that they only took care of him for the financial benefit;[14]

f) At the age of eighteen the Respondent moved to Winnipeg and was homeless for a period of three years. He engaged in prostitution to support himself between the ages of eighteen and twenty one;[15]

g) The Respondent has had few family supports in the community throughout his life;[16]

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[9] Factum of the Appellant at page 22.
[10] Pre-Sentence Report, Appellant's Record, Tab 9, page 78 [*PSR*].
[11] *PSR*, *supra* para 18(a) at page 77.
[12] *PSR*, *supra* para 18(a) at page 77.
[13] *PSR*, *supra* para 18(a) at page 78.
[14] *PSR*, *supra* para 18(a) at page 78.
[15] *PSR*, *supra* para 18(a) at page 89.

h) The Respondent stated that drugs and alcohol were a factor in his offending. While he initially stated that drugs and alcohol had not been a problem, he later agreed that his marijuana use had been problematic. The pre-sentence report is replete with references to his drug and alcohol use;[17]

i) The Respondent took full responsibility for his actions, and acknowledged that he needed to be punished;[18]

j) The Respondent expressed empathy for the victim and the victim's family, and remorse for his actions;[19]

k) The Respondent stated that he wanted to seek help for his behavior;[20]

l) The Respondent struggled in pre-sentence custody. He developed anxiety to the extent that he vomited blood on one occasion. He also felt that he was targeted for the type of offence that he committed and his race.[21]

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?

19. The Respondent's position with respect to the first issue is that the jurisprudence over the past few decades in the area of sentencing for sexual offences as they relate to children demonstrates a keen awareness of the severity of these crimes and a general trend towards increased sentences. A change in this area of the law is neither necessary nor desirable.

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

20. The Respondent's position with respect to the second issue is that the Manitoba Court of Appeal did not err by interfering with the sentencing judge's decision. The Manitoba Court of Appeal properly found an error of principal that influenced the sentence in a material way.

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[16] *PSR*, *supra* para 18(a) at page 79.
[17] *PSR*, *supra* para 18(a) at page 84
[18] *PSR*, *supra* para 18(a) at pages 74-75.
[19] *PSR*, *supra* para 18(a) at page 75.
[20] *PSR*, *supra* para 18(a) at page 75.
[21] *PSR*, *supra* para 18(a) at page 76.

PART III – STATEMENT ARGUMENT

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

A) The jurisprudence has evolved

21. The Appellant argues that the current sentencing ranges and starting points are outdated, insufficient, and reflect neither the greater understanding that we now have of the psychological harm inflicted on victims, nor the will of Parliament to increase sentences for these offences.

22. The difficulty with this assertion is that there is virtually no evidence that courts across this country have been unable to respond to legislative and social changes. To the contrary, the jurisprudence over the past few decades in the area of sentencing for sexual offences as they relate to children demonstrates just the opposite.

23. Since the 1985 *Sandercock*[22] decision of the Alberta Court of Appeal, and the 1991 *D.C*[23] decision of the Manitoba Court of Appeal, there has been widespread acknowledgment at the appellate level that sentences for sexual assault have both increased and become more victim-focussed.

24. In 2012, the British Columbia Court of Appeal acknowledged that sentences have, in fact, been increasing in response to changing attitudes. In considering the historic pattern of sentencing in sexual assault cases involving children, the court concluded:

> While a range may not be detectable from these cases they do reveal the escalation in recent years in severity of sentences imposed where children are the victims of sex offences… Parliament has made it very clear that the protection of children is a basic value of Canadian society which the courts must defend.[24]

25. In 2016, the British Columbia Court of Appeal heard another sentence appeal involving the sexual abuse of a child, and had no difficulty rejecting dated precedents provided by the defence for the express reason that the jurisprudence had advanced significantly since those decisions:

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[22] *R. v. Sandercock,* 1985 ABCA 218 [*Sandercock*].
[23] *R. v. D.(C.)*, [1991] M.J. No. 480 (MBCA) [*D.C.*].
[24] *R. v. Allen*, 2012 BCCA 377 at paras 57-60 [*Allen*].

