COURT OF APPEAL FOR ONTARIO
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COUR D'APPEL DE LONTARIO

Court File No.: C65766

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

- and -

KEVIN MORRIS

Respondent

- and -

THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, CRIMINAL LAWYERS' ASSOCIATION, ABORIGINAL LEGAL SERVICES, SOUTH ASIAN LEGAL CLINIC OF ONTARIO, CHINESE AND SOUTHEAST ASIAN LEGAL CLINIC AND COLOUR OF POVERTY/COLOUR OF CHANGE NETWORK, THE BLACK LEGAL ACTION CENTRE, CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN MUSLIM LAWYERS ASSOCIATION, URBAN ALLIANCE ON RACE RELATIONS AND CANADIAN ASSOCIATION OF BLACK LAYWYERS

Interveners

FACTUM OF THE INTERVENER CANADIAN CIVIL LIBERTIES ASSOCIATION

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PART I: STATEMENT OF THE CASE

1. Systemic and background factors are a relevant consideration when it comes to sentencing offenders. This appeal provides this Honourable Court the opportunity to give guidance to sentencing judges on *the extent* to which systemic and background factors are relevant; on the *type of evidence* required; and on *how* systemic and background factors are considered in the sentencing analysis. With respect to *how* systemic and background factors should be considered in the analysis, this Honourable Court should

affirm the relevancy of these factors not only to an individual's moral blameworthiness; these factors can and should also be considered when assessing denunciation and the role the sentencing court can and should play in denouncing certain conduct.

PART II: CCLA POSITION ON QUESTIONS IN ISSUE

2. The Canadian Civil Liberties Association ("CCLA") respectfully submits that systemic and background factors are relevant considerations throughout the sentencing process. There should be no closed list that would preclude the consideration of these factors at a certain stage in the sentencing analysis. In particular, systemic and background factors are relevant when considering denunciation. While serious crimes should be denounced, a just sentence reflects the systemic conditions in which the crime occurred. Separate and apart from the application of the restraint principle to denunciation, sentencing judges must reflect on how society's actions and inactions towards a certain population contributed to the offender's actions before denouncing, on behalf of society, that very offence.

PART III: ISSUE AND LAW

A. Importance of Considering Systemic and Background Factors on Sentencing

3. The fundamental principle of sentencing is that offenders are sentenced in a manner proportionate to the gravity of the offence and the degree of responsibility of the offender. The process of arriving at a fit and appropriate sentence is more artful than scientific. While the *Criminal Code* sets out various factors to consider, it does not regulate relevancy. It is artificial to suggest that one factor – for instance systemic and background

factors – can only be considered when assessing moral blameworthiness. Sentencing judges do not approach their task in such a siloed manner.

4. A consideration of systemic and background factors throughout the sentencing process demonstrates a mature approach to sentencing and one that properly allows sentencing judges to craft a fit and proportionate sentence. It is necessary to take these factors into account in order to be sensitive to realities of the offender's conduct. Sentencing judges should be instructed to and trained to recognize how society's actions and inactions have created disadvantages for minority communities. While certain conduct may be perceived by the sentencing judge as unreasonable, aggravating, or deserving of severe denunciation, that determination can only fairly be made after the conduct is placed in the appropriate sociological context. Unless the sentencing judge turns their minds to this context, the sentence cannot be properly tailored to the individual; it cannot be a fit sentence.

5. In every case, the individual's situation is a product of at least two factors: the decision to commit the crime and the background context of that individual offender. These two factors are present in differing proportions in every case. Sometimes the background context, including systemic discrimination, operates in such a powerful way as to virtually steer the individual choice to engage in crime or to not perceive a viable non-criminal option. In such cases, we must sentence the individual in a manner that

accounts for that fact. Conceptualized in this way, and contrary to the approach advocated by the Appellant,[1] systemic and background factors extend to denunciation.

B. Denunciation and the Relevancy of Systemic and Background Factors

6. The sentencing court has the responsibility and power to communicate society's disapproval and condemnation of the offence committed. It is important that serious crimes be denounced. However, this responsibility and power cannot be exercised in a vacuum. In considering how best to denounce the conduct sentencing judges should consider the following two questions:

(a) Whether the individual circumstances of the case – including the systemic factors relevant to the individual before the court – warrant the application of the restraint principle and a greater focus on the remedial provisions of s. 718.2(e); and

> Clayton Ruby, Gerald Chan, Nader Hasan, Annamaria Enenajor, *Sentencing* (9th ed.), (Toronto: LexisNexis Canada, 2017), at §1.18-1.20.
> See also: Reasons for Sentence, Appeal Book, at pp. 236-237, at paras. 55-62.
> *R. v. Jackson*, 2018 ONSC 2527, at paras. 172-173, and 176.

(b) Whether society's complicity in creating the conditions in which the crime was committed tapers the significance of denunciation and how a recognition of this reality increases the moral authority and legitimacy of the court to denounce the conduct.

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[1] See Appellant's Factum at para. 55.

