Citation: R v Petrowski, 2020 MBCA 78 Date: 20200827
Docket: AR19-30-09322

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Mr. Justice William J. Burnett
Madam Justice Lori T. Spivak

B E T W E E N :

HER MAJESTY THE QUEEN	)	***M. T. Gould***
	)	*for the Appellant*
Respondent	)	*(via videoconference)*
	)	
	)	***J. A. Hyman*** *and*
- and -	)	***M. T. Sinclair***
	)	*for the Respondent*
	)	*(via videoconference)*
TODD MATTHEW PETROWSKI	)	
	)	*Appeal heard:*
(Accused) Appellant	)	***May 1, 2020***
	)	
	)	*Judgment delivered:*
	)	***August 27, 2020***

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the Manitoba, *Court of Appeal Rules*, Man Reg 555/88R, all appeals are heard remotely by videoconferencing until further notice.

CAMERON JA

Introduction

[1] The accused was convicted of possession of fentanyl for the purpose of trafficking (section 5(2) of the *Controlled Drugs and Substances Act* (the *CDSA*)) after trial in provincial court and sentenced to 10 years'

imprisonment. He appeals his sentence on the sole ground that it was unfit and asks that this Court reduce his sentence to seven years' imprisonment.

[2] In this appeal and the companion appeal of *R v Slotta*, (2020 MBCA 79), heard at the same time as this case, the Crown asks that the Court set sentencing ranges for trafficking in fentanyl that are higher than the ranges enunciated in *R v Rocha*, 2009 MBCA 26 at para 64, for mid-level trafficking of drugs such as cocaine. Although it has not cross-appealed, the Crown relies on the case of *Hill v The Queen*, [1977] 1 SCR 827, in submitting that this Court has the authority to increase the accused's sentence and correspondingly requests that the accused be sentenced to at least 12 years' imprisonment.

[3] For the reasons that follow, I would allow leave to appeal, dismiss the appeal and dismiss the Crown's request to increase the sentence imposed.

Facts

[4] The facts in this case are straightforward. The police became aware that a package from China containing 51 grams of fentanyl was destined to be delivered to an address in Winnipeg (the address). On the date of the offence, the accused attended the address twice, but the parcel had not yet been delivered. On the second occasion, his then girlfriend (the co-accused) attended the address and also checked the mailbox.

[5] A regular Canada Post delivery person delivered some mail while the two were at the address. The co-accused spoke with the delivery person while the accused checked the mail that had just been delivered. He and the co-accused then left the address and went to the post office.

[6] An undercover officer, posing as a Canada Post worker, attended the address and left a Canada Post delivery notice with his phone number on it to call. A female, identifying herself by the co-accused's first name, called the officer to arrange to obtain the parcel.

[7] The accused and the co-accused then attended the address in a taxi. The co-accused met the undercover officer. After telling him a concocted story about the package, she signed for delivery of it and took it to the taxi where the accused was waiting. The police then immediately arrested the two of them. The package was seized. It contained 51 grams of fentanyl.

[8] After a joint trial with the co-accused, the trial judge rejected the accused's evidence that he had no knowledge of what was in the package. Based on the evidence called by the Crown and the co-accused, she found that the accused ordered the package and therefore knew what was in it, and its value. She accepted that the address to which the package had been delivered belonged to one of the accused's co-workers. She found that the accused recruited the co-accused to help him retrieve the package and that he told her to make up the story that she provided to the undercover officer when she accepted the package on his behalf. Based on the above findings, she convicted the accused.

Sentence Decision

[9] At the sentencing hearing, the accused submitted that, in light of his strong family support and prospects for rehabilitation, he should receive a sentence of seven years' imprisonment.

[10] The Crown asked for a period of 13 years' imprisonment. The Crown submitted that the case law that it filed demonstrated that sentences imposed for the trafficking of fentanyl were typically two to three times greater than what they would have been for other Schedule I offences, such as cocaine.

