SCC File No.: 38300

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Manitoba)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

AND:

JUSTYN KYLE NAPOLEON FRIESEN

RESPONDENT
(Appellant)

ATTORNEY GENERAL OF ONTARIO, CRIMINAL LAWYERS' ASSOCIATION, LEGAL AID SOCIETY OF ALBERTA, ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF BRITISH COLUMBIA

INTERVENERS

FACTUM OF THE INTERVENER, ATTORNEY GENERAL OF BRITISH COLUMBIA

(Pursuant to Rule 37 of *The Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. This appeal provides this Court with the opportunity to confirm the important role appellate deference should play when an appeal court considers a sentencing court's findings and assessment of relevant factors – particularly when a sentencing judge has made a material error. In such a situation, the Attorney General of British Columbia (the "AGBC") submits that all findings and assessments which are untainted by error should still enjoy a full measure of deference from an appeal court when it considers whether to intervene and vary the sentence.

2. The issue arises in this appeal, where the Manitoba Court of Appeal intervened after finding an error in principle by the sentencing judge, held that it could then "consider the matter afresh"[1], and proceeded with a full re-consideration and determination of relevant sentencing factors. It did so despite specifically concluding there was no error with the manner in which the sentencing judge assessed and balanced the relevant factors.[2]

3. The Manitoba Court of Appeal's approach taken here, of "considering the matter afresh" is diametrically opposed to the approach to appellate review in British Columbia, where deference is still owed to all findings and assessments which are untainted by error, as recently held in ***R. v. Agin***, 2018 BCCA 133. The AGBC submits this is the proper approach to review for fitness of sentence - untainted assessments should continue to receive deference even when an error in principle has been identified, and an appeal court should not simply cast them aside and consider the matter of sentence "afresh" as occurred here. This Court hears sentence appeals infrequently, and this appeal provides an opportunity to clarify which approach is correct.

4. As the AGBC will explain, the profound functional justifications for appellate deference also support the ***Agin*** approach. The AGBC will also address the continuing

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[1] ***R. v. Friesen***, 2018 MBCA 69 at para. 17.
[2] ***Friesen*** at paras. 18 & 28-33.

importance of fitness when an appeal court reviews a sentence in light of a material error, and with specific reference to this case, the role that an error which might have *benefitted* an appellant should play in determining whether to intervene.

PART II – INTERVENER'S POSITON ON QUESTIONS IN ISSUE

5. The AGBC's submissions all relate to the second issue identified in the appellant's factum: Did the Manitoba Court of Appeal err by interfering with the sentencing judge's decision?

PART III – ARGUMENT

A. The *Agin* approach - Appellate deference should continue when an error has occurred

6. In British Columbia, questions relating to the precise manner in which an appeal court should review fitness of sentence and determine whether to intervene were recently addressed by a five-member Division of the Court of Appeal for B.C. in ***Agin***. The Court took the unusual step of sitting five in order to resolve the uncertainty as a result of this Court's comments in ***R. v. Lacasse***, 2015 SCC 64.[3]

7. In ***Agin***, a 4:1 majority of the Court of Appeal clarified that, consistent with this Court's holding in ***Lacasse***, an appeal court no longer owes deference to the *sentence* imposed when an error in principle has been identified, and that error had an impact on sentence. However, in ***Agin*** the Court also emphasized that the review of fitness must proceed on the basis that all findings and determinations of appropriate sentencing factors that are untainted by the error continue to enjoy appellate deference. As the Court stated, while the error eliminates deference to the sentence imposed, "this does not imply that deference should not be accorded to findings of fact absent palpable or overriding error, or to determinations with respect to the relative weight to assign to the various goals of sentencing that are found to be untainted by the error in issue."[4]

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[3] See ***Agin*** at paras. 3 & 28-48; ***R. v. Joe***, 2017 YKCA 13.
[4] ***Agin*** at para. 55.