> As can be seen, these cases, while they do represent sentences of less than two years, are dated. In my view, they do not reflect society's current awareness of the impact of sexual abuse on children and the concomitant escalation in the severity of sentences imposed: see R. v. Allen, 2012 BCCA 377 (CanLII) and R. v. Rich, 2014 BCCA 24 (CanLII).[25]

26. This sentiment was again affirmed in 2019 when the British Columbia Court of Appeal stated that "Sentences are increasing as courts more fully appreciate the damage that sexual exploitation by adults causes to vulnerable, young victims."[26]

27. In 2016, the Manitoba Court of Appeal endorsed the view of the British Columbia Court of articulated in *Allen* in *Norton*:

> Furthermore, I agree with the British Columbia Court of Appeal that sentences for sexual offences against minors are increasing. Indeed, prior to the 2008 amendments to the Code imposing a minimum penalty, it was not uncommon for the court to impose conditional sentences or lower incarceratory sentences for similar crimes. See for example R v DJP, 2003 MBCA 12 (CanLII), 170 ManR (2d) 282; R v GCF (2004), 2004 CanLII 4771 (ON CA), 189 OAC 29; Pritchard; and R v MGB, 2007 ABCA 243 (CanLII), 417 AR 147.[27]

28. In Ontario, it is clear that the lasting psychological harm inflicted on child sexual assault victims was already a paramount consideration in the 1998 decision of the Ontario Court of Appeal in *Stuckless*:

> I am unable to find a single reported appellate decision in recent years which does not view the sexual abuse of children as extremely serious, whether or not there is penetration. In saying there was no violence "apart from the coercion implicit in the relationship between the parties" (emphasis added) or "beyond what was implicit in the interference with the physical integrity of the complainant", Watt J. misappreciated how serious these offences were. Sexual abuse is an act of violence. When committed against children, the violence is both physical and profoundly psychological. It is coercive and exploitative conduct, and represents the use of compulsion against someone who is

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[25] *R.* v. *Vautour* 2016 BCCA 497 at para 52 [*Vautour*].
[26] *R. v. Scofield*, 2019 BCCA 3 at para 61 [*Scofield*].
[27] *R. v. Norton,* 2016 MBCA 79 at para 43 [*Norton*].

> defenceless. As Moldaver J. stated in R. v. McF., released April 27, 1992, unreported (Ont. Gen. Div.):
>
> > I cannot conclude that [the accused] should be treated in a more lenient fashion simply because he refrained from the use of threats of physical harm or the infliction of limited and measured amounts of force.
> >
> > . . . I must again reiterate the feelings that I have expressed in similar cases where the lack of serious physical harm has been advanced as a factor to be considered in mitigation. The crimes of incest and sexual assault are inherently violent. They can and often do have a crippling effect upon the psychological and emotional well-being of the victim. Conduct which brutalizes the mind can be far more devastating, painful and long-lasting than conduct which causes injury to the body. [28]

29. In sentencing the same offender, Gordon Stuckless, for similar offences in 2019, the Ontario Court of Appeal considered the evolution of the approach to sentencing for sexual abuse of children:

> Society's understanding of the gravity of sexual offences and their impact on children has evolved considerably. Historically, Canadian courts often treated sexual offences against children as deserving of modest sentences… Perhaps the community at large was unaware of the negative impact of sexual abuse on the bodily integrity and self-worth of vulnerable young victims. Perhaps with a diet of murders and aggravated assaults, sexual offences against children seemed less important or reflective of misguided attitudes that suggested a 'get over it' approach to victims. With *R. v. D.(D.)* (2002), 2002 CanLII 44915 (ON CA), 58 O.R. (3d) 788 (C.A.), this court opened the door to a fresh approach to sentencing for offences involving sexual abuse of children, and *R. v. D.M.*, 2012 ONCA 520 (CanLII), 111 O.R. (3d) 721, pressed further. As my colleague Huscroft J.A. has written, the harm to children subjected to sexual abuse was described in 2011 by Moldaver J.A. (as he then was) in *R. v. Woodward*, 2011 ONCA 610 (CanLII), 107 O.R. (3d) 81. As directed in that decision, the focus in sentencing adult sexual predators is on the harm caused to the child: at para. 76. This direction was amplified by subsequent legislative initiatives on sentencing for offences involving sexual exploitation and abuse

[28] *R. v. Stuckless*, [1998] O.J. No. 3177 (ONCA) at para 43 [*Stuckless*].

> against children undertaken by Parliament and which I will address.[29]

30. The court in *Stuckless* (2019) reviewed the legislative changes to sentencing for the sexual abuse of children and determined that the jurisprudence from across the country has recognized the impact of sexual abuse on a child:

> As the foregoing review of Parliament's legislative initiatives and appellate jurisprudence from across the country suggests, there has been significant recognition of the impact of sexual abuse on a child, particularly when that abuse is perpetrated by a person in a position of trust or authority. Parliament's legislative reforms governing sexual offences signal that society's denunciation of this conduct must be reflected in the sentences imposed by courts. These legislative amendments… indicate a significant societal recognition of the gravity of sexual offences against children.[30]

