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:

JUSTYN KYLE NAPOLEON FRIESEN

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

FACTUM OF THE INTERVENER
THE LEGAL AID SOCIETY OF ALBERTA, INTERVENER

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

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PARTS I & II – OVERVIEW & POSITION ON QUESTIONS ON APPEAL

[1] The intervener, Legal Aid Alberta (LAA), takes no position on the outcome of this appeal. LAA also takes no position on the range or sentencing principles that should apply to sexual offences committed against children. Instead, because this appeal raises issues related to starting-point sentencing, LAA offers its perspective about how starting points have been used in Alberta, and highlights some of the problems associated with starting-point sentencing.

PART III – ARGUMENT

1. There are concerns surrounding Alberta's approach to starting-point sentencing.

[2] No Canadian court has adopted starting-point sentencing with as much enthusiasm as the Alberta Court of Appeal. This Court has previously addressed this phenomenon, commenting on Alberta's three-year starting point for "major sexual assault" in *McDonnell*. In *McDonnell*, the Court of Appeal had increased a sentence because the sentencing judge failed to apply the starting point for major sexual assault. But on behalf of a majority of this Court, Justice Sopinka explained that "mischaracterization of the offence according to judicially created categories is not an error in principle, nor should it be treated as one".[1]

[3] Still, even after *McDonnell*, the Court of Appeal has repeatedly reaffirmed the central place of starting-point sentencing in Alberta. One leading decision, *Arcand*, reasoned that sentencing had "evolved" since *McDonnell*.[2] In response, Prof. Quigley argued that Alberta's highest court had not been "fully respectful" of this Court's "repeated admonitions" about the deference that must be shown to sentencing judges. He suggested the Court of Appeal had "effectively ignore[d] binding precedent" from this Court, "return[ing] to the relative rigidity" of Alberta's pre-*McDonnell* authorities.[3] And for years, there have been lively debates *within* the Alberta Court of Appeal about how judges should use starting points.[4]

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[1] *R v McDonnell*, [1997] 1 SCR 948 at para 42.
[2] *R v Arcand*, 2010 ABCA 363 at paras 112 (majority), 327-352 (dissent); see also *R v Ostertag*, 2000 ABCA 232 at paras 11-24; *R v Rahime*, 2001 ABCA 203 at paras 24-26.
[3] T. Quigley, "Annotation to *R v Arcand*" (2010), 83 CR (6th) 202 at 202-203. See also C.C. Ruby, *et. al.*, *Sentencing*, 9th ed (Toronto: LexisNexis, 2017) at paras 4.11 to 4.13.
[4] *R v Waldner*, 1998 ABCA 423; *R v Beaudry*, 2000 ABCA 243; *R v Jefferson*, 2008 ABCA 365; *R v Lee*, 2012 ABCA 17; *R v Murphy*, 2014 ABCA 409; *R v Legerton*, 2015 ABCA 79; *R v Gashikanyi*, 2017 ABCA 194; *R v Godfrey*, 2018 ABCA 369.

[4] This Court has never overruled *McDonnell*. Instead, in *Lacasse*, this Court explicitly readopted *McDonnell*'s warning that "it can never be an error in principle in itself to fail to place a particular offence within a judicially created category of assault for the purposes of sentencing."[5] And yet a "binding," categorization-driven approach remains alive and well in Alberta in the years since *Lacasse*.[6] For example, consider the Indigenous single mother who, as a favour to a friend, without being paid, and on a single occasion, carried an unknown (to her) quantity of drugs. The Court of Appeal relied on starting-point logic to triple her jail sentence:

> We accept that it was an error in principle to find Ms. Giroux was not engaged in the possession of cocaine in more than a minimal amount for the purposes of trafficking, and thus not to apply the three year starting point in fashioning sentence, i.e. that this was not commercial trafficking.[7]

[5] This Court should reaffirm what it has already explained in *McDonnell* and *Lacasse*: starting points can provide broad guidance, but sentencing judges do not err when they fail to place an offence within a starting-point category. This appeal also presents the Court with an opportunity to consider some of the practical problems associated with starting-point sentencing.

