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)

-and-

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. This case raises the important question of whether sentencing ranges for child sexual abuse offences are still consistent with Parliamentary and judicial recognition of the severity of these crimes, and raises as well the question of when an appellate court ought to interfere with a trial judge's sentencing decision in a child sexual abuse case.

2. To this end, the Attorney General for Ontario advances a "principled approach" to sentencing, that could be applicable to all cases of child sexual abuse, regardless of whether the case arises in a province that uses "starting points" or "sentencing ranges". AG Ontario's "principled approach" builds upon Ontario's jurisprudence, as well as that of this Honourable Court, while also seeking to give full effect to Parliament's successive legislative directions of the past 15 years, which have called for sentences to better reflect the seriousness of child sexual abuse offences.

PART II – QUESTIONS IN ISSUE

3. The Appellant has raised two grounds of appeal:

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?

Although AG Ontario takes no position on the outcome of the appeal, AG Ontario offers a "principled approach" to sentencing in an effort to assist the Court in addressing these two grounds of appeal.

PART III – ARGUMENT

4. AG Ontario's "principled approach" to sentencing in child sexual abuse cases is discussed below.

A. "Sentencing Ranges" and "Starting Points" Must Have Regard for the Concerns of Parliament and the Public about the Gravity of Child Sexual Abuse Offences

5. Parliament's successive amendments to the *Criminal Code* over the past 15 years demonstrate that there has been a significant evolution in the way Parliament has directed judges to approach sentencing issues in child sexual abuse cases. For instance, in 2005, 2012, and 2015, Parliament enacted and expanded certain offence provisions of the *Criminal Code*, in order to better protect children in our community. In addition, over this same time period, Parliament established and increased the mandatory minimum and maximum sentences for numerous offences involving the sexual abuse of children, so as to punish these

crimes more harshly.[1] Parliament's ongoing legislative amendments to the *Code* have reflected the view that children must be better protected under the criminal law, and that the old provisions of the *Code* were *not* adequately accomplishing these purposes.

6. Certain courts have commented on the effect of the Parliamentary reforms made to the *Criminal Code* in 2005, 2012, and 2015 with respect to child sexual abuse offences.[2] For instance, the Ontario Court of Appeal, in its recent decision in *Stuckless*, observed that these particular legislative amendments reflect the view that there has been a significant recognition in society of the gravity of sexual offences against children, of the impact of sexual abuse on children, and of the harm caused by these types of offences.[3] The Parliamentary amendments signal as well that society's denunciation of this conduct must be reflected in the sentences imposed by courts. [4]

7. Given the steady number of amendments made to the *Criminal Code* by Parliament over the past 15 years, judge-made sentencing "ranges" and "starting points" in child sexual abuse cases must have regard for these present-day concerns expressed by Parliament and the public about the gravity of child sexual abuse offences, the harm caused to children and the community, and the need for greater denunciation. Furthermore, given that sentencing ranges and starting points, at best, are simply "historical portraits"[5] of the sentences that were customarily being imposed at the time that the ranges and starting points were *first* established, courts should view with "some caution" sentencing ranges and starting points that *precede* these legislative amendments.[6] As the Ontario Court of Appeal recognized in its 2018 decision in *J.S.*, Parliament's increases in the mandatory minimum and maximum sentences for sexual offences against children have reflected both "Canadians' concerns" and "Parliament's concern" about the gravity

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[1] *R. v. Lacasse*, 2015 SCC 64 at para. 7; *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; *Safe Streets and Communities Act (Bill C-10), S.C. 2012, c. 1*; *Tougher Penalties for Child Predators Act (Bill C-26), S.C. 2015, c. 23*

[2] See, for example, *R. v. W.(D.R.)*, *2012 BCCA 454* at paras. 32-34; *R. v. King*, *2013 ABCA 3* at para. 20.

[3] *R. v. Stuckless*, *2019 ONCA 504* at paras. 103-112.

[4] *Ibid*, at paras. 103-112.

[5] *Ibid*, at para. 57.