31. The court in *Stuckless* (2019) also discussed the impact of the legislative changes on the sentencing process:

> This recognition (of the gravity of sexual offences against children underlying the legislative amendments) is not an alteration of weight to be assigned to a factor, or justification for imposing a higher sentence than is fit in the circumstances. Understanding the gravity of the offences in a general sense is an important aspect of imposing a proportionate sentence. It serves to contextualize the seriousness of the offences and recognizes that sentencing should not be divorced from a contemporary understanding of the harm occasioned by the offences. The legislative amendments are not a standalone justification for imposing a higher sentence, nor do I rely on them for that purpose. As mentioned, they simply reflect society's better understanding of harm caused by these offences to victims and the community, and the need to address this harm in the sentencing process as argued by the Crown.[31]

32. Several conclusions can be gleaned from the appellate jurisprudence across the country. First, contrary to the assertion of the Appellant, sentences for sexual offences involving children have not been stagnant since the introduction of starting points in the late 80s and early 90s. Further, the assertion of the Appellant that "significant weight is still being placed on decisions

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[29] *R. v. Stuckless*, 2019 ONCA 504 at para 90 [*Stuckless*].
[30] *R. v. Stuckless*, *supra* para 29 at para 112 (emphasis added).
[31] *R. v. Stuckless*, *supra* para 29 at para 112 (emphasis added).

which are decades old" due to a "general failure of sentences to evolve and reflect society's current awareness of both the prevalence and the impact of child sexual abuse" is not borne out in an analysis of the jurisprudence.[32] Finally, the recognition by Parliament of the gravity of sexual offences against children underlying the various legislative amendments is not an alteration of weight to be assigned to a factor, nor justification for imposing a higher sentence than is fit in the circumstances.

B) The Offence of Sexual Interference is not Amenable to a Starting Point

33. Over the last few decades this Honourable Court's interventions into the sentencing process have been aimed primarily at reinforcing the principle that sentencing is an individualized process in which the court must take into account not only the circumstances of the offence, but also the specific circumstances of the offender. This concept is succinctly articulated by this Court in *R. v. M. (C.A.):*

> "It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. . . . Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction."[33]

34. In *Lacasse*, this Court reaffirmed the supremacy of proportionality as the cardinal principal of sentencing which must guide appellate courts in considering the fitness of a sentence imposed on an offender. This Court in *Lacasse* also confirmed that the severity of a sentence depends not only on the seriousness of the crime's consequences, but also on the moral blameworthiness of the offender. The principal of parity of sentences is secondary to the principal of proportionality, and the former should never supersede the latter.[34]

35. Despite this emphasis on individualization, this Honourable Court has acknowledged the utility of sentencing ranges and starting points to assist the lower courts in achieving greater uniformity and consistency. It has upheld the ability of appellate courts to endorse sentence

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[32] Factum of the Appellant at para 34.
[33] *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para 92 [*M. (C.A.)*].
[34] *R. v. Lacasse*, 2015 SCC 64 at paras 12, 54 [*Lacasse*].

ranges and to create starting points within their jurisdiction that can respond to pressing issues within communities at the local level.[35]

36. Historically, two starting points have been employed by Canadian courts for sexual offences. The first is a three year starting point for a major sexual assault against an adult, which first appeared in the 1985 *Sandercock* decision of the Alberta Court of Appeal. The second is the four to five year starting point that applies to a major sexual assault of a child by an offender who is in a position of trust in relation to the child.[36]

37. The Appellant asserts that there exists a "gap" in the sentencing regime because the sentencing range for a major sexual assault against a child committed by a person who is not in a position of trust falls between the three year *Sandercock* starting point for an adult and the four to five year starting point for a major sexual assault or sexual interference committed on a child by an adult in a position of trust. The Appellant deduces that the existence of this "gap" results in the effective capping of sentences for child sexual assault where there is no trust relationship, and unfit sentences.

38. There are several difficulties with this position. First, this assertion amounts to a bold statement with little or no substantiation. The Appellant has not provided any examples of situations where sentences have been artificially restrained. Further, the notion that the starting point for a major sexual assault of a child by a person who is not in a position of trust must be lower than the starting point for the same offence by a person who is in a position of trust is logically sound. A position of trust is not only statutorily aggravating, it is long recognised in the sentencing jurisprudence of many offences as being significantly aggravating. A starting point is not determinative of the ultimate sentence. A sentencing judge is required to then increase or decrease the sentence based on the aggravating and mitigating factors. There is nothing preventing a sentencing judge from increasing the sentence significantly if the aggravating factors warrant it. Therefore, it does not inevitably follow that the sentence imposed in a "gap" case will not exceed the sentence imposed in a position of trust case. To the contrary, in situations where the circumstances warrant it, such as the case at bar, you would almost

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[35] *R. v. Proulx*, 2000 SCC 5 at para 86.
[36] *Sandercock*, *supra* para 23; *D.C.*, *supra* para 23.

certainly expect a principled analysis to result in a similar or even higher sentence than that imposed where there is a relationship of trust.