[11] The trial judge considered the purpose and principles of sentencing set out in section 718 of the *Criminal Code* (the *Code*), as well as section 10 of the *CDSA*. She reviewed the circumstances of the offence, the accused's degree of participation in the offence, his moral culpability and his personal circumstances, including the factors enunciated in *R v Gladue*, [1999] 1 SCR 688. She stated what she considered to be the aggravating and mitigating factors.

[12] Acknowledging that there were similarities and differences in the circumstances of each case, she summarised some of the case law from this jurisdiction. Included in her analysis were cases based on joint recommendations, which she recognised.

[13] After taking into account all of the above, the trial judge imposed the sentence of 10 years' imprisonment. She then considered whether such a sentence would be crushing to the accused, but found that it was the "least restrictive sentence" that she could impose "in order to account for the offence yet offer hope of ongoing rehabilitation".

Positions of the Parties

[14] The accused argues that the sentence is unfit because it offends the principle of parity in that it exceeds sentences imposed on other offenders in

similar circumstances. In support of his argument, he relies on a number of cases wherein sentences lower than the one that he received were imposed on persons who had been convicted of having trafficked in fentanyl. Although not argued at the sentencing hearing, the accused submits that, in order to place him in the hierarchy of fentanyl dealing and to evaluate the danger he presented to society, it is necessary to know the purity of the product seized from him. He states that, because the strength of the fentanyl was not known in this case, the Court should consider his involvement and the danger he caused to be at a lower level.

[15] The accused also argues that the sentence offends the principle of proportionality given the mitigating factors present in this case.

[16] The Crown notes that in *Rocha*, this Court stated that mid-level traffickers of cocaine who are mere couriers should expect a sentence in the range of three to six years while mid-level traffickers that are trusted beyond a mere courier should expect a sentence in the range of five to eight years (see para 64). The Crown submits that fentanyl is "more dangerous, more destructive of human lives and potential than other serious and deadly drugs." It asserts that courts across Canada have accepted that those who traffic in fentanyl should receive more severe penalties than traffickers of other controlled substances.

[17] In light of the nature of the drug and the increased sentences being imposed by the courts for all levels of trafficking in fentanyl, the Crown proposes that this Court endorse the following fentanyl specific sentencing ranges:

a) Street level—five to eight years;

b) Mid-level, with no decision-making authority such as a courier—eight to 12 years;

c) Mid-level, decision maker or with significant trust—10 to 15 years;

d) High-level—15 years to life.

[18] The Crown argues that, in this case, the accused would fall in the mid-level decision-making category. It argues that the 10-year sentence imposed was at the bottom of the suggested range. It asserts that, in light of the circumstances of this case, including that the accused was a mature offender with a criminal record and that he was the operating mind in the scheme to import a significant amount of fentanyl, an appropriate sentence would be at least 12 years.

[19] The accused submits that it would not be appropriate for this Court to set sentencing ranges for the trafficking of fentanyl. He states that there is insufficient information regarding fentanyl and that the evidence in this case would not allow the Court to reach any conclusion regarding the trafficking of it other than to say that it is a strong and potent opioid. Furthermore, he notes that a number of appellate courts in Canada have refrained from setting such ranges.

Standard of Review

[20] Decisions of sentencing judges are to be afforded deference by appellate courts. Interference is only permitted where a sentencing judge makes an error in principle, fails to consider a relevant factor or gives

erroneous consideration to an aggravating or mitigating factor. The error must be material in that it is apparent from the trial judge's decision that such an error had an impact on the sentence (see *R v Lacasse*, 2015 SCC 64 at para 44; and *R v Friesen*, 2020 SCC 9 at para 26). Appellate intervention is only justified where a sentence imposed by a trial judge is demonstrably unfit (*Lacasse* at para 51).

[21] A demonstrably unfit sentence has been described as "clearly unreasonable", "clearly or manifestly excessive", "clearly excessive or inadequate" or representing a "substantial and marked departure". These expressions demonstrate the "very high threshold" applicable to appellate review of the fitness of a sentence (*Lacasse* at para 52).

[22] The inquiry into fitness is focussed on the fundamental principle of proportionality. In *Lacasse*, Wagner J (as he then was) explained (at para 53):

> . . . Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s. 718.2(*a*) and (*b*) of the *Criminal Code*.