7. These are distinct yet complimentary aspects of denunciation, both of which demand a consideration of systemic and background factors. The CCLA's submissions will focus on the second inquiry.

i. Moral Authority of the Court to Denounce Conduct

8. The denunciatory element of sentencing "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." This symbolic, collective statement is about more than deterring future criminal activity. Denunciation and general deterrence are separate principles. Denunciation is inextricably tied to the moral quality of the offence, rather than simply preventing future harm or promoting public safety. It is about expressing condemnation; signalling not only that something is wrong but as a collective we agree that that action is wrong. Sentences imposed for certain crimes reaffirm and restate to the public the collective belief that the conduct is unacceptable. They reflect what society stands for and will not tolerate. Denunciation is about reinforcing societal values. This begs the question: what societal values do we wish to reinforce?

> *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 81.
> *R. v. Brookes,* 2011 ONCJ 447, [2011] O.J. No. 4127, at para. 29.
> *R. v. Muzzo,* 2016 ONSC 2068, 353 C.C.C. (3d) 411, at para. 58.
> *R. v. Megna,* 2016 ONCJ 624, [2016] O.J. No. 5483, at para. 33.
> Ronald J. Rychlak, "Society's Moral Right to Punish: A Further Explanation of the Denunciation Theory of Punishment", 65 Tul. R. Rev. 299 (1990-1991) at pp. 301, 331-332.

9. The very idea of a society expressively telling a particular offender that they have encroached on the basic code of values can only exist if society holds itself to those very same values. The court's authority to denounce the conduct is enhanced by an increased

sensitivity to this reality. There is an incoherence to a society collectively denouncing a crime that is in some part the product of society's norms, actions or inaction. For this expression of denunciation to have any meaning and for it to be respected and understood in the larger community, sentencing judges must take a reflective stance and query whether society has contributed to the behaviour that the sentencing judge now seeks to denounce.

> *R. v. Louka,* 2017 CarswellOnt 14008, 141 W.C.B. (2d) 349, at para. 10.
> Antony Duff, "Punishment, Communication and Community" in Derek Matravers and Jon Pike (eds) *Debates in Contemporary Political Philosophy: An Anthology* (Routledge: London and New York, 2003) at pp. 399-402.

10. As Professor Rychlak argues, "the most important aim of the denunciatory theory, however, is to reassure the majority of society that the system does work." The "system" must include more than just the criminal justice system's ability to sentence offenders harshly. A complete view of the "system" includes allocating for the underlying social, political and economic systems that shape the environment in which the crime was committed.

> Rychlak, "Society's Moral Right to Punish", *supra* at p. 332.

11. By reflecting on this question and allocating for society's responsibility for the offence, the court promotes confidence in the administration of justice for both the majority and minority sectors of the community. The expression of disapproval will be meaningfully calibrated. Judgments issued in the public's name and to protect public values need to attend to all public values, including taking responsibility for society's role in anti-Black racism or other systems of oppression relevant to the individual offender before the court.

Adopting this approach to denunciation is responsive to the complexities which inform our understanding of the causes of crime in our communities.

12. A distinction must be drawn between rejecting denunciation as a relevant sentencing principle and the manner in which the sentencing judge gives effect to that sentencing principle. The CCLA is not advocating for a rejection of the applicability of denunciation. Rather, sentencing judges should undertake a self-reflective exercise to determine how the sentencing court, as the representative and spokesperson for society as a whole, should denounce conduct which society is complicit in by not addressing conditions that led to the commission of the offence. Where the sentencing judge finds that society is implicated, this does not entirely do away with the need to denounce the conduct. However, it may temper the length of the sentence or the language used to describe the conduct to properly allocate responsibility.

13. It should be open to the court to consider these systemic considerations when determining the length and type of sentence necessary to communicate society's denunciation of the conduct. It may be that after conducting such an assessment the total length of the sentence is reduced. If society's complicity in the crime committed deserves to be denounced a reduced sentence may be the just result.

14. This is not to say, as the Appellant argues, that the "collective statement of abhorrence" would always be defeated.[2] Rather, it is a balance. To do otherwise may

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[2] Factum of the Appellant, at para. 55.

result in an unfit and unproportionate sentence. As MacLachlin C.J. found in *Sauvé v. Canada (Chief Electoral Officer)*:

> Denunciation as a symbolic expression of community values must be individually tailored in order to fulfill the legitimate penal purpose of condemning a particular offender's conduct ... and to send an appropriate "educative message" about the importance of law-abiding. [emphasis added]

Sentencing judges must remain focused on creating a fit sentence that is tailored to the individual before them. That said, individuals do not operate in a vacuum – arriving at a just sentence requires a more nuanced approach which allocates for contributing systemic factors.

> *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 50.

15. This approach does not deprive the individual of agency or rely on a determinist theory of criminal culpability.[3] These systemic factors are real and play out in very real ways in individuals' lives. Sentencing judges should be sensitive, and in some cases educated, to take these factors into account and assign weight as they see fit.

