

CANADA / JUDGMENT

R. v. Ellis

2022 BCCA 278

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 278 R. v. Ellis

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Ellis,

2022 BCCA 278

Date: 20220816

Docket: CA47971

Between:

Regina

Appellant

And

Tanya Lee Ellis

Respondent

And

Vancouver Area Network of Drug Users, Canadian Drug Policy Coalition, Independent Criminal Defence Advocacy Society, We Wai Kai First Nation and West Coast Legal Education and Action Fund

Interveners

Before:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Mr. Justice Marchand

On appeal from: An order of the Provincial Court of British Columbia, dated November 29, 2021
(R. v. Ellis, 2021 BCPC 280, Campbell River Docket 41820-2-C)

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Place and Date of Hearing:

Vancouver, British Columbia

May 26, 2022

Place and Date of Judgment:

Vancouver, British Columbia

August 16, 2022

Written Reasons by:

The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Marchand

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Summary:

This is a Crown appeal from a suspended sentence and 12 months' probation imposed for trafficking and possession for the purpose of trafficking. Both offences involved fentanyl. The sentencing judge determined that the appellant and similarly-situated offenders should no longer be subject to the generally applicable sentencing range of 18-36 months' imprisonment established by this Court in *R. v. Smith*, 2017 BCCA 112. Held: Leave to appeal from sentence is granted; the appeal is allowed; and the 12-month probation order is increased to three years with more stringent conditions. The sentencing judge committed a number of errors in principle that impacted the sentence, including the misuse of expert opinion evidence, considering herself bound by the range in the absence of "exceptional circumstances", and failing to appreciate that the range in *Smith* speaks only to the gravity of the offence of trafficking in fentanyl, not the personal characteristics of the offender.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

- [1] In 2017, this Court established a generally applicable sentencing range of 18-36 months' imprisonment for first-time offenders who sell fentanyl at the street-level: *R. v. Smith*, 2017 BCCA 112 at paras. 45, 48. A sentence of greater than 36 months' imprisonment may be appropriate for people with prior convictions for trafficking in fentanyl.
- [2] A range that is "materially higher" than the ones generally "applicable to other dangerous drugs such as heroin" was considered necessary because of "the enhanced risks associated with [trafficking in fentanyl] and the individual responsibility of dealers given those risks and public knowledge of them" (at para. 49).
- [3] The majority in *Smith* noted that "other dangerous drugs do not kill as frequently, accidentally, or as unpredictably as fentanyl" (at para. 49). Fentanyl was described by the majority as a "scourge" that "poses intolerable risks of accidental overdosing" (at para. 48). Because of those risks and the ensuing harms, the sentencing principles of deterrence and denunciation must "generally be given primacy": *Smith* at paras. 45, 49. See also *R. v. Choi*, 2022 BCCA 90 at para. 10; *R. v. Schneider*, 2019 BCCA 310 at paras. 16, 22.
- [4] In 2021, Tanya Ellis pleaded guilty in the Provincial Court to two offences under the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA]: trafficking and possession for the purpose of trafficking. The offences involved fentanyl and cocaine mixed with fentanyl.
- [5] Relying on expert opinion evidence, Ms. Ellis asked the sentencing judge to "revisit" the *Smith* range and to rule that it does not apply to people who traffic at the street-level because they suffer from a substance use disorder and need money to support their use of substances. Before this Court, Ms. Ellis explained that the objective of the expert opinion evidence was to "allow and compel the [judge] to set aside the priorities of denunciation and deterrence for [her], and similarly situated offenders".

