NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. White*, 2020 NSCA 33

Date: 20200325
Docket: CAC 484357
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Jason Erroll White

Respondent

Judge:	The Honourable Justice Jamie W.S. Saunders
Appeal Heard:	November 26, 2019, in Halifax, Nova Scotia
Subject:	**Drug Sentencing Appeal. Fentanyl and Cocaine. Schedule I, *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. Standard of Review. Principles of Sentencing. Public Safety. Deterrence. Denunciation. Proportionality. Parity. Errors in Principle. Fitness of Sentence. Pre-Sentence Report. Impact of Race and Culture Assessment. Rehabilitation. Gravity of the Offence. Moral Blameworthiness of the Offender.**
Summary:	Using a battering ram to gain entry, police executed a search warrant on an apartment in Halifax where they seized a considerable amount of drugs and cash. The drugs included 2,086 pills of fentanyl which were stamped with "CDN" on one side and "80" on the other, making them look like OxyContin 80 milligram pills. Besides the fentanyl, cocaine and crack cocaine were also seized, along with more than $12,000 in cash. Expert evidence at trial established that the value of fentanyl "on the street" was between $41,000-$83,000; the cocaine between $8,000-$10,000; and the crack cocaine between $6,500-$8,100. The offender was 38 years

of age and had an extensive criminal record which included prior convictions for trafficking, manslaughter, break and enter, and aggravated assault.

After trial the judge imposed a sentence of six years for the fentanyl conviction to be served concurrently with a four-year sentence for the cocaine offence.

The Crown appealed.

Result: Leave granted, appeal allowed, sentence set aside, and a new sentence imposed of eight years for the fentanyl conviction and five years for the cocaine conviction, to be served concurrently.

The Court conducted an extensive analysis of sentencing jurisprudence across Canada in cases involving trafficking or possession for the purpose of trafficking in fentanyl, cocaine and heroin. Fentanyl is 100 times more potent than morphine and 25-50 times more potent than heroin. Two milligrams of fentanyl (about the size of four grains of salt) is enough to kill the average adult. Because fentanyl is odorless and tasteless, it is hard to detect. Unintentional exposure by touching or inhaling can cause serious illness or death.

The trial judge failed to conduct a proper proportionality analysis where the gravity of this offence and high degree of moral blameworthiness on the part of this offender would have been obvious. Adding to the gravity of this particular offence was the sheer volume of fentanyl seized, an amount acknowledged to be "among the largest seizures prosecuted in Canada" without even taking into account the large amounts of cocaine and crack cocaine also seized. Even more aggravating was the fact that the extreme danger of ingesting the fentanyl was hidden by disguising them as a different type of drug. These are Schedule I offences for which Parliament has prescribed life imprisonment as an appropriate maximum sentence upon conviction.

The trial judge also failed to conduct a proper parity analysis by considering jurisprudence from other parts of Canada where courts have had more experience in cases involving fentanyl. Such a review would have established that the sentence imposed by the judge was clearly unfit. The approach to be taken in sentencing those convicted of participating in the distribution of so-called "hard drugs" requires as its principal objective the protection of society, such that primary emphasis must be placed on the principles of deterrence and denunciation.

The trial judge's flawed analyses were also skewed by the importance he attached to the offender's prospects for rehabilitation, in the absence of any real evidence to support it. Certain narratives in both the Pre-Sentence Report and the Impact of Race and Culture Assessment (IRCA) appear to have prompted the judge to conclude that through "taking courses and maturation" the offender had made positive strides which would "auger well" for his chances of rehabilitation upon release.

On the contrary, the Court found that deciding to possess fentanyl, and cocaine, and crack cocaine, for the purpose of trafficking had nothing to do with the offender's maturity or anger management. His crimes were motivated by greed without regard for the health and safety of those whose very lives were put at risk by his trafficking operations. Choosing to continue his enterprise as a mid-level trafficker and repeat offender should not be ascribed to his race, culture, upbringing, or community.

Given the circumstances of this offence and this offender, a proper sentence was eight years for the fentanyl conviction, and five years for the cocaine conviction, the sentences (together with the sentence for the breach of probation) to be served concurrently.

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Appellant

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Jason Erroll White

Respondent

Judges:	Beveridge, Saunders and Bryson, JJ.A.
Appeal Heard:	November 26, 2019, in Halifax, Nova Scotia
Held:	Leave to appeal granted, appeal allowed, sentence set aside, and a new sentence imposed per reasons for judgment of Saunders, J.A.; Beveridge and Bryson, JJ.A. concurring.
Counsel:	Monica McQueen, for the appellant Trevor K.F. McGuigan, for the respondent

Reasons for judgment:

[1] The Crown applies for leave to appeal and appeals the sentence imposed by Nova Scotia Provincial Court Judge William B. Digby on December 14, 2018, following the respondent's conviction, after trial, of two offences contrary to the *Controlled Drugs and Substances Act* (*CDSA*): possession of fentanyl and possession of cocaine, both for the purpose of trafficking.

[2] The respondent received sentences of six years and four years, respectively, to be served concurrently. With the agreement of both parties, Digby, J. further ordered that credit of 1,002 days be subtracted from the total of six years, to account for the time the respondent had spent in pre-trial custody.

[3] The Crown says the sentence is seriously flawed by several errors in principle and that in any event, the sentence is demonstrably unfit.

[4] With great respect to the trial judge, I agree he erred in principle and that these errors produced a sentence which, in this case, is obviously unfit.

[5] For the reasons that follow, I would grant leave to appeal, set aside the sentence, and impose a new sentence of eight years for the fentanyl conviction and five years for the cocaine conviction, to be served concurrently.

[6] I will begin by providing a brief summary of the background, adding such further detail as may be required during my consideration of the issues on appeal.

Background

[7] On February 15, 2017, using a battering ram to gain entry, police executed a search warrant on an apartment in Halifax where they seized a considerable amount of drugs and cash. The drugs found included 2086 pills of fentanyl which were stamped with "CDN" on one side and "80" on the other, making them look like OxyContin 80 milligram pills, "popular among drug users". Besides the fentanyl, cocaine and crack cocaine were also seized, along with $12,145 in cash, found in a safe, an empty Q-Tip box in a backpack, and in bundles of cash in the respondent's pants' pockets, and other locations in the apartment.

[8] Three persons were in the apartment at the time. The respondent, Jason White, was found near a bedroom closet inside of which most of the fentanyl pills were stored. Documents seized clearly established that Mr. White resided at that apartment. There were two women present. A Ms. Hubley was acquitted immediately following the trial. The third person, a Ms. Delorey, was subsequently acquitted after Digby, J. concluded that while she resided with the respondent and "probably knew" about the pills and cocaine, her lack of connection to the cash left him with a reasonable doubt about her participation in the offences.

[9] The judge accepted the expert testimony presented at trial which established that the drugs seized were being held there for the purpose of trafficking and that the "value" of the fentanyl "on the street" was between $41,000-$83,000; the cocaine between $8,000-$10,000; and the crack cocaine between $6,500-$8,100.

[10] In convicting the respondent Judge Digby said:

> With respect to Mr. White … you have the evidence with respect to the money found on his person. You also have the evidence that when the officers entered the room he was seen either coming out of, or near, the closet where the Fentanyl in substantial quantity was subsequently found by the police. … when I look at the entirety of the evidence ... and although each individual factor in itself might not draw you to the conclusion that Mr. White was in possession of the drugs, when I put all of the factors together, the fact that he was in the room next to the drugs, was a resident of the premises, and that he had cash on him – and not trivial amounts – that's consistent with the way in which traffickers work, according to the expert evidence … the inference that Mr. White was in possession of the goods is the only reasonable inference that can be draw [sic] in the circumstances.
>
> That being the case, the Crown has proven its case against Mr. White, and with respect to counts 1 and 2, I find him guilty of those offences. …

[11] A pre-sentence report was ordered. This established that the respondent was 38 years of age (he is now 40) and had an extensive criminal record, which included prior convictions for trafficking, manslaughter, break and enter, and aggravated assault.

[12] At his sentencing hearing the Crown asked for a sentence of eight years on the fentanyl conviction, plus five years for the cocaine conviction, to be served

consecutively. The Crown additionally sought various ancillary orders, none of which were contested and are not now the subject of this appeal. The defence proposed a sentence of five years for the fentanyl offence to be served concurrently with 30 months on the cocaine charge. Digby, J. imposed a sentence of six years for the fentanyl conviction to be served concurrently with a four year sentence for the cocaine offence.

[13] At the time these offences were committed, the respondent was bound by a probation order. He was convicted of breaching that order and received a sentence of 90 days' incarceration, also to be served concurrently with the *CDSA* sentences. That sentence is not the subject of appeal.

Issues

[14] In its Notice of Appeal and its factum the Crown raised the following grounds:

1. The sentence was demonstrably unfit;
2. The trial judge erred in giving insufficient weight to aggravating circumstances, including the potential harm to society caused by the nature of the substances trafficked, as well as the prior record of the offender;
3. The trial judge erred in giving insufficient weight to the principles of proportionality and parity, in not according greater severity to offence related to Fentanyl;
4. The trial judge erred in imposing concurrent sentences when they ought to have been imposed consecutively, or in not correctly considering the impact on sentence of the multiple offences.