[6] For example, many of Alberta's starting-point categories remain unworkably broad and vague. In *Stone*, this Court cautioned that starting-point categories must be clearly defined.[8] But consider two of Alberta's most important starting points:

- *Major sexual assault (3-year starting point)*: "where the sexual assault is of a nature or character such that a reasonable person could foresee that it is likely to cause serious psychological or emotional harm, whether or not physical injury occurs."[9]
- *Commercial trafficking in cocaine and similar hard drugs (3-year starting point)*: "cases of a commercial operation on something more than a minimal scale."[10]

[7] It can be challenging to determine whether a particular offence falls into one of these categories. Sexual assault, by its nature, will cause emotional distress in nearly every case. But how does a court determine when that harm is likely to be "serious," and apply this test

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[5] *R v Lacasse*, 2015 SCC 64 at para 60; *McDonnell* at paras 32-3; *R v Suter*, 2018 SCC 34 at para 25.
[6] See e.g. *R v Hajar*, 2016 ABCA 222; *R v DJA*, 2016 ABCA 282 at paras 9-11; *R v Gandour*, 2018 ABCA 238 at paras 54-59; *R v Reddekopp*, 2018 ABCA 399 at para 5.
[7] *R v Giroux*, 2018 ABCA 56 at para 12.
[8] *R v Stone*, [1999] 2 SCR 290 at para 245.
[9] *Arcand* at paras 170-172; see also *R v Sandercock*, 1985 ABCA 218; *R v DWG*, 1999 ABCA 270.
[10] *Rahime* at para 18; see also *R v Maskell*, 1981 ABCA 50 at para 20.

consistently? The Court of Appeal has identified some qualifying sexual acts. But otherwise, the category remains open for debate.[11] As for drug trafficking, the Court itself has conceded that the starting point cannot be defined with much precision. Judges are instructed to examine the "entire context" and consider "*indicia* of commerciality" to decide whether cocaine trafficking was more than "minimally" commercial.[12] The Court has suggested this decades-old starting point will "develop through the case law".[13] But with respect, this is reminiscent of Justice Potter Stewart's definition of pornography: "I know it when I see it".[14] Without precise definitions, there is a risk that starting-point categories will become tautological or impressionistic.[15]

[8] Alberta's categorization debates would be less worrisome if the Court of Appeal did not continue to attach so much significance to these categories. Yet in Alberta, failing to apply a starting point often has consequences. The Court has suggested that a large departure from a starting point may reflect the "failure to give effect to the principle of parity".[16] And that "failing to explain why a particular sentence should radically depart from [a] starting point may disclose an error of principle".[17] It recently warned judges they remain "bound" by starting points.[18]

[9] Appellate courts should not do indirectly what they are forbidden from doing directly. For example, an appellate court must not substitute its own views about the relative weight of different sentencing considerations.[19] But when an appellate court asks whether a sentencing judge has deviated "too far" from a quantitative starting point, the appeal judges might be tempted to ask themselves how far *they* would have moved from the starting point. They might compare their own notional sentences against the actual sentence. And if the difference makes the appellate court uncomfortable, the court might be too quick to infer that the sentence was unacceptably low or high. A disagreement about how much weight to place on a particular factor could be unconsciously recast into "unfitness," or a "failure to give effect to the parity principle."

