SCC File No.: 39227

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

BETWEEN:

CAMERON O'LYNN PARRANTO also known as CAMERON O'LYNN ROCKY PARRANTO and PATRICK DOUGLAS FELIX

Appellants

- and -

HER MAJESTY THE QUEEN

Respondent

- and –

CRIMINAL TRIAL LAWYERS'ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION, ABORIGINAL LEGAL SERVICES, LEGAL AID SOCIETY OF ALBERTA, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF ALBERTA, ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES DE LA DÉFENCE (AQAAD)

Interveners

FACTUM OF THE INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION
(Pursuant to Rule 42 of the Rules of the Supreme Court of Canada)

MCKAY FERG LLP
1705, 639 5th Ave SW
Calgary, AB T2P 0M9

Tel.: (403) 984 1919
Fax: (844) 895-3926

Sarah Rankin
Email: sarah@mckaycriminaldefence.com
Heather Ferg
Email: heather@mckaycriminaldefence.com

Counsel for the Intervener, Canadian Civil Liberties Association

JURISTES POWER LAW
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

Maxine Vincelette
Tel.: (613) 702-5573
Fax: (613) 702-5573
Email: mvincelette@juristespower.ca

Ottawa Agent for the Intervener, Canadian Civil Liberties Association

ORIGINAL TO:

THE REGISTRAR
SUPREME COURT OF CANADA
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

PAUL MOREAU
358-14032 23Avenue
Edmonton, AB T6R 3L6

Tel: 780-425-8337
Fax: 780-425-4296
Email: paul@moreaulaw.ca

Counsel for the Appellant, Cameron O'Lynn Parranto also known as Cameron O'Lynn Rocky Parranto

SUPREME ADVOCACY LLP
100-340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: 613-695-8855 x 102
Fax: 613-695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Appellant, Cameron O'Lynn Parranto also known as Cameron O'Lynn Rocky Parranto

ADVOCATE LAW
#1, 4820 47 Avenue
Red Deer, AB T4N 6B9

Andrew Phypers
Jared Craig
Tel: 403-754-4333
Fax: 403-770-8257
Email: andrew@advocatelawyers.ca

Counsel for the Appellant, Patrick Douglas Felix

SUPREME ADVOCACY LLP
100-340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: 613-695-8855 x 102
Fax: 613-695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Appellant, Patrick Douglas Felix

PUBLIC PROSECUTION SERVICE OF CANADA
5251 Duke Street
Suite 1400, Duke Tower
Halifax, Nova Scotia, B3J 1P3

David W. Schermbrucker
Monique Dion
Tel.: 902-426-2285
Fax: 902-423-1351
Email: David.Schermbrucker@ppsc-sppc.gc.ca

Counsel for the Respondent, Her Majesty the Queen

PUBLIC PROSECUTION SERVICE OF CANADA
160 Elgin Street,
Suite 1200
Ottawa, ON K1A 0H8

François Lacasse
Tel: 613-957-4770
Fax: 613-941-7865
Email:Francois Lacasse@ppsc-sppc.gc.ca

Ottawa Agent for Counsel for the Respondent, Her Majesty the Queen

PRINGLE, CHIVERS, SPARKS, TESKEY
1720 – 355 Burrard Street
Vancouver, BC V6C 2G8

Daniel J. Song
Tania Shapka
Tel: 604-669-7447
Fax: 604-259-6171
Email: djsong@pringlelaw.ca
Email: tshapka@pringlelaw.ca

Counsel for the Intervener, Criminal Trial Lawyers' Association

SUPREME LAW GROUP
900 – 275 Slater Street
Ottawa, ON K1P 5H9

Moira Dillon
Tel: 613-691-1224
Fax: 613-691-1338
Email: mdillon@supremelawgroup.ca

Ottawa Agent for the Intervener, Criminal Trial Lawyers' Association

ABORIGINAL LEGAL SERVICES
211 Yonge Street, Suite 500
Toronto, ON M5B 1M4

Jonathan Rudin
Douglas Varrette
Tel: 416-408-4041
Fax: 416-408-1568
Email: rudinj@lao.on.ca
Email: varretted@lao.on.ca