- [6] The judge acceded to this submission. She decided that the Smith sentencing range does not apply to street-level offenders who suffer from a substance use disorder and who traffic in fentanyl to ensure their own drug supply. The judge sentenced Ms. Ellis to a "restorative" suspended sentence with 12 months' probation and minimal conditions. Ms. Ellis is not a first-time offender.
- [7] The Crown appeals the sentence, alleging numerous errors in principle and that the sentence is demonstrably unfit.
- [8] In my view, the appeal from sentence must be allowed.
- [9] The judge's reasons for sentence are thoughtful and considered. There is also no doubt that Ms. Ellis has faced considerable hardship in her life and continues to do so.
- [10] However, the judge committed several errors in principle and those errors had a material impact on the sentence. Accordingly, this Court must sentence Ms. Ellis afresh, with deference to the judge's factual findings: *R. v. Friesen*, 2020 SCC 9 at paras. 26-28; *R. v. Parranto*, 2021 SCC 46 at paras. 29-30, 36, 117-119, 122, 229-233.
- [11] Our sentencing analysis must be guided by the Smith range, which gives meaningful effect to the gravity of the offences committed by Ms. Ellis and the palpable risk of serious harm those offences carry for people who purchase fentanyl from street-level traffickers, for their families and for the communities in which they live. Conduct that demonstrates a reckless disregard for human life increases the gravity of the offence: *Parranto* at para. 70.
- [12] However, what constitutes a fit sentence for Ms. Ellis must also be informed by the judge's social context findings and Ms. Ellis's personal circumstances. The judge's findings shed important light on the moral blameworthiness of Ms. Ellis as an individual with a long-standing substance use disorder, whose daily functioning and behavioural choices are deeply affected by an all-consuming illness: *R. v. Hansen*, 2012 BCCA 142 at paras. 25-26.
- [13] The judge's findings also appropriately inform the weighing of relevant principles of sentencing specific to Ms. Ellis, including deterrence and rehabilitation. The judge found that evidence-based medical treatment likely holds out the greatest hope of rehabilitation for Ms. Ellis and, ultimately, for the protection of the public.
- [14] In the particular circumstances of this case, I am satisfied that a suspended sentence and three years' probation is a fit sentence for Ms. Ellis.

Proceedings in the Provincial Court

The Offences

- [15] An agreed statement of facts was filed at sentencing and is summarized at paras. 5--14 of the judge's reasons for sentence, indexed as 2021 BCPC 280 (the "Reasons for Sentence").

- [16] On three occasions between November 20, 2019 and December 5, 2019, Ms. Ellis sold small amounts of illicit drugs to an undercover police officer. The drugs included fentanyl. The transactions were arranged directly by phone with Ms. Ellis. During one of those transactions, Ms. Ellis's young daughter was in the car for part of her mother's interaction with the undercover officer.
- [17] Ms. Ellis was arrested on December 5, 2019. The police found drugs wedged between the driver's seat and the centre console of her car. Ms. Ellis had approximately \$1,734 in cash. There was crack cocaine in her jacket pocket; a plastic container with drug residue in her car; and a digital scale with residue that included cocaine and fentanyl. There was drug paraphernalia in the car, including a glass pipe with a hose that was between Ms. Ellis's knees upon her arrest.

Personal Circumstances of Ms. Ellis

- [18] Ms. Ellis testified at the sentencing hearing. She was then 41 years old. Ms. Ellis is not Indigenous; however, she has two Indigenous daughters. The eldest daughter was living away from home and attending university when Ms. Ellis committed her offences. The youngest daughter lived with Ms. Ellis's mother, who has legal custody of her. At the time of sentencing, Ms. Ellis was also staying with her mother, who lives on the Quinsam Reserve adjacent to the community of Campbell River.
- [19] In her testimony, Ms. Ellis told the judge that:
- She has been addicted to drugs since Grade 8.
 - Her longest period of sobriety has been approximately two years.
 - Initially, her drug of choice was crack cocaine. Now, it is heroin (consisting largely of fentanyl), although she continues to smoke crack.
 - She has attended a residential treatment centre seven times, but continues to use drugs.
 - She has also engaged in other forms of counselling.
 - Although court orders have kept her "accountable for the things that need to be done or the things that the court [wants her] to do", she has not found conditional sentence orders or probation orders to be of any benefit in addressing her substance use disorder.
 - After her partner died in August 2019, she began selling fentanyl to support her own drug habit and to "do what [she] could" for her children. At the time, she was receiving about \$740 per month in income assistance.
 - Her days would focus on where she was going to obtain her drugs. That was "always going through [her] head" and it is why she "picked up the drugs right away" after her partner died and began selling them.