39. The term "gap" implies that something is missing, or has been inadvertently overlooked. In fact, the truth is to the contrary. The notion of imposing a starting point in this area has been considered and rejected at the appellate level in most Canadian jurisdictions.

40. Currently, the only appellate court that endorses a starting point for a major sexual interference is Alberta, and even that decision has proven contentious. In *Hajar*, the Alberta Court of Appeal established a three year starting point for a major sexual interference, holding that "it would be illogical and damaging to leave a gap where the victims of a comparable crime, major sexual interference, are those most in need of protection, our children."[37]

41. *Hajar* is an outlier amongst the jurisprudence, and is contentious even within the Alberta. In a strong dissent, Slatter J.A. held that "establishing a starting point sentence is only practical if it is possible to identify a sufficiently homogeneous category of case to which the starting point can apply." He went on to endorse the view of the trial judge that:

> Further, like the crime of manslaughter, an offence under s. 151 is not an archetypal offence that would lend itself to the establishment of a starting point. <u>There are simply too many variables to be factored into a determination of an appropriate sentence in these types of cases to make a starting point truly useful</u>. Circumstances may vary considerably, including the age difference between the parties, the number of offences and their degree of seriousness (see Bjornson at para 12), the relationship between the parties, the degree of any force or violence used, the length of time over which the offences occurred, the presence of luring or grooming, the use of contraceptives and any exposure to risks of pregnancy and disease, and the use of alcohol or drugs, to name the most obvious factors.[38]

42. The reasoning of Slatter J.A. was adopted by Berger J.A. in *Gashikanyi*, a subsequent decision of the Alberta Court of Appeal which expressly refused to follow *Hajar.* In *Gashikanyi*, Berger J.A. concluded that, in addition to concerns that the wide-ranging nature of the offence of

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[37] *R. v. Hajar*, 2016 ABCA 222 at para 76 [*Hajar*].
[38] *Hajar, supra* para 40 at para 259; *Hajar*, *supra* para 40 at para 267 (emphasis added).

sexual interference is not suitable to a starting point, the appropriate range of sentence was readily ascertainable in that jurisdiction, and therefore there was no justification for the establishment of a starting point. *Gashikanyi* has since been questioned in the recent *D.S.C.* decision of the Alberta Court of Appeal.[39]

43. Other appellate courts have expressly evaluated the utility of creating a starting point for sexual assaults involving children, and have declined to do so. In *Revet*, the Saskatchewan Court of Appeal articulated the concern that "to develop a typical case, for the purposes of suggesting a starting point sentence, there must be other decisions to which proper comparison can be made." Citing a lack of uniformity in the facts of the cases before it, the court concluded that it was an impossible task to fashion an appropriate starting point.[40]

44. In *Norton*, the Manitoba Court of Appeal considered *Hajar* and declined to follow suit in favour of its own contextually sensitive approach previously outlined in *Sidwell*. *Sidwell*, while affirming a starting point for the more easily defined category of "position of trust" major sexual offences against children, stresses the individualization of the sentencing process, seeking out cases with similar facts, and a consideration of a wide range of factors that may be relevant to the sentencing of an accused in a major sexual assault case.[41]

45. The concerns articulated with the creation of a starting point for major sexual assaults on children by the various appellate courts have their origin in directions provided by this Honourable Court. While this Court has permitted the use of starting points, it has warned that for a starting point to be effective, it must be clearly defined and used accurately by the sentencing judge. McLachlin, J., writing for the dissent in *McDonnell*, provided the following caution:

> It is critical that the appropriate starting point be used. To place an offence in a higher category than warranted may result in a sentence which is too harsh. On the other hand, to place an offence in a lower category than warranted may result in a sentence which is disproportionately low having regard to the

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[39] *R. v. Gashikanyi*, 2017 ABCA 194 [*Gashikanyi*]; *R.* v. *D.S.C.*, 2018 ABCA 335 at para 40 [*D.S.C.*].
[40] *R. v. Revet*, 2010 SKCA 71 at para 72 [*Revet*].
[41] *Norton, supra* at para 27*; R. v. Sidwell (K.A.)*, 2015 MBCA 56 [*Sidwell*].

> penalties imposed on other offenders for the same or similar conduct.
>
> To avoid the problem of inappropriate starting points, courts of appeal must first provide clear descriptions of what type of offence falls within what category. This done, trial judges must properly classify the offence before them having regard to these criteria. This exercise is not new to courts. Judges have long assessed the general seriousness of particular types of offences with a view to determining the appropriate range of sentences.[42]

46. These comments of McLachlin, J. were cited with approval by the majority in *Stone*, a further decision considering the appropriateness of the starting point in a sentencing context.