[15] In oral argument during the hearing, counsel for the Crown seemed to resile from its initial position on the fourth ground of appeal. It now appears to accept the argument that while the sentences in this case ought to be substantially increased, they should be served concurrently.

[16] I prefer to address the merits of this appeal by collapsing the Crown's various grounds and submissions into three discrete questions:

(i) Did the judge err in his consideration of the principle of proportionality, and did that error have an impact on the sentence imposed?

(ii) Did the judge err in his consideration of the principle of parity, and did that error have an impact on the sentence imposed?

(iii) Having regard to the circumstances of this offence and this offender, what is a fit and proper sentence?

[17] As I will explain, I am satisfied the judge erred in his consideration of both proportionality and parity, and those errors had a direct impact upon the sentence Mr. White received. Accordingly, I would set aside the sentence and conduct my own analysis to determine a fit and proper sentence in the circumstances.

[18] I will start by briefly reviewing well-known principles which apply whenever appeals against sentence are concerned. Then, in the Analysis section that follows, I will discuss more specifically the sentencing principles that are triggered when dealing with such dangerous and potentially lethal drugs as fentanyl. As I will show, the trial judge failed to consider these factors or properly apply them to the circumstances of this offence and this offender.

Standard of Review

[19] Sentencing is an inherently discretionary exercise. Because of the highly contextual nature of the sentencing process, trial judges enjoy a broad discretion to impose the sentence they consider appropriate in a particular case. Accordingly, their sentencing decisions are accorded great deference on appeal.

[20] These well-settled principles were reaffirmed in *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at paras. 14-15:

> [14] … [A]ppellate courts must show great deference in reviewing decisions of trial judges where appeals against sentence are concerned. An appellate court may not vary a sentence simply because it would have ordered a different one. The court must be "convinced it is not fit", that is, "that . . . the sentence [is] clearly unreasonable" (*R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 46, quoted in *R. v. McDonnell*, [1997] 1 S.C.R. 948, at para. 15). This

> Court also made the following comment in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 90:
>
> > […] absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.
>
> [Citations have been omitted.]
>
> [15] Owing to the profoundly contextual nature of the sentencing process, in which the trier of fact has broad discretion, the standard of review to be applied by an appellate court is one based on deference. The sentencing judge has "served on the front lines of our criminal justice system" and possesses unique qualifications in terms of experience and the ability to assess the submissions of the Crown and the offender (*M. (C.A.)*, at para. 91). In sum, in the case at bar, the Court of Appeal was required — for practical reasons, since the trier of fact was in the best position to determine the appropriate sentence for L.M. — to show deference to the sentence imposed by the trial judge.

[21] An important, additional criterion was established by the Supreme Court in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089 [*Lacasse*]. There, Wagner, J. (as he then was), writing for the majority, explained at para. 44:

> [44] In my view, an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor will justify appellate intervention only where it appears from the trial judge's decision that such an error had an impact on the sentence.
>
> [Underlining is mine.]

[22] Quite apart from errors seen to have had an impact on the sentence imposed, we may also intervene where the sentence itself is demonstrably unreasonable. It is possible of course for a sentence to be demonstrably unfit, even where the trial judge has not erred in principle (*Lacasse* at para. 52).

[23] While the standard of review is a deferential one, a sentencing judge's broad discretion in crafting a sentence tailored to the circumstances of the offence and the offender is not without limits. These limits were explained by LeBel, J., writing for the Court, in *R. v. Nasogaluak*, 2010 SCC 6 at paras. 43-45:

> [43] The language in ss. 718 to 718.2 of the *Code* is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender. The determination of a "fit" sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case [citations omitted] … The relative importance of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge's discretion to decide on the particular blend of sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines and principles in the Code and in the case law.
>
> [44] The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the *Code*. …
>
> [45] The discretion of a sentencing judge is also constrained by statute, not only through the general sentencing principles and objectives enshrined in ss. 718 to 718.2 articulated above but also through the restricted availability of certain sanctions in the *Code*. …

[24] More recently, these principles were distilled by Moldaver, J., writing for the majority, in *R. v. Suter*, 2018 SCC 34, [2018] 2 S.C.R. 496 at paras. 23-24:

> [23] It is well established that appellate courts cannot interfere with sentencing decisions lightly: see *R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 48; *R. v. L.F.W.*, 2000 SCC 6, [2000] 1 S.C.R. 132, para. 25; *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at para. 14; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 46; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 39. This is because trial judges have "broad discretion to impose the sentence they consider appropriate within the limits established by law" (*Lacasse*, at para. 39).
>
> [24] In *Lacasse*, a majority of this Court held that an appellate court could only interfere with a sentence in one of two situations: (1) where the sentence imposed by the sentencing judge is "demonstrably unfit" (para. 41); or (2) where the

> sentencing judge commits an error in principle, fails to consider a relevant factor, or erroneously considers an aggravating or mitigating factor, *and* such an error has an impact on the sentence imposed (para. 44). In both situations, the appellate court may set aside the sentence and conduct its own analysis to determine a fit sentence in the circumstances.
>
> [Underlining is mine]

[25] I will now apply those sentencing principles in considering the merits of this appeal.

Analysis

[26] The many important issues raised in this case have serious implications for users of illegal opioids, as well as those who seek to profit from their sale.

[27] The significance of this appeal is aptly captured by the Crown in paras. 2-3 of its factum:

> 2. The word fentanyl has become associated in North America with a tragic epidemic of overdoses from an illegally distributed substance that combines the twin evils of extreme addictive capabilities and narcotic strength that dwarfs the potency of most other known available substances by many multipliers. No sentient adult in our community, and certainly not one involved in the drug culture, can claim not to have heard about the dangers of fentanyl. The respondent had not a small quantity of this substance to peddle to his victims, but over two thousand pills, among the largest seizures prosecuted in Canada. He also had large amounts of cocaine and crack cocaine, drugs that by themselves attract significant censure from courts at sentence. The moral culpability associated with this callous distribution requires a much more severe sanction.
>
> 3. Despite being presented with numerous precedents from across the country, including appellate decisions, to guide his consideration, the trial judge made no attempt to review sentences in similar situations to achieve parity with sentences in other jurisdictions. The appellant posits this is required when local precedents are scarce, as in this case. The sentence imposed here was among the lowest given anywhere in Canada for trafficking substantial amounts of fentanyl.

[28] This succinct summary of the Crown's position sets up the context for my assessment of the trial judge's failure to properly address the gravity and consequences of this offence and the respondent's culpability in its commission, or

to consider sentences in comparable circumstances so as to achieve parity with sentences imposed in other Canadian jurisdictions.

[29] I will deal first with proportionality. Then I will address parity. Finally, I will determine what I consider to be a fit sentence in these circumstances.

(i) Did the judge err in his consideration of the principle of proportionality, and did that error have an impact on the sentence imposed?

[30] The "fundamental purpose" of sentencing is found in s. 718 of the *Criminal Code* which reads:

> **Purpose and Principles of Sentencing**
>
> **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.

[31] In furtherance of this fundamental purpose of sentencing, Parliament has directed that proportionality is the fundamental principle of sentencing. Section 781.1 provides:

> **Fundamental principle**

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

[32] Imposing a sentence obliges trial judges to address the "fundamental principle" of proportionality (*Lacasse*, para. 53)). The sentence must be proportionate to the gravity of the crime and the offender's culpability in its commission. The gravity of the offence and its consequences will be informed by the range of sentence prescribed in the applicable legislation. In drug cases, the dangerousness of the particular drug, as well as the quantity of drugs seized, will also be relevant considerations when addressing both gravity and culpability.

[33] While the trial judge made passing reference to:

> …the carnage and devastation, heartbreak, loss of life, loss of careers, loss of jobs, accidental death of family members that are the result from taking of these drugs (sic)….

he failed to properly link that "devastation" to either the type and quantity of drugs the respondent possessed for the purpose of trafficking, or his culpability in the offence.

[34] It should be recalled that the police seized 2,086 fentanyl pills, 101 grams of cocaine and 81.9 grams of crack cocaine. The total weight of the 2,086 pills was 333 grams. The combined weight of the cocaine and crack cocaine was 6.5 ounces. The police also seized $12,145 in cash. Expert testimony established that if the fentanyl pills were sold at between $20-$40 per pill, they had a total "street value" of between $42,000-$84,000. The powdered cocaine was worth between $8,000-$10,000 and the crack cocaine was worth between $6,500-$8,100. Even more alarming is the fact that the fentanyl pills were stamped with "CDN" on one side and "80" on the other, making them look like OxyContin 80 mg pills. Thus, the extreme danger of ingesting the fentanyl was hidden to users by disguising them as a different type of drug.

[35] In this case, there was ample evidence describing the dangers and havoc associated with fentanyl. Prior to sentencing the parties agreed that Judge Digby could consider a report entitled "*Statement Regarding Fentanyl*" (the report) prepared by Graham R. Jones, Ph.D., Chief Toxicologist of the Office of the Chief Medical Examiner of Alberta. In his report, Mr. Jones explained that fentanyl is a

synthetic opioid that has been in medical use since the 1960s, but that the usual "street" sources for its illegal use come from either "diverted" pharmaceutical products, or illicitly synthesized non-pharmaceutical fentanyl.