[6] See, for instance, *R. v. Inksetter*, *2018 ONCA 474* at paras. 23-24. The Court observed that even if amendments made to the "mandatory minimum" sentencing provisions for certain child sexual abuse offences were to be declared at some future point to be of no force and effect, Parliament's legislative initiatives still signal Canadians' concerns regarding the incidence of such crime, and sentencing decisions that precede these types of Parliamentary amendments must be viewed with "some caution".

and prevalence of such offences, and courts "must be responsive" to these concerns.[7]

8. For its part, certain jurisprudence from the Ontario Court of Appeal mirrors this evolution in sentencing that Parliament has directed. For instance, the Court's 2002 landmark sentencing decision in *D.(D.)* established a series of sentencing ranges to be used as guidelines in child sexual abuse cases.[8] The facts of the case itself had involved the ongoing sexual abuse of four child victims, by an accused who was in a position of *trust* toward them. However, in the Ontario Court of Appeal's 2011 decision in *Woodward*, while the Court affirmed the ongoing relevance and importance of all the *principles* of sentence first articulated in *D.(D.)*, the Court then proceeded to *increase* the "heavy price" of jail punishment to be paid by those who sexually offend against children.[9] The Court referred to the penitentiary ranges of sentence first established by *D.(D.)*, and then applied them in upholding the 6 ½ year sentence in Woodward's case, which had involved only *one* instance of sexual abuse and "child luring" of *one* child victim, by an accused who was *not* in a position of trust toward the child. In 2018, the Ontario Court of Appeal reaffirmed in *J.S.* the ongoing relevance and importance of all the *principles* of sentence first articulated in its 2002 decision in *D.(D.)*, but resisted placing undue reliance on the facts and sentencing ranges first discussed in *D.(D.)*, when considering whether J.S.'s 18-year-sentence for certain child sexual abuse offences was unfit. In upholding the sentence, and refusing to interfere with the trial judge's exercise of discretion, the Court noted that *D.(D.)* was "decided 16 years ago, when the Internet was in its relative infancy" and "new categories of child sexual abuse" had not yet emerged within the community.[10]

B. Sentencing in Child Sexual Abuse Cases Must Give Primary Effect to Section 718.01 of the *Code*

9. Parliament enacted s. 718.01 of the *Criminal Code* on July 22, 2005 as part of Bill C-2 (*Protection of Children and Other Vulnerable Persons*).[11] Section 718.01 states:

> 718.01 *Objectives – offences against children* – When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

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[7] *R. v. J.S.*, *2018 ONCA 675* at paras. 96-104.
[8] *R. v. D.(D.)*, *[2002] O.J. No. 1061 (C.A.)*.
[9] *R. v. Woodward*, *2011 ONCA 610* at para. 75. At para. 58 of *Woodward*, Moldaver JA noted that even if the Court's 2006 decision in *R. v. Jarvis*, *(2006), 214 O.A.C. 189 (CA)* had purported to set a range of 12 to 24 months for the offence of luring, that range needed to be revised given the 2007 amendments to the *Code* in which Parliament doubled the maximum punishment for the offence from 5 to 10 years.
[10] *R. v. J.S.*, 2018 ONCA 675 at paras. 100-104.
[11] *Criminal Code of Canada: ss. 718.01.*

Importantly, this case provides this Court with its *first* opportunity to explain the purpose and effect of Parliament's 2005 enactment of s. 718.01 of the *Code* on the sentences imposed in child abuse cases.

10. AG Ontario suggests that the enactment of s. 718.01 in 2005 is an important legal development in child sexual abuse cases and should form part of a "principled approach" to sentencing for a couple of reasons. First, while provincial appellate courts have suggested for many years that, in child abuse cases, primary consideration *ought to* be given to the principles of denunciation and deterrence, Parliament's enactment of s. 718.01 in 2005 made this legal approach a *mandatory* requirement.[12] Parliament's decision to remove any judicial discretion on this particular issue means that judges *must* give full effect to s. 718.01, as part of *every* sentence to be imposed in *all* child sexual abuse cases. Similarly, courts must *not* focus their sentencing analysis on subordinate principles of sentence, like that of rehabilitation. Second, the mandatory nature of the legislative scheme suggests the need for harsher penalties. As this Court stated in *Lacasse*, "in all cases in which general or specific deterrence and denunciation must be emphasized, the courts have very few options other than imprisonment for meeting these objectives".[13]

11. Parliament's enactment of s. 718.01 in 2005 was only one part of Bill C-2's overall legislative scheme, which was designed to better protect children from "all forms" of exploitation, abuse, and neglect,[14] and to make certain that sentences "*better reflect the seriousness of the offence*".[15] As one Member of Parliament put it: "Bill C-2…seeks to ensure that the penalties for offences committed against children reflect the serious nature of committing *any* offence against a child".[16] "Each reform proposed by Bill C-2 viewed individually and collectively says to Canadians, to our children, to criminal justice personnel, and to would-be offenders: the abuse, neglect and sexual exploitation of *any* child in Canada is a *serious* matter and *must be treated as such by the criminal justice system*".[17]

