Court File No.

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

BETWEEN:

HER MAJESTY THE QUEEN,

APPLICANT (Respondent),

- and -

JUSTYN KYLE NAPOLEON FRIESEN,

RESPONDENT (Appellant).

MEMORANDUM OF ARGUMENT

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MEMORANDUM OF ARGUMENT

Part I – Statement of Facts

A. Introduction

1. The Respondent contacted the victim's mother through a social media dating website. The result was an encounter in which the mother made her four-year old daughter available to the Respondent for his sexual gratification. At his direction, and while he was naked and masturbating, the child's mother violently forced the child to perform fellatio on the Respondent.

2. Only the child's screams which caught the attention of another adult in the residence stopped the attack. The adult removed the child. The Respondent, determined to "rape" the child, demanded her return. In an effort to achieve this, he attempted to extort the mother by threatening to disclose an earlier incident involving her two-year old son.

3. The Respondent pled guilty to sexual interference (and acknowledged that the offence was a major sexual assault) and to attempted extortion. After weighing the applicable aggravating and mitigating factors, the sentencing judge imposed a global sentence of six years. The Manitoba Court of Appeal quashed the sentence on the basis that the Respondent had not been in a position of trust in relation to the victim at the time of the offence and, in its view, the sentencing judge used the wrong starting point. It substituted a sentence of four and a half years.

4. As an initial matter, this represents a failure to respect the deference owed to sentencing judges who are most familiar with the nuances of the case and best placed to balance the competing principles at stake. More fundamentally, however, this case highlights the need – noted by a number of appellate courts – to review the current patchwork of starting points and sentencing ranges in this area in order to reconcile its inherent contradictions.

5. Both Parliament and Canadian courts are increasingly acknowledging the devastating harm done to child victims of sexual offences and the need to strongly deter and denounce such behaviour. The generally-accepted sentencing ranges, however, do not reflect this acknowledgment. The widely-applied starting point for the major sexual assault of an adult victim is three years whereas the starting point for major sexual assault carried out against a child

victim by an offender in a position of trust is four to five years. This leaves offenders like the Respondent in a "gap" for which little sentencing room exists.

6. The Manitoba Court of Appeal effectively resolved this dilemma by treating the Respondent's crimes as if they had involved an adult victim. This failed to reflect the significant moral blameworthiness associated with the sexual abuse of a four-year old, even without a trust relationship.

7. There has been little guidance for cases of major sexual assault against children not involving positions of trust. As a result, courts have struggled to determine an appropriate range resulting in sentences that are often untenably low. The Applicant seeks leave in order to address the resulting incoherence and to outline the general principles applicable to sentencing for the sexual abuse of children in these circumstances.

8. It further seeks leave to highlight Parliament's increased focus on the seriousness of sexual crimes against children and their lifelong – often inter-generational – impact. To the extent that current sentencing ranges (some of which have not been adjusted in over three decades) fail to reflect this focus, the Applicant seeks an opportunity to argue that they should be updated to accord with these principles.

B. Facts and Procedural History

9. In June 2016, the mother of the four-year old victim met the Respondent on a dating website. On July 16, 2016, at the Respondent's direction, the mother brought her child into the bedroom. After the child's clothes and diaper were removed and she was placed on the bed, the Respondent directed the mother to force the child's mouth to his penis. The child was then forced to fellate the Respondent.

10. The Respondent was naked and masturbating himself. The entire incident was audio-recorded by the mother. The Respondent was heard to say:

> No, you ain't gonna run you fucker. ([The child] begins crying.)
>
> Put her pussy on here (...Child is in distress as [the Respondent] talks and it is difficult to hear what he is saying).

> You put her mouth on my cock.
>
> Put her mouth down there.
>
> ...
>
> Put her mouth on my cock.
>
> Force it down there.
>
> (inaudible as [the child] is screaming)
>
> Transcript of Audio Recording, Leave Book at pp. 47-48.

11. The mother's friend, who had been minding other children in the home, heard the child's screams and intervened. After the friend removed the child from the bedroom, the Respondent threatened the mother in an effort to have the child brought back so that he could continue to violate her. He stated:

> You're gonna go downstairs, tell your friend if you don't agree to fuck your daughter, that shit's going to come out and she's gonna be cool with it.
>
> ...
>
> You're gonna go downstairs tell your friend you[r] son, you sucked your son's cock.
>
> ...
>
> ...I haven't fucked your daughter yet, you just played with my tool...
>
> *Ibid* at pp. 51-52.