- She generally sold only to people she knew. She sold to a group of about five to ten people.
- Most of the time, she sold fentanyl. Occasionally, she would sell cocaine.
- The fentanyl came from the people who sold drugs to her for her own use. She packaged the drugs for resale. She did not work for someone. Nor did anyone work for her.
- Generally, Ms. Ellis would conduct three to eight drug transactions per day. She would reload her resale supply every three days.
- In addition to heroin and crack cocaine, Ms. Ellis has been using methadone for more than 20 years, but does not believe it has helped her. Methadone has kept her from experiencing significant withdrawal symptoms, but it is "absolutely all through [her] bones and everything and [she does not] even want to know what it would be like to come off that".
- Spending time in jail has not stopped her from taking drugs. She cleans up for awhile, but then returns to the "same problems, the same struggles". Probation orders have not stopped her from taking drugs because she has "never really gotten any help through probation".
- She has experienced "bad withdrawal in jail a couple [of] times and it was horrible." But, because of the methadone, she did not have to "endure the worst of the worst".
- The majority of "profit" she made from selling drugs went towards her own habit. She also used some of the money to help out with personal expenses and occasionally she would have some left over to buy clothing for her children.
- She believes she did not have any other choice but to sell. She was "hooked on the drugs and [she] was dealing with the grief of somebody [she] had been with for a long time and [did not] know how to deal with it".
- What would assist her the most would be to get her own place, regain custody of her youngest daughter, be "on the proper medications that are going to help her", keep busy and be around supportive people.
- Even though she has been prosecuted for trafficking, if selling drugs "meant not going through withdrawal", she would probably do it again.

[20] The judge described Ms. Ellis's life as "dismal" (at para. 20). She found her to be a "candid and forthright witness". When testifying, Ms. Ellis "appeared very sad and defeated" (at para. 33).

Expert Medical Evidence

[21] Ms. Ellis called an expert witness at the sentencing hearing.

- [22] Dr. Ryan McNeil is an Assistant Professor in General Medicine and a Director of Harm Reduction Research at the Yale School of Medicine. He also works as an Affiliated Scientist with the Qualitative and Community-Based Research Team at the British Columbia Centre on Substance Use and as an Affiliated Assistant Professor of Medicine at the University of British Columbia.
- [23] Dr. McNeil was qualified by the judge to give expert opinion evidence in four areas: (a) overdose risk, prevention and harm reduction; (b) demographics of drug users in British Columbia; (c) physiology of opioid addiction (including the effectiveness of denunciation and deterrence on drug users); and (d) drug jargon and slang.
- [24] The Crown did not take issue with Dr. McNeil's expertise; however, it argued his evidence was inadmissible because it was neither relevant nor necessary to the sentencing of Ms. Ellis. The Crown said that some of the issues to be addressed by Dr. McNeil did not arise on the facts of the case and, importantly, the doctor would speak in generalities only. He did not meet or personally interview and assess Ms. Ellis.
- [25] The judge rejected the Crown's position.
- [26] After a voir dire testing the admissibility of Dr. McNeil's evidence, the judge ruled that the doctor's testimony was relevant to "important aspects" of the sentencing analysis, including an assessment of Ms. Ellis's moral blameworthiness. His evidence would also enable the judge to understand how "communities may be shifting in their beliefs regarding drug addicts and drug sellers, those involved in that lifestyle, and how that may have shifted in the four years since Smith was decided": *R. v. Ellis* (4 February 2021), Campbell River, BC, Dockets 41820-1, 41820-2-C (voir dire) at para. 24.
- [27] The judge admitted Dr. McNeil's testimony. After hearing from him, the judge confirmed that the evidence was helpful. It was "relevant to [the judge's] understanding of Ms. Ellis's circumstances: her drug addiction, its causes and why she committed the index offence[s]." Dr. McNeil's testimony about the "best clinical approaches to effectively treating substance use disorders, from which Ms. Ellis suffers, [was] also relevant to [the judge's] assessment and determination of how to weigh and blend all the objectives of sentencing, including deterrence and rehabilitation" (Reasons for Sentence at paras. 99, 136).
- [28] Relying on Dr. McNeil's evidence, the judge informed her sentencing analysis with reference to the following propositions:
- People with substance use disorders overwhelmingly have a history of trauma, poverty, mental health issues and involvement in the child welfare system (at para. 106).
 - People with substance use disorders who sell drugs to others at the street level are among the most marginalized and vulnerable individuals in society (at paras. 106, 121).
 - They are easy enforcement targets for the police and when removed from the streets, they are easily replaced with other street-level traffickers (at para. 106).