Counsel for the Intervener, Aboriginal Legal Services

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: 613-787-3562
Fax: 613-230-8842
Email: neffendi@blg.com

Ottawa Agent for the Intervener, Aboriginal Legal Services

LEGAL AID SOCIETY OF ALBERTA
400 Revillon Building
10320 102 Avenue
Edmonton, AB T5J 4A1

Dane F. Bullerwell
Tel: 780-638-6588
Fax: 780-415-2618
Email: dbullerwell@legalaid.ab.ca

Counsel for the Intervener, Legal Aid Society of Alberta

SUPREME ADVOCACY LLP
100-340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: 613-695-8855 x 102
Fax: 613-695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for the Intervener, Legal Aid Society of Alberta

ALBERTA JUSTICE AND SOLICITOR GENERAL
9833 – 109 St. N.W.
3rd Floor, Bowker Bldg.
Edmonton, AB T5K 2E8

Joanne B. Dartana
Tel: 780-422-5402
Fax: 780-422-1106
Email: joanne.dartana@gov.ab.ca

Counsel for the Intervener, The Attorney General of Alberta

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613-786-8695
Fax: 613-788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for the Intervener, The Attorney General of Alberta

MANITOBA JUSTICE
Prosecution Service
510 – 405 Broadway
Winnipeg, MB R3C 3L6

Rekha Malaviya
Renée Lagimodière
Tel: (204) 945-2852
Fax: (204) 945-1260
Email: rekha.malaviya@gov.mb.ca
renee.lagimodiere2@gov.mb.ca

Counsel for the Intervener, The Attorney General of Manitoba

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613-786-8695
Fax: 613-788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for the Intervener, The Attorney General of Manitoba

BUREAU D'AIDE JURIDIQUE D'AMQUI
49, boulevard Saint-Benoît Est
Bureau 5
Amqui, QC G5J 2B8

Hugo Caissy
Tel: 418-629-4404
Fax: 418-629-3515
Email: hcaissy@ccjbslg.qc.ca

Counsel for the Intervener, Association québécoise des avocats et avocates de la défense (AQAAD)

CHARLEBOIS-SWANSTON, GAGNON, AVOCATS
166 rue Wellington
Gatineau, QC J8X 2J4

Paul Charlebois
Tel: 819-770-4888 Ext: 105
Fax: 819-770-0712
Email: pcharlebois@csgavocats.com

Agent for the Intervener, Association québécoise des avocats et avocates de la défense (AQAAD)

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PART I – OVERVIEW AND FACTS

[1] Starting point sentences inhibit fair and individualized sentencing. They do so by attempting to solve problems that do not exist. There is no crisis of confidence in the justice system as a result of variable and individualized sentences, and an uninformed public outcry alone could not justify restrictions on an individual's liberty. Sentencing judges do not struggle to identify or apply the relevant sentencing principles. There is no pool of offenders who have opted not to offend after learning their sentence will be based on a starting point.

[2] Canadian sentencing is designed to produce variable sentences. This variation reflects a choice by Parliament to prioritize individualized sentencing. The variation is demonstratively rational. Sentencing judges are required to consider uniform sentencing objectives and give reasons. The starting point approach treats variability as a problem to be solved. As a result - and by design - it constrains the discretion of sentencing judges and limits the scope of discretionary variance. The objective is to make both the outcome and analysis more uniform. Starting points are not compatible with the individualized sentencing at the heart of the Canadian system.

[3] Starting points are different than ranges. They reflect the perspective that Courts of Appeal should lead sentencing judges and determine proportionality on their behalf.[1] The stated goals of this leadership range from achieving social or policy outcomes, to keeping sentences strict so Parliament does not have to.[2] Starting points cannot be made compatible with fair, individualized, evidence-based, and adversarial sentencing hearings. The practice should be stopped by this Court.

PART II – ISSUES

[4] The Canadian Civil Liberties Association's (the "CCLA") interest in this appeal pertains to the first issue identified by the Appellant Mr. Parranto. On that issue the CCLA's position is that starting practice of starting point sentencing should be ended by this Court.