12. The friend kicked the Respondent out of the residence and contacted the police.

13. The Respondent was arrested on July 18, 2016 and on March 19, 2017, entered guilty pleas to sexual interference and attempted extortion. In his pre-sentence report, he claimed that he had "blacked out" as a result of drug and alcohol use, but also asserted that drugs and alcohol were not problems for him. He said he was sexually abused when he was 11 years old.

14. The Respondent stated that he enjoys being around children. He hoped to be a role model someday and to be a "Big Brother." A risk assessment conducted for the purpose of the pre-sentence report evaluated the Respondent as a high risk to sexually re-offend.

15. Defence counsel acknowledged that the offence constituted a major sexual assault, but suggested that a three-year starting point applied because there was no position of trust. It urged the sentencing judge to note the year the Respondent had spent in pre-sentence custody and to impose two years less a day going forward followed by supervised probation.

16. The Crown sought a sentence of seven years taking into account both the sexual interference and attempted extortion charges. It suggested that the appropriate starting point for the sexual interference charge was four to five years. The Crown asserted that the mother (who is co-accused and has pleaded not guilty) was in a position of trust and that, as party to the offence, the Respondent should be treated similarly.

C. The Sentencing Judge's Decision

17. The sentencing judge expressly rejected this notion: "I do not hold that in fact [the Respondent] was in a position of trust with this child because of the circumstances leading up to this."

> Reasons for Sentence, March 9, 2017, Leave Book at p. 5.

18. He observed that sentencing precedents are "all over the place in terms of what a proper sentence would be as it relates to these circumstances." He held, however, that while it involved a trust relationship, the Manitoba Court of Appeal's decision in *R. v. Sidwell* also provided general assistance in balancing the relevant aggravating and mitigating factors.

> *Ibid* at p. 3.
> *R. v. Sidwell*, 2015 MBCA 56, [2015] 8 W.W.R. 494.

19. After noting the paramountcy of denunciation and deterrence, the age of the victim and the use of the child's mother to commit the offence, he questioned whether the principles outlined in *Sidwell* applied only to positions of trust and concluded that "not being in a position of trust I do not think changes the message that *Sidwell* gives us."

> Reasons for Sentence, Leave Book at p. 6.

20. Having regard to all of the circumstances, the sentencing judge determined that a four- to five-year starting point was appropriate. Given the multiple offences and the aggravating factors, he sentenced the Respondent to six years concurrent on each of the two offences.

D. The Manitoba Court of Appeal Decision

21. The Manitoba Court of Appeal agreed with the Crown that the three-year starting point established in *R. v Hajar* and *R. v. Sandercock* (where the victims were 14 and 16 respectively and no positions of trust existed) was too low in the circumstances.

> *R. v. Hajar*, 2016 ABCA 222, [2016] 12 W.W.R. 435.
> *R. v. Sandercock*, 1985 ABCA 218, [1986] 1 W.W.R. 291.

22. Nevertheless, it held that by referring to *Sidwell*, the sentencing judge had effectively elevated the Respondent's conduct to that involving a position of trust. As such, no deference was owed to his decision. Approaching the sentence *ab initio*, it concluded that the many aggravating factors present called for a four-year sentence on the charge of sexually interfering with the victim. In order to prevent a "free ride" in relation to the attempted extortion charge, the Court added six months making the total sentence four and a half years.[1]

Part II – Question in Issue

Did the Manitoba Court of Appeal err by interfering with the decision of the sentencing judge?

The Attorney General of Manitoba applies for leave to appeal to this Honourable Court pursuant to s. 40(1) of the *Supreme Court Act*. The case raises several important questions of law, including:

1) How courts ought to approach sentences for sexual offences against children where the offender is not in a position of trust;

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

2) Whether the three-year starting point applicable to major sexual assaults against adults can be reconciled given the increased judicial recognition of the unique harm caused to child victims and Parliament's clear direction that offences against children should be treated more severely; and

3) Whether existing sentencing precedents take into account Parliament's clear intention to increase sentences for sexual offences against all children, and not only those wherein the offender is in a position of trust.