C. All Child Sexual Abuse is Serious

12. Section 718.2 (a)(ii.1) of the *Criminal Code* is another statutory provision that was enacted in 2005 as part of the coming into force of Bill C-2.[18] Section 718.2(a)(ii.1) requires that *all* evidence of child abuse ought to be viewed as an aggravating factor at the time of sentence. That is, *regardless* of the nature, type, length, or other circumstances of the abuse, and *regardless* of the circumstances of the offender, or the

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[12] See footnote 1.
[13] *R. v. Lacasse*, *supra* at para. 6.
[14] *Preamble to 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.*
[15] *House of Commons Debates, Vol. 140, No. 007 (October 13, 2004)*, at 1515-1520.
[16] *Debates of the Senate, Vol. 381, Issue 73 (June 20, 2005)* at 2040-2050.
[17] *Ibid*.
[18] *Criminal Code of Canada: ss. 718.2(a)(ii.1).*

relationship between the offender and victim, *all* instances of child abuse must be "deemed to be aggravating circumstances" in the determination of a fit sentence. Section 718.2(a)(ii.1) thereby makes clear that courts must treat *all* cases of child sexual abuse as serious.

13. Accordingly, s. 718.2(a)(ii.1) should be emphasized as an important component of any "principled approach" to sentencing in child sexual abuse cases, and as part of an overall legislative regime that in recent years has had, as one of its purposes, the need for sentences in *all* child abuse cases to better reflect the seriousness of the crimes so committed.

D. All Children Have the Right to be Safe from Sexual Abuse

14. The right of all children in our community to security and equal protection under ss. 7 and 15 of the *Charter*, and the right of all children, as well, to be protected from harm, should form part of any "principled approach" to sentencing in child sexual abuse cases. In *Baker*, this Court recognized that "children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society".[19] Clearly, "if children's rights and interests are central, protection of those same children from harm is critically important".[20]

15. Given the inherent vulnerability of children within our community, and the enormous power imbalance that exists between children and adults, children "both need and have the right to the best protections society can provide".[21] Moreover, "all members of our society, especially children, should be equally free to live and circulate in society without being subjected to sexual abuse".[22]

E. The Principles from *D.(D.)* and *Woodward* Should Form Part of a "Principled Approach" to Sentencing in *All* Child Sexual Abuse Cases in the Determination of a Fit Sentence

16. AG Ontario includes, as part of its proposed sentencing framework, the principles first articulated by Moldaver JA (as he then was) in the Ontario Court of Appeal's landmark 2002 decision in *D.(D.),*[23] and later affirmed by Moldaver JA in the Court's 2011 decision in *Woodward*.[24] The decisions, as a couplet, establish and reinforce the following legal cornerstones when it comes to the determination of fit and appropriate sentences in *all* child sexual abuse cases in Ontario:

(1) Our children are our most valued and our most vulnerable assets.

(2) We as a society owe it to our children to protect them from the harm caused by sexual predators.

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[19] *Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817* at para. 67.
[20] *R. v. B.E., [1999] O.J. No. 3869 (C.A.)* at paras. 50-51.
[21] *Debates of the Senate, supra,* at 2030-2040.
[22] *R. v. Hajar, 2016 ABCA 222* at paras 43-44.
[23] *R. v. D.(D.), [2002] O.J. No. 1061 (C.A.)* at paras. 34-38.
[24] *R. v. D.(D.), Ibid,* at paras. 34-38; *R. v. Woodward, 2011 ONCA 610* at para. 72.

(3) Throughout their formative years, children are very susceptible to being taken advantage of by adult sexual offenders and they make easy prey for such predators.

(4) Adult sexual predators recognize that children are particularly vulnerable, and they exploit this weakness to achieve their selfish ends, heedless of the dire consequences that can and often do follow.

(5) 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) children who have been sexually abused are prone to become abusers themselves when they reach adulthood.

(6) Absent exceptional circumstances, in the case of adult predators, the objectives of sentencing commonly referred to as denunciation, general and specific deterrence, and the need to separate offenders from society must take precedence over the other recognized objectives of sentencing.[25]

17. AG Ontario suggests that the foundational principles from *D.(D.)* and *Woodward* ought to apply in child sexual abuse sentencing cases across the country, not just in Ontario.

F. A Harm-based Analysis is Essential

18. A "principled approach" to sentencing in child sexual abuse cases must also be "harm-based" - that is to say, courts must advert to the harm caused to children and their communities by the incidence and prevalence of child sexual abuse.