PART III – STATEMENT OF ARGUMENT

Starting Points Frustrate the Sentencing Exercise at First Instance

[5] Starting points constrain the sentencing exercise at first instance. This is their objective and their effect. The Alberta Court of Appeal defended starting points in *Arcand*. The decision sees a

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[1] *R v Arcand,* 2010 ABCA 363 at paras 8, 89 [*Arcand*].
[2] *Arcand, ibid* at para 125.

call for a "leadership role in sentencing" everywhere: in Parliament's 1996 changes to the *Criminal Code,*[3] in the need to protect the public and their confidence in the justice system,[4] even in this Court's deference to sentencing decisions which is seen to direct "a large part of the responsibility to review sentences for fitness" to Courts of Appeal, rather than to suggest that sentencing decisions requiring intervention are rare.[5]

[6] *Arcand* predicts that irrationally divergent sentences will flourish without this leadership and precipitate a loss of public confidence in the system. Leadership is part of a "dialogue" with Parliament, and communicates that sentences do not need to be legislatively controlled to avoid such a public outcry.[6] Elsewhere in the case law, it is said that leadership broadcasts the "hostile attitude" in Alberta towards certain substances.[7]

[7] Regardless of the problem to solve, "leadership" takes the same form: standardized sentencing. Starting point case law assumes the *Criminal Code* insufficiently constrains sentencing discretion. *Arcand* assumes without argument that Courts of Appeal are "institutionally better able to" maintain the principle of parity than sentencing judges.[8] Starting point cases take for granted that, without "leadership", sentencing judges will produce intolerable variation, and sentences too lax or inconsistent to maintain public confidence or achieve the key social objectives.[9]

Starting Points are a Standardized Analysis

[8] Starting points aim for standardized outcomes by providing a standardized sentencing analysis. Modifying future judicial behaviour and constraining the scope of potential differences in opinion are the point.

[9] The constraints have consistent features. Starting points typically consider a hypothetical offender's good character.[10] Absent "unusual" or "exceptional circumstances", a sentencing judge may not give it different or additional weight.[11] The starting point preweighs both the "standard

[3] *Arcand, ibid* at paras 82, 73.
[4] *Arcand, ibid* at para 8.
[5] *Arcand, ibid* at paras 88-90.
[6] *Arcand, ibid* at paras 88-90.
[7] *R v Maskell,* 1981 ABCA 50 at para 19.
[8] *Arcand, supra* note 1 at para 81.
[9] *Arcand, ibid* at paras 8, 68, 73, 77.
[10] See for example *R v Felix,* 2019 ABCA 458 at para 45 [*Felix*].
[11] *R v Godfrey,* 2018 ABCA 369 at para 16 [*Godfrey*].

harm" caused by an offence and the weight given to that harm.[12] Little remaining leeway exists for a sentencing judge to form a different conclusion about the harm proved in a specific case, or the way they would consider the "standard harm."

[10] A sentencing judge may conclude the pressures or deprivations that drove an offender's cycle of crime have been resolved. They act on this conclusion at their own peril, and risk being overturned for overemphasizing irrelevant or already-accounted for factors. They may conclude analyzing blameworthiness, meaningful accountability and community safety must reflect the specific offender's personal and community history of trauma. They cannot comfortably rely on these factors to depart from a starting point.[13]

[11] Starting points bind trial judges to pre-determined portions of the sentencing analysis. A starting point reflects the Court of Appeal, thinking on a sentencing judge's behalf. This is why it is not sufficient to reiterate that starting points are not binding. When the Court of Appeal intervenes in a sentence that significantly deviated from the starting point, it rarely locates the error in the length of the sentence. The error is found in performing an individualized analysis: giving factors different weight than was permitted, or considering impermissible factors.