16. Notably, this aspect of denunciation was not explicitly addressed by the trial judge. However, the process and analysis he did undertake reveals that he was engaged in precisely this sort of uncomfortable attempt to understand how a court – sitting as the representative of society – can denounce behaviour which it has allowed for or even fostered. Sentencing judges should be encouraged to adopt this approach.

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[3] We agree with the position of the Appellant at paragraph 65 of their factum, that "social context evidence can provide a better understanding of the offender and the circumstances that led to the offence. It should not be an excuse or justification for criminal conduct, and it does not create a race-based discount."

ii. Indigenous Offenders

17. There is no principled reason to limit the application of systemic and background factors on denunciation to Indigenous offenders.[4] The Appellant correctly acknowledges that "indigenous communities shared and practiced a decidedly different understanding of sentencing", one that is far removed from considerations of deterrence, separation and denunciation. However, this different understanding of sentencing does not lead to the conclusion that Indigenous offenders are the "singular exception" where systemic and background factors inform how to express denunciation.

18. First, it must be noted that the Supreme Court has been hesitant to assume that Indigenous peoples do not share in the goals of punishment such as deterrence, separation and denunciation. Additionally, the more serious the crime, the more a sentence for an Indigenous offender will resemble that imposed for a non-Indigenous offender. It is not the case that denunciation has *no* relevance to Indigenous offenders.

R. v. Gladue, [1999] 1 S.C.R. 688, at paras. 70-81.

iii. Second, a "similar common historical understanding or rejection of particular sentencing ideals" is not the *only* reason to question the applicability of an uncritical approach to denunciation to any given case. A common understanding that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender also requires a mature and critical approach to denunciation. This fundamental principle of sentencing applies to all offenders, not just Indigenous offenders.

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[4] See paragraphs 55-56 of the Appellant's factum.

C. Conclusion

19. Sentences are the means by which society's system of values is communicated. As such, the pronouncement of a sentence "positively instills the basic set of communal values shared by all Canadians as expressed in the *Criminal Code*." The fundamental principle of sentencing as set out in the *Criminal Code* is that the sentence "must be proportionate to the gravity of the offence *and* the degree of responsibility of the offender": s. 718.1 (emphasis added). Embedded into this fundamental principle is a balancing that prevents an unchecked application of denunciation. The "similar common understanding" that applies to all offenders is that an individual should be sentenced in a manner proportionate to their responsibility and that their responsibility is accurately identified. This understanding provides the basis to consider the broader context in which the crime took place, including systemic and background factors throughout the sentencing process, including when considering denunciation.

R. v. M. (C.A.), *supra*, at para. 81.

20. Recognizing that sentencing is a form of social censure, "the degree of censure required to express society's condemnation of the offence is always limited by the principle that an offender's sentence must be equivalent to his or her moral culpability, not greater than it." Sentencing is an art form. Systemic and background factors serve to shape our understanding of moral culpability but also how to express denunciation. The ultimate goal is to arrive at a fit and proportionate sentence.

R. v. Nasogaluack, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 42.

21. Failing to account for society's impact on a marginalized offender's conduct is but another form of discrimination. As sentencing judges set about the process of communicating society's abhorrence for the conduct of the offender, it must do so within the framework of the *Charter*: "a sentence cannot be "fit" if it does not respect the fundamental values enshrined in the *Charter*." By recognizing society's role in systemic discrimination and oppression, the sentence is able to communicate respect for the shared set of values expressed in the *Charter*.

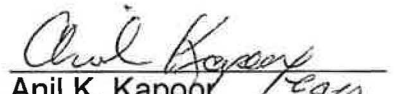
> *R. v. Nasogaluack*, *supra*, at paras. 48-55.

PART IV: ORDER REQUESTED

22. The CCLA takes no position on the disposition of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Toronto this 18th day of July 2019.



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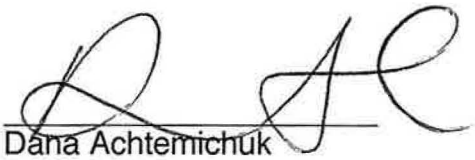

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SCHEDULE A: AUTHORITIES CITED

R. v. Brookes, 2011 ONCJ 447, [2011] O.J. No. 4127, at para. 29.

R. v. Gladue, [1999] 1 S.C.R. 688, at paras. 70-81.

R. v. Jackson, 2018 ONSC 2537, at paras. 172-173, and 176.

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R. v. Nasogaluack, 2010 SCC 6, [2010] 1 S.C.R. 206, at paras. 42, 48-55.

Sauvé v. Canada (Chief Electoral Officer), 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 50.

SCHEDULE B: RELEVANT LEGISLATIVE PROVISIONS

***Criminal Code*, R.S.C. 1985, c. C-46, at s. 718**

Purpose

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

Fundamental principle

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization,

(v) evidence that the offence was a terrorism offence, or

(vi) evidence that the offence was committed while the offender was subject to a conditional sentence order made under section 742.1 or released on parole, statutory release or unescorted temporary absence under the *Corrections and Conditional Release Act.*

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

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