19. In this regard, Moldaver JA (as he then was) stated in *D.(D.)* and *Woodward* that sentencing in child sexual abuse cases *must* focus on the devastating harm that is caused to children from the commission of such crime:

> The harm occasioned to children by adult sexual predators is 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. Because of this, the message to such offenders must be clear – prey upon innocent children and you will pay a heavy price![26]
>
> . . .
>
> In so concluding, I wish to emphasize that when trial judges are sentencing adult sexual predators who have exploited innocent children, the focus of the sentencing hearing should be on the harm caused to the child by the offender's conduct and the life-altering consequences that can and often do flow from it.[27]

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[25] *R. v. Woodward*, 2011 ONCA 610 at para. 72. Section 718.01 of the *Code* appears to have overtaken this particular principle. Section 718.01 mandates that in all circumstances, even exceptional ones, denunciation and deterrence must take precedence over the other recognized objectives of sentencing.

[26] *Ibid*, at para. 73.

[27] *Ibid*, at para. 76.

20. Indeed, *D.(D.)* and *Woodward* deliver *the same message* as that conveyed by Parliament over the past 15 years - sentences must be imposed for child sexual abuse offences that more greatly denounce and deter such crimes, given their gravity, their prevalence, and the devastating harm caused to children. As the Ontario Court of Appeal recently observed in *Stuckless*, "even one instance of sexual abuse can permanently alter the course of a child's life".[28] "The gravity of this harm should not be overlooked" in sentencing offenders who sexually abuse children.[29] Harm-based analysis has also been statutorily recognized in s. 718.2(a)(iii.1) of the *Criminal Code* since 2013. [30]

G. Judicial Determinations of "Proportionate" Sentences Must Have Regard for Parliamentary and Societal Recognitions of the Heightened Gravity of Child Sexual Abuse Offences

21. The purpose of both "sentencing ranges" and "starting points" is to assist courts to address "parity" in sentencing among "similar offenders" who commit "similar offences" in "similar circumstances".[31] However, while parity is a statutorily recognized principle of sentence under s. 718.2(b)[32] of the *Criminal Code*, both statute law and case law make clear that parity is secondary in importance to the *fundamental* principle of "proportionality".[33] "(P)roportionality is the cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on an offender".[34] Section 718.1 of the *Code* states the principle of proportionality as follows:

> 718.1 *Fundamental principle* – A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. [35]

The principle of proportionality dictates that *the more serious* the crime and its *consequences*, the heavier the sentence will be.[36] The central issues to a court's proportionality assessment must be the *overall* gravity of the offence that has been committed, and the offender's *overall* moral culpability for it.

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[28] *R. v. Stuckless*, *supra*, para. 136. In *Stuckless*, the Ontario Court of Appeal also reaffirmed at paras. 56, 90 and 135 the importance of the harm-based approach to sentencing, first articulated in *D.(D.)*.

[29] *Ibid*, at para. 136.

[30] *Criminal Code of Canada: ss. 718.2(a)(iii.1)*.

[31] *R. v. Lacasse*, *supra*, at para. 57.

[32] *Criminal Code of Canada: ss. 718.2(b).*

[33] See *R. v. Lacasse*, *supra*, at para. 58. The principle of parity has inevitable limits because of the individualized nature of the sentencing process. As the Supreme Court of Canada stated in *Lacasse*: "*everything* depends on the gravity of the offence, the offender's degree of responsibility, and the specific circumstances of each case".

[34] *R. v. Lacasse*, *supra*, at para. 12.

[35] *Criminal Code of Canada: ss. 718.1.*

[36] *R. v. Lacasse*, *supra*, at para. 12.

22. Given that Parliament has continually amended the *Code* in recent years out of heightened recognition for the gravity of child sexual abuse offences, a "principled approach" to sentencing suggests that *each* judicial assessment under s. 718.1 as to the *gravity* of any child sexual abuse offence committed in an individual case must *also* necessarily have regard for *Parliamentary and societal recognitions of its gravity*, and the harm caused to children by sexual abuse, particularly when a judge is required to determine the *length* of sentence that would be most "proportionate" under s. 718.1.[37]

H. The Moral Culpability of Sexual Predators Who "Prey" on Children is Very High

23. Given the inherent power imbalance that exists between adults and children, the moral culpability of adults who prey upon children is very high. Therefore, a "principled approach" to sentencing in child sexual abuse cases ought to recognize the heightened moral culpability of such adults in judicial determinations of "proportionality" under s. 718.1. As Moldaver JA (as he then was) observed in *D.(D.)* and *Woodward*, children throughout their formative years are very susceptible to being taken advantage of by adult sexual predators. For this reason, children "make easy prey".[38]

I. Sentences Imposed for Child Sexual Abuse Offences Must Have Regard for the "Constellation of Factors" and "Confluence of Circumstances" that are Present in the Particular Case