Part III – Argument

A. Deference and the Applicable Standard of Review

23. As this Honourable Court has firmly established, the failure to apply a particular sentencing range or starting point does not, in and of itself, constitute reviewable error.

> *R. c. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089 at para. 11.
>
> *See also*:
>
> *R. v. M.(T.E.)*, [1997] 1 S.C.R. 948, [1997] S.C.J. No. 42 at para. 2.
> *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206 at para. 44.

24. In this case, the Manitoba Court of Appeal held (notwithstanding his explicit finding that the Respondent was not in a trust relationship with the victim) that by considering *Sidwell*, the sentencing judge had effectively found exactly that, and that this was an error in principle:

> That said, 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.
>
> *R. v. Friesen*, 2018 MBCA 69, 148 W.C.B. (2d) 145 at paras. 10, 15-16. (Emphasis added.)

25. With respect, this misapprehends the nature of the sentencing judge's decision. He did not "rely on an aggravating factor that he had found did not exist in this case." On the contrary, he explicitly stated:

> I do not hold that in fact [the Respondent] was in a position of trust with this child because of the circumstances leading up to this...it appears to be a perverted organized meet that has occurred to somehow deal with [his] fetishes that in fact it does not put it into a position of trust.
>
> Reasons for Sentence, Leave Book p. 5. (Emphasis added.)

26. Numerous aggravating factors did exist, however, including the young age of the victim and the involvement of her mother in the offending behaviour. Weighing relevant factors and principles is precisely the balancing exercise marked for deference in *Lacasse*. Had the sentencing judge identified a trust relationship where none actually existed, appellate interference might have been justified (if the error resulted in an unfit sentence, as discussed below).

27. Here, however, the sentencing judge made no such error. He assessed the facts correctly and determined that they established a level of culpability sufficient to support a four- to five-year starting point. The presence or absence of a trust relationship was a factor for the sentencing judge to consider. It was not a precondition for the application of an elevated sentencing range that reflected his assessment of the Respondent's moral blameworthiness and the harm he had caused.

28. Sentencing ranges and starting points provide a foundation from which to begin the analysis. However, as this Honourable Court has emphasized: sentencing an offender is ultimately an individualized process. The factors unique to each offence and offender must be assessed on a case-by-case basis, just as the sentencing judge did in the case at bar:

> 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. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly.
>
> *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, 105 C.C.C. (3d) 327 at para. 91.

29. As this Honourable Court underscored in *Lacasse*: the consideration of a "wrong" starting point is not in itself a reviewable error warranting appellate intervention. Deference is still required unless the resulting sentence is actually unfit. It is the sentence itself that is the proper subject of review, not the range the judge used to determine it.

> *Lacasse* at para. 11.

30. With respect, nowhere in the Manitoba Court of Appeal's decision did it analyze the fitness of the Respondent's sentence or explain why a six-year term was unfit given his actions. Rather, the Court simply concluded in the final paragraph that the sentence was "demonstrably unfit."

31. Given the seriousness of the Respondent's crimes and the many obvious aggravating factors including (but not limited to) – the use of physical violence against a four-year old, the active involvement of the victim's own mother, the Respondent's wrath when interrupted in his violation of the victim – the Applicant respectfully disagrees. The sentence was eminently fit.

32. This Honourable Court has regularly re-emphasized the importance of restraint in appellate sentence review. Notwithstanding this clear direction, this case demonstrates that additional reinforcement of this message is necessary.

B. Starting Points and the Sexual Assault of Children

i. A noteworthy "gap" in cases where no trust relationship exists

33. It is now well accepted that the "starting point" for sentencing where the victim of a major sexual assault is an adult is three years' incarceration. Many courts have also determined that where (i) the victim of a major sexual assault is a child, and (ii) a position of trust exists, an increased starting point of four to five years is appropriate.

Sandercock.

See also:

R. v. D.(C.), [1991] M.J. No. 480, 14 W.C.B. (2d) 245 (Man. C.A.).
R. v. SJB, 2018 MBCA 62, 147 W.C.B. (2d) 570.
Hajar.

34. No direction is, however, provided in the scenario where the victim is a child but no relationship of trust exists with the offender.