[12] The Alberta Court of Appeal has acknowledged this Court's statements that starting points cannot be binding. The portion of *Arcand* that contains this notional concession, however, belies a commitment to an interventionist approach to sentence appeals.[14] In practice, the starting point is treated as binding, and named as such.[15] The onus to "reasonably justify" a deviation from the starting point is high. It can only rely on facts truly "relevant to sentence" as evaluated by the Court of Appeal.[16] The defendant will need to be "exceptional" to escape the starting point.[17] Even the conclusion that they are exceptional may not be enough – the reality is that deviating leaves a sentence open "to attack."[18] Sentencing judges are thus told they may up their own minds about a proportionate sentence, but also know that the starting point is the "*determinant* of proportionality."[19]

[12] *R v Hajar,* 2016 ABCA 222 at para 61.
[13] *R v Corbiere,* 2017 ABCA 164 at paras 19-20; *Godfrey, supra* note 11 at paras 12-17.
[14] *Arcand, supra* note 1 at para 106.
[15] *Godfrey, supra* note 11 at paras 6, 8.
[16] *Arcand, supra* note 1 at para 106.
[17] *Godfrey, supra* note 11 at para 16.
[18] *Godfrey, ibid* at paras 16, 40.
[19] *Godfrey, ibid* at paras 14-16; *Arcand, supra* note 1 at para 125 (emphasis in original).

[13] This makes starting points incompatible with the individualized sentencing at the heart of the Canadian system. After almost a decade of consideration, Parliament rejected a model of guideline sentencing with modifications overseen by Courts of Appeal.[20] They chose broad discretion guided by harmonized principles. Community confidence and accountability flow from sentences imposed based on collectively chosen sentencing principles, in light of all of the evidence and arguments presented in the matter, imposed by a sentencing judge who sees and hears from other members of that community about similar issues on a daily basis. Reasons "are a fundamental means of developing the law uniformly" – of safeguarding parity.[21] It is "fairness and rationality" that are essential to preserving public confidence in the justice system.[22] No other proactive constraints are required.

[14] Parliament and this Court have acknowledged the reality that sentencing is an art. Placing the discretion in the hands of trial judges reflects the depth of skilled human judgment they possess, and were selected to exercise through their appointments into their roles. The kind of "experience and judgment" that comes from "having served on the front lines of our criminal justice system" qualifies sentencing judges to perform the "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" all the while "taking into account the needs and current conditions of and in the community" – a community the sentencing judge sees, hears and interacts with on every sitting day.[23] The possibility of variation in sentences is the point of our approach. Its foundation ensures variation is the product of principled consideration.[24]

[15] The public may struggle with the certain sentencing decisions. The judicial response should assess whether that struggle reflects the perspective of an informed and "reasonable member of the public."[25] A *perception* of unreasonable variability or leniency does not demonstrate that this is so. Sentences perceived as lenient often reflect a sentencing judge's handling of complex considerations including colonialism, the fraught relationship between incarceration and rehabilitation, or a personal transformation by a defendant. Even the decision by a particular region to make sentencing judge schedules available, critiqued in *Arcand,* reflects difficult choices

[20] *Arcand, supra* note 1 at footnote 31.
[21] *R v REM,* 2008 SCC 51 at para 12.
[22] *Re BC Motor Vehicle Act,* [1985] 2 SCR 486 at 533
[23] *R v M(CA),* [1996] 1 SCR 500 at para 91 [*M(CA)*].
[24] *M(CA)*, *ibid* at para 56.
[25] *R v St-Cloud,* 2015 SCC 27 at paras 79-80.

required to serve the community while balancing finite resources.[26] There is reasonable disagreement inside and outside the justice system on these issues. This disagreement, and reasonable variability that results, forms and informs a public conversation about the role of our justice system, the sentencing process, and outcomes. Courts of Appeal benefit from this conversation in analyzing the law, but must stand firm in defence of fairness and proportionality in the sentencing process.

[16] Starting points constrain the sentencing analysis. As a result, they undermine the sentencing judge's ability to impose what they conclude is a just sentence, with reference to the applicable principles and law – key protections for fairness in the sentencing process.

Starting Points Rely on Inappropriate Judicial Notice

[17] Starting point case law justifies and implements "leadership" by relying on judicial notice of facts. The "facts" used to justify starting points are frequently not proper subjects of judicial notice. These decisions habitually rely on empirical claims about complex social facts which have not been established in evidence, tested in the adversarial process, or conclusively settled within the relevant academic literature. Relying on them chafes against the burden of proof for aggravating facts - a major protection for accused persons against the unjustifiable loss of liberty.

