Court File No. 38300

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

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

JUSTYN KYLE NAPOLEON FRIESEN

Respondent

- and -

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PARTS I and II: OVERVIEW AND INTERVENER'S POSITION ON APPEAL

1. Unshakable faith in starting-point sentencing has seduced the Alberta Court of Appeal into ignoring the doctrine of precedent. Despite this Court's repeated and renewed commitment to appellate deference in sentencing, the Alberta Court of Appeal remains unmoved, enforcing the "binding" nature of its starting points on trial courts with unforgiving frequency.

2. Because courts in Manitoba rely on the starting-point jurisprudence out of Alberta, this Court must grapple with ***Hajar***[1] and ***Arcand***[2] before resolving the issues in this appeal. The Criminal Trial Lawyers' Association ("CTLA") takes no position on the outcome of this appeal but asks this Court to communicate in no uncertain terms that, regardless of those decisions of the Alberta Court of Appeal, starting points are not binding on lower courts.

3. Starting points cannot be binding for three main reasons. Firstly, there is no legal basis for courts to create categories of offences for sentencing purposes, and elevating starting points to binding rules of law collides with the separation of powers and risks eroding the legitimacy of the judicial role in sentencing. Secondly, slavish adherence to starting points tends to fetter the discretion of sentencing judges and leads to disproportionately higher rates and lengthier terms of incarceration. Thirdly, and relatedly, binding starting points translate into instruments of systemic discrimination against Indigenous offenders, as reverence for the principle of parity impairs the principle of restraint under s. 718.2(e) of the *Criminal Code*.

4. Contrary to the warnings of various proponents, relegating starting points to non-binding guidelines will not flood sentencing courts with crests of uncertainty. The majority of provinces and territories have eschewed starting points, and the administration of criminal justice in those jurisdictions is no less stable or reliable. Thus, by affirming that starting points are not rules of law, this Court can be confident that no turbulence will disturb the criminal sentencing process.

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[1] ***R. v. Hajar***, 2016 ABCA 222.
[2] ***R. v. Arcand***, 2010 ABCA 363.

PART III: STATEMENT OF ARGUMENT

I. STARTING-POINT SENTENCES CANNOT BE BINDING RULES OF LAW

5. Starting-point sentences cannot be binding on lower courts because they would (1) offend the principle of separation of powers; (2) unduly fetter a sentencing court's discretion and increase rates of imprisonment; and (3) reproduce systemic bias against Indigenous offenders.

A. Binding Starting Points Offend the Principle of Separation of Powers

6. What does it mean when a starting-point sentence is "binding"? In Alberta, the court of appeal has repeatedly attempted to redefine the answer in response to this Court's sentencing decisions on starting points, ranges and appellate deference. Specifically, this Court in ***McDonnell*** recognized that the judiciary does not have the power to create categories of offences for sentencing purposes *that have the force of law*.[3] Hence, the CTLA submits that respect for the fundamental convention of *stare decisis* should lead appellate courts to accept that a guideline starting-point sentence cannot be binding on lower courts.

7. Even though the Alberta Court of Appeal in ***Sandercock*** described the three-year starting point for major sexual assault as a "guideline" that does not rigidly constrain the discretion of a sentencing judge,[4] the court subsequently began to find error when judges failed to properly categorize an offence within an established starting point.[5] Sopinka J. tried to put a stop to this practice in ***McDonnell*** when he said unequivocally that this can never be an error of law alone.[6] Yet despite ***McDonnell***, the majority in ***Arcand*** concluded that the sentencing judge "ignored binding authority, *Sandercock*, and the starting point it set for major sexual assault… [and] this too constitutes reversible error."[7] Indeed, even after this Court in ***Lacasse*** affirmed ***McDonnell*** and reiterated that starting points are "not hard and fast rules,"[8] the Alberta Court of Appeal has continued to find error when a lower court ignores a "binding" starting point.[9]

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[3] ***R. v. McDonnell***, [1997] 1 S.C.R. 948.
[4] ***R. v. Sandercock***, 1985 ABCA 218 at paras 1, 4 and 8.
[5] The minority in ***Arcand***, *supra* note 2, at para 371 recognized this.
[6] ***McDonnell***, *supra* note 3, at para 32.
[7] ***Arcand*** *supra* note 2, at para 273. See also, e.g., ***R. v. Marchesi***, 2009 ABCA 304 at paras 6-8.
[8] ***R. v. Lacasse***, 2015 SCC 64 at paras 60 and 61.
[9] ***R v Reddekopp***, 2018 ABCA 399 at paras 3 and 5; ***R. v. D.S.C.***, 2018 ABCA 335 at para 40.