> This Court's decision in *McDonnell*, *supra*, highlights the need for clarity on the part of appellate courts in setting ranges for offences. More specifically, McLachlin J., in dissent, stated that appellate courts must clearly specify what categories of offences are meant to be covered by a starting point (para. 104). Although the majority, *per* Sopinka J., did not expressly identify this need for clarity in the classification of offences, it did agree that appellate courts may set starting points as guides for lower courts. In my opinion, a clarity requirement must be read into this appellate court authority because such guides would not be useful without a clear description of the category created and the logic behind the starting point appropriate to it. The same need for clear direction applies to ranges set by appellate courts.[43]

47. The appellate decisions previously referenced clearly evidence an intentional decision to leave the offence of a major sexual interference open-ended and unconstrained by a particular starting point or endorsed range. This is for good reason: the offence of sexual interference is not amenable to easy classification. The interplay of many different relevant factors may push a sentence far above or below that which is appropriate in another case. Sentences in this area range from a short conditional sentence order to double digit penitentiary terms, depending on the circumstances of the offence and the degree of responsibility of the offender.

48. If this Honourable Court were to accede to the request of the Appellant to essentially drive up sentences across the board on the basis that current appellate level sentencing ranges are outdated and need to be brought into line with contemporary knowledge, one practical effect

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[42] *R. v. McDonnell*, [1997] 1 S.C.R. 948 at para 103-104 [*McDonnell*].
[43] *R. v. Stone*, [1999] 2 S.C.R. 290 at para 245 [*Stone*].

would necessarily be a reduction in the number of cases deviating below the lower end of that standard, even where a lower sentence is otherwise proportionate in all of the circumstances. This is especially problematic in the current climate where multiple appellate courts around the country have struck down mandatory minimum sentences in this area because they are forcing trial judges to impose sentences that are disproportionate because they are unduly harsh.

49. In *Scofield*, the British Columbia Court of Appeal upheld a finding of unconstitutionality, with the majority substituting a conditional sentence of twelve months for the six month conditional sentence imposed by the trial judge, in a case where a twenty-two year old accused engaged in several acts of unprotected intercourse with two fifteen-year old girls that he had met online, who had provided de-facto consent. The mandatory minimum was found to be unfit because the offender had a cognitive disability that resulted in his having the mental maturity of someone much younger. He was not able to understand that what he did was wrong.[44]

50. In *J.E.D.*, the Manitoba Court of Appeal upheld a determination that the minimum one-year sentence was unconstitutional in a case involving an accused who was developmentally delayed and had multiple cognitive disabilities including autism spectrum disorder and ADHD.[45]

51. The import of the extensive jurisprudence in this area is that in some circumstances a sentence far below what would otherwise be imposed is called for. Sentencing courts are well equipped to recognize circumstances of high moral blameworthiness and respond appropriately by implementing stiff penalties. Individualization at the low end of the scale would suffer if this Court were to implement a higher benchmark in an area where few cases are alike, and the impact of the factual differences is great. The individuals who will suffer are those marginalized groups that genuinely merit individualized consideration: those with developmental disabilities and impairments such as FASD, compelling *Gladue/Ipilee* factors, and other personal circumstances which render lengthy terms of incarceration neither desirable nor productive.

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

A) Did the sentencing judge make a reviewable error?

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[44] *Scofield, supra* para 26.
[45] *R. v J.E.D.*, 2018 MBCA 123 [*J.E.D.*]

52. The Appellant alleges that the Manitoba Court of Appeal inappropriately intervened to correct an error in the sentencing judge's reasons that did not exist. More specifically, the Appellant contends that the sentencing judge's consideration of *Sidwell* does not mean that he was impliedly relying on the starting point contained therein, rather, the Appellant contends that the sentencing judge relied on *Sidwell* for general principles.

53. With respect, this contention is not borne out on a plain reading of the sentencing judge's reasons. The reliance on the starting point in *Sidwell* is explicit:

> It is also a situation where under all of the Sidwell terms and directions, I believe this does fit into **a four to five year start position** and I believe that, in fact, the nature of it is such that this is the appropriate position to take.[46]

54. The application of the starting point articulated in *Sidwell*, in the circumstances of the case at bar, suggests a fundamental misapprehension of the ratio contained therein. The "terms and directions" provided in *Sidwell* indicate that a starting point of four to five years applies to situations where a major sexual assault is committed on a young person within a trust relationship by means of violence, threats of violence or by means of grooming.[47]

55. The error is particularly salient because the Manitoba Court of Appeal has long held that the sexual abuse of a child by a parent is a crime like no other, and should be placed in a category of its own for sentencing purposes:

> The gross abuse of parental trust, and the fact that the offence often commences when the victim is a child of tender years and continues over a lengthy period, are the usual hallmarks of a sexual assault involving members of a family unit. 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.[48]

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[46] Reasons for Decision, Appellant's Record, Tab 1, page 5, lines 16-20 (emphasis added).
[47] *Sidwell*, *supra* para 41 at para 38.
[48] *D.C., supra* para 23 at para 14.