[23] The principle of parity of sentences is secondary to the fundamental principle of proportionality (see para 54).

<u>The Determination of Sentencing Ranges</u>

[24] The establishment of sentencing ranges is one way in which appellate courts may provide guidance to sentencing courts. They are "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" (*Lacasse* at para 57).

[25] Sometimes an appellate court will establish a sentencing range in recognition of a particular need (see *R v Smith*, 2019 SKCA 100 at para 44 (*Smith 2019*)).

[26] In *R v Kravchenko*, 2020 MBCA 30 at para 34, Mainella JA explained that, in the sentencing context, appellate courts have the responsibility to try to minimise disparity of offences for cases involving similar offences and similar offenders in accord with section 718.2(b) of the *Code* which provides:

> **Other sentencing principles**
> **718.2** A court that imposes a sentence shall also take into consideration the following principles:
>
> **(b)** a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

[27] Of course, he was careful to recognise that the guidance provided by the courts must not interfere with the sentencing judge's discretion to impose an individualised sentence.

[28] The Supreme Court of Canada has repeatedly reinforced that sentencing ranges are not "hard and fast rules" (*Friesen* at para 37). While they are used mainly to ensure parity of sentences, they are not "averages" or "straitjackets" (*Lacasse* at para 57). Rather, they should be seen as "historical portraits for the use of sentencing judges, who must still exercise their discretion in each case" (*ibid*).

[29] As was observed by Fitch JA in *R v Leach*, 2019 BCCA 451, referring to his decision in *R v Mann*, 2018 BCCA 265 at para 100, "ranges develop over time, guided by judicial experience and the need for public protection" (at para 113).

[30] In *Friesen*, Wagner CJC and Rowe J, writing for a unanimous Court, stated (at para 39):

> A range or starting point should only be created for a category of offences that share enough common features that it is useful to judge them by the same rubric. When an appellate court outlines a range or starting point, it must also provide a clear description both of the category created and the logic behind it (*Stone* [*R v Stone*, [1999] 2 SCR 290] at para. 245). Without this description, it can be difficult to tell when the range or starting point is appropriate and how to use it.
>
> [emphasis added]

[31] In *R v Felix*, 2019 ABCA 458, the Alberta Court of Appeal set a starting point (as opposed to defining a sentencing range) of nine years' imprisonment for fentanyl trafficking at a wholesale level. In setting the nine-year starting point, the Court underscored the significant dangers of fentanyl. It stated that, according to an affidavit written by Dr. Graham R. Jones filed in evidence, fentanyl-related deaths in Alberta had roughly doubled each year preceding the writing of the affidavit, that there had been 343 fentanyl-related deaths in Alberta in 2016, and that there would be an estimated 500 fentanyl deaths in Alberta in 2017 (see para 16).

[32] On the other hand, a number of appellate courts have declined to set sentencing ranges for the trafficking of fentanyl. For example, despite having endorsed a range of 18-36 months' imprisonment for first-time street-level

trafficking of fentanyl in *R v Smith*, 2017 BCCA 112, (*Smith 2017*), the British Columbia Court of Appeal has repeatedly refrained from setting sentencing ranges for mid or high-level traffickers of fentanyl on the basis that it was premature to do so (see *Leach* at para 113; and *Mann* at para 100).

[33] A similar decision was reached by the Ontario Court of Appeal in *R v Loor*, 2017 ONCA 696 at para 50.

[34] As well, some courts have raised concerns that the evidence presented was insufficient. In declining to set a sentencing range for trafficking in fentanyl in *R v White*, 2020 NSCA 33, Saunders JA stated (at paras 116-17):

> I would also respectfully decline the Crown's invitation, at this time, to establish either a range, or a starting point, for persons convicted in Nova Scotia of trafficking in fentanyl or possessing it for the purpose of trafficking. We simply do not have enough experience in dealing with cases involving fentanyl to establish such a range or starting point.
>
> In my view, it would require a suitable evidentiary record, presumably based on persuasive expert evidence in the fields of medicine, toxicology and law enforcement. Such a record would then provide a basis for the trier of fact to properly assess the current situation in Nova Scotia and decide what, if any, further steps ought to be taken to appropriately characterize the various levels of participants in the fentanyl distribution chain. That assessment would then enable the trier to consider the placement or ranking of the offender within that hierarchy, which in turn might assist the trier in the necessary proportionality and parity analyses. Such a complete record, together with the trial judge's reasons, would then provide a suitable basis for appellate review. Absent such a foundation I am not prepared, at this time, to declare either a range or a starting point.
>
> [emphasis in original]

See also *Smith 2019* at paras 120, 125-27.