[36] Fentanyl is said to be 100 times more potent than morphine, and 25-50 times more potent than pharmaceutical grade heroin.

[37] Fentanyl kills by an effect of analgesic and respiratory depression. The stronger the opioid, the greater the effect. Fentanyl can also cause other toxicity reactions including muscle rigidity, nausea and vomiting.

[38] The report references scientific literature which describes a "lethal dose" for fentanyl as being 2 milligrams (2000 ug - micrograms - a microgram being one millionth of a gram). Many factors will affect the lethality of a dose, including the method of administering it, as well as the degree of tolerance achieved by the user from prior use.

[39] The greater lipid-solubility of fentanyl as compared to heroin means that it will produce a very intense, relatively short-acting "high". This gives fentanyl a very high abuse potential.

[40] The report concludes that the number of fentanyl-related deaths has roughly doubled each year between 2011 and 2015, with a total of 152 such deaths in Alberta reported in the first six months of 2016.

[41] The obvious dangers and heightened risk of death associated with fentanyl use have been recognized in a number of cases in Canada. I need only refer to two. *R. v. Smith*, 2017 BCCA 112, is often cited as the leading case in British Columbia dealing with sentencing for fentanyl offences. In that case, the British Columbia Court of Appeal accepted the following description of the dangers of fentanyl:

> [16] …
>
> Fentanyl is 20 to 50 times more potent than heroin. A mere 2 milligrams is a lethal dose. This is as small as a grain of salt. Overdoses frequently occur in individuals who thought they were using heroin, oxycodone, cocaine or other similar substances but who unknowingly consumed fentanyl. When fentanyl is labelled and sold as other street drugs, such as heroin, users may not know what they are taking and may not understand the heightened degree of risk. The risk of death is thus heightened

> exponentially among users who do not reduce their dosage. [Underlining in original]

[42] Similarly, in *R. v. Loor*, 2017 ONCA 696, the Ontario Court of Appeal accepted the following expert evidence which had been presented at trial:

> [35] Fentanyl, like heroin, is an opioid. Opioids are drugs that act on the central nervous system to relieve pain. Unlike heroin, which is illegal, fentanyl is a prescription drug, which can be obtained legally for therapeutic use.
>
> [36] Therapeutically, fentanyl is used for the management of moderate to severe chronic pain. Patches are an effective way to administer fentanyl because they are applied to the skin and provide a patient with continuous pain relief for up to three days. But fentanyl is a very powerful drug, according to Dr. Woodall, up to 100 times more powerful than morphine and 20 times more powerful than heroin. Because it is so potent, fentanyl is only prescribed in a patch under strict medical supervision and to those who are "opioid tolerant", that is to those who have been taking opioids for a long time.
>
> [37] Because fentanyl is so potent it becomes a very dangerous drug when it is not used for therapeutic reasons under medical supervision. Those who have a prescription for it and yet abuse it, or those without a prescription who buy a patch on the street or borrow one from a friend are at risk of toxicity and death.
>
> [38] The effects of fentanyl are why people abuse it. Fentanyl gives people a high, a feeling of well-being, of euphoria. Those who use it for a long time may become addicted. But because fentanyl depresses the central nervous system, it can slow down the way one's brain functions, decrease one's heart rate, and slow down one's breathing. A person who takes enough fentanyl may eventually stop breathing and die.

[Underlining is mine]

[43] Notwithstanding the alarming content of the Alberta Chief Toxicologist's report, as well as the jurisprudence cited by both the Crown and defence in their sentencing briefs, the trial judge failed to make any reference to the report, or to sentencing precedents from other provinces in cases involving fentanyl.

[44] Neither did he consider the statutory provisions which ought to have informed his sentencing analysis.

[45] Fentanyl, as well as the salts, derivatives and analogues thereof, are item 16 in Schedule I of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

Cocaine is also a substance included in Schedule I (item 2). By virtue of para. 5(3)(a) of the *Act*, a person convicted of possessing either substance for the purpose of trafficking is liable to imprisonment for life.

[46] The approach to sentences for *CDSA* offences is also mandated by section 10(1) of the *Act*:

> 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.

[47] In addition, paragraph 10(2)(b) of the *CDSA* states that "If a person is convicted of a designated substance offence for which the court is not required to impose a minimum punishment, the court imposing sentence on the person shall consider any relevant aggravating factors including that the person… (b) was previously convicted of a designated substance offence, as defined in subsection 2(1) of this Act…". The respondent's previous convictions under the *CDSA* in 1999 (for two separate events in 1997 and 1998), obviously satisfy this statutory condition, and of course prior convictions for similar offences is also a well-settled aggravating factor under the common law of sentencing.

[48] Further guidance is found in sections 718 to 718.3 of the *Criminal Code*. Among those statutory purposes and principles – protection of the public; denunciation; general and specific deterrence; proportionality; and parity are particularly relevant in this case.

[49] Apart from these statutory requirements, the judge was also obliged to apply the specific directions of Justice Wagner in *Lacasse* regarding the connection and interplay between the "fundamental principle" of proportionality and its "secondary" principle of parity:

> [53] This inquiry must be focused on the fundamental principle of proportionality stated in s. 718.1 of the *Criminal Code*, which provides that a sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender". A sentence will therefore be demonstrably unfit if it constitutes an unreasonable departure from this principle. 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*.
>
> [54] The determination of whether a sentence is fit also requires that the sentencing objectives set out in s. 718 of the *Criminal Code* and the other sentencing principles set out in s. 718.2 be taken into account. Once again, however, it is up to the trial judge to properly weigh these various principles and objectives, whose relative importance will necessarily vary with the nature of the crime and the circumstances in which it was committed. The principle of parity of sentences, on which the Court of Appeal relied, is secondary to the fundamental principle of proportionality. …

[Underlining is mine]

[50] These then were the statutory provisions and sentencing principles the trial judge was required to apply in sentencing the respondent.

[51] The proportionality analysis triggers a 2-part inquiry: an assessment of the gravity of the offence and the culpability of the offender. I have already described the evidence pertaining to the enormous risk and ruin brought about by the illicit use and sale of fentanyl in communities across the country. Such evidence is indisputable. In my opinion, that evidence is relevant to both the gravity of the crime and the moral blameworthiness of the criminal. I accept and adopt the statement by the British Columbia Court of Appeal in *Smith*, *supra*, that:

> [44] … The danger posed by such a drug must surely inform the moral culpability of offenders who sell it on the street, and obviously increases the gravity of the offence beyond even the gravity of trafficking in drugs such as heroin and cocaine.

[Underlining is mine]

[52] Adding of course to the gravity of this particular offence is the sheer volume of fentanyl seized from the respondent, an amount acknowledged to be "among the largest seizures prosecuted in Canada" without even taking into account the large amounts of cocaine and crack cocaine also seized from the respondent. And, as I have explained, these are offences for which Parliament has seen fit to prescribe

life imprisonment as an appropriate maximum sentence upon conviction. Given all of this, the extreme gravity of the offence and risk to the community is undeniable.

[53] After addressing the gravity of the offence, the judge should have turned his mind to the second part of the proportionality analysis: the respondent's moral culpability in committing these crimes.

[54] Unfortunately, the judge failed to properly address any of these components. Instead, he expressed some difficulty in determining the level of Mr. White's moral blameworthiness. He said:

> …What I don't have is much information which would allow me to assess the moral culpability of Mr. White beyond his legal culpability. For example, I don't know whether he was the brains behind this operation and the organizer, or he was simply a worker minding the stash. I think the obligation on the Crown when seeking high sentences is to provide information which would suggest a higher level of culpability. In this particular situation, not having heard from Mr. White at trial, no information other than he was found in one of the bedrooms in the apartment, I am left to somewhat speculate beyond the legal culpability as to the extent of his moral culpability. …

[55] Respectfully, I cannot accept the judge's reasoning. First, I am not aware of *any* evidence which would support the judge's statement that he could not determine whether the respondent "was the brains behind the operation" or was simply "a worker minding the stash" and so was left to speculate about "the extent of his moral culpability". A material finding of fact with no evidence to support it constitutes an error in law. Second, and more fundamentally, the trial judge's declared uncertainty is immaterial in the face of his earlier finding that Mr. White was "a mid-level trafficker" running an "operation" that was "not a simple street-level trafficking situation".

[56] The trial judge's express finding that Mr. White was a mid-level fentanyl trafficker is what ought to have guided his assessment of the respondent's moral culpability.

[57] In summary, at the time of sentencing, the respondent was a 38-year-old mid-level drug trafficker, with a lengthy criminal record that included convictions for crimes of violence as well as Schedule I drug trafficking; who was found to have been in possession for the purpose of trafficking of more than 2,000 fentanyl

pills, acknowledged to be among the largest seizures ever prosecuted in Canada; a drug which is 20-50 times more toxic than heroin and up to 100 times more toxic than morphine; an offence for which Parliament has prescribed a maximum penalty of life imprisonment.

[58] Those are the facts the judge failed to properly take into account when addressing proportionality. This failure produced a sentence that neither reflected the gravity of the crime, nor the respondent's high degree of moral blameworthiness in its commission.