[18] A Court may accept a fact without proof if it is "so notorious or generally accepted as not to be the subject of debate among reasonable persons" or "capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy."[27] The empirical claims underpinning starting points do not fit in either category.

[19] A primary example of this claim and practice are statements about public confidence in the justice system and public tolerance for sentence variability. As Canada's renowned criminologist Tony Doob has observed, it is difficult to see how Canadians could have an informed opinion about the range of sentences imposed in their jurisdictions, given a dearth of data about this, and that most information filters through the happenstance of media coverage.[28] There is little to indicate that the 1996 Sentencing Reforms have failed to achieve the goal of public confidence in the system. Nor to indicate that Alberta faces a unique crisis of confidence. There is also little to

[26] *R v Jordan,* 2016 SCC 27 at paras 26-28; *Hryniak v Mauldin,* 2014 SCC 7 at para 2.
[27] *R v Find,* 2001 SCC 32 at para 48.
[28] See for example Anthony N Doob, "The Unfinished Work of the Canadian Sentencing Commission" (2011) 53:3 Canadian J of Criminology and Crim Just 279.

indicate that normal democratic processes have so radically failed to respond to the crisis that the Courts must step in.

[20] The dubiousness of such a crisis of confidence is also challenged by a national perspective. Most of Canada does not use starting points. They primarily rely on the discretion of sentencing judges, as structured by the 1996 reforms. This appears to work. There is no evidence of a discernable difference between jurisdictions in the 40 years Alberta has relied on starting points. Certainly the existence of problems is not so obvious or indisputable as to justify judicial notice that an entire analytical regime in sentencing, crafted by appellate courts, is necessary.

[21] Nor is there support for the suggestion that starting points make any difference to general deterrence in sentencing. This is consistent with the weight of empirical evidence suggesting that longer sentences do not have an impact on individual or general deterrence.[29] Despite this, starting point case law consistently relies on claims about general deterrence.[30] It takes as self-evident the claim that a higher starting point for a sentence of incarceration will alter the "cost-benefit math" performed by potential offenders.[31]

[22] Leaving aside the body of expert evidence that could be brought to contest the relationship between lengthy sentences of incarceration and deterrence, the causal chain logically relies on a number of implicitly assumed and implausible facts – facts which are, at minimum, not notorious or obviously true. The claim assumes the truth of the idea that offenders or potential offenders are familiar with the sentencing practices of the Courts in their region and may even have compared the sentencing practices in Alberta to those of other jurisdictions. In practice, this means assuming as fact that there is a group of offenders who would not, for example, traffic cocaine if they learned that a future sentencing decision would rely on a 3 year starting point, plus or minus any case-specific sentencing factors not already reflected in that number. It also assumes as true that this group of offenders would have gone ahead with their plan to traffic if the average sentence was

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[29] See for example Anthony N Doob & Cheryl Marie Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" (2003) 30 Crime & Just 143 [Doob & Webster]; Michael Tonry, "The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings" (2009) 38 Crime & Just 65 [Tonry]; Anthony N Doob & Carla Cesaroni, "The Political Attractiveness of Mandatory Minimum Sentences" (2001) 39:2 &3 Osgoode Hall LJ 287 [Doob & Cesaroni].

[30] Much of this information has been identified by the Appellants. See for example the authorities cited at footnote 2 of the Factum of the Appellant Patrick Douglas Felix.

[31] *Felix, supra* note 10 at para 40.

lower than the starting point, or if their sentencing judge had discretion to consider their sentence individually. Similar groups of well-informed offenders making margin calls on the appeal of criminal activity are thought to be contemplating home invasion robberies, sexual assaults, offences against children and a litany of other offences covered by starting points.

[23] These facts cannot be assumed without evidence. The claim that marginal changes to sentencing for specific offences will have predictable or meaningful effects on rates of offending is at odds with the overwhelming research on the issue, even where the minimum sentence is fixed.[32] The suggestion that some target sentence number will be uniquely deterring differs from the more general suggestion that some kind of relationship exists between the fact of a punishment consisting of some form of significant deprivation.