- People with substance use disorders do not think rationally when they need more drugs to prevent withdrawal (at para. 107).
- Using additional drugs to prevent withdrawal is more of a biological imperative than a rational choice (at para. 107).
- In most communities in British Columbia, the only way people who suffer from substance use disorders can obtain the drugs they need is to buy from traffickers or to become a trafficker themselves and to keep a portion of their supply for their own use (at para. 107).
- The presence of fentanyl in trafficked drugs is now ubiquitous (at para. 108).
- Evidence-based treatment is the most effective deterrent for people who suffer from a substance use disorder (at para. 127).
- Incarceration does not address the underlying causes of a substance use disorder (at para. 127).
- Numerous law enforcement agencies, government, medical professionals and others have come to accept that a substance use disorder is a health or medical condition (at para. 127).

Expert Police Evidence

- [29] A 20-year member of the RCMP testified at the sentencing hearing. Constable Jones was qualified to provide expert opinion evidence on "trafficking in heroin, fentanyl and cocaine, by way of dial-a-dope and at the street level" (at para. 35).
- [30] Constable Jones agreed that street-level traffickers tend to be "highly marginalized" and are often "selling drugs to support their own use and struggle with unstable housing" (at para. 41). Drug use has "taken over their life" (at para. 41). He said:
- [44] many drug sellers are selling to support their drug addiction and that addicts in the throes of withdrawal, are highly motivated to support their habit including resorting to violence, committing break and enters and theft and prostitution. He agreed that these individuals will continue to use drugs despite the negative consequences of unemployment, loss of family and threats of criminal punishment.

Opioid Crisis in British Columbia

- [31] Evidence of British Columbia's ongoing opioid crisis was before the judge. She found that since April 2016, overdose deaths have continued to climb:
- [68] The public health crisis that was officially declared by the Provincial Health Officer on April 14, 2016, has continued, essentially, unabated. Despite the use of these emergency powers, additional funding for initiatives to "save lives, end stigma and improve access to services for people struggling with addiction", the sad reality is that the deaths caused by drug overdose continues to escalate. The most recent report from the BC Coroners Service for the period ending September 30, 2021, shows that the deaths from suspected illicit drug toxicity in August and September, 2021 were the largest ever recorded since the emergency was

declared. Based on this data, about 5.5 people are dying every day in British Columbia from toxic drugs. The deaths from toxic drugs for 2021 are the highest ever recorded in the first nine months of a calendar year and represent a 24% increase over the same period in 2020. To place this in stark perspective, in 2016, 992 people died from illicit toxic drugs compared to 1,534 for the first nine months of 2021. If this continues at the same rate and barring continued increases, the province is on track to record over 2,000 deaths by the end of this year.

[69] The number of deaths due to illicit drug toxicity is markedly higher than deaths by suicide, motor vehicle incidents, homicide or prescription drugs. The vast majority of deaths occur in a residence (over 80%). A quarter of these deaths occur in residences described as hotels, motels, rooming houses, single room occupancy residences, shelters and/or other social/supportive housing environments. Illicit fentanyl and its analogues were involved in 87% of these deaths, an increase from about 30% in 2015.

[70] Between January and August, 2021, the report indicates that nineteen people in the Greater Campbell River area died as a result of toxic illicit drug overdose.

[Emphasis added.]