[59] Before concluding my analysis of proportionality, I wish to comment on two other discrete issues raised by counsel in argument. These issues arise out of certain remarks contained in the Pre-Sentence Report, and an Impact of Race and Culture Assessment (IRCA) which were filed and formed part of the record at the respondent's sentencing hearing.

[60] As to the first issue, and while not in itself determinative, I agree with the Crown that the judge's flawed proportionality analysis was also skewed by the importance he attached to the respondent's prospects for rehabilitation, in the absence of any real evidence to support it. Within the 3-page Pre-Sentence Report, its author records sentiments attributed to the respondent's mother that through "taking courses and maturation" Mr. White "no longer has anger concerns", and has "made positive strides with his anger management". These comments appear to have prompted the judge to say:

> …when I make reference to your record it appears that a number of your convictions would involve loss of temper or control; in other words, an anger management problem. … It would appear the people consulted for the Pre-Sentence Report acknowledge that you actually have made a difference in your behaviour. Perhaps that and with the passage of time gaining a little wisdom have settled you down somewhat. …

[61] Later, referring to the IRCA prepared by Robert S. Wright, M.S.W., R.S.W. the judge remarked:

> Mr. Wright's comments concerning your background help explain why you would have anger management issues and inability to react properly in a socially accepted manner to situations because of the activities that you observed as a youth. … I think that explanation to me is helpful, along with the comments I just

> referred to in the Pre-Sentence Report because it indicates to me that you do have a positive side to you, which hopefully will auger well for rehabilitation once you finish the sentence which I'm obligated to impose. …

[62] Respectfully, deciding to possess fentanyl, and cocaine, and crack cocaine for the purpose of trafficking had nothing to do with maturity or anger management. These crimes were motivated by greed and the potential for profit, without any regard for the health and safety of those whose very lives were put at risk by the respondent's operations.

[63] As to the second issue, I would agree with the Crown's submission that in the circumstances of this case it was appropriate for the judge to give very little effect to the impact of race and culture in holding the respondent accountable for the crimes for which he was being sentenced. It is true that the narrative contained in the IRCA suggests that the respondent's manslaughter conviction arose when he interceded in a fight between his aunt and her boyfriend and during the scuffle he stabbed the man in the chest. The respondent was 22 years of age at the time. That and other family tragedies are said to have had an adverse impact upon the respondent's life, prompting a continuing pattern of run-ins with the law and further periods of incarceration.

[64] While all of this may have had some connection to Mr. White's race and culture and the other difficulties he encountered as a young man, there is another side to this history. The IRCA clearly establishes that the respondent had positive role models in his life and many opportunities to succeed. His father was a school teacher and guidance counsellor. His mother was a social worker. While their marriage didn't last and the respondent and his mother moved in with her own parents in order to complete her Masters degree and pursue her career in social work, there is nothing in the report which would suggest the well-educated and successful members of Mr. White's "blended and extended family" did not do their best to ensure that he had a safe environment, a good home and a positive upbringing. In his interview with Mr. Wright, the respondent admitted that while most of his friends had been in trouble as kids and young men, they all seem to be doing well now. In other words, despite their difficulties growing up, they have gone on to lead productive lives in their communities. Whatever impact systemic racism and other hardships the respondent experienced in his youth may have had on his initial encounters with the justice system, Judge Digby was obviously not

persuaded that those experiences accounted for much when assessing the gravity of this offence, or the respondent's high degree of culpability in its commission. The fact that the respondent had chosen to continue lining his pockets with the profits gained as a mid-level trafficker of fentanyl, cocaine and crack cocaine, was not something the trial judge was prepared to ascribe to his race, culture, upbringing, or community.

[65] Neither the Crown nor the defence suggests the judge was wrong in the way in which he treated the IRCA. On this record, neither would I.

[66] I turn now to the judge's error in considering the principle of parity, and its impact on the sentence imposed.

(ii) Did the judge err in his consideration of the principle of parity, and did that error have an impact on the sentence imposed?

[67] All Canadians, no matter where they reside in this country, are subject to the same criminal law as enshrined in the *Criminal Code of Canada*, R.S.C. 1985, c. C-46, and the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. Of course the sentencing process is highly contextual and meant to address the specific circumstances of the offence and the offender. Yet consistency in sentencing is also an important objective. Accordingly, after taking into account all of the features of a particular case, similar offences and similar offenders should be treated alike at sentencing, whether the conviction arose in Vancouver or Winnipeg, Halifax or Charlottetown. This is the principle of parity mandated in s. 718.2(b) of the *Criminal Code*:

> a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[68] One of the functions of parity is to ensure fairness and guide our responsibility as judges to impose a sentence that is just and appropriate:

> **§2.31** This principle of parity has developed to preserve and ensure fairness by avoiding disproportionate sentences among convicted persons where, essentially, the same facts and circumstances indicate equivalent or like sentences. …

See for example, Ruby, C.C., Chan. G.C. & Hasan, N.R., *Sentencing*, 9th Edition (Toronto: LexisNexis, 2012) at §2.31 & §2.35).

[69] In conducting a parity analysis, sentencing judges are required to focus on both the "fundamental principle" of proportionality and the "secondary" principle of parity (*Lacasse*, paras. 53-54). Judges must also understand that while the proportionality and parity analyses are separate and distinct inquiries, there will always be a connection and interplay between the two. That is because proportionality not only involves a consideration of the individual features of an accused and his or her crime(s) but also a comparison with sentences for similar offences committed in much the same circumstances. As Wagner, J. directed in *Lacasse*:

> [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* …
>
> [Underlining is mine]

[70] Regrettably, despite being presented with numerous precedents to guide his analysis, the trial judge in this case made no attempt to review sentences in similar situations in order to achieve parity with comparable sentences in other jurisdictions. The judge never reconciled the "individualization and parity of sentences" to ensure the respondent's sentence was proportionate.

[71] Instead of undertaking a meaningful review of similar sentences in other jurisdictions, the judge effectively sidestepped the required analysis, leaving it for this Court to decide. He said:

> With respect to the issue of the fentanyl, fentanyl is a drug which has caused much havoc and caused many deaths in western Canada. Fortunately for those of us in the East, the wave of fentanyl hasn't seemed to have reached us in the same degree. Offences involving fentanyl are much rarer in Nova Scotia than they are for example in BC. To some extent, that informs me that extremely lengthy sentences are not necessary, but because of the devastating nature of the drug, a very strong message needs to be sent to those who attempted [sic] [are tempted] to

> engage in the possession of fentanyl for the purpose of trafficking or the trafficking of fentanyl. …
>
> Given the circumstances in this case, my view that it's an appropriate and to some extent it's largely my view given the lack of precedents in Nova Scotia, at least until the Court of Appeal rules further, an appropriate sentence would be one of 6 years concurrent. The sentence of 90 days for the breach of probation will also be concurrent. So, the total sentence that you're serving, sir, is 6 years, less credit for 1,002 days, your time spent in custody.

[72] Respectfully, the judge ought to have considered the principle of parity. Since he did not, I will do so now.

[73] I will begin my parity analysis with a general commentary on the approach this Court has repeatedly taken when dealing with the most serious kinds of drug offences. I will start with cases involving cocaine. I will go on to consider precedents from other provinces in cases involving mid-level dealing in heroin. I will then turn to a more specific discussion of Canadian jurisprudence involving fentanyl convictions.

Cocaine

[74] Much can be learned by recalling the approach taken in Nova Scotia almost 40 years ago when judges were initially confronted by the arrival of cocaine on the streets of our communities.

[75] In *R. v. Merlin*, [1984] N.S.J. No. 346, this Court had the first occasion to address the principles of sentencing in cases involving cocaine and looked to the experience in other provinces for guidance. There, MacKeigan, C.J.N.S. declared on behalf of the Court:

> [12] This court has not had occasion to consider specifically the principles of sentencing as applied to trafficking in cocaine or, indeed, other "hard drugs", apart from dicta which have emphasized that the "leniency" shown to marihuana or hashish offences "has no place in the sentencing vocabulary when speaking of drugs such as LSD, phencyclidine, heroin, etc." (*R. v. Stuart* (1975), 11 N.S.R.(2d) 591; 5 A.P.R. 591, at p. 595). We accordingly must look at what has been done by other courts in other provinces.
>
> [13] Cocaine is apparently an amphetamine-like drug. Unlike heroin, its use creates no physical dependence but may result in a high degree of psychological

> dependence and even in psychological and mental damage. See the lengthy review by Berger, J., of the British Columbia Supreme Court in *R. v. Bengert* et al. (1979), 15 C.R.(3d) 97.
>
> [14] Appeal courts of several provinces have in recent years accepted the fact that cocaine is perhaps not as serious or dangerous a drug as heroin: but see contra *R. v. Arellano et al.* (1975), 30 C.R.N.S. 367 (Que. - Hugessen, A.C.J.). It is undoubtedly much more dangerous than marihuana or hashish.
>
> [Underlining in original]

[76] In Nova Scotia there developed a long tradition of recognizing that the severity of a sentence should match the dangerousness of the drug involved, all other factors being equal. As our judicial understanding of the danger of "hard drugs" evolved, so too did the approach taken in sentencing those convicted of participating in their distribution. Using very explicit language, this Court has repeatedly directed that the approach to be taken in sentencing those convicted for trafficking, and possession for the purpose of trafficking, in so-called "hard drugs" requires as its principal objective the protection of society, such that our primary emphasis must be placed on the principles of deterrence and denunciation. The majority of these pronouncements have been made in relation to cocaine trafficking, and only a few need to be referred to here.