[35] While other courts, including those in Manitoba, have some experience regarding sentencing in cases involving the trafficking of fentanyl, this is the first time that this Court has substantively considered the issue. As I earlier indicated, sentencing ranges develop over time and must be capable of clearly describing a category created and the logic behind it based on a proper evidentiary foundation. In my view, we are not yet at that point in Manitoba, nor does this case provide such a record.

[36] Despite the above, I agree that it is important for courts to impose sentences that protect the public. Section 10(1) of the *CDSA* provides:

> **Purpose of sentencing**
> **10(1)** Without restricting the generality of the *Criminal Code*, the fundamental purpose of any sentence for an offence under this Part is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community.

[37] In this vein, the developing sentencing jurisprudence regarding the trafficking of fentanyl emphasises the significant danger and harm that it poses to society and endeavours to reflect it in the sentences imposed.

Sentences Involving Fentanyl Should Reflect the Dangerous Nature of the Drug

[38] The proportionality analysis requires consideration of the gravity of the offence. Fentanyl is a Schedule I substance (see Schedule I of the *CDSA*). Pursuant to section 5(3)(a) of the *CDSA*, anyone who is convicted of

trafficking it in is guilty of an indictable offence liable to imprisonment for life.

[39] Canadian courts have consistently recognised that denunciation and deterrence must be the primary sentencing considerations in cases involving trafficking in Schedule I substances defined in the *CDSA*, such as cocaine, heroin, and methamphetamine. In *White* at paras 74-92, Saunders JA undertook an extensive analysis of Canadian jurisprudence regarding sentences for cocaine and heroin, following which he concluded (at para 92):

> From this broad canvass of Canadian case law, it is indisputable that no matter where the crime occurs, persons convicted of trafficking, or possession for the purpose of trafficking, in dangerous and highly addictive substances, can expect to receive lengthy prison sentences. The primary objective being the protection of society requires severe punishment that will expressly denounce such conduct, and deter not only the offender, but any others who may be similarly inclined.

See also *R v Johnson*, 2020 MBCA 10 at para 12; *R v Racca*, 2015 MBCA 121 at para 13; and *R v Grant (IM)*, 2009 MBCA 9 at paras 108-109.

[40] In *R v Stone*, [1999] 2 SCR 290, Bastarache J, writing for a majority Supreme Court of Canada (the dissenting opinion not being on this point), stated (at para 239):

> It is incumbent on the judiciary to bring the law into harmony with prevailing social values. This is also true with regard to sentencing. To this end, in *M. (C.A.)*, [*R v M (CA)*, [1996] 1 SCR 500], Lamer C.J. stated, at para. 81:
>
> > The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory

> element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law. . . . Our criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated. In short, in addition to attaching negative consequences to undesirable behaviour, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the *Criminal Code*. (Emphasis in original.)

[41] Although *Stone* was a case involving domestic violence, the principles are equally applicable to illicit drugs. The imposition of sentences must evolve with the nature of the drugs involved and the degree to which the trafficking of them causes harm and encroaches on society's basic code of values. Some drugs are more deadly than others and take a higher toll on the community.

[42] In this case, the Court had the benefit of a report authored by Dr. Graham R. Jones dated January 27, 2016 (the Jones report), providing information regarding fentanyl which had been entered as evidence at the sentencing hearing. This report is authored by the same person and appears to contain much of the same information that was considered by the courts in *Felix* and *White*. It is also similar to the evidence provided in other provinces such as British Columbia (*Mann* at paras 16-31); Saskatchewan (*Smith 2019* at paras 81-84); and Ontario (*Loor* at paras 35-39).