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[11] See *R v TLG*, 2006 ABCA 313; *R v JBS*, 2009 ABCA 347; *R v Sayers*, 2015 ABCA 21.
[12] *R v Getty*, 1990 ABCA 51 at paras 18-26; *R v Webber*, 2013 ABCA 189 at para 26; *R v Darnell*, 2014 ABCA 235 at para 15; *R v Melnyk*, 2014 ABCA 313; *R v Corbiere*, 2017 ABCA 164.
[13] *Melnyk* at para 6.
[14] *Jacobellis v Ohio*, 378 US 184 (1964) at 197.
[15] See *Hajar* at paras 264-268, esp. para 266 (dissent); *Arcand* at paras 374-378 (dissent).
[16] *R v Christie*, 2004 ABCA 287 at paras 52-53.
[17] *Godfrey* at para 7.
[18] See e.g. *Godfrey* at para 6; *Reddekopp* at para 5.
[19] *Lacasse* at paras 49-50, 78; *R v SLW*, 2018 ABCA 235 at para 49.

[10] Starting-point sentencing is also complicated. Using this approach, judges decide whether the circumstances of a real-world offence were aggravating or mitigating compared to the circumstances of some archetypal crime. Disagreements are common. For example, by definition, a "major sexual assault" involves a foreseeable likelihood of serious emotional harm. Yet the Court of Appeal also suggests that it is aggravating, compared to the archetypal offence, when an offender *actually causes* serious emotional harm.[20] So an "aggravating" fact will be present in the large majority of these cases. Should judges routinely increase sentences from the starting point to account for the same foreseeable consequence that justified creating the starting-point category in the first place? The Court also invites judges to "position on a continuum the nature of the assault, including the circumstances surrounding it, to determine its seriousness."[21] The judge then decides whether the sentence should move up or down from the starting point based on where that crime falls on the continuum. But what principled criteria should judges use to decide whether a crime was a "lower-end major sexual assault," "usual major sexual assault," or "worse-than-archetypal major sexual assault"? Starting-point sentencing is said to make sentencing less impressionistic. Yet this process is hardly a science.

[11] One thing is clear: on appeal, the judge's reasons go under the microscope. The Crown and defence often disagree about whether circumstances were *truly* aggravating or *truly* mitigating, compared to some hypothetical baseline category. There are claims of "double counting." And all this complexity leaves many ways for an appellate court to identify an error in principle.

[12] Starting-point sentencing can also place undue emphasis on just one variable in the proportionality equation. A starting-point category is defined in terms of the elements of some generic crime. But sentences must remain proportionate to the seriousness of the offence *and* the degree of responsibility of the offender. A judge can only determine an offender's responsibility by considering that person's unique circumstances and antecedents. And judges cannot assess proportionality without considering how a particular sentence will affect *that* offender. Proportionality is inherently individualized.[22] Judges do not sentence broad categories of hypothetical offences. Judges sentence real people. Crimes do not go to jail. People go to jail.

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[20] *Arcand* at para 305, point 15; see also paras 170-181 (majority), paras 374-378 (dissent).
[21] *TLG* at paras 11-12; see also *R v BL*, 2011 ABCA 375 at para 12; *Sayers* at paras 12, 29.
[22] *Criminal Code*, s 718.1; *R v Ipeelee*, 2012 SCC 13 at paras 38-9; *R v Nur*, 2015 SCC 15 at para 43; B. Berger, "Sentencing and the Salience of Pain and Hope" (2015), 70 SCLR (2d) 337 at 357-361.

[13] Real-world offenders and real-world crimes are often far more complicated than the criminal archetypes and generic crimes that an appellate court imagines *ex ante*. Courts define starting points by reference to what the court believes is the "typical" offence.[23] But Alberta's starting point for cocaine trafficking will sweep in both the sophisticated criminal who earns enormous profits while preying on the vulnerable *and* the homeless addict who sells to support his addiction. The starting point for convenience-store robbery[24] covers both the professional stick-up artist *and* the mentally ill woman who brandishes a jackknife when a clerk finds her shoplifting food. Many offences can fall within a starting point's broad definition even if the offences do not engage all of the concerns that motivated the creation of the starting point.