8. Frankly, this does not respect the authority of ***McDonnell*** and other decisions of this Court. When Sopinka J. said it can never be an error for a sentencing judge to fail to place an offence within a judicially-created category of offence, he was not referring to a sentencing judge failing to "advert to" or pay lip-service to a starting point. He was referring to a sentencing judge failing to apply a starting point at all. If ***McDonnell*** still retains its force, then an appellate court cannot interfere with a sentence on the sole basis that a sentencing judge chose to ignore a starting point.

9. This is because Parliament, not the judiciary, is vested with the power to create offences. Both Sopinka J. and Wagner J. (as he then was in ***Lacasse***) recognized that judge-made offences—even for sentencing purposes—improperly encroach on the legislative sphere if they have legal consequences. Distilled to its essence, the principle of separation of powers demands respect among the three branches of government: "[i]t is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other,"[10] particularly where another branch is better suited to make the decisions at issue.[11] More pointedly, courts must respect the limits of their role in the constitutional order and refrain from second-guessing the policy choices of the legislative and executive branches.[12]

10. Indeed, the separation of powers is a source of judicial legitimacy and a foundation of judicial restraint.[13] It should impel courts to impose proper limits on themselves.[14] Parliament cannot wield a quill on a whim and pen new footnotes in our Constitution on the role of the judiciary. Thus, for the principle of separation of powers to work, courts bear the responsibility of engaging in introspection and respecting their own limits. In any event, that judges cannot perform functions beyond their traditional role would hardly be a "daring innovation."[15]

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[10] ***New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)***, [1993] 1 S.C.R. 319.
[11] ***Canada (Prime Minister) v. Khadr***, 2010 SCC 3 at para 37; ***Doucet-Boudreau v. Nova Scotia (Minister of Education)***, 2003 SCC 62 at para 34.
[12] ***Doucet-Boudreau***, *supra* note 11, at para 35.
[13] Saunders, Cheryl. "Separation of Powers and the Judicial Branch" (2006), 11(4) Judicial Review 337 at 346. **[Book of Authorities – Tab 2]**
[14] *Ibid*.
[15] "de Smith, S. A. "The Separation of Powers in New Dress" (1966-67), 12(4) McGill Law Journal 491 at 496.

11. Hence, if a starting-point sentence was truly binding *as a rule of law*, then this would disrupt the traditional role of the judiciary. Small wonder, then, that courts in Alberta struggle with the jurisprudence around starting-point sentencing. With their imposing heft, cases such as ***Arcand*** and ***Hajar*** promise inscrutability. For decisions that are supposed to assist sentencing courts with guidelines and "not hard and fast rules," they are unwieldy pronouncements.

12. Citing this Court's previous decisions, some judges of the Alberta Court of Appeal have refused to acquiesce in the self-proclaimed binding nature of ***Arcand*** and ***Hajar***.[16] For example, O'Ferrall J.A. concurred in the result in ***D.S.C.*** but declined to adopt the majority's reasons which criticized ***Gashikanyi***,[17] wherein he asserted that starting points "are not binding."[18]

13. This assertion, however, aligns with the minority reasons in ***Arcand***, where Hunt and O'Brien J.J.A. wrote that "[a] guideline can be useful even though its use is not obligatory. But we do not think the Supreme Court's acceptance of guideline sentencing permits it to be elevated, in effect, to a rule of law. In our view, that is the outcome of the majority judgment in this case. We respectfully disagree."[19] Here, the reasoning is consistent with ***Lacasse*** and ***McDonnell***. Indeed, the minority criticized the majority for ignoring this Court's "overriding" authority.[20]

14. Unlike Alberta, most other jurisdictions appear to have heeded this Court's admonitions in ***McDonnell*** or have evinced skepticism about the efficacy of the starting-point approach:

- **Nova Scotia**: "Nova Scotia has not adopted the starting point approach."[21]
- **British Columbia**: "starting points are now 'disapproved'."[22]

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[16] See, e.g., ***R. v. Lee***, 2012 ABCA 17 and ***R. v. Gashikanyi***, 2017 ABCA 194.
[17] ***Gashikanyi***, *supra* note 16.
[18] *Ibid* at para. 77.
[19] ***Arcand***, *supra* note 2, at para 352 (emphasis added).
[20] *Ibid* at para 382.
[21] ***R. v. J.J.W.***, 2012 NSCA 96 at para 21; See also ***R. v. Oickle***, 2015 NSCA 87 at para 39.
[22] ***R. v. D.A.W.***, 2002 BCCA 336 at para 31; See also ***R. v. Goodliffe***, 2003 BCSC 2025 at paras 16-19 and ***R. v. Agin***, 2018 BCCA 133 at paras 95-97 (per Bennett J.A.).