The Sentence

[32] The Crown sought a cumulative sentence of three years' imprisonment. Ms. Ellis asked for a suspended sentence with probation and minimal conditions.

[33] On November 29, 2021, the judge imposed a suspended sentence with 12 months' probation.

[34] In addition to the conditions mandated by the Criminal Code, R.S.C. 1985, c. C-46, the judge ordered that Ms. Ellis report to a probation officer no more than once every two months. The probation officer can refer Ms. Ellis to a forensic psychiatrist or for medical assessment to determine the "best evidence-based medical treatment appropriate for her" (at para. 147). However, according to the order, any such referral may only be done with Ms. Ellis's consent. The probation officer can also refer Ms. Ellis to counselling or life skills programming. However, this too requires Ms. Ellis's consent.

[35] The judge imposed 30 hours of community work service as a condition of probation. She then stated:

[149] Ideally, this work service will also involve some remuneration as a means of assisting Ms. Ellis financially but also to help her gain confidence in herself. The community service would be of a kind that places Ms. Ellis with people who are healthy individuals and not suffering from an active drug addiction. This is to be completed by March 31, 2023. Any hours involving a psychiatric/medical assessment or treatment as provided for by this order, counselling or life skills program will be deduced from her community work service hours.

- [36] The deadline for completing the community work service is four months past expiry of the sentence. The parties agree that this is an error. It does not allow for enforcement of the work service condition during the term of the order.
- [37] The judge also imposed a mandatory 10-year weapons prohibition under s. 109 of the Criminal Code, ordered that Ms. Ellis provide a sample of her DNA for inclusion in the national data bank, and exempted her from paying a victim surcharge.

Reasons for Sentence

- [38] At the start of her reasons, the judge acknowledged that Ms. Ellis was asking the court to "revisit the efficacy and utility of deterrence and denunciation and the use of carceral sentences involving street-level trafficking and drug use" (at para. 3).
- [39] The judge began her response to that submission by considering Smith. She understood that the sentencing range in Smith arose from greater public and judicial awareness of the supply and toxicity of fentanyl (at para. 74). In setting the 18-36 months range, this Court was responding to "the justifiable concern and outrage over the increasingly large rates of overdose deaths and harm caused by fentanyl, carfentanil and their analogues" (at para. 77).
- [40] After reviewing Smith, the judge analyzed whether she could reconsider the range.
- [41] Relying on *Canada (Attorney General) v. Bedford*, 2013 SCC 72, the judge decided she did not have to treat Smith as a "binding precedent" if satisfied "there has been a shift in the legal or social landscape" specific to the "sentencing of offences involving the sale of drugs at the street level, including fentanyl" (at paras. 81-82).
- [42] Based on the evidence before her, the judge determined that a "fundamental shift" has indeed occurred. From her perspective, the evidence established that:
- [88] since the onset of the opioid crisis in 2016, and since the Smith decision, there has been a fundamental shift in societal understanding of drug addiction - the underlying causes, risk factors and the best evidence based treatment protocols and guidelines. There has also been a fundamental shift in understanding the consequences for those who are addicted - specifically the relationship between the addiction, the need to have access to a drug, the imperative to avoid the severe effects of withdrawal and the low level or street level trafficking of those drugs
- [Emphasis added.]
- [43] Relying on these "shifts", the judge decided she was entitled to "revisit the sentencing range established in Smith for drug trafficking at the street level and to consider the role of deterrence and denunciation in assessing a fit sentence for these individuals" (at para. 88). See also para. 142.
- [44] The judge found:

[125] There is a difference in the moral culpability of someone selling small quantities of drugs in an unsophisticated manner primarily to support their own substance use and, in contrast, the mid and high level, organized, sophisticated drug supplier/dealer who is not necessarily addicted, but profits substantially from the sale of these drugs

[45] In light of this difference, the judge concluded that:

[138] drug addicts who sell small quantities of drugs at the street level for the primary purpose of ensuring their own drug supply, are far less morally culpable than those farther up in the hierarchy. They are motivated, not for profit or greed, but to ensure their own supply and to avoid the severe effects of withdrawal.