[43] Briefly, the report filed in this case establishes:

- Fentanyl is a potent opioid analgesic (pain killer) which also has anesthetic properties at higher doses. Medically, it is used as a

surgical analgesic and as an adjunct to anesthesia. It is also available for long-term control of severe pain and for the treatment of breakthrough pain in chronic conditions such as cancer, where the slow release of opioids is not sufficient to control pain;

- Like all opioids, a sufficient dose of fentanyl will cause a reduction in respiration rate which may lead to lack of oxygen to the brain and other organs which, if low enough, may cause brain damage, organ damage, coma and death;

- Toxic concentrations of fentanyl can also cause muscle rigidity, as well as nausea and vomiting, which can be aggravating factors to someone who is already compromised by the primary effects of the drug;

- Fentanyl is 80 to 100 times more potent than morphine and 25 to 50 times more potent than pharmaceutical grade (99% pure) heroin;

- A fatal dose of fentanyl will likely be lower than 2 milligrams for many people and especially a relatively naïve user. In *Felix*, the Court observed that, for inexperienced users, a lethal dose is likely to be under one milligram (see para 15);

- For those who have built up a tolerance to the drug, fatal toxicity can be produced with a sufficient dose;

- Fentanyl has a very high abuse potential and physical dependence will develop after repeated use;

- Fentanyl can be administered intravenously, inhaled or absorbed into the skin. Tablets are not used medically, although a slow- release lozenge is available.

[44] In *Leach*, the Court noted that, in April 2016, the Provincial Medical Health Officer declared a public health emergency in response to an alarming increase in drug overdose deaths in British Columbia, largely attributable to fentanyl (see para 16). Despite this, the Court noted that the evidence established that, "[i]n the first 10 months of 2017, there were 999 fentanyl detected overdose deaths in British Columbia representing a 136% increase in the number of fentanyl detected deaths (423) that occurred during the same period in 2016" (at para 48).

[45] In addition to the Jones report, the Crown also filed an expert report from Detective Sergeant Tony Atkins of the Winnipeg Police Service (the Atkins report) regarding fentanyl powder. This report states that fentanyl powder is sold in points and cut at an extremely high ratio, usually 100 to one due to its potency. It also states that dealers purchase larger amounts of the drug and then mix it with a cutting agent. Importantly, the report states:

> . . . [T]he problem with fentanyl is it is very [hard] to blend properly leaving the finished product with hot spots. These are areas where there is a high concentration of product, giving a much higher dose to the user. The user in turn in many cases will end up [overdosing] and even dying which we have seen across the country in eve[r] increasing numbers. It takes such a small amount of the drug to kill or [overdose] the user making this drug very dangerous.

[46] In recognition of the significantly increased dangers posed by fentanyl as opposed to other hard drugs, appellate courts have indicated that convictions for offences involving fentanyl are aggravating (*Smith 2019* at paras 119-20; and *Loor* at para 43). Correspondingly, some courts have stated that these types of cases should attract a more severe sentence than those involving other hard drugs such as cocaine or heroin. See, for example, *White* at para 101; *Felix* at para 50; and *Smith 2017* at para 49.

[47] A similar view has been expressed by courts in Manitoba. In *R v Chartrand*, 2018 MBPC 48, Lang PJ examined a number of sentences imposed by Manitoba courts in cases involving fentanyl. He concluded (at para 73):

> These cases demonstrate that Manitoba courts have been following the approach that was laid out by the British-Columbia Court of Appeal in [*Smith 2017*]. In that case, the Court recognized that the sentencing range for fentanyl should be "materially higher" or "different and markedly higher" than the sentencing range for other dangerous drugs, even heroin, because of the enhanced risks associated with fentanyl. As a result of the "continuing escalation in the number of fentanyl-detected deaths" and the now "ubiquitous awareness" of the risks posed by illicit fentanyl, a very substantial increase in the sentencing range for trafficking in fentanyl was justified. ([*Smith 2017*] at paragraphs 48-49; 65)

Also see the unreported cases of *R v Csincsa* (21 June 2018), Winnipeg CR17-01-36464 (Man QB); *R v Lander* (1 November 2018), Winnipeg 012- 71715 (Man Prov Ct); and *R v Barker* (19 March 2020), Winnipeg 556- 9964 (Man Prov Ct).