- **Ontario**: "The use of starting-point or guideline sentencing has been somewhat controversial and has never been fully endorsed by this court."[23]

- **Quebec**: "this Court has always refused to establish starting points in the sentencing process."[24]

- **Newfoundland**: "This Court does not use the 'starting point approach'. Rather, we use the 'acceptable range approach'."[25]

- **Prince Edward Island**: "This court has previously rejected a starting point approach to a sentence that has incarceration as a starting point."[26]

- **Yukon**: "Yukon does not subscribe to the starting-point approach..."[27]

- **Nunavut**: "The starting point approach adopted by the Alberta Court of Appeal is very difficult to implement given the recent pronouncements of the Supreme Court of Canada..."[28]

15. Thus, there has been an undeniable shift away from the starting-point methodology beyond the borders of the Prairies. This is unsurprising given this Court's rulings in ***McDonnell*** and ***Lacasse***. However, ***Arcand*** and ***Hajar*** remain irreconcilable with those decisions and encroach unapologetically into the legislative sphere. Given that "[n]onbinding guideline judgments" still have the capacity to "promote consistency while preserving judicial discretion,"[29] starting points can still be useful without jeopardizing the separation of powers.

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[23] ***R. v. N.H.(C.)***, 2002 CanLII 7751 (ONCA) at para 32; See also ***R. v. Woodward***, 2011 ONCA 610 at para 45; ***R. v. L.M.***, 2011 ONCJ 387 at paras 35 and 36; ***R. v. Glassford***, 1988 CanLII 7094 (ONCA).
[24] ***R. c. Bernier***, 2011 QCCA 228 at para 36.
[25] ***R. v. Mitchell***, 2017 NLCA 26 at para 16 citing Rowe J.A. (as he then was) in ***R. v. Byrne***, 2009 NLCA 3 at footnote 1.
[26] ***Cody v. R.***, 2007 PESCAD 7 at para 34.
[27] ***R. v. Mathieson***, 2018 YKSC 49 at para 63; See also ***R. v. White***, 2008 YKSC 34 at paras 83 and 84.
[28] ***R. v. Pudlat***, 2000 CanLII 2423 (NUCJ) at para 34.
[29] Krasnostein, Sarah and Arie Freiberg. "Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?" (2013), 76 Law and Contemporary Problems 265 at 281-82.

B. Starting Points Fetter Discretion and Increase Rates of Imprisonment

16. In theory, starting points are not judicially-created mandatory minimums because they permit adjustments upward or downward taking into account the circumstances of each case. However, in practice, they have the effect of constraining discretion in the sentencing process because the Alberta Court of Appeal actively reverses sentences that, in its view, are significantly more lenient than the starting point.

17. This can be seen in the routine appellate intervention in Crown appeals from three to four-month sentences for cocaine trafficking. In these cases, the Alberta Court of Appeal repeatedly admonished and overturned sentencing judges for *declining to follow or apply* the three-year starting point for commercial-level cocaine trafficking.[30] Tellingly, not one sentence in the 90-day range has been upheld by the Alberta Court of Appeal. In contrast, the British Columbia Court of Appeal has affirmed that even suspended sentences can be appropriate dispositions for cocaine trafficking.[31] In addition, the sentencing range for street-level cocaine-trafficking in British Columbia is six to 18 months.[32] It can hardly be said that the negative societal impact of cocaine addiction and trafficking in Alberta is measurably greater than in British Columbia to justify the harsher sentences that flow from the three-year starting point.

18. Moreover, it cannot be coincidence that sentences for sexual assaults in Alberta, Saskatchewan and Manitoba—where the starting-point methodology has taken root—have been higher than anywhere else in the country, and indeed at one point, three times higher than in Ontario and British Columbia.[33] Based on this data, Professor Manson concluded that starting-points "may reduce disparity, [but] will tend to increase rates of incarceration," and that these "methodological decisions are for Parliament, not appellate courts."[34] Professor Quigley has

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[30] ***R. v. Giroux***, 2018 ABCA 56 at paras 10-12; ***R. v. Godfrey***, 2018 ABCA 369 at paras 2-8; ***R. v. Melnyk***, 2014 ABCA 344 at para 7; ***R. v. Trinh***, 2012 ABCA 383 at paras 7 and 11; ***R. v. Rainville***, 2010 ABCA 288 at para 6.
[31] ***R. v. Voong***, 2015 BCCA 285.
[32] *Ibid*.
[33] Manson, Allan. "McDonnell and the Methodology of Sentencing" (1997), 6 C.R. (5th) 277 at p. 4. **[Book of Authorities – Tab 1]**
[34] *Ibid*.