[24] There are similar problems with the Court's assumptions about how higher sentences affect drug offending in particular. The opioid crisis in North America has accelerated research on the impacts of criminalization, interdiction and punishment. At this point the literature establishes that, at minimum, it cannot be assumed that stiffer sentences or aggressive enforcement will make people who use drugs safer. What the debate underscores is that, at minimum, these questions are too multi-dimensional and contested to be appropriate subjects for judicial notice. The question of what Courts should do to help bring down the death toll is not clear, obvious, or without significant debate. Assuming a particular path is correct without evidence and expert assistance poses real risks, and should not be condoned. It cannot, for example, be assumed that sentencing changes will shrink, rather than dangerously destabilize, the supply chain – one consequence of which may be unpredictable substance composition and increased fatalities.[33] There is mixed evidence on whether drug markets are irrational such that making predictions on the effects of sentences is difficult, and on whether higher sentences make markets more lucrative and volatile.[34] The

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[32] See for example: Doob and Webster, *supra* note 29; Tonry, *supra* note 29.

[33] See for example: Nick Werle & Ernest Zedillo, "We Can't Go Cold Turkey: Why Suppressing Drug Markets Endangers Society" (2018) 46:2 JL Med & Ethics 325; Rocco d'Este, "Breaking the Crystal Methamphetamine Economy: Illegal Drugs, Supply-side Interventions and Crime Responses" (2021) 88 Economica 208; Jeromie Ballreich et al, "Modeling Mitigation Strategies to Reduce Opioid-Related Morbidity and Mortality in the US" (2020) 3:11 Substance Use and Addiction 1.

[34] See for example: Leo Beletsky & Corey S Davis, "Today's fentanyl crisis: Prohibition's Iron Law, revisited" (2017) 46 Intl J Drug Pol'y 156; Mark AR Kleiman, "Getting Deterrence Right: Applying Tipping Models and Behavioural Economics to the Problems of Crime Control" (1998-1999) 3 Persp on Crime & Just 1; Peter Reuter & Mark AR Kleiman, "Risks and Prices: An Economic Analysis of Drug Enforcement" (1986) 3 Crime & Just 289.

possibility that tougher sentencing will increase the likelihood people with addiction will be incarcerated is also of concern given that incarceration increases the overdose risk for people using opioids.[35] There is also an emerging consensus that the series of efforts to target opioid supply itself may be a primary contributing factor to the level of devastation the opioid crisis is creating - in part because aggressively targeting substances drives markets towards more concentrated and lethal substances which are more compact and easier to transport.[36]

[25] These empirical claims are not isolated examples. In considering the facts assumed by the Court of Appeal it also cannot be ignored that, regardless of the problem, starting point case law presents a single solution: higher sentences. Alberta has never created a starting point to, for example, remedy intolerably high sentences imposed by sentencing judges, respond to the overrepresentation of Indigenous people in jails, or the disproportionate impacts of incarceration on those with mental health issues. This fact underscores another hazard of the “leadership” approach.[37] If the Court sees addressing certain outcomes or concerns as its duty, it must be proactive. This means acting before the parties or sentencing judges have sorted out empirical questions about useful actions by testing evidence. And a Court has only so many options at their disposal: holding a hammer, every complex social problem seems to need a nail.

[26] The perils of the Court of Appeal’s approach go beyond disturbing what should be a settled debate about whether marginal increases in sentence produce general deterrence. This Court is aware of the evidence it does not, and other parties to this Appeal have provided it.[38] Starting point cases routinely rely on highly debatable facts, not established in evidence, to increase sentences. Intuitions about policy goals and solutions are insufficient to justify aggravated sentences. The effect is countless additional years of lost liberty on the basis of dubious justifications. Systematic reliance on these facts, solidified into a starting point, means they are beyond the reach of a

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[35] Public Prosecution Service of Canada, “3.19 Bail Conditions to Address Opioid Overdoses” (last modified 3 March 2020), online: <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch19.html#fnb4>.

[36] See for example the authorities at *supra* footnotes 33 and 34; see also Daniel Ciccarone, “The triple wave epidemic: Supply and demand drivers of the US opioid overdose crisis” (2019) 71 Intl J Drug Pol’y 183.