[48] While no statistics have been provided regarding the number of deaths, overdoses, or harm resulting from overdoses caused by fentanyl in

Manitoba, a review of Manitoba sentencings involving the drug demonstrate that there is no question that it is being trafficked in this jurisdiction. It would be foolhardy to think that there has not yet been significant resultant trauma. In any event, I echo the comments of Saunders JA in *White*, where he stated (at para 97):

> Although no evidence was presented in this case with respect to the number of deaths or medical emergencies in Nova Scotia which could be linked to fentanyl, it is obvious that the substance traffickers are peddling elsewhere in Canada, and which the respondent intended to traffic in this case, is the same product that is killing people in other parts of the country. It will undoubtedly kill people in Nova Scotia as well, if significant steps are not taken to discourage its illegal distribution. Meaningful, deterrent sentences must play a role in that effort.

[49] I acknowledge that, in *R v Seman*, 1996 CarswellMan 112 at paras 17-19, this Court expressed doubt whether there existed a proper basis for a sentencing distinction between heroin and cocaine grounded in dangerousness as both were harmful drugs. In this case, the evidence demonstrates that fentanyl presents significant danger and harm. Therefore, based on the above analysis, and acknowledging that sentencing is an individualised process, it is my view that sentencings involving the trafficking of fentanyl must reflect the increased danger and harm that this drug causes to the individual and to society as a whole.

Sentences Imposed for Trafficking and Importing Fentanyl

[50] A review of the case law demonstrates that the sentence imposed by the trial judge was not unfit having regard to sentences imposed for similar offences on similar offenders.

[51] In *Loor*, the Ontario Court of Appeal reduced a sentence from nine to six years' imprisonment for an accused who was at the low level in a fentanyl trafficking organization. The *Loor* case was part of a series of sentencing decisions regarding persons involved in that organization, which was neatly analysed by Antonio JA in *Felix* as follows (at para 69):

> Ontario Court of Appeal decisions imply a starting point of nine years for wholesale fentanyl trafficking. The accused in *R v Baks*, 2015 ONCA 560; *R v Loor*, 2017 ONCA 696; *R v Sinclair*, 2016 ONCA 683; and *R v Godreau*, 2016 ONSC 6318, were all involved in a sophisticated scheme of falsified fentanyl prescriptions. Ms Baks and Mr. Loor both pleaded guilty and received six years. Ms Baks' sentence was reduced due to powerful mitigating factors, including testifying against those higher in the organization. Mr. Loor's sentence was lower because he was lower in the organization's hierarchy. Mr. Sinclair's eight-year sentence after a guilty plea reflected a one-year reduction for his testimony against the kingpin. Mr. Godreau was not found to be the ringleader, although two others testified he was; after trial he received 10 years.

[52] She concluded (at para 70):

> Ontario trial decisions, adjusted to account for mitigating circumstances, suggest a nominal range of nine to 14 years: for example, *R v Vickerson*, 2018 ONSC 671; *R v Vezina*, 2017 ONCJ 775; *R v Gignac*, unreported (January 22, 2018) 17- 11263, 17-583 (Ont CJ); *R v Sidhu*, unreported (June 16, 2017) 17-821 (Ont CJ); *R v Solano-Santana*, 2018 ONSC 3345.

[53] In *Felix*, the accused, had no prior record, entered guilty pleas and was found to have been the director of a sophisticated fentanyl and cocaine trafficking operation at the wholesale level. The Court stated that a sentence of 13 years would be appropriate for the trafficking of fentanyl alone (see para 79). However, it ultimately imposed a sentence of 10 years based

on the evolving nature of sentencing in this area at the time and the fact that the Crown's position at the original sentencing was that 10 years was a fit sentence (see para 82).