[77] In *R. v. Byers*, [1989] N.S.J. No. 168 this Court tied the need for deterrence to the severity of the harm posed by the drug:

> [3] In my opinion the time has come for this Court to give warning to all those greedy persons who deal in the supply and distribution of the narcotic cocaine that more severe penalties will be imposed even when relatively small amounts of the drug are involved. Nor should the lack of a criminal record stand in the way of a substantial period of imprisonment. No one today can claim to be so naive as to think that trafficking in cocaine can be conducted without serious damage to our social structure.

[78] In *R. v. Huskins* (1990) CanLII 2399 (NSCA) it was said at p. 4:

> No one can seriously dispute that cocaine is an extremely dangerous drug and that society demands that those who are involved in selling it must be dealt with severely. Rare indeed will be the case where less than federal time should be considered as a proper sanction for such offense.

[79] In *R. v. Scott*, 2013 NSCA 28, I emphasized (albeit in dissent, but not on this point) the link between the harm posed by the drug, and the importance of imposing severe sentences to clearly reflect denunciation and deterrence:

> [123] … Cocaine has long been recognized by this Court as a drug whose ravages have been a scourge in Nova Scotia; visiting crime, violence, affliction and misfortune upon our urban and rural communities. Those who choose to participate in the cocaine trade and seek to profit from the misery of others must know that once they are caught, arrested and convicted, the consequences will be swift and harsh.

[80] These longstanding pronouncements are consistent with and echoed by the Supreme Court of Canada. In *Lacasse*, *supra*, Justice Wagner stated:

> [6] While it is normal for trial judges to consider sentences other than imprisonment in appropriate cases, in the instant case, as in all cases in which general or specific deterrence and denunciation must be emphasized, the courts have very few options other than imprisonment for meeting these objectives, which are essential to the maintenance of a just, peaceful and law-abiding society.

Later in his reasons, Justice Wagner went on to explain how lengthy prison terms are necessary in order to achieve denunciation and deterrence. He referred with approval to the decision of the Quebec Court of Appeal in *R. v. Brutus*, 2009 QCCA 1382, noting:

> 75 Along the same lines, the Quebec Court of Appeal said the following in *Brutus*:
>
> > [TRANSLATION] In closing, it should be borne in mind that the courts have long been sharply critical in discussing the commission of driving offences of this nature and have asserted that the objectives of denunciation and deterrence must be emphasized in order to convey their wish to give expression to society's condemnation of such crimes by means of exemplary sentences, particularly in cases (like this one) involving serious consequences for the victims. Society's condemnation may be reflected in longer terms of imprisonment, which have a deterrent effect both on the offender and on all those who might be tempted to imitate the offender. The sentence imposed in this case is not unreasonable in light of this objective, nor is it unreasonable in light of all the circumstances of the case. [para. 18]

[81] While the above commentary from *Lacasse* deals with impaired driving rather than drug offences, the Supreme Court has also identified drug trafficking as a serious offence meriting denunciation and deterrence. In *R. v. Kang-Brown*, 2008 SCC 18, Justice LeBel stated at ¶184:

> [184] The objective being pursued by the police was an important one, because trafficking in illegal drugs is a serious criminal offence. As has already been mentioned, the offence in issue in this case carries a maximum punishment of life imprisonment. Drug trafficking leads to other crimes. Illegal hard drugs such as cocaine are widely recognized to be a serious problem in our society. Their use not only fuels organized crime, but can also destroy lives. …

[82] The New Brunswick Court of Appeal has taken a similar approach in sentencing for dangerous drug offences such as those involving crack cocaine. In *R. v. Cormier*, 2018 NBCA 38, the accused had peddled multiple substances and at the time of his arrest was found with approximately 25 grams of crack cocaine, and 50 Percocet pills, also a Schedule I substance. Although the sentence imposed by the trial judge was varied on account of the judge's error in considering the accused's failure to express remorse as an aggravating factor, the decision is instructive for its comprehensive review of the approach taken by other appellate courts in Canada in cases involving dangerous and extremely addictive drugs. Writing for the Court, Quigg, J.A. said:

> [31] … involving trafficking in or possession of hard drugs for the purpose of trafficking, I would … identify certain principles that might provide guidance to sentencing courts.
>
> [32] The **first** of these principles is that those who traffic in or who possess Schedule I substances -- the so-called hard drugs -- for the purpose of trafficking, will only rarely and exceptionally escape a sentence of imprisonment. This is so because of the emphasis courts must give to the sentencing objectives of denunciation and deterrence for these types of crimes on account of the devastating effects these substances have on society in general and on those who fall victim to their nefarious and highly addictive properties in particular.
>
> [33] The **second** principle is that, among the hard drugs, crack cocaine requires particular consideration. Crack cocaine is described as being a derivative of cocaine powder: Simon Armstrong et al., *Sentencing Drug Offenders*, (Toronto: Thompson Reuters, 2004) (loose-leaf updated 2017, release 33) ch 3 (see 3-3).
>
> [34] In *Sentencing Drug Offenders*, crack cocaine is described as follows:

> Crack cocaine is a form of freebase cocaine produced by mixing powder cocaine with an alkaline solution, such as baking soda, and heating it into lumps. The name "crack" comes from the cracking or popping sound it makes when it is heated or cooked. Crack cocaine is less pure than traditional freebase cocaine because the adulterants present in powder cocaine are not removed. However, both forms are more concentrated, and thus more dangerous, than powder cocaine.

[35] In *R. v. Trinh*, 2000 ABCA 231, [2000] A.J. No. 964 (QL), an expert witness testified as to the impact of consuming crack cocaine:

> [...] crack cocaine is an extremely addictive substance. The user builds up a tolerance, and requires more and more of the drug to get and keep a given level of euphoria. The expert had dealt with users whose habit cost them as much as $600 per day. The habit's cost leads many users to crime and prostitution. He said that the vast majority of street level crack cocaine users are prostitutes who consume it after earning some money. [para. 5]

[36] In the cases counsel for both parties provided us, many involved individuals who were found guilty of possession of crack cocaine for the purpose of trafficking. This jurisprudence generally recognizes that crack cocaine is more dangerous and harmful than traditional powder cocaine. The connotation used by courts to describe crack cocaine and the effects of its consumption suggests it should be an important consideration when crafting an appropriate sentence. There is a general consensus among courts that crack cocaine is a highly addictive drug causing harm to society and that the main objective of sentencing in possession or trafficking cases should be deterrence. Some courts of appeal consider crack cocaine to be an aggravating factor in sentencing, and, in some cases, courts have determined trafficking in crack cocaine indicates an added degree of commercialization and premeditation, not directly associated with powder cocaine, because of the additional steps required to convert powdered cocaine into crack. Some courts have characterized the sale of crack cocaine as an "immensely profitable crime of premeditation" (see *R. v. Wong*, 2004 ABCA 260, [2004] A.J. No. 861 (QL), at para. 14).

[37] The Court of Appeal of Alberta has made strong remarks regarding the possession of crack cocaine. In each of *Trinh*, *R. v. Ma*, 2003 ABCA 220, [2003] A.J. No. 901 (QL), and in *Wong* the court emphasized the need to discourage trafficking crack cocaine or possession for the purpose of trafficking. The addictive nature of the drug and aggravated harm to users appear to have motivated that Court to place a greater emphasis on the principle of deterrence over all other objectives.

> [38] Similar conclusions were echoed by the Court of Appeal of Manitoba in *R. v. Kosanouvong*, 2002 MBCA 144, [2002] M.J. No. 428 (QL), where the court described trafficking crack cocaine "as a commercial venture involving a hard, addictive drug". It concluded the prior case law submitted for its consideration expressed "denunciation and deterrence" as important principles when sentencing for this type of offence.
>
> [39] The Ontario Court of Appeal has placed additional emphasis on deterrence and denunciation when sentencing an offender for trafficking crack cocaine or its possession for the purpose of trafficking. The Court of Appeal suggests the involvement of this substance constitutes an aggravating factor: *R. v. Woghiren*, [2004] O.J. No. 5030 (C.A.) (QL).
>
> [40] In *R. c. Dorvilus*, [1990] J.Q. No. 1243 (QL), the court emphasized that courts should be unyielding toward crack cocaine, due to its high addiction rate and low cost, which are attractive features to the youth. Moreover, in *R. c. Moreira*, 2011 QCCA 1828, [2011] J.Q. No. 14006 (QL), the Court of Appeal reiterated that crack cocaine traffickers should expect higher sentences than those trafficking in powder cocaine (see para. 33).
>
> [41] The Nova Scotia Court of Appeal expressed a strong statement against trafficking crack cocaine in *R. v. Carvery*, [1991] N.S.J. No. 501 (C.A.) (QL). The court stated evidence had been led "reinforcing crack cocaine's reputation as a cruelly addictive narcotic", and held that "[t]rafficking in crack cocaine is a crime so corrosive to the social fabric that sentences must reflect deterrence above all other considerations, even when the offender [...] has no previous record".
>
> [Emphasis in original]

Heroin

[83] In *Sentencing Drug Offenders* (loose-leaf ¶2:300.20.20, Canada Law Book, 2004 current to June 2015) Simon Armstrong frames “mid-level” trafficking in heroin as between 28 grams to 1 kilogram.