24. Some of the appellate jurisprudence in child sexual abuse cases has talked about the importance of arriving at a sentence that addresses the "cumulative circumstances" and "confluence of factors"[39] of a given case, so that the global sentence imposed is one that addresses the overall gravity and moral blameworthiness of the accused's conduct, and properly recognizes the sentencing objectives of denunciation and deterrence.[40]

25. This particular legal perspective, first articulated by this Court in the child sexual abuse case of *L.M.*, and later applied by the Ontario Court of Appeal in *D.G.F.*, is a "principled approach" to sentencing that should be applicable in *all* child sexual abuse cases, particularly given the infinite number of ways in which crimes against children can be committed, and the many different types of perpetrators who, for diverse motivations, commit crimes against children.[41] The cases of *L.M.*, *D.G.F.*, and *D.(D.)* also recognize that sentences for child sexual abuse offences can reach "well into the double-digit level", "depending on the number of offences and the confluence of circumstances that may exist in each case".[42]

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[37] *R. v. P.J.B.*, *[2010] A.J. No. 145 (C.A.)* at para. 10. See also *R. v. Stuckless*, *supra*, at para. 112.
[38] *R. v. D.(D.)*, *supra*, at paras. 34-38; *R. v. Woodward*, *supra*, at para. 72.
[39] *R. v. D.G.F.*, *2010 ONCA 27* at para. 26.
[40] *R. v. L.M.*, *2008 SCC 31* at paras. 30-31, 36; *R. v. D.G.F.*, *supra*, at paras. 20-26.
[41] *R. v. L.M.*, *2008 SCC 31* at paras. 30-31, 36; *R. v. D.G.F.*, *supra*, at paras. 20-26.
[42] *R. v. D.G.F.*, *supra*,, at para. 29.

26. Importantly, a sentencing approach that has regard for the "cumulative circumstances" and "confluence of factors" that exist in a given case, properly considers *all* of the aggravating and mitigating circumstances that pertain to *both* the offence *and* the offender.

J) There is Nothing Mitigating about Child Sexual Abuse Offences that are Committed by Acquaintances or Strangers

27. Although s. 718.2(a)(iii) of the *Code* states "evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim" is "deemed" to be "an aggravating factor" at the time of sentencing, *the opposite is not true*.[43] That is, *there is nothing mitigating* about acts of child sexual abuse committed by acquaintances or strangers. A "principled approach" to sentencing recognizes that sexual abuse causes devastating harm to children, *regardless* of whether the offender is known and trusted by the child or is a stranger whom the child has encountered in their real or virtual world.

28. Statistically, the vast majority of adult sexual offenders are known to their child victims at the time of the offences.[44] Accordingly, it is not surprising that most child sexual abuse sentencing decisions involve an offender who has committed the crime within the context of a "trust" relationship. That said, acts of child sexual abuse committed by acquaintances and strangers are *also* extremely serious. As this Court observed in *Legare*, technology has become an enabler for predatory adults who cloak themselves in the anonymity of the Internet for a sexual purpose, in order to troll for vulnerable children, and then entice children into sexual activity, whether through the Internet or in person.[45]

29. Accordingly, "starting points" and "sentencing ranges" in child sexual abuse cases must have regard for the fact that *all* sexual offences against children are *harmful* to children – *regardless* of whether the offender is known to the child or is a stranger whom the child has encountered on the Internet or in their everyday life. Moreover, while an offender's sexual abuse of a child can occur in the real or virtual world, or in a public or private space, an offender's abuse of a child *within the child's own home* ought to be treated as a *highly* aggravating factor, given that the child's home is the place where the child ought to feel safest.[46]

PART IV – SUBMISSIONS RESPECTING COSTS

30. AG Ontario requests that no costs order be made against Ontario as an intervener.

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[43] *Criminal Code of Canada: ss. 718.2(a)(iii).*

[44] Rotenberg, C. 2017. "Police-reported sexual assaults in Canada, 2009 to 2014: A statistical profile" (October 3, 2017). Juristat. Statistics Canada. (online at: *https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/54866-eng.htm*) p. 13.

[45] *R. v. Legare*, *2009 SCC 56* at para. 2.

[46] *R. v. M..J.*, 2016 ONSC 2769, [2016] OJ No.3177 (QL) at para 31.

PART V – NATURE OF ORDER SOUGHT

31. The intervener makes no submissions as to the outcome of this appeal. The intervener requests permission to make oral submissions of no longer than five minutes.

ALL of which is respectfully submitted this 9th day of August, 2019.

Lisa Joyal

Lisa Joyal
Counsel for the Intervener
The Attorney General for Ontario

PART VI – TABLE OF AUTHORITIES

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