[54] In *Smith 2019*, the Saskatchewan Court of Appeal reduced an overall sentence from 18 years' imprisonment to nine years for a number of trafficking and firearms-related offences. In imposing a sentence of eight years of imprisonment for trafficking of pills containing fentanyl and heroin, the Court considered case law regarding the sentencing of such cases and concluded (at para 113):

> There are differences among the approaches to sentencing for trafficking in fentanyl and heroin in the various jurisdictions, but a review of the present case law shows that, across the country, double-digit sentences are reserved for trafficking that involves features that are not present in this case: notably, the presence of firearms as part of the process of trafficking, large quantities of high-quality fentanyl (most often in powder form), the offender's elevated place within the drug hierarchy and a sophisticated drug operation. Often, some element of importation is present, whether charged or not, which increases the duration of the sentence.
>
> [emphasis added]

[55] In *Smith 2017*, British Columbia increased the sentencing range for street-level traffickers of fentanyl to 18-36 months or higher. In *Mann*, the Court upheld a sentence for trafficking in fentanyl of four years, stating that the 36-month range in *Smith* was not a cap and that the circumstances of the offence were more significant than those in *Smith* (see para 87). In *Leach*, it upheld a sentence of 16 years' imprisonment for the organiser of a high-level drug-trafficking organization, which primarily consisted of the trafficking of fake oxycodone pills containing fentanyl. Of the 16 years it imposed, 12 of

them were for conspiracy to traffic in a controlled substance and eight years concurrent was imposed for possession of fentanyl for the purpose of trafficking.

[56] In Manitoba, significant terms of imprisonment have been imposed for the trafficking of fentanyl. See, for example, in *Barker*—exportation and trafficking of small amounts of adulterated fentanyl, drug related record—12 years concurrent on each charge; *R v McKay* (19 October 2018), Winnipeg 012-55996 (Man Prov Ct)—trafficking in fentanyl which batch the accused believed had already caused a death and overdoses—15 years reduced to 13 years for totality based on joint recommendation; *R v Falconer* (20 December 2017), Winnipeg 012-53725 (Man Prov Ct)—trafficking in fentanyl—six and one-half years less one and one-half years' pre-sentence custody; *R v Wheelwright* (19 June 2018), Winnipeg 012-53725 (Man Prov Ct)—mid-level trafficker of fentanyl blotters—six and one-half years minus time spent in custody; and *R v Muswagon* (21 November 2017), Winnipeg 012- 50131 (Man Prov Ct)—trafficking in fentanyl and other substances, significant *Gladue* factors, significant rehabilitation, court stating case of limited precedential value based on the unique circumstances of the case—four years.

[57] Cases involving the importation of fentanyl also provide guidance. In *R v Olvedi*, 2018 ONSC 6330, the accused was sentenced to 15 years' imprisonment for importing 500 grams of pure fentanyl from China for a high-level trafficker in exchange for money.

[58] In *Csincsa*, the accused was sentenced, pursuant to a joint recommendation, to 10 years' imprisonment for three instances of having

imported from China fentanyl in the amounts of 2 grams, 3 grams and 9.26 grams.

[59] In *R v Hudson*, 2019 ONSC 290, the accused was sentenced to eight years' imprisonment for the importation of fentanyl. In sentencing the accused, the Court found her to be a "small cog in the importation" operation and "likely permitt[ed] her residence to be used as a drop box" (at para 21). In addition, the accused in that case had no criminal record and was an excellent candidate for rehabilitation.

[60] In *R v Mastromatteo,* 2018 ONCJ 421, the accused was heavily involved in trafficking fentanyl. He was sentenced to seven years and six months' imprisonment. In imposing sentence, the Court placed significant weight on the fact that the accused was only 20 years of age at the time of the offence. It stated, "Dysfunction fails to convey the family life that he and his siblings were exposed to" (at para 37). It noted that his mother encouraged him to use drugs. The Court emphasised that, had the accused not used the time that he was on judicial interim release to engage in numerous rehabilitative initiatives, he would have been looking at a considerably longer sentence.