35. Several appellate courts have commented on this anomaly. In 2006, the Alberta Court of Appeal endorsed a four- to five-year starting point where the offender is in a position of trust but observed:

> It is clear from *S. (W.B.)* and subsequent cases, however, that *S. (W.B.)* concerns assaults on children involving a breach of trust: *R. v. Bourdon* (1996), 187 A.R. 302 (Alta. C.A.); *R. v. Q. (J.T.)* (1999), 244 A.R. 369 (Alta. C.A.); *R. v. W. (J.J.)*, 348 A.R. 395, 2004 ABCA 50 (Alta. C.A.). The Court specifically stated in *S. (W.B.)* that it was not determining sentencing policy in cases where a total stranger "picks the child up on the street and commits a major sexual assault upon the child": at p. 20.
>
> There are relatively few sentencing cases of sexual assaults on children where there is *not* a position of trust. This underscores the reality that abusers are most often those who have easy access to children in a protected environment. The internet has opened a new window into that environment, part of the reason why internet-originating offences are especially frightening.
>
> *R. v. Deck*, 2006 ABCA 92, [2006] A.J. No. 333 at paras. 22, 23. (Italics in original; underlining added.)

36. In *R. v. Allen* which concerned a sexual assault against a 14-year old child where no position of trust existed, the comments of the British Columbia Court of Appeal illustrate that this paradox had still not been resolved:

> ...there is little guidance for this Court to be taken from the case law as to the appropriate sentence. We must therefore look to the principles which govern sentencing to determine the proper sentence in this case.
>
> *R. v. Allen*, 2012 BCCA 377, [2012] B.C.J. No. 1945 at para. 58.
>
> *See also*:
>
> *R.* v. *McLean*, 2016 SKCA 93, [2016] S.J. No. 406 at para. 60.

37. It is striking that two "categories" of offences have incontrovertibly been identified by courts across Canada yet the third, exemplified here, is noticeably absent. It is thus not surprising that the sentencing judge and, subsequently, the Manitoba Court of Appeal, were left struggling as to the appropriate place to start. The ambiguity resulted in a problematic contradiction when the Court agreed with the Crown that:

> ...the starting point for sentencing in this case ought to be higher than the three-year starting point applied in *R. v. Hajar*, 2016 ABCA 222 and *R. v. Sandercock*, 1985 ABCA 218, because of the [Respondent's] use of violence and the young age of the child.
>
> *Friesen* at para. 25.

38. Yet it then concluded that a four- to five-year starting point was too high, and offered no resolution to this longstanding incongruity in the jurisprudence.

ii. A three-year starting point is not appropriate where the victim is a child

39. For many years, Parliament has attempted to stress the significance of the indisputable damage done to child victims of sexual offences by increasing punishments for these crimes. The first mandatory minimum sentences for child sexual offences were legislated in 2005. At the same time, sections 718.01 and 718.2(a)(ii.1) of the *Criminal Code* were enacted emphasizing sentencing principles specific to the abuse of children.

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

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

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

41. Parliament responded in 2014 by introducing two sister bills including Bill C-26. The purpose of Bill C-26 was described during the House of Commons debates:

> The amendments [...] would help to ensure any offenders who have committed sexual offences against children are fully held to account for crimes committed against the most vulnerable members of our society. These amendments would also serve as a deterrent for these heinous crimes.
>
> *Ibid* (Attorney General of Canada) at page 6048.
>
> *Tougher Penalties for Child Predators Act* (Bill C-26), S.C. 2015, c. 23.

42. Bill C-26 resulted in increased mandatory minimum sentences for offences against children. As well, consecutive sentences for multiple offences against more than one child victim became non-discretionary. These amendments, when read in conjunction with long-standing principles articulated in sections 718.01 and 718.2(a)(ii.1) reinforce the priority which Parliament has placed on the imposition of substantial sentences for sexual offences against all children (regardless of their relationships with the offenders), and the paramountcy of deterrence and denunciation.

43. Sections 718.01 and 718.2(a)(ii.1) are particularly relevant in that they oblige sentencing judges to note that the abuse of children is in itself an aggravating factor.

> s. 718.01 **Objectives – offences against children** – When a court imposes a sentence for an offence that involves 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.
>
> s. 718.2 **Other sentencing principles** – A court that imposes a sentence shall also take into consideration the following principles:
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
>
> ...
>
> (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
>
> ...
>
> shall be deemed aggravating in the circumstances. ...
>
> *Criminal Code of Canada*, R.S.C. 1985, c. C-46, ss. 718.01, 718.2. (Emphasis added.)