[37] Paula Smith, Claire Goggin & Paul Gendreau, *The Effects of Prison Sentences and* Intermediate Sanctions on Recidivism: General Effects and Individual Differences (Ottawa: Public Works and Government Services Canada, 2002). See for example the Factum of the Appellant Patrick Douglas Felix at footnote 2; Doob & Webster, supra note 29; Tonry, supra note 29; Doob & Cesaroni, supra note 29.

defendant to contest or challenge without taking on binding precedents. Sidestepping the normal processes for testing facts that aggravate or increase a sentence is inconsistent with the basic adversarial norms of our system.

[27] Routine implicit reliance on judicial notice also highlights the difference between ranges and starting points. *Arcand* emphasizes that starting points are *not* ranges.[39] Ranges are the "outcome" of sentencing judges seeking proportionality time and time again; *Arcand* tells us starting points are *determinative* of proportionality.[40] Ranges, however, emerge when countless legal professionals in courtrooms across jurisdictions, debate difficult problems with concrete facts and evidence. This reasoning is incremental, and grounded in evidence and the adversarial process.

Starting Points Are Procedurally Unfair

[28] Defendants are entitled to a fair, rational and adversarial process to determine how much liberty they will lose. A properly conducted sentencing hearing ensures that the sentence is individualized, contextual and reasonable. Starting points deprive defendants of these protections.

[29] The procedural safeguards in sentencing include both the nature of the process, and the applicable rules of evidence and standards of proof. The process ensures offenders are sentenced for aggravating facts either admitted, or proven beyond a reasonable doubt.[41] A defendant may present information and arguments about the analysis and disposition in their case. They may also hear and respond to the Crown position and arguments. They participate in discussion about the appropriate weight for particular objectives, and in the debate about how to relate their case to a broader social context or trends in offence types.

[30] Starting points foreclose this process. They embed assumed facts and policy positions into binding law. They identify the priority sentencing objectives in advance. They pre-weigh the role of multiple mitigating factors, identifying the prototypical offender for whom the starting point is a proportional sentence. They take conclusions about what length of sentence will have a meaningful impact on rates of offending, and entrench them in a number.

[31] This harm is broader than the way starting points constrain the decision-making, and the problems of improper judicial notice. A defendant is often confined to debating whether the starting point applies. If so, a package of reasoning, and hierarchy of sentencing objectives and

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[38] *Arcand, supra* note 1 at para 148.
[39] *Arcand, supra* note 1 at para 125.
[40] *R v Gardiner,* [1982] 2 SCR 368 at paras 114-115; *Criminal Code*, RSC 1985, c C-46

mitigating and aggravating factors, is imported. A defendant may not be heard on relevant issue, the option to weigh evidence on a particular issue may not be available to the sentencing judge, and areas of argument may be foreclosed. Controversial and contested questions of fact have been incorporated, through judicial notice, into the starting point that governs the process.

Conclusion

[32] The broad exercise of sentencing discretion ensures fair and proportionate sentences in every case. The underlying motivations and factual assumptions of starting points do not withstand scrutiny or justify the loss of liberty they produce. A prepackaged analysis given to trial judges conflicts with the adversarial process, and the procedural and evidentiary protections for defendants at sentencing. Starting points cannot be maintained in a way that avoids constraining the discretion of sentencing judges, and the practice should be stopped by this Court.

PART IV - STATEMENT CONCERNING COSTS

[33] The Appellant has no submissions as to costs.

PART V - ORDER SOUGHT

[34] The CCLA takes no position on the appropriate disposition as relates to the Appellants before the Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3rd DAY OF MAY, 2021

for **Sarah Rankin**
Heather Ferg
Counsel for the Intervener CCLA

PART VI – TABLE OF AUTHORITIES

APPELLANT AUTHORITIES	**CITED AT PARAGRAPH NO.**
CASES	
R v Arcand, 2010 ABCA 363	3, 5, 6, 7, 12, 13, 15, 27,
R v Corbiere, 2017 ABCA 164	10,
R v Felix, 2019 ABCA 458	9, 21
R v Find, 2001 SCC 32	18
R v Gardiner, [1982] 2 SCR 368	29
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