[61] All of the above provides a spectrum from which the issues of parity and proportionality can be considered in this case. While other cases were submitted by the Crown which also dealt with carfentanil, a vastly more potent analog of fentanyl, I leave consideration of those cases to be determined by this Court at a time when the issue is directly before it.

[62] The cases submitted by the accused are not reflective of his moral blameworthiness. They are distinguishable on the basis that some involve

first-time offenders, persons who entered guilty pleas, persons who were low-level operators, and cases where the accused co-operated with police and agreed to testify at great personal risk. Others were youthful offenders with excellent rehabilitative prospects, such as in the cases of *Hudson* and *Mastromatteo*.

[63] Further, while the purity of the fentanyl may be considered as aggravating in some cases (see, for example, *Olvedi* at para 107), in my view, the fact that its purity was unknown is not a significant factor in this case. In *Felix*, the Court stated, "sentences will not depend finely on the purity or potency of a particular drug. This is particularly so with drugs like fentanyl which are highly toxic even in very small doses" (emphasis added) (at para 47).

[64] In *Leach* the Court stated that it could not fault the sentencing judge for not treating as mitigating the fact that the accused was dealing in doses of fentanyl just below the median lethal dose (see para 74).

[65] Also see *R v Hamilton* (2004), 186 CCC (3d) 129 at para 151 (Ont CA)—purity of cocaine will not be a particularly significant factor in assessing the seriousness of the offence and *R v Potts*, 2018 ONCA 294 at para 79—the level of purity of cocaine was found not to diminish the gravity of the offence or the moral blameworthiness of the offenders.

[66] Contrary to the accused's contention that the trial judge erred by failing to give weight to his mitigating circumstances and his rehabilitative prospects, the trial judge did consider these factors. Among other things, she considered the fact that he was on a methadone program while on judicial

interim release, was upgrading his education, had strong family support and that he had not been re-involved.

[67] On the other hand, she considered the aggravating factors, including the manner in which the fentanyl came into the accused's possession from China and that it was a significant quantity of a highly dangerous drug. She accepted the Atkins report which stated that the fentanyl seized from the accused could have resulted in 5,100 grams if cut at the ratio of 100 to one, which was the common practice. She noted that, if sold at individual units at point level, which was .1 of a gram (i.e., 51,000 grams) at the street price of $20-$50 per unit, the potential for profit was high.

[68] The trial judge noted that the accused had a previous youth record which included convictions for serious offences (and one related offence). She also noted his adult record, which included a number of entries which she considered to be less serious.

[69] I would pause to note that the trial judge accepted as an aggravating factor the fact that the package containing the fentanyl was sent through regular mail. She stated that, because the potential for danger can occur from airborne contamination, many people were put at risk. Absent expert evidence in this regard, the trial judge accepted the submissions of the Crown regarding risk to unsuspecting third parties. Defence counsel at the sentencing hearing (not the same as counsel on the appeal) did not object to that portion of the Crown's submission.

[70] While it would have been preferable for the Crown to have provided expert evidence in this regard, I note that other courts have accepted and

[71] commented on expert evidence of this nature. For example in *Olvedi* the Court stated (at para 26):

> Powder fentanyl can be inhaled and absorbed through the skin, which means that it presents serious risks to anyone who handles it or is simply near to it. Dr. Woodall testified that she and her colleagues have strict health and safety guidelines for handling fentanyl in their laboratory. . . .

Also see paras 47-48.

[72] After considering the aggravating and mitigating factors, the trial judge reviewed cases that she considered to be similar in nature in reaching her conclusion that 10 years was an appropriate sentence.

[73] Considering similar cases, the circumstances of this case, including the dangers associated with fentanyl, the amount of fentanyl involved, the fact that the accused had imported it and that he used the co-accused to insulate himself, I am not persuaded that the trial judge erred or that the sentence of 10 years' imprisonment that she imposed was demonstrably unfit.

[74] In light of all of the above, I would grant the accused leave to appeal sentence and dismiss his sentence appeal. Similarly, having found the sentence was not unfit, I would dismiss the Crown's request to increase the sentence.

"Cameron JA"

I agree: "Burnett JA"

I agree: "Spivak JA"