[14] In practice, starting points often diminish the importance of case-specific factors. Yes, judges can adjust a sentence away from the starting point to account for the unique facts of the offence and the offender. But starting points can have the "natural effect of bunching sentences around a median rather than spreading them across a range to suit individualized circumstances".[25] Unlike ranges, starting points do not give judges a sense of *how far* a sentence can increase or decrease while staying proportionate. And quantitative sentencing guidelines have a psychological "anchoring effect," even if the guidelines are advisory.[26] The suggestion that these figures are "just a starting point and not an end point" overlooks how an opening number will sometimes overwhelm the sentencing debate. To minimize these problems, sentencing judges and appellate courts must resist the gravitational pull of a starting point. There are many cases where proportionality demands more than just nudging a sentence up or down from the default stint in the penitentiary. Indigenous offenders, for example, require a "different method of analysis in determining a fit sentence". And even offences that call for denunciation or deterrence often require significant restraint in many individual cases.[27]

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[23] *Sandercock* at paras 6-7.
[24] *R v Johnas*, 1982 ABCA 331 at para 19.
[25] A. Manson, "*McDonnell* and the Methodology of Sentencing" (1997), 6 CR (5th) 277.
[26] C. Guthrie, *et. al.*, "Inside the Judicial Mind" (2001), 88 *Cornell Law Rev.* 777; M.W. Bennett, "Confronting Cognitive 'Anchoring Effect' and 'Blind Spot' Biases in Federal Sentencing" (2014), 104(3) *Journal of Crim. Law & Criminology* 489; I.D. Marder & J. Pina-Sánchez, "Nudge the judge? Theorizing the interaction between heuristics, sentencing guidelines and sentence clustering" (2018), *Criminology & Crim. Justice* (online). See also *US v Navarro*, 817 F.3d 494 (7th Cir 2015) at 501-2; *Molina-Martinez v US*, 587 US ___ (2016) at 9-10 (slip op.).
[27] *Ipeelee* at para 59; *R v Lloyd*, 2016 SCC 13 at para 33; *R v Jacko*, 2010 ONCA 452 at paras 84-87; *R v Burnett*, 2017 MBCA 122 at paras 23-26; *R v Dragani*, 2018 BCCA 225; *CDSA*, s 10(5).

[15] Instead of anchors, starting points and ranges should function like navigational buoys. They should help judges chart a course, keeping sentences away from the rocks. But they should still leave experienced judges a wide berth to steer an individualized path to justice. LAA invites this Court to remind lower courts that even substantial departures from a starting point are not necessarily suspicious. Significant downward departures do not always demand exceptional circumstances. Nor should they be reserved for the most sympathetic offenders imaginable.

2. There are limits on an appellate court's ability to establish fair quantitative guidelines.

[16] Even if Canadian courts choose to rely on sentencing guidelines, it is doubtful whether individual sentence appeals are always the proper vehicle for crafting quantitative guidelines. In the mid-1980s, the now-defunct Canadian Sentencing Commission considered ways to minimize unjustified disparity in sentencing. The commissioners did not believe guideline judgments were a panacea. They observed that appellate courts "do not have the means and resources required to gather all of the necessary information to create policy on appropriate levels of sanctions". Appellate courts are instead "structured to respond to individual cases that are brought before them".[28] Appellate courts often labour under heavy caseloads, face significant time pressures, lack access to relevant statistics and empirical evidence, and depend heavily on submissions.

[17] Instead of relying solely on appellate courts, many other common-law jurisdictions have established permanent sentencing commissions. The role of these councils has varied across jurisdictions, and their duties have changed over time.[29] Some perform research into sentencing issues and invite courts to adopt their findings about sentencing policy. Others issue purely advisory guidelines. Still others formulate presumptively binding sentencing algorithms. But whatever the commission's role, the jurists and experts on an independent, inquisitorial sentencing council will consider a much wider range of policy concerns, sentencing statistics, and social science than a court hearing a single sentence appeal.