56. Having found that there was no relationship of trust between the Respondent and the victim, reliance on the starting point that presumed a relationship of trust necessarily resulted in a sentence that penalized the Respondent for a significantly aggravating factor that did not exist.

57. Accordingly, the Manitoba Court of Appeal found that the sentencing judge had committed an error in principle:

> 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.[49]

58. The Appellant asserts that the sentencing judge "recognized the gap in the jurisprudence relating to child sexual abuse where there is no position of trust and then relied on the general principles in *Sidwell* to determine an appropriate sentence" (Factum of the Appellant, at para 61). A plain reading of the sentencing judge's reasons lends itself to the opposite conclusion. Rather than recognizing a gap, the sentencing judge identified a starting point, albeit an inappropriate one, and then adjusted the sentence upwards based on the aggravating features of the case. Had the starting point been applicable, his methodology would have been sound.

59. Given that no starting point applied in the present case, the sentencing judge was obligated under *Sidwell* to consider precedents with similar sexual acts and circumstances in order to establish a range of appropriate sentences, and then determine an appropriate sentence based on an analysis of the aggravating and mitigating factors of the case before him. While it is acknowledged that the cases provided to the sentencing judge for consideration were not close to factually identical to the case before him, there were certainly relevant similarities and distinctions identified to the sentencing judge to assist him in establishing an appropriate range of sentence. These cases do not appear to have been considered by the sentencing judge, as they were not acknowledged in his reasons in any meaningful manner.

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[49] *R. v Friesen*, 2018 MBCA 69 at para 16 [*Friesen*].

60. The Appellant points out that both the Respondent and the Manitoba Court of Appeal have criticized the sentencing judge's use of *Sidwell*, and yet rely on the same decision. There is nothing contradictory in pointing out the sentencing judge's misuse of a leading case and advocating for its proper application. The sentencing judge explicitly applied the starting point in *Sidwell* in circumstances where it was inappropriate, and, as a result, imposed a sentence that effectively incorporated an aggravating factor that was not present. The Court of Appeal meaningfully considered precedents, including but not limited to *Sidwell*, and then considered the aggravating and mitigating factors of the present case along with the precedents, and reached a principled result.

61. It is particularly noteworthy that the sentence imposed by the Manitoba Court of Appeal of four and a half years is no less than what one would expect to be imposed in a situation involving the abuse of a position of trust. Despite the absence of this critical factor, the aggravating factors in the case at bar are such that a lengthy sentence was inevitable upon a principled analysis. In fact, the sentence in the present case is longer than what was imposed in *Sidwell*, in spite of the aggravating factors that existed in *Sidwell* and not in the present case (16 month duration, position of trust, a related record, a lack of responsibility/remorse, and acts of masturbation, anal and oral sex).

B) Did the Manitoba Court of Appeal overlook the deference owed to sentencing judges?

62. The Appellant suggests that the Court of Appeal overlooked the deference owed to sentencing judges. This contention runs contrary to the clear articulation of the highly deferential standard of review that is identified and acknowledged by the appellate court:

> The law affords a sentencing judge great latitude in tailoring a sentence to the offence and the offender (R v Ipeelee, 2012 SCC 13 (CanLII) at para 38, [2012] 1 SCR 433; and R v Nasogaluak, 2010 SCC 6 (CanLII) at paras 43-46, [2010] 1 SCR 206). Accordingly, the threshold for appellate intervention with a sentence is "very high" and limited only to situations of material error or where the sentence is demonstrably unfit (section 687(1) of the Code and R v Lacasse, 2015 SCC 64 (CanLII) at para 52, [2015] 3 SCR 1089). A material error has two qualities beginning with demonstration of an error in principle, such as an error in law, a failure to consider or give sufficient weight to a relevant factor, consideration of an irrelevant factor or an overemphasis of an

> appropriate factor. The second aspect is that the error must have impacted the sentence in more than just an incidental way (see Lacasse at para 44). Where the error is harmless, as it has "no real effect" on the sentence, appellate intervention is not permitted (Lacasse at para 45). A sentence will be demonstrably unfit where it unreasonably departs from the principle of proportionality taking into account the individual circumstances of the offence and the offender and the acceptable range of sentence for similar offences committed in similar circumstances (see Lacasse at paras 52-55; and R v Ruizfuentes (HS), 2010 MBCA 90 (CanLII) at para 7, 258 ManR (2d) 220).[50]

It is apparent from the above that the court properly instructed itself on the relevant principles of appellate review on sentencing.