8. The reasoning and approach to appellate review and intervention in ***Agin*** is sound. The Manitoba Court of Appeal's approach of "sentencing afresh" is fundamentally flawed and should not be followed. It makes no sense for an appeal court to oust deference altogether and simply discard all of the sentencing judge's determinations that are untainted by error. Such an approach is wholly inconsistent with the jurisprudence of this Honourable Court, which has repeatedly emphasized the important functional reasons which justify appellate deference to sentencing judges. Most notably, in ***R. v. M.(C.A.)***, this Court stated:

> [W]here the sentencing judge has had the benefit of presiding over the trial of the offender, he or she will have had the comparative advantage of having seen and heard the witnesses to the crime. But in the absence of a full trial, where the offender has pleaded guilty to an offence and the sentencing judge has only enjoyed the benefit of oral and written sentencing submissions (as was the case in both ***Shropshire*** and this instance), the argument in favour of deference remains compelling. A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of both the Crown and the offender. A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community.[5]

9. This Court has repeatedly emphasized and re-affirmed the importance of the deferential standard of review, along with these profound functional justifications: ***R. v. McDonnell***, [1997] 1 S.C.R. 948 at para. 15; ***R. v. Proulx***, 2000 SCC 5 [2000] 1 S.C.R. 61 at para. 126; ***R. v. L.M.***, 2008 SCC 31, [2008] 2 S.C.R. 163, at para. 15; ***R. v. Nasogaluak***, 2010 SCC 6, [2010] 1 S.C.R., at para. 46, ***Lacasse*** at paras. 11 & 39-41.

10. The three main functional justifications remain compelling ones: 1) a sentencing judge's comparative advantage in having seen the witnesses and received counsel's

[5] [1996] 1 S.C.R. 500 at para. 91.

sentencing submissions first-hand; 2) sentencing judge's front-line experience, judgment and thus comparative expertise in regularly sentencing offenders; and 3) a sentencing judge's local knowledge and sense of the community where he or she presides. These profound functional justifications further justify the continuing importance of appellate deference – even after an error has been identified - to a sentencing judge's factual findings and assessment and assignment of weight to the relevant factors that are untainted by error.

11. These functional justifications are particularly apposite here in considering whether it was appropriate for the Court of Appeal to have "sentenced afresh" when no error was identified with the sentencing judge's assessment of the appropriate factors. The first functional justification was relevant here, as the sentencing judge has had the opportunity to see and hear the offender make a brief statement of apparent remorse to the court.[6] As Doherty J.A. noted in ***R. v. Ramage***, a trial judge is in a better position to evaluate an offender's remorse.[7]

12. The second functional justification was also specifically relevant here. The sentencing judge, with all the advantages identified in ***M.(C.A.)*** of front-line experience and judgment in the criminal justice system, found the offence "clearly one of the worst I have seen" and the offender's lack of insight and the future risk he posed to be "frightening".[8] These important qualitative assessments as to the gravity of the offence and the risk posed by the offender should have survived intact on appeal, and should have been the focal point of the Court of Appeal's review for fitness. Instead they were simply cast aside by the Court when it "considered the matter afresh".

13. The third justification, local knowledge and local sense of the community, may not have played as an obvious role as in other cases, such as in ***Lacasse*** itself, where the sentencing judge's concerns about the high incidence of impaired driving in the local Beauce

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[6] Transcript of Proceedings, March 9, 2017, p. 28(6-9), Appellant's Record, p. 72.
[7] 2010 ONCA 488 at para. 71.
[8] Reasons of Stewart P.C.J., p.1(2-3) & p. 5(1); p. 3(5-6), Appellant's Record, p. 3 Appellant's Record, pp. 1 & 5; p. 3.

region of Quebec was considered an important and proper consideration.[9] Still, here the sentencing judge was the representative of the community when he assessed the seriousness of the offence and the significance of the respondent's lack of insight. In this way, he was applying his "strong sense of the particular blend of sentencing goals that will be 'just and appropriate' for the protection of that community." [10]

14. The ***Agin*** approach properly draws upon the distinct areas of expertise and properly respects the respective roles of sentencing and appellate courts. The strength and role of a sentencing court lies in the discretionary art of fashioning a fit sentence, while an appellate court's lies in reviewing for and identifying legal error. Ruby et al. describe the distinct roles as follows:

> **The task of an appellate court must be appellate; it is fundamentally distinct from that of the court at trial.** The trial judge is charged by statute with the duty of sentencing of the offender; the responsibility of a court of appeal is to assess the fitness of that sentence.[11]

15. There is no principled basis for disturbing a sentencing judge's findings which are not tainted by error. The "sentencing afresh" approach is also unnecessarily wasteful of precious judicial resources. This is an important consideration, as this Court emphasized in ***Lacasse*** at para. 48, wherein the following comments by Doherty J.A. in ***Ramage*** at para. 70 were cited with approval:

> Appellate repetition of the exercise of judicial discretion by the trial judge, without any reason to think that the second effort will improve upon the efforts of the first, is a misuse of judicial resources. The exercise also delays the final resolution of the criminal process, without any countervailing benefit to the process.