more colourfully described the starting-point approach as a "fetish against disparity" that inflicts injustice on Indigenous people.[35]

19. The suffocating effect of starting points has not been lost on some trial courts in Alberta. In ***R. v. Boriskewich***, the sentencing judge tuned his ear to the disunity and discord emanating from the starting-point jurisprudence and ultimately resigned to the reality that the Alberta Court of Appeal constrained his discretion by having "a chilling effect on [his] ability to craft an individualized sentence…"[36]

20. In ***R. v. Parranto***, the sentencing judge boldly observed that the Alberta Court of Appeal did not use starting points as "guides" or "historical portraits" (as this Court described in ***Lacasse***) because in ***Arcand*** it held that a significant departure from a starting point may constitute a palpable and overriding error.[37] That case is presently on reserve after the Crown appealed and asked a five-member panel to fix a nine-year starting point for fentanyl trafficking. Given the sentencing judge's comments, it is reasonable to expect that the court of appeal will forcefully reassert that starting points are binding—unless this Court says otherwise.

21. Indeed, ***Parranto*** appears destined to stand alongside ***Arcand*** and ***Hajar*** in the pantheon of Alberta starting points. It will extend one hand to provide assurance that starting points are not judicially-created mandatory minimum sentences but strike swiftly with the other when a sentencing judge dares to impose a significantly lower sentence. This enforced discipline fetters the broad discretion that sentencing judges are supposed to exercise and thereby increases rates of incarceration—the impact of which is felt most disproportionately by Indigenous offenders.

C. Starting Points Reproduce Systemic Bias Against Indigenous Offenders

22. Courts in the Prairies incarcerate Indigenous offenders at higher rates than anywhere else in Canada. Lebel J. acknowledged in ***Ipeelee*** that, in 1988, Indigenous persons accounted for 32% of the inmates in federal prisons in the Prairies while comprising of only 5% of the general

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[35] Quigley, Tim. "Are We Doing Anything about the Disproportionate Jailing of Aboriginal People?" (1999), 42 C.L.Q. 129 at p. 9. **[Book of Authorities – Tab 3]**
[36] ***R. v. Boriskewich***, 2017 ABPC 202 at paras 51 and 52.
[37] ***R. v. Parranto***, 2018 ABQB 863 at para 44.

population; whereas, nationally, they accounted for 10% of federal inmates and 2% of the population.[38]

23. Today, statistics are even more alarming: as of March 31, 2018, Indigenous offenders accounted for 28% of federal in-custody population while comprising only 4.3% of the Canadian population.[39] The Prairie region leads the country in offender growth[40] and, at present, the percentage of Indigenous offenders in the federal institutions in the Prairies has ballooned to 46.4%.[41] And just as embarrassingly, the majority of federally sentenced Indigenous women are incarcerated in the Prairies (35%).[42]

24. Given Professor Manson's previous findings that starting points tend to increase rates of incarceration, these statistics are compelling evidence that sentencing judges should, if necessary, be free to ignore appellate starting points to further the objectives of s. 718.2(e) of the *Criminal Code* and arrive at a fit sentence for a particular Indigenous offender.

25. In Alberta, the mythical starting-point offender has no criminal record and is of prior good character. But the starting-point offender is not a *racialized* offender. Instead, the majority in ***Arcand*** situated "good character" from the perspective of "an ordinary or average person."[43] Since the real and intergenerational experiences of Indigenous persons are hardly ordinary or average, comparing Indigenous offenders to the starting-point standard of "prior good character" is virtually meaningless and reproduces institutional racism against Indigenous people. Few Indigenous offenders can mirror the "good character" of an "ordinary or average" Canadian and thereby qualify for the baseline starting-point sentences in Alberta. In this way, the architecture of starting points invites further systemic disadvantage to Indigenous offenders. ***Gladue***[44] factors cannot simply be reduced to a mitigating factor on a "checklist" that results in a

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[38] ***R. v. Ipeelee***, 2012 SCC 13 at para 57.
[39] Office of the Correctional Investigator, "Annual Report 2017-2018," Government of Canada, online, at p. 61.
[40] *Ibid* at p. 11.
[41] Office of the Correctional Investigator, "Backgrounder – Aboriginal Offenders – A Critical Situation," Government of Canada, online.
[42] Office of the Correctional Investigator, "Annual Report 2017-2018," Government of Canada, online, at p. 82.
[43] ***Arcand***, *supra* note 2, at paras 133-34.
[44] ***R. v. Gladue***, [1999] 1 S.C.R. 688