63. The appeal court was also acutely aware that the mere identification of an error is not sufficient to justify appellate intervention, specifically with respect to the use of starting points:

> However, the choice of sentencing range or starting point is a discretionary decision and "cannot in itself constitute a reviewable error" (R v Lacasse, 2015 SCC 64 (CanLII) at para 51). See also at paras 11, 60, 67.[51]

64. The court did NOT find that the sentencing judge erred in using the wrong starting point. It found that the sentencing judge erred in principle by using a starting point that necessarily included an aggravating factor that he has specifically found not to exist.

65. Once an appellate court has identified an error in principle, intervention will only be justified "where it appears from the trial judge's decision that such an error had an impact on sentence."[52]

66. The Appellant asserts that, upon identification of the error in principle, the Manitoba Court of Appeal was obligated to provide an actual analysis as to fitness. With respect, this is incorrect. In essence, there are two manners in which appellate intervention is permitted: (1)

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[50] *Friesen*, *supra* para 57 at para 10.
[51] *Friesen*, *supra* para 57 at para 15
[52] *Lacasse, supra* para 34 at para. 44 (emphasis added).

upon identification of an error in principle, failure to consider a relevant factor, or overemphasis of a relevant factor, or (2) if the sentence is demonstrably unfit.[53]

67. Once the error in principle was identified, the court was then obligated to determine if the error had an impact on the sentence. It found that it did:

> 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.[54]

68. Having concluded that there was an error in principle that had an impact on the sentence, the Court of Appeal was free to re-sentence the Respondent.[55]

69. Ultimate fitness of sentence is a separate basis of appeal which may succeed irrespective of whether or not an error in principle is found. A fulsome exploration of that issue was beyond the scope of the appeal as it was not raised as a ground of appeal in the Respondent's initial appeal from sentence.[56]

C) Was the six-year sentence imposed by the sentencing judge fit?

70. The Appellant further argues that the six-year sentence imposed by the sentencing judge was fit.[57] To be clear, the Respondent submits that the appellate court was not required to engage in a fulsome analysis with respect to ultimate fitness having found an error of principle that affected the sentence in a material way. Nevertheless, the Respondent submits that the six-year sentence that was initially imposed was not a fit sentence. In so saying, the Respondent disagrees with the Appellant's characterization of the relevant aggravating factors.

71. First, this was NOT a preplanned act. Not only was there no evidence before the court of any premeditation, any notion of pre-planning was specifically dispelled by counsel for the Respondent during the course of submissions.

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[53] *Lacasse, supra* para 34 at para 41.
[54] *Friesen*, *supra* para 57 at para 16 (emphasis added).
[55] *Lacasse, supra* para 34 at para 44.
[56] *Lacasse, supra* para 34 at para 52.
[57] Factum of the Appellant at para 70.

72. Further, the Respondent respectfully disagrees that the level of violence and cruelty employed in this case distinguishes this case from any other case involving an unwilling participant. In the twenty-one minute recording, the Respondent attempted to have the child fellate him for approximately a minute and a half at the outset, which was unsuccessful. The remainder of the audio does not involve the child. It is clear from the audio that the child was resistant and extremely upset while this was occurring. This highlights the real point of distinction between this case and others - the presence of recorded audio.

73. Every single instance of non-consensual sexual contact with a child is a serious violation of that child's bodily integrity, and has the potential to inflict lasting harm and trauma that may never fully dissipate. There is no support for the Appellant's assertion that the level of cruelty and violence in this case sets it apart from other similar cases. The archetypical sexual interference case is that of the family member in a position of trust who revisits their abuse on an unwilling victim again and again. They often use threats, coercion, and emotional manipulation to ensure that the child doesn't disclose the abuse. The nature of the violation takes many forms. With the exception of de-facto consent cases, each and every victim is an unwilling participant. Whether that victim reacts with tears, with silence, by blacking out, by closing their eyes, by screaming for help - we will never know, as rarely is there any evidence that allows an outside observer to see and/or hear what happened with their own eyes. The fact of the matter is that each and every one of these crimes would be even more deeply unsettling if the court had eyes and/or ears in the room. It is difficult to say how the level of cruelty in this case exceeds that of the offender who compulsively revisits the same victim time after time, or the offender who completes the act without an alarm being raised because the child does not understand what is happening, or is threatened into silence.