44. While other related subsections of section 718.2 may apply to offences in which the victim is an adult, the recognition of the harm done to children in particular, automatically sets the sexual abuse of children apart.

45. In keeping with Parliament's intentions, Canadian courts are also recognizing the basis for increased sentences for sexually abusing a child:

> The punishment for offenders committing sexual offences involving persons under age 18 has been steadily increasing over the last decade as there is greater understanding that, while the physical harm such offences cause is often transitory, the psychological harm is typically permanent and significant (see *R v RJ*, 2017 MBCA 13 at para 11).
>
> *SJB* at para. 39.

46. Specifically, in *RJ*, the Manitoba Court of Appeal noted:

> The harsh and grim reality of child sexual abuse is that the sentence of the victim is always longer than that of the perpetrator. The consequences of the accused's crimes will affect his victims for the rest of their lives, well after the accused has completed any punishment that the courts can mete out.
>
> *R. v. RJ*, 2017 MBCA 13, 136 W.C.B. (2d) 121 at para. 11.
>
> *See also*:
>
> *Hajar* at paras. 61-70.
> *Allen* at para. 57.
> *R. v. Norton*, 2016 MBCA 79, [2016] M.J. No. 235 at para. 43.
> *R. v. E.S.*, 2017 BCCA 354, 142 W.C.B. (2d) 330 at para. 57.

47. The relevant jurisprudence has failed to evolve to reflect both the increased awareness of the consequences of the sexual violation of children absent a position of trust and the efforts of Parliament. Guidance on these issues is a matter of national significance that merits the attention of this Honourable Court. Without such direction, sentencing courts will continue to struggle to identify appropriate sentences for offenders who victimize children, particularly in the absence of a position of trust.

iii. The existing decades-old range does not distinguish between adult and child victims

48. While the establishment and use of starting points is generally a matter for provincial Courts of Appeal, this case highlights a more overriding concern: the analogy of the abuse of a four-year old to an attack on an adult. Simply stated, these are not the same crime. The moral blameworthiness involved, while significant in both cases, cannot be realistically compared. A three-year starting point does not reflect the culpability involved in the decision to sexually abuse a child.

49. In *Hajar*, the Alberta Court of Appeal noted that "[p]erpetrators who sexually abuse children are more culpable than perpetrators who sexually abuse adults, not less."

> *Hajar* at para. 12. (Emphasis added.)

50. Notwithstanding this recognition, it affirmed a three-year starting point for "major sexual interference." With the greatest respect, these positions cannot be reconciled.

> *Ibid* at para. 11.
>
> *See also*:
> *R. v. Hammermeister*, 2016 ABCA 302, [2016] A.J. No. 1045 at para. 27.

51. In *R. v. Revet,* the Saskatchewan Court of Appeal described its reluctance to set a starting point for sexual offences against children:

> Neither the Crown nor the appellant were able to find precedents involving similar facts from this jurisdiction. It was also common ground that this Court has never established a range of sentences in respect of convictions for child sexual abuse. This would obviously be difficult to do given the very wide range of variables in respect of the nature of the offence, the respective ages of the offender and victim, as well as their respective circumstances.
>
> *R. v. Revet*, 2010 SKCA 71, [2010] 8 W.W.R. 580 at para. 16. *See also* para. 26.

52. The court however went on to consider the starting point for a major sexual assault against an adult and stated: "There is no reason why the same starting point should not be used in a case such as this [that is, a case involving a child victim]." This statement adds additional confusion given the court's observation that the gravity of sexual assaults against children is "at

least as high…if not higher." Despite this, the Saskatchewan Court of Appeal upheld the three-year sentence imposed for a major sexual assault on a 14-year old girl.

Ibid at paras. 24, 26.