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[9] ***Lacasse*** at paras. 87-105.
[10] ***M.(C.A.)*** at para. 91.
[11] Clayton C. Ruby et al., ***Sentencing,*** 9th ed. (Toronto: LexisNexis, 2017) §4.3; AGBC's emphasis.

A comment regarding the error identified by the Court of Appeal

16. Before turning to the role fitness should continue to play, a comment is warranted regarding the error identified here by the Manitoba Court of Appeal. The AGBC does not agree with the Court's determination that the sentencing judge committed an error in principle. The Court held the sentencing judge should not have relied on cases involving a significant aggravating feature – a breach of trust – which the sentencing judge found did not apply. The AGBC submits that a sentencing judge does not err merely by referring to, and seeking guidance from, analogous sentencing case law dealing with an offence wherein an additional aggravating feature is present, but absent in the case under consideration.

17. Seeking such assistance from broadly analogous case law is entirely appropriate. Indeed, it will be necessary when a court faces the challenge of sentencing for a very serious offence with a notable difference from the typical fact pattern. In this instance, unlike most other cases of a highly aggravated sexual assault of a very young child, there was no breach of trust, in the view of the sentencing judge. This did not mean that the sentencing judge had to disregard entirely other cases where a breach of trust was present.

18. In British Columbia the use of broadly analogous case law was also addressed in ***Agin***, where a similar argument was made that it was improper to have regard to sentencing precedents for serious violent "home invasions", in sentencing for an offence which did not involve a dwelling. The sentencing judge referred to the offence as a very serious "workplace invasion" as it shared many of the usual aggravating features typical of "home invasions" including the prominent use of firearms. In ***Agin*** the majority held that it was not an error in principle for the judge to have considered the "home invasion" cases in this context:

> While those cases did incorporate a statutory aggravating factor not present in Mr. Agin's case, they were similar enough in other respects to be relevant and the judge was entitled to consider them. It was not an error in principle for the judge to look at broadly analogous cases for guidance. That is all the judge did in this case. Accordingly, appellate intervention is not justified on this basis.[12]

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[12] ***Agin*** at para. 63.

B. The central role of fitness when a material error has been identified

19. Although an error which had an impact on the sentence may open the door to appellate intervention, intervention should not be automatic. Reaching the threshold for appellate intervention does not mean that an appellate court should always cross it. The AGBC's position is that a further step should be required – the original sentence must also be shown to be unfit. Fitness should be central to the issue of *whether* the appeal court should intervene. Simply adjusting for the lower court's error, by substituting one fit sentence for another, is antithetical to the proper role of an appeal court as contemplated by Parliament in s. 687(1). As recently noted in ***Joe*** "'Fitness' of sentence is the ultimate question on appellate review (s. 687(1))."[13]

20. Notably, in ***Lacasse*** Wagner J. (as he then was) emphasized that "the credibility of the criminal justice system in the eyes of the public **depends on the fitness of sentences** imposed on offenders."[14] This has long been the fundamental guiding principle of appellate review of sentences. As stated in ***R. v. Shropshire***, "[a] variation in the sentence should only be made if the court of appeal is convinced it is not fit."[15] Thus in ***Agin***, the Court stated that where an appeal court has identified a material error, it should then consider the fitness of the sentence, and [i]f the sentence is unfit, the court may vary the sentence and impose a fit sentence."[16]

21. Accordingly, the review for fitness in the wake of material error will not lead inexorably to intervention in all cases. An appeal court will want to consider carefully whether the sentence imposed was nevertheless fit. It may easily reach this conclusion where the offender appeals, for example, if it determines that the sentence was a lenient one despite the material error made to his or her detriment.[17]

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[13] ***Joe*** at para. 46.
[14] ***Lacasse*** at para. 3; AGBC's emphasis.
[15] ***R. v. Shropshire***, [1995] 4 S.C.R. 227 at para. 46.
[16] ***Agin*** at para. 57.
[17] For example, see ***R. v. Qureshi***, 2019 BCCA 273 at paras. 17-18.

C. The role of a material error which *benefits* an appellant

22. In addition, an appeal court may very well refrain from intervening when more than one error is identified, and one of the errors *was actually to the benefit of the appellant.* For example, if an offender appeals, and an error made to his benefit is identified, the countervailing beneficial impact should be carefully considered. After all, an appeal court has jurisdiction to consider varying a sentence at the behest of the respondent, if notice is given.[18] It only makes sense that a respondent also be permitted to point to errors which favoured the appellant. Appellate review of fitness should consider all errors, and what the net impact they had on the sentencing. Such a beneficial error could very likely and properly weigh against intervention.