[84] Presently, there are no precedents in Nova Scotia establishing a sentencing range for heroin trafficking. However, the following authorities from elsewhere in Canada are helpful.

[85] In *R. v. Brown,* 2016 MBCA 115**,** the Manitoba Court of Appeal upheld the sentencing decision of a trial judge who found the accused to be a mid-level trafficker trafficking in heroin and, therefore, sentenced him: “within the range of

five to eight years in accordance with, among other cases, this Court's decision in *R. v. Rocha*, 2009 MBCA 26, 236 Man. R. (2d) 213 (Man. C.A.)" (para. 4).

[86] The range is higher in Ontario. *R. v. Shahnawaz* (2000), 51 O.R. (3d) 29 (Ont. C.A.) (SCC refusing leave to appeal 2000 CarswellOnt 4094) has been identified as the leading case on heroin trafficking in Ontario (*R. v. Wawrykiewicz*, 2017 ONSC 3527 at para. 17). In that case, the offender sold 650 grams (23 ounces) of heroin to an undercover police officer. The Ontario Court of Appeal identified the range of sentence for trafficking in that amount of heroin as 9 to 12 years. The trial judge imposed a 17-month conditional sentence. The Court of Appeal found that that sentence was well below the range, and imposed a 6-year sentence after taking into account time spent in custody and on conditional sentence, as well as factors unique to the individual offender, including that he had been tortured in Afghanistan and resultingly was uniquely affected by incarceration.

[87] The more recent Ontario Court of Appeal decision of *R. v. Bains*, 2015 ONCA 677 steps back somewhat from *Shahnawaz*, approving the trial judge's assessment of the sentencing range for heroin as being six to 12 years' imprisonment (without overturning *Shahnawaz*). The Court in *Bains* stated:

> [182] The trial judge identified the range of sentence appropriate for possession of one kilogram of heroin for the purpose of trafficking as a sentence of imprisonment in a penitentiary for six to 12 years. He rejected the trial Crown's submission of 12 years because of an absence of any of the statutory aggravating factors. It was his view that a term of imprisonment at the lower or mid-level of the range was apt.
>
> [...]
>
> [192] [...] [T]he sentences imposed are within the range of sentence the appellants themselves concede is appropriate for first offenders convicted of possession of heroin for the purpose of trafficking. The sentences sit at the mid-point of the range the appellants say is apt, although some authority suggests that the appropriate range is nine to 12 years for similar amounts of heroin: *R. v. Shahnawaz* (2000), 149 C.C.C. (3d) 97 (Ont. C.A.), at para. 6.

[Underlining mine]

[88] The accused in *Bains* was a first-time offender, but the amount involved (one kilogram of heroin) was considered to be the "upper end" of the mid-level category.

[89] More than 20 years ago, in *R. v. Phun*, 1997 ABCA 244, 56 Alta. L.R. (3d) 266 (Alta. C.A.), the Alberta Court of Appeal set a "5-year starting point sentence" for "commercial trafficking in heroin on more than a minimal scale" (*R. v. Parranto*, 2019 ABCA 457 at para. 18).

[90] In *R. v. Borecky*, 2013 BCCA 163, the accused had a substantial related criminal record and was involved in a "commercial enterprise." The drugs found were cocaine, methamphetamines and heroin valued at roughly $100,000.00. In overturning the decision of the sentencing judge, the British Columbia Court of Appeal stated that in those circumstances, "the appropriate sentence for the drug offences, absent their combination with the weapons and ammunition was at least five years" (para. 73).

[91] In conclusion, while there may be regional differences, sentences for mid-level heroin trafficking typically fall between five and ten years' imprisonment. Extreme factors may push the sentence up to 12 years' imprisonment. Significant mitigating factors may push the range below five years, but a lengthy penitentiary sentence is to be expected.

[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.

Fentanyl

[93] Against this jurisprudential background of sentencing for cocaine and heroin, where then does fentanyl fit?

[94] Based on the evidence in this case, that fentanyl is up to 100 times more powerful than morphine and 20-50 times more potent than heroin, and is a

substance so deadly that a lethal dose consists of two millionths of a gram, it stands to reason that convictions for offences involving fentanyl should draw a more severe sentence than one which "only" involved cocaine, or heroin.

[95] It is worth noting that the jurisprudential distinction accorded the toxicity of fentanyl was certainly recognized by the respondent's counsel when he recommended to Judge Digby a sentence of five years for the fentanyl offence, twice as long as the sentence of 30 months he proposed for the cocaine charge.

[96] As noted earlier, the report authored by Alberta's Chief Toxicologist which was introduced into evidence in this case by consent, concluded that the number of fentanyl-related deaths had roughly doubled each year between 2011 and 2015, with a total of 152 such deaths in Alberta recorded in the first six months of 2016.

[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.

[98] Before considering the experience of trial and appellate courts dealing with fentanyl in other parts of Canada, I wish to comment briefly on the important role appellate courts play in both curtailing disparity in sentencing, as well as ensuring that our laws keep abreast of current social values.

[99] Although the particular issue addressed in *R. v. Stone*, [1999] 2 S.C.R. 290, involved domestic violence against women, the observations of Justice Bastarache, writing for the majority, are instructive in this case in the face of mounting judicial alarm over the devastation caused by the illegal distribution of highly addictive and lethal opioids. In his reasons, Bastarache, J. observed at para. 244:

> One function of appellate courts is to minimize disparity of sentences in cases involving similar offences and similar offenders; see *M. (C.A.)*, *supra*, at para. 92, and *McDonnell*, *supra*, at para. 16, *per* Sopinka J. …

In my view, this role seems particularly important where there are few precedents within the jurisdiction where the offence occurs, and the closest comparators are cases from other provinces.

[100] Bastarache, J. also describes the judiciary's role in ensuring that our laws reflect evolving social values. At ¶239 he says:

> [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.)*, *supra*, 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.]
>
> This Court's jurisprudence also indicates that the law must evolve to reflect changing social values regarding the status between men and women; see *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *R. v. Lavallee*, [1990] 1 S.C.R. 852; *R. v. Seaboyer*, [1991] 2 S.C.R. 577.

[101] Informed by these principles, I will now consider the experience of other Canadian courts when sentencing for fentanyl convictions. As we will see, trial and appellate courts across Canada have recognized the very dangerous nature of fentanyl as an illicit substance, by imposing sentences that are markedly higher than sentences for other Schedule I substances, all other factors being equal.

[102] Here, both at the original sentencing hearing and on appeal, counsel for the Crown and the defence referred to various precedents to support their respective positions. Respectfully, I find the cases relied upon by the respondent to be easily distinguishable for a variety of reasons. For example, some involved first-time offenders; or accused persons who had pled guilty; or who had demonstrated very positive prospects for rehabilitation; or the sentence followed a joint

recommendation; or where the offender was a low-level operator; or was selling to support an addiction to fentanyl; or where the accused had cooperated with the police and agreed to testify against others at great personal risk; or where genuine remorse and other positive steps toward rehabilitation were found to be significant mitigating circumstances. None of those features are present in this case.

[103] In attempting to establish a proper sentence for the respondent in this case, I find the precedents relied upon by the Crown to be much more persuasive. I refer to these decisions drawn from the Crown's factum starting at para. 77:

> 77. In *R. v. Baks* the Ontario Court of Appeal reduced a nine year sentence to six years for Ms. Baks' role in a scheme to forge prescriptions of her employer, a doctor. The amount involved was 990 fentanyl patches of 100 micrograms each, along with 90 tablets of Oxycodone. The court found significant mitigating circumstances that are not present in the current case before this Court. Ms. Baks was young with no prior related record, and had been found not to have profited much personally from the activity. Her rehabilitative prospects were excellent. She acted at the instigation of "higher ups" in the scheme, and finally she cooperated by testifying against those above her in the scheme. Her original sentencing occurred in 2014, when little was yet known about fentanyl.
>
> 78. In *R. v. Loor*, the Ontario Court of Appeal upheld a sentence of six years for obtaining, via forged prescriptions, and for the purpose of trafficking, 45 patches of fentanyl. This accused was not the head of the "ring" of traffickers carrying on this scheme. In fact Ms. Baks, referred to in the previous paragraph, was mentioned in this decision to be "higher up" than Mr. Loor. He had lent his name to the fake prescriptions, which he then had filled. The court accepted that specific and general deterrence must be important principles in sentencing drug matters. The length of the sentence was clearly related to the danger associated with the drug. The Crown had presented expert evidence of a toxicologist at the sentence hearing below. She confirmed that fentanyl patches are 20 times more powerful than heroin, with potentially deadly results. The patches obtained by this offender were found to be worth $18,000 to $20,000 on the street in North Bay, Ontario, although this offender was not shown to have profited personally. The accused, 39 years old, had a prior record for trafficking. The leader of the ring was initially sentenced to nine years, reduced on appeal to eight.
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> 79. There are also numerous trial level decisions out of Ontario. In *R. v. Vezina*, the accused possessed for the purpose of trafficking 205 grams of fentanyl mixed with heroin, said to be worth $61,500. This accused also had methamphetamine for the purpose of trafficking, as well as a loaded prohibited firearm. Two expert witnesses were called at the sentence hearing, including a

senior supervising police officer who testified with respect to the frequency of calls the police force received related to drug overdoses. Although not all overdoses conclude in deaths, the number of deaths from opioid poisonings was increasing in Waterloo, the location of the offence. Mr. Vezina pled guilty to the charges, and his Pre-Sentence Report indicated that his youth years involved significant family upheaval, and he suffered from a long standing addiction at the time of the offence. He had a significant prior record. He received a sentence of eleven years for the drug offences. His situation is clearly more serious than that of Mr. White, but not to a factor of doubling the sentence.