53. Some years later, the Saskatchewan Court of Appeal in *R. v. V.(L.)* revisited the issue and again observed:

> I am not persuaded that it is either wise or necessary at this point to establish a formal and specific starting point sentence of the sort suggested by the Crown. However, and as explained below, I nonetheless conclude that the time has come to look carefully at the case law in this area with a view to more clearly appreciating the difference between a sexual offence committed against an adult and such an offence committed against a child.
>
> …
>
> We now have a situation where there is often little, if any, difference between the sentences imposed on offenders who engage in a single act of sexual assault on an adult victim and offenders who, as parents or persons in positions of trust or authority, sexually abuse a child either just once or multiple times over an extended period. In other words, and generalizing substantially of course, both kinds of offences are tending to yield the same sentence even though, on any meaningful measure, assaults against a child should normally warrant a stronger sanction.
>
> *R. v. V.(L.)*, 2016 SKCA 74, [2017] 1 W.W.R. 439 at paras. 69, 101. (Emphasis added.)

54. In *V.(L.)*, the accused had been convicted of sexual assaulting his daughter repeatedly over a period of years. The trial judge sentenced him to three years. The Saskatchewan Court of Appeal increased the sentence to four years.

55. With respect, while provincial Courts of Appeal have agreed in principle that sexual abuse of child victims is especially serious and should, all things being equal, result in more severe sentences, this has not been reflected in their starting-point jurisprudence or, therefore, in the resulting sentences.

56. The four- to five-year starting point for sexual offences involving positions of trust is decades old, and has never been updated to reflect Parliament's increased focus on deterring and denouncing child sexual abuse. In *R. v. D.(C.)*, in 1991, the Manitoba Court of Appeal stated:

> The starting point to sentencing for a major sexual assault committed in a family relationship where the victim is a young child and serious sexual acts are repeated over a period of time should, in our view, be four to five years' imprisonment. We use a variable figure to emphasize that even the starting point will depend upon the circumstances. This starting point may be somewhat higher than that previously used in this province, but it is justified by the frequency with which this offence occurs and by our increasing knowledge of the devastating effect it has on the victim.
>
> *D.(C.)* at para. 16.

57. *D.(C.)* was decided almost thirty years ago. As this Honourable Court observed in *Lacasse*:

> Sentencing ranges are nothing more than summaries of the minimum and maximum sentences imposed in the past, which serve in any given case as guides for the application of all the relevant principles and objectives. However, they should not be considered "averages", let alone straitjackets, but should instead be seen as historical portraits for the use of sentencing judges, who must still exercise their discretion in each case…
>
> *Lacasse* at para. 57.

58. With respect, our "historical portrait" requires a fresh look. Acknowledging Parliament's intention and Canadian society's increased awareness by "modernizing" these principles is long past due.

C. Conclusion

59. The facts in the case at bar were egregious. The Respondent's moral blameworthiness was extraordinarily high. The offence was pre-planned. The Respondent had identified the mother, through social media, as someone who would make her child available to him for his sexual satisfaction.

60. The harm done to the child in the course of the act was exacerbated by the active involvement of the mother who physically forced her child in complying with the Respondent's demands. Their callous indifference to the child's suffering was reprehensible. The violence demanded by the Respondent and perpetrated by both he and the mother were aggravating factors of extreme significance. Arguably, the level of violence and cruelty distinguish the case

at bar from the majority of sexual assaults against children in which courts more commonly hear of their commission through coercion or acquiescence.

61. The sentencing judge had a distinct disadvantage: sentencing precedents would have been available had the victim been an adult or if the Respondent were in a position of trust. Absent an available and appropriate range of sentences, the sentencing judge cannot be faulted for having turned to a similar but different decision for its basic principles. Indeed, he was obliged to do so. There was no basis for the Manitoba Court of Appeal's intervention and, given the deference owed to the sentencing judge, it should not have interfered.

62. This Honourable Court's assistance is required to fill in the gap, address the lack of cohesion in respect of sentences for sexual offences against children in the absence of a trust relationship, and ensure that sentencing ranges reflect Parliament's demonstrated commitment to accountability in cases of child sexual abuse. The Applicant respectfully submits that the current jurisprudence not only creates confusion and inconsistency, but it results in an injustice as the impact of victimization on an entire group of victims remains unaddressed.

Part IV – Submission As To Costs

63. The Applicant does not seek costs and asks that no costs be awarded against it.

Part V – Order Sought

64. The Applicant seeks an order of this Honourable Court granting leave to appeal.

All of which is respectfully submitted this 19th day of September, 2018.

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RENÉE LAGIMODIÈRE
Counsel for the Applicant

Part VI – Table of Authorities

Authorities	**Cited at Paragraph No.**
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