74. Finally, the Respondent strongly disagrees with the Appellant's assertion that there are no mitigating factors in this case. First and foremost, the Respondent had no criminal record (he had a conditional discharge for unelated matters), and this was the first offence that he had committed of this type and magnitude. A first time offender, who has not experienced the clang

of the prison door, is entitled to leniency as opposed to an offender returning to the court for a subsequent offence.[58]

75. Second, a guilty plea should be taken into consideration even in cases where there is overwhelming evidence. A guilty plea saves the victim and the victim's family the trauma of a trial and saves the state the time and expense of a lengthy trial. It is a demonstration that the accused is taking responsibility for their actions and brings finality to proceedings in a public setting. The Respondent entered a guilty plea without setting the matter down for hearing, and therefore no witnesses were even subpoenaed to testify in this matter. The Respondent also made numerous comments expressing his remorse for harming the victim.

76. The Alberta Court of Appeal recently discussed the importance of a guilty plea in the context of a sexual offence against a child in the face of overwhelming evidence:

> There are, however, mitigating factors here. A key one is the entry of a guilty plea to both offences. Hajar is to be given credit for pleading guilty, which represents an acceptance of responsibility under s 718(f) of the Code. This is to be encouraged. That said, this is a case where Hajar was literally "caught in the act" by a concerned citizen who phoned the police. Moreover, the guilty plea occurred after the preliminary inquiry at which the child was required to testify. A guilty plea after preliminary inquiry does not typically mitigate sentence as much as a guilty plea beforehand. It must also be acknowledged that in this case, there does not appear to be any internalization of guilt or real remorse. However, a guilty plea can also be an indication that the objective of rehabilitation is within reach and restraint more influential. There is something of that here. In the result, the guilty pleas should be accounted for.[59]

77. Finally, the personal circumstances of the Respondent cried out for some consideration by the Court. The Respondent was a youthful offender who had experienced an upbringing most cannot imagine: he was physically, emotionally, and sexually abused for his entire youth. He was made to have sex with a female member of his immediate family and his brother at the direction of that family member when he was eleven years old. He was apprehended by Child and Family Services because of abuse on more than one occasion. When he finally found a modicum of stability with a Big Brother at age fifteen, that individual's wife began sexually

[58] *R. v. Do*, 2019 BCCA 191 at para 21.
[59] *R. v. Hajar, supra* para 40 at para 163.

abusing him. He was homeless for three years from age eighteen to twenty-one and resorted to prostitution in order to support himself. His traumatic childhood affected him his entire life.

78. An offender's personal circumstances can properly be taken into account in reducing an otherwise appropriate sentence. In the present case, the Respondent's personal circumstances should necessarily have impacted on his sentence: the lack of positive supports and victimization as a youth reduced the Respondent's moral blameworthiness.[60]

79. Upon completion of a principled analysis of the jurisprudence, the circumstances of the offence and the circumstances of the offender, and the aggravating and mitigating factors, the Respondent submits that the six-year sentence imposed in the Provincial Court of Manitoba was manifestly unfit in the circumstances.

PART IV – COSTS

80. The Respondent does not seek costs and requests that no costs be ordered against it.

PART V – ORDER SOUGHT

81. The Respondent asks that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 7th day of July, 2019

Gerri Wiebe

Ryan McElhoes

[60] *R. v. Shahnawaz*, [2000] O.J. No 4151 (ONCA) at para 6, leave to appeal refused [2001] S.C.C.A. No. 24.

PART VI – IMPACT ON PUBLICATION BAN

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

83. The Respondent's materials do not include any information which identifies the victim.

PART VII - TABLE OF AUTHORITIES

Authorities	**Cited at Paragraph No.**
R. v. Allen, 2012 BCCA 377	**24, 27**
R. v. D.C., [1991] M.J. no. 480	**23, 55**
R. v. Do, 2019 BCCA 191	**74**
R v D.S.C., 2018 ABCA 335	**42**
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R. v. M. (C.A.), [1996] 1 S.C.R. 500	**33**
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R. v. Proulx, 2000 SCC 5	**35**
R. v. Revet, 2010 SKCA 71	**43**
R. v. Sandercock, 1985 ABCA 218	**23, 36, 37**
R. v. Scofield, 2019 BCCA 3	**26, 49**
R. v. Sidwell (K.A.), 2015 MBCA 56	**44, 53, 54, 58, 59, 60, 61**
R. v. Shahnawaz, [2000] O.J. No 4151 (ONCA)	**78**
R. v. Stone, [1999] 2 S.C.R. 290	**46**
R. v. Stuckless, [1998] O.J. No. 3177	**28**
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