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[28] Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Justice Canada, 1987) at xxiv; see also 69-71, 294-296. See also the Hon. G. Hammond, "Sentencing: Intuitive Synthesis or Structured Discretion?", [2007] *New Zealand Law Rev.* 211 at 231-233.

[29] See generally: A. Ashworth & J.V. Roberts, "The Origins and Nature of Sentencing Guidelines in England and Wales", in A. Ashworth & J.V. Roberts, *Sentencing Guidelines: Exploring the English Model* (Oxford: Oxford University Press, 2013); G. Brown, *Criminal Sentencing as Practical Wisdom* (Oxford: Hart Publishing, 2017) at 142-171; United States Law Library of Congress, "Sentencing Guidelines: Australia, England and Wales, India, South Africa, Uganda" (Washington, DC: Library of Congress, 2014, online).

[18] One reason why other jurisdictions have turned to sentencing councils is because guideline cases can be an awkward fit within an adversarial justice system. In this appeal, both parties have cited an Alberta starting-point decision, *Hajar*. But *Hajar* highlights some of the concerns surrounding Alberta's procedure for creating starting points.

[19] Before *Hajar*, the Alberta Crown had asked the Court of Appeal to extend the three-year starting point for major sexual assault to so-called "major sexual interference" – in essence, serious sexual offences where an under-age victim gave "*de facto* consent" to unlawful sexual touching. The Court believed it needed more information to decide the issue. So the Court gave the Crown a roadmap, describing in some detail the submissions and expert evidence the Court hoped to review in some future appeal.[30] But the Court of Appeal refused to settle the question the second time it came before the Court. This time, the Court was concerned that the Crown had introduced contentious social science for the first time on appeal.[31] So the Crown began calling expert evidence in some offenders' sentencing hearings, laying the groundwork for a test case.[32]

[20] At Mr. Hajar's sentencing hearing, the Crown led a "substantial" body of "expert reports and literature on the effects of sexual activity on young persons," as well as *viva voce* evidence from a psychologist who testified about "the risk factors associated with adolescent sexual involvement with older individuals."[33] Mr. Hajar left this voluminous evidence largely unchallenged, perhaps because much of the Crown's social science discussed the *risk* of harm to hypothetical victims, while there was little doubt that Mr. Hajar had *actually* harmed his victim. Now armed with an attractive record, the Crown renewed its request for a starting point. This time the Court of Appeal agreed. The Court relied heavily on the expert evidence, describing it as "fundamental to understanding the seriousness" of the offences in question.[34] And although Mr. Hajar objected to some aspects of this expert evidence on appeal, the Court of Appeal was unsympathetic. The majority noted that Mr. Hajar had "ample opportunity" to explore the social science issues and "could have called expert reply evidence".[35]

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[30] *R v Bjornson*, 2012 ABCA 230 at para 8.
[31] *R v King*, 2013 ABCA 3 at paras 12-18.
[32] See e.g. *R v Ambrus*, 2015 ABPC 167 at paras 16-50, and esp. paras 73-75; *R v Hammermeister*, 2015 ABPC 228 at paras 13-23, Crown appeal allowed, *R v Hammermeister*, 2016 ABCA 302.
[33] *R v Hajar*, 2014 ABQB 550 at paras 21, 33-43.
[34] *Hajar* (ABCA) at paras 61-65.
[35] *Hajar* (ABCA) at paras 54-60.

[21] Mr. Hajar had a chance to challenge the Crown's evidence. But no one else did. Other offenders can no longer challenge the conclusions of a single judge, made in a single offender's sentencing hearing. In effect, the social science findings by the *Hajar* sentencing judge are now embedded in Alberta's "binding" starting point. Yet compare how this Court dealt with the social context evidence in *Lacasse*. Offenders are afforded an opportunity to make representations about the prevalence of an offence – even though a judge can take judicial notice that an offence is prevalent.[36] Why should this less-contentious issue demand greater procedural fairness?