"downward adjustment" from a starting point.[45] Instead, s. 718.2(e) "calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders."[46]

26. The problem with starting points is that "they do not sufficiently consider the moral blameworthiness of the offender."[47] In practice, they have contributed to inequities in sentencing Indigenous offenders by allowing the principle of parity to overwhelm the principle of restraint.[48] For example, even after ***Ipeelee***, the Alberta Court of Appeal overturned 90-day intermittent sentences imposed on Indigenous offenders convicted of cocaine trafficking, substituting them with sentences that would have been fit for a similarly situated non-Indigenous offenders.[49]

27. In ***Wilson***,[50] the sentencing judge in that case did, in fact, use a different method of analysis to conclude that a conditional sentence order was a fit sentence for an Indigenous offender who had pleaded guilty to possessing a kilogram of cocaine. As the panel of the Alberta Court of Appeal noted, she "went to infinite pains" to hold many hearings and deliver "extended, detailed and even philosophical reasons."[51]

28. But the panel was fixated on the starting-point sentence. The court set aside the CSO because the sentencing judge "ignored binding precedent" and reasoned that ***Gladue*** factors could not reduce the sentence "by at least 42%" from the Crown's presumptive sentence or "in fact, 56%" from the starting point.[52] This analysis improperly reduced the offender's lived experience as an Indigenous person to a bead on an abacus. This is contrary to the judiciary's duty to ensure courts do not contribute to ongoing systemic racial discrimination.[53]

29. Indeed, ***Gladue*** appears only as a fleeting afterthought in ***Hajar*** and ***Arcand*** (wherein the offender *was* Indigenous).[54] These decisions are thunderous proclamations on the starting-point

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[45] Rudin, Jonathan. "Eyes Wide Shut: The Alberta Court of Appeal's Decision in R. v. Arcand and Aboriginal Offenders" (2011), Alberta Law Review 987 at 1004.
[46] ***Ipeelee***, *supra* note 38, at para 59 (emphasis added).
[47] ***Agin***, *supra* note 22, at para 97 (per Bennett J.A., dissenting on other grounds).
[48] See "Starting-Point Sentencing Chart For Indigenous Offenders" [**BOA – Tab 4]**
[49] ***R. v. Corbiere***, 2017 ABCA 164; ***R. v. L'Hirondelle***, 2018 ABCA 33.
[50] ***R. v. Wilson***, 2008 ABQB 588.
[51] ***R. v. Wilson***, 2009 ABCA 257 at para 3.
[52] *Ibid* at paras 15 and 16.
[53] ***Ipeelee***, *supra* note 38, at para 67.
[54] ***Hajar***, *supra* note 1, at para 121; ***Arcand***, *supra* note 2, at para 294.

approach in Alberta. Neither seriously contemplated whether s. 718.2(e) might override the imperative to have consistency and uniformity when sentencing Indigenous offenders. Curiously, the majority in ***Arcand*** relied on s. 15 of the *Charter* to justify appellate courts taking a "leadership role in achieving uniformity of approach in sentencing."[55] However, as Professor Quigley has aptly observed, "[u]niformity hides inequity, impedes innovation and locks the system into its mindset of jail," and "there is a constitutional imperative" to avoid obsessing over disparity because in a diverse society, equal treatment has a differential impact.[56] This is consistent with ***Ewert v. Canada*** in which Wagner J. (as he then was) said that, "to operate fairly and effectively, those administering [the justice system] must abandon the assumption that all offenders can be treated fairly by being treated the same way."[57]

30. In sum, contrary to the majority's comments in ***Arcand***, this Court has never fully "endorsed" the starting-point approach. To date, judges in Alberta have only increased the intensity of the starting-point controversy. Respectfully, this Court can silence the debate with a single yet unremarkable statement: starting points are not binding rules of law.

PARTS IV and V: ORDERS SOUGHT AND CASE SENSITIVITY

31. The CTLA seeks no costs or orders and makes no submissions on case sensitivity.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of August 2019.

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[55] ***Arcand***, *supra* note 1, at para 87.
[56] Quigley, Tim. "Some Issues in Sentencing of Aboriginal Offenders", in Richard Gosse, James Youngblood Henderson and Roger Carter, eds., *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice*. (Saskatoon: Purich Publishing, 1994) at p. 286 (emphasis added).
[57] ***Ewert v. Canada***, 2018 SCC 30 at para 59.

PART VI: TABLE OF AUTHORITIES

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STATUTORY PROVISIONS

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