80. With respect to the format of the drug, *R. v. Hulme* is perhaps the closest to the present respondent. He had in his possession 784 fake Oxycontin pills which actually contained fentanyl, in addition to 11 patches and 261 actual Oxycodone pills. The offender was 38 years old with some mental health issues and an addiction to crack cocaine. He was convicted after trial in the Ontario Superior Court of Justice. He also possessed Hydromorphone for trafficking, $1230 in cash, and drove a vehicle while under the influence. It was his erratic driving and a public complaint that brought him to police attention. The fake pills contained acetylfentanyl, another analog. He had previously never spent much time in jail, although he had one previous trafficking conviction, for which he served 45 days. His motivation was said to be commercial. The court found that the fake OxyContin pills can sell on the street for twice the price of known fentanyl, and thus profits were increased. He received a sentence of seven years for a quantity less than in the present case.

81. In Manitoba, the accused in *R. v. Muswagon* received, for possession of only 18 pills of fentanyl, a four year sentence. In her case, the pills were shaped to look like Percocets, and the offender may not even have known that she was carrying fentanyl. Like the respondent here, the accused had dated prior convictions for trafficking offences for which she had received penitentiary terms. She pled guilty. Because she was Aboriginal, Gladue factors were taken into account in arriving at her sentence. This serious sentence was for a fraction of the drugs held by the respondent.

82. In *R. v. Falconer*, the accused had 227 "blotters" of fentanyl. She pled guilty to the offence. She received six and a half years for the offence, from which was subtracted several months of remand time already served. She also had an ounce of methamphetamine, placing her in the similar category of a multi-drug seller. She was also an addict herself. The court emphasized the need for general and specific deterrence, noting that her drug use history made her a high risk to re-offend.

83. In Alberta, in *R. v. Huynh*, the Provincial Court imposed a sentence of seven years on the accused for producing 100 pills of fentanyl. The accused was caught working in a powder mixing and pill pressing "lab" in Calgary. It is not

> alleged that the lab actually synthesized fentanyl as a chemical process, but rather that they used raw powder to mix with cutting agents, pressed pills, and coated them to look like standard pharmaceuticals. Mr. Huynh was not the brains behind the operation. The accused was 30 years old, and had a previous record for fraud offences. He had a gambling addiction which had destroyed his family relationships. The sentencing judge recognized that moral blameworthiness attached to the deliberate act of engaging in the pill production. It was stated, "profit and greed were the only motives at play here". His guilty plea and his very recent completion of a gambling treatment program were the only mitigating factors. In determining a fit sentence, the court pointed to appellate dictates that a starting sentence for trafficking heroin in Alberta was five years, and that the severity of the sentence should follow the greater harm caused by the type of drug. Clearly of course the court must be speaking of the potential harm, as no individuals were directly harmed by the drugs seized in the present case.
>
> 84. The Supreme Court of the Northwest Territories, in *R. v. Dube*, imposed a sentence of nine years prison for conspiring in the possession of 1073 pills of fentanyl for the purpose of trafficking, along with other substances. Mr. Dube pled guilty to the drug charge and associated possession of proceeds of crime and aggravated assault charges. The police were able to lay charges as a result of evidence gathered through wiretapping. Mr. Dube was found to be the leader of a ring operating throughout the region, which included a dial a dope operation. At the end of the operation, in addition to the fentanyl, police seized 691 grams of powdered cocaine, 1.5 kilos of crack and a syrup containing Benzodiazepine. The offence was found to have been committed for the benefit of a criminal organization, a factor considered specifically in para. 718.2(a)(iv) of the Code. The accused had suffered medical problems that went untreated as a child. His criminal history dated to his teenage years, having amassed 24 convictions by age 19. His sister had suffered addiction, but his mother still supported him, which the court suggested might be unwarranted. He was only 22 years old at the time of sentencing. The decision outlines the jurisprudence for sentencing both fentanyl and the nearest comparator, heroin, in the Territory and region.

[Underlining is mine]

[104] Given the extreme risks associated with fentanyl, the lack of local examples would suggest that we consider the experience of courts in other provinces. The fact that fentanyl has been slow to reach the borders of Nova Scotia is not an excuse to ignore the tragic consequences linked to its use. The time has come for this Court to ensure that trafficking in fentanyl does not gain a foothold in this province, and to send a message to traffickers that this is not a place where they would wish to do business.

[105] Courts in other parts of Canada, with greater experience in and exposure to the perils of fentanyl, have taken different approaches in efforts to curb its illegal distribution.

[106] Some appellate courts have fixed a "starting point". Others have established "a range". Some have said it is too early to set any range for different levels or categories of fentanyl trafficking, preferring to wait until a better evidentiary record can be presented. As I will explain, I currently find myself in this third camp.

[107] Whereas in *Smith, supra*, the British Columbia Court of Appeal declared that street level fentanyl dealers should receive sentences of between 18 and 36 months or longer, that same Court two years later was not ready to set a range for mid-level traffickers. In *R. v. Davies*, 2019 BCCA 359, the Court noted "it is somewhat premature to identify a range for mid-level traffickers in fentanyl" (at ¶35).

[108] The very recent decision of the Alberta Court of Appeal in *R. v. Felix*, 2019 ABCA 458 is instructive, not only because it bears certain similarities to this case, but also because the Court conducts a very detailed assessment of fentanyl trafficking, and the judiciary's role in protecting the public from the devastation caused by its illegal distribution.

[109] Mr. Felix was also 38 years of age. Besides trafficking in cocaine he was also found to have sold 2,388 fentanyl pills. At trial, the Crown entered into evidence an affidavit from Dr. Graham R. Jones, the same Chief Toxicologist whose report was introduced by consent in this case. In allowing a Crown appeal from the global sentence of seven years imposed by the trial judge, a 5-judge panel of the Alberta Court of Appeal set a "starting point" of nine years for offences involving trafficking or possession for the purpose of trafficking fentanyl and its analogs. In Alberta it appears that the same meaning is attached to "wholesale" as to "mid-level" trafficking. Wholesale cocaine trafficking was defined as trafficking "at or above the multiple-ounce level" and the "scale of wholesale fentanyl trafficking would involve multiple hundreds of individual uses" (**¶**53-54**)**. Writing for a unanimous Court, Antonio, J.A. said:

> [2] This judgment establishes a starting point of nine years for fentanyl trafficking at a wholesale level. …

> [40] Fentanyl trafficking has created a crisis in Alberta, as in the rest of the country. It falls to the courts to protect the public by imposing sentences that will alter the cost-benefit math performed by high level fentanyl traffickers.
>
> …
>
> [45] The starting point established herein presumes an offender who has no criminal record and is of prior good character, and who has been found guilty after trial. It applies to trafficking, or possession for the purpose of trafficking, of fentanyl and its analogues. Like other drug trafficking starting points, it is defined by two dimensions: the dangerousness of the drug and the scale of the offender's involvement.
>
> …
>
> [66] As for all drug trafficking, particularly where there is any degree of sophistication, primacy must be given to denunciation and deterrence. Participation in a trafficking network is a calculated decision, premised on the ability to reap gains that outweigh any costs. This is precisely the type of crime for which deterrence may be most effective.
>
> …
>
> [71] As a principled extension of existing starting points for drug trafficking, supported by existing precedents, the starting point for wholesale fentanyl trafficking, as defined above, is set at nine years.