[22] *Hajar* reflects how our adversarial justice system can struggle to resolve sentencing controversies that extend beyond a particular offender's case. In *Hajar*, the Alberta Crown – a sophisticated and strategic litigant – carefully crafted its impressive record of social science. But we cannot expect individuals like Mr. Hajar to act as a proxy for other offenders. Offenders will make submissions on their own behalf, not on behalf of differently situated, hypothetical offenders who might fall within some future starting point. Most offenders lack deep pockets. And offenders are more concerned about their *own* punishment than helping courts develop general principles of sentencing law. Individual offenders often have little desire to mount a challenge to the Crown's broader policy arguments or complex social science.[37]

[23] Sentencing courts should not function as "boards of inquiry" that delve into complex sociological issues.[38] Yet in Alberta, it seems that individual sentencing judges are now asked to make contentious findings of social fact. And these findings could apply beyond that one offender's case. Consider, for example, the perennial debate over the role of general deterrence. The Court of Appeal has consistently cited general deterrence as one of the reasons for creating a starting-point sentence.[39] This approach has driven sentences higher. But there is a substantial body of social science that raises doubts about whether longer jail sentences are indeed a more effective deterrent.[40] Should offenders lead this expert evidence during their sentencing hearings,

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[36] *Lacasse* at paras 94-95.
[37] *Wong v the Queen*, [2001] HCA 64 at para 45.
[38] *R v Wells*, 2000 SCC 10 at para 55.
[39] *Johnas* at paras 12, 33; *Sandercock* at para 14; *R v WBS*, 1992 ABCA 221 at paras 33, 41; *R v Matwiy*, 1996 ABCA 63 at para 33.
[40] T. Gabor & N. Crutcher, "Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures" (Ottawa: Justice Canada, 2002) at 7-10; R. Paternoster, "How Much Do We Really Know About Criminal Deterrence?" (2010), 100 *Journal of*

just in case their sentence is appealed, and just in case the appellate court is asked to create a starting point? If the sentencing judge accepts this evidence, is her finding owed deference on appeal? In the *Charter* context, we rely on trial judges to make difficult findings of social fact. But there are many practical differences between *Charter* challenges and *Gardiner* hearings.[41]

[24] Methodology matters. Starting points can have a dramatic impact and long-lasting effects. Starting-point cases are high-stakes litigation, where a single offender's appeal can influence thousands of future sentences. And Alberta's quantitative starting points have proven remarkably resilient. Despite *Arcand*'s suggestion that appellate courts might revisit their starting points from time to time, Alberta's key starting points have stood largely unchanged for decades.[42] The Court of Appeal is now considering whether to create a starting point for fentanyl trafficking.[43] But might a stern starting point – demanded in the name of general deterrence – persist long after a drug crisis subsides? Starting points should not become a one-way ratchet: driving sentences higher in response to pressing concerns or high-profile crimes, but seldom revisited as society evolves or the social science matures.

[25] Given these concerns, starting points should remain only broadly advisory. This does not mean that appellate courts should never provide guidance to sentencing judges. General principles are helpful. Social context can be relevant during sentencing. And of course, appellate decisions defining or explaining the sentencing principles that apply to a particular offence are one perfectly acceptable kind of guideline judgment. But quantitative starting points for judge-defined offences are at least quasi-legislative.[44] Over time, they are at risk of hardening into prescriptive rules. And creating these guidelines demands a special adjudicative approach.

Law & Criminology 765; D.S. Nagin, "Deterrence in the Twenty-First Century" (2013), 42(1) *Crime & Justice* 199; A.N. Doob, C.M. Webster, & R. Gartner, "Issues Related to Harsh Sentences and Mandatory Minimum Sentences: General Deterrence and Incapacitation" (Toronto: University of Toronto, 2014, online); K.D. Tomlinson, "An Examination of Deterrence Theory: Where Do We Stand?" (2016), 80(3) *Federal Probation* 33. See also *R v Proulx*, 2000 SCC 5 at para 107; *Wong* at para 44; *Nur* at para 45; *Lacasse* at paras 73 (majority), 133-134 (dissent).