23. The AGBC submits that just such a countervailing error arose here to the benefit of the respondent, one that was overlooked by the Court of Appeal. The sentencing judge held that the respondent was not in a position of trust vis-à-vis the victim. The AGBC submits, however, that the undisputed facts did, as a matter of law, satisfy the statutory criteria in s. 718.2(a)(iii) of the *Code*. This point involves a question of the correct statutory interpretation of the section. Here there was an obvious abuse of a position of trust (held by the mother in relation to her daughter) committed by and with the urging and involvement of the respondent. Although the respondent did not actually hold the position of trust, he inveigled the victim's mother to make the victim available for his own deviant purposes. The AGBC submits this constituted an *abuse* by him of the mother's position of trust. The *Oxford English Dictionary* defines "abuse" as meaning "to use (something) improperly, to misuse; to make bad use of; to pervert; to take advantage of wrongly."[19] The ordinary meaning of "abuse" captures precisely what the respondent did.

24. So should the section. The precise wording of s. 718.2(a)(iii) is significant. Notably, the section does not actually require that *the offender* must be the person who holds a position

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[18] ***R. v. Hill (No. 2)***, [1977] 1 S.C.R. 827

[19] ***Oxford English Dictionary***, online, "abuse", accessed August 9, 2019

of trust in relation to the victim. The section simply reads, "evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim….shall be deemed to be aggravating circumstances". Parliament has not, therefore, restricted the section's ambit to an offender who actually holds the position of trust. If Parliament had intended to restrict the section, it could have easily done so, by including the words "held by the offender" so that it would read instead, "evidence that the offender, in committing the offence, abused a position of trust or authority *held by the offender* in relation to the victim".[20]

25. Interpreting s. 718.2(a)(iii) so as to properly capture the situation here is faithful to the language chosen by Parliament. It also better fulfills Parliament's crucial purpose in sentencing: the protection of society, and in this specific context, children. Parliament has stipulated in s. 718 that one of the fundamental purposes of sentencing is the protection of society. In cases involving sexual abuse of children, s. 718.01 emphasizes denunciation and deterrence so as to "proclaim the centrality" of the "core value" of protecting children.[21]

26. Section 718.2(a)(iii) fulfills these purposes better if it also includes – rather than excludes - an offender like the respondent who takes advantage of a parent's position of trust and authority by inducing that parent to betray that trust. Such conduct is properly viewed as highly aggravating given the profound vulnerability of the child who has been exploited at the non-parent's behest. As this Court noted in ***R. v. Magoon***, "Parents are placed in a position of trust and responsibility over children precisely because children are often helpless without the protection and care of their parents."[22]

27. If, on the correct interpretation of s. 718.2(a)(iii), the respondent's conduct engaged the section, this would amount to an error in principle by the sentencing judge, who failed to

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[20] In similar reasoning, the Court in ***R. v. Nixon*** (1991), 63 C.C.C. (3d) 428 (B.C.C.A.) declined to read words into the firearms prohibition section of the *Code* and held that a party to a violent offence was captured by the provision, even though he did not himself use violence; see ***Nixon*** at para. 13.
[21] ***R. v. Rayo***, 2018 QCCA 824 at para. 104.
[22] 2018 SCC 14 at para. 66,

recognize an aggravating factor. This was an error which *benefitted* the respondent, one which would obviously weigh against appellate intervention.

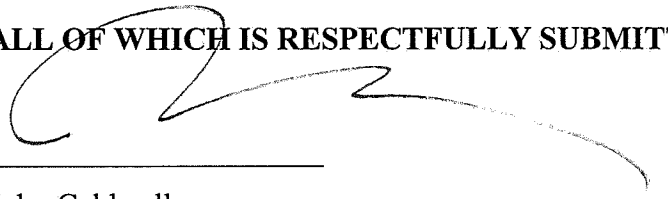
PART IV: SUBMISSIONS ON COSTS

28. The AGBC makes no submissions on costs.

PART V: ORDER SOUGHT

29. The AGBC has been granted permission to present oral argument at the hearing of the appeal in accordance with the Court Order made on July 2, 2019, by Madam Justice Abella. The AGBC takes no position on the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



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Dated this 12th day of August, 2019

PART VI – TABLE OF AUTHORITIES

CASES

LEGISLATION

SECONDARY SOURCES