[110] As noted, Mr. Felix was 38 years of age at the time of sentencing. He was born and reared in Newfoundland where he completed high school with honours and attended college to complete a crane operator program. He moved to Fort McMurray, Alberta in 2002 to work. He had steady employment as a crane operator. Since being charged with these offences he had started two companies engaged in rebuilding and restoring Fort McMurray after the 2016 wildfires. He was said to "actively parent" four children: two of his own and two other children of a woman with whom he had established a current relationship. His counsel "presented 17 letters of reference from family friends and neighbors attesting to [his] generosity and reliability as a member of the community and to his sincere remorse" (¶23). Such testimonials did not impress the Court. Antonio, J.A. remarked:

> [76] There is little to offer in mitigation. Lack of a criminal record is built into the starting point and is neither mitigating nor aggravating. I accept the sentencing judge's view that the guilty plea is mitigating but to a reduced extent due to its timing. Similarly, I accept his finding that prospects of rehabilitation are

> favourable. I also endorse the sentencing judge's rejection of the more imaginative claims of mitigation, including the effect of bail conditions, failed *Charter* arguments, and the nature and timing of the undercover operations.
>
> [77] In 17 reference letters, family and friends attested to Mr. Felix's generosity and reliability. These testimonials are of little mitigating value. They contain inaccurate assumptions about Mr. Felix's character and contribution to the community. Simply put, the authors of these letters did not know Mr. Felix as well as they thought. The testimonials illustrate the breach of trust inherent in Mr. Felix's crimes: he was undermining the health of his community while pretending to be a responsible and supportive member of it. They also show that Mr. Felix was not driven to his illegal activities by unfortunate social or economic circumstances. He was simply motivated by greed.

[111] The Court went on to impose a sentence of 10 years on each of the fentanyl counts and six years on each of the cocaine counts, the sentences to run concurrently. It is obvious that had the Crown not sought a global sentence of 10 years, the Alberta Court of Appeal would very likely have declared that:

> [79] … the appropriate sentence for Mr. Felix's fentanyl trafficking would be 13 years concurrent on each of the two counts.
>
> …
>
> [82] I recognize that, in this case, a guilty plea was entered and sentencing positions were taken at a time when sentencing in this area was still evolving. I therefore consider that the sentence imposed should be bounded by the Crown's position below, which was that a fit global sentence would be ten years.

[112] In *R. v. Smith*, 2019 SKCA 100, the Saskatchewan Court of Appeal observed:

> [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.

[113] In *R. v. Loor, supra*, the Ontario Court of Appeal upheld a sentence of six years in prison where the accused, a medical secretary, was convicted of possession of 45 fentanyl patches for the purpose of trafficking. He was described as a "low-level trafficker" with some prospects for rehabilitation. He had a record for trafficking, but there was a 5-year gap since his last conviction. The case is also instructive for the way in which the Ontario Court of Appeal treated others involved in the same trafficking ring. The "kingpin" of the ring was identified as a man named Raymond Goudreau. Mr. Loor was a low-level player in Goudreau's operation. Two others, Baks and Sinclair, were "higher-ups in the trafficking ring". Baks trafficked 900 fentanyl patches, in other words, 20 times more than did Loor. Sinclair likely trafficked a similar amount. After pleading guilty, Baks was initially sentenced to nine years on a joint submission, but on appeal, her sentence was reduced to six years (*R. v. Baks*, 2015 ONCA 560). Sinclair was also initially sentenced to nine years after pleading guilty, but on appeal his sentence was reduced to eight years (*R. v. Sinclair*, 2016 ONCA 683). Laskin, J.A. explained why there was "no inconsistency in the sentences imposed … on Baks and Sinclair and the sentence imposed on … Loor. Each of them is understandable." He wrote:

> [46] This court reduced Baks' sentence from nine years to six years because of a powerful set of mitigating considerations (in addition to her guilty plea):
>
> * She was a young person with no previous record, and no indication of any previous criminal activity;
> * She had excellent prospects for rehabilitation;
> * She acted at the instigation of and under pressure from Sinclair, with whom she had a romantic relationship; and
> * Most important, early on she fully cooperated with the police's investigation and then gave a statement and testified against both Sinclair and Goudreau.
>
> [47] This court reduced Sinclair's sentence from nine years to eight years because two of the mitigating considerations that reduced Baks' sentence also applied to his sentence:
>
> * He had excellent prospects for rehabilitation; and
> * He testified against Goudreau.

> [48] None of these mitigating considerations that reduced the sentences for Baks and Sinclair apply to Loor. A six year sentence for Loor is not demonstrably unfit or out of line with the sentences imposed on Baks and Sinclair.

[114] Justice Laskin went on to explain why he declined the Crown's invitation to set a range for fentanyl trafficking cases. He said:

> [49] Loor has failed to demonstrate that his sentence was unfit or reflected any error in principle. The Crown invited us to establish a range for fentanyl trafficking, while acknowledging that sentencing is a "highly individualized exercise" and that the relevant considerations affecting a sentence will vary from individual to individual: see Lacasse at para. 58.
>
> [50] Few fentanyl trafficking cases have reached this court. It is thus perhaps too early in our jurisprudence to establish a range. But I think it fair to say that generally, offenders -- even first offenders -- who traffic significant amounts of fentanyl should expect to receive significant penitentiary sentences.

[115] The New Brunswick Court of Appeal *R. v. Cormier*, *supra*, declined to fix a range for offenders who traffic in or are found in possession of Schedule I drugs, saying:

> [30] Despite the detailed work and able arguments of counsel, I would decline, <u>at this time</u>, to set a <u>definitive</u> range for sentencing offenders who traffic in or are in possession of Schedule I drugs. I so decline because …, in order for any range to be set, there would need to be a fairly clear line of demarcation between the types of dealers who engage in these crimes. There is, for example, a significant difference between a youthful offender who might share or even sell to friends at a party and a distributor who has a network of dealers to widely distribute the drugs. Yet, both are guilty of the same offence. Before any type of <u>definitive</u> range can be set, the various levels of drug traffickers would need to be identified and properly defined. We simply don't have a proper evidentiary record for this in the present case.
>
> [Emphasis in original]

[116] I would also respectfully decline the Crown's invitation, <u>at this time</u>, 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.

[117] 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.

[118] Accordingly, I will now turn to my third and final question in determining a proper sentence for the respondent.

(iii) Having regard to the circumstances of this offence and this offender, what is a fit and proper sentence?

[119] I have already described in detail the trial judge's errors in failing to conduct a proper proportionality or parity analysis. These errors led to a sentence which in this case is clearly unfit. The sentence of six years for the fentanyl conviction and four years for the cocaine conviction simply do not adequately address the seriousness of the respondent's crimes, nor the moral blameworthiness of his actions. Neither does the sentence reflect the primary goal of sentencing in "hard drug" cases which is to protect our community by the application of strong measures intended to denounce and deter.

[120] To recap, the respondent was found in possession of both fentanyl, cocaine and crack cocaine having a combined, potential street value of approximately $100,000. He also had in his possession more than $12,000 in cash. He was 38 years of age with a serious criminal record including previous convictions for trafficking in Schedule I substances. These are offences for which Parliament has prescribed a maximum penalty of life imprisonment. The extreme seriousness of the offence and the respondent's high degree of blameworthiness in its commission are obvious. Even more blatant on the scale of moral culpability is the aggravating fact that this lethal opioid was disguised as something quite different.

[121] Having considered the quantity, value and lethality of the drugs seized; the fact that the fentanyl was disguised as OxyContin, making its ingestion even more dangerous; the respondent's position as a mid-level trafficker; the high degree of moral culpability; his lengthy criminal record including previous convictions as a Schedule I trafficker; his previous chances for rehabilitation that were obviously unsuccessful; the fact that there were few, if any, mitigating circumstances; and after having reviewed sentences imposed elsewhere in comparable circumstances, I find that a fit and proper sentence for Mr. White on the charge of possession of fentanyl for the purpose of trafficking is eight years. Contrary to his counsel's submission on appeal, our decision to increase the respondent's original sentence by a third, can hardly be characterized as "little more than tinkering".

[122] Although the risk to law enforcement personnel and other first responders who are exposed to fentanyl was not made part of the evidentiary record in this case, one can certainly take judicial notice of the precautions that must be taken. Simply referring to the easily assessible Government of Canada website and the protocols published by its Canadian Centre for Occupational Health & Safety explains that two milligrams of fentanyl (about the size of four grains of salt) is enough to kill the average adult. Because fentanyl is odorless and tasteless, it is hard to detect. Unintentional exposure by touching or inhaling can cause serious illness or death.

[123] Recognizing the more deadly consequences of fentanyl as compared to cocaine, I consider a proper sentence on the second count of possessing cocaine for the purpose of trafficking to be five years.

[124] On the issue as to whether or not these sentences should be served concurrently or consecutively, I agree with Judge Digby when he reasoned:

> These offences occurred at the same time, and at the same place. They are, aside from the breach of probation, convictions under the same section of the statute, Section 5(2) of the *Controlled Drugs and Substances Act*. I see this as a situation where the same societal interest is in play for all three of the offences; that is the protection of the public from accessing non-prescribed street drugs … I think the criteria for concurrent sentences are quite clearly met in this case …

Accepting, as I do, this aspect of the judge's analysis, and mindful of this Court's approach in such cases as *R. v. Adams*, 2010 NSCA 42 and *R. v. Skinner*, 2016 NSCA 54, I would order that the sentences here all be served concurrently.

Conclusion:

[125] In conclusion, the sentences imposed by the trial judge following the convictions for fentanyl possession, and cocaine possession respectively, are set aside. In their place, a sentence of eight years is imposed for the fentanyl conviction, and five years for the cocaine conviction, the sentences (together with the sentence for the breach of probation) to be served concurrently, less the 1,002 days already served by the respondent on remand prior to being sentenced.

Saunders, J.A.

Concurred in:

Beveridge, J.A.

Bryson, J.A.