[41] *Canada v Bedford*, 2013 SCC 72 at paras 48-56; *PSBAA v Alberta*, 2000 SCC 2; *R v Henry*, [1999] NSWCCA 111 at paras 49-110 (majority), paras 313-316 (dissent); S.C. Hill, D.M. Tanovich, & L.P. Strezos, eds., *McWilliams' Canadian Criminal Evidence*, 5th ed., (Toronto: Canada Law Book, 2017, loose-leaf, updated 2018, rel. 3) at s 26:40.

[42] *Arcand* at para 107; see *Maskell*; *Johnas*; *Matwiy*; *Melnyk*.

[43] J. Wakefield, "How long should fentanyl dealers spend in jail? Alberta court weighs 'starting point' sentence for deadly drug", *The Edmonton Journal* (June 20, 2019), online.

[44] *McDonnell* at paras 33-34; *Wong* at paras 79-86, 141-147; *Lacasse* at para 61.

[26] There is often wisdom in judicial minimalism. Disparity concerns are very old. Common-law jurisdictions have debated how to reconcile parity with individualization for generations. Yet, within the limits of the *Charter*, "[t]he degree of latitude afforded to sentencing judges is fundamentally a matter of political choice."[45] *Arcand* cautioned that "[i]f the courts do not act" to address disparity, "then Parliament will."[46] But Parliament knows about this Court's sentencing jurisprudence. Parliament understands this Court's approach to deference in sentencing. And Parliament has continued to prioritize the fundamental principle of proportionality over the subsidiary principle of parity. For the most part, Parliament continues to leave judges with broad discretion to tailor punishments to fit offenders. Higher courts can still provide principled guidance to sentencing judges. And they will still review outlier sentences for fitness.

[27] If Parliament decides change is necessary, then a legislative response could offer far more nuance than a judge-made solution. For example, when the High Court of Australia questioned whether state appellate courts should create broad sentencing guidelines on their own initiative, some states clarified and expanded their statutory frameworks for these guideline appeals, and confirmed that some non-parties (including public defenders) have automatic standing.[47] A legislative solution might allow provincial appellate courts to hear guideline cases *en banc*, avoiding contradictory decisions from different panels.[48] An independent council of judges and experts could conduct empirical research and propose refinements to judge-made guidelines. And Parliament could clarify this Court's role in addressing interprovincial disparity.[49]

PARTS IV, V, & VI – COSTS, ORDER SOUGHT, AND CASE SENSITIVITY

[28] LAA seeks no costs, seeks no further orders, and makes no submissions on case sensitivity.

All of which is respectfully submitted this 13th day of August, 2019.

as agent for

Dane F. Bullerwell, *Counsel for the Intervener, the Legal Aid Society of Alberta*

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[45] T. O'Malley, "Living Without Guidelines", in Ashworth & Roberts, *Sentencing Guidelines: Exploring the English Model*, at 218. See also *Lloyd* at paras 45 (majority), 108-109 (dissent).
[46] *Arcand* at para 8.
[47] *Wong v The Queen*; *Crimes (Sentencing Procedure) Act 1999* (NSW), Division 4, ss 36 to 42A; *Sentencing Act 1991* (Vic), Part 2AA, ss 6AA to 6AG; *Markarian v The Queen*, [2005] HCA 25.
[48] *Arcand* at paras 182-229 (majority), paras 379-423 (dissent); *Lee* at paras 44-76 (per Berger J.A.).
[49] See e.g. *R v Gardiner*, [1982] 2 SCR 368 at 396-405; *R v CAM*, [1996] 1 SCR 500 at para 33.

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