[Emphasis added.]

[46] As a result, from the judge's perspective, it is only the "mid and high level, organized, sophisticated drug supplier/dealer" who is:

[125] most deserving of the full weight of the law and a sentence in those circumstances clearly requires a substantial emphasis on denunciation and deterrence and separation from society

[Emphasis added.]

[47] Ms. Ellis is not a "mid [or] high level, organized, sophisticated supplier/dealer." Instead, she is a "low-level street-level addict[ed] seller" and, as a result, the judge found that her moral blameworthiness for trafficking in fentanyl was "significantly reduced" (at paras. 128, 135, 138, 140). She is not the kind of offender whose sentence "requires a substantial emphasis on denunciation and deterrence" (at para. 125).

[48] The judge acknowledged that selling fentanyl is a "serious offence" (at para. 128). Fentanyl is "dangerous, it is ubiquitous and people are dying because of it" (at para. 128). However, she noted that sentences must be proportionate and the principle of proportionality "incorporates not only the gravity of the offence, but also the moral blameworthiness of the offender" (at para. 140). The judge found that:

[140] the moral culpability of the addict who sells small amounts at a street level, is significantly attenuated by the nature of the addict's illness. This involves one addict selling to another addict. Both individuals are the people who are at risk of an overdose death.

[Emphasis added.]

[49] Taking Ms. Ellis's diminished moral blameworthiness into account, the judge considered a fit sentence to be a suspended sentence with 12 months' probation. The judge was satisfied that the principles of deterrence and denunciation, to the extent they might apply to Ms. Ellis, would be met through the existence of the criminal proceeding, the fact that Ms. Ellis had been subject to bail for two years while awaiting sentencing, and that she would now have two more convictions for trafficking-related offences (at para. 142).

[50] The judge described the sentence she imposed as having a "restorative focus" (at para. 143). The sentence would:

[143] assist Ms. Ellis in her desire to associate with healthy people, learn other skills and tools that will assist her in managing her illness but, most importantly, assist her in realizing that she is a valuable and contributing member of this community. Ms. Ellis is deserving of appropriate evidence-based medical treatment and with assistance of counsel, Ms. Ellis will be referred to the appropriate medical professionals with expertise in evidence-based medical treatments as outlined by Dr. McNeil.

Proceedings in This Court

Issues on Appeal

[51] The Crown contends that the sentence reflects three errors in principle. The Crown says the judge: (a) failed to conduct an individualized assessment of Ms. Ellis's moral culpability and, instead, sentenced her based on general characteristics attributed to people with a substance use disorder who sell for subsistence reasons; (b) erred in relying on inadmissible expert opinion evidence in determining a fit sentence; and (c) gave inadequate effect to the principles of deterrence and denunciation by failing to consider or give sufficient weight to the gravity of Ms. Ellis's conduct.

[52] In its reply to Ms. Ellis's statement in the appeal, the Crown fleshed out the first of these alleged errors, arguing that the failure to conduct an individualized assessment is apparent from the judge's decision to apply a "rigid class-based sentencing paradigm" (emphasis added).

[53] The Crown also says that a sentence of 12 months' probation with minimal conditions is demonstrably unfit. Ms. Ellis is not a first-time offender. Moreover, she committed grave offences that carried a palpable risk of harm to others, including the realistic potential for accidental and fatal overdose.

[54] In response, Ms. Ellis says the judge did not commit errors in principle. To the contrary, the sentencing decision reflects a principled determination, supported by expert opinion evidence, that "to prioritize the goals of denunciation and deterrence (punishment) over rehabilitation (evidence-based treatment)" for street-level traffickers such as Ms. Ellis who suffer from a substance use disorder is to "encourage rather than curtail the concerns outlined in Smith." Ms. Ellis contends that a sentence of 12 months' probation was reasonable in the circumstances and gives meaningful effect to the principle of proportionality in light of her diminished moral culpability.

Interveners

[55] Five parties were granted leave to intervene in this appeal.

- [56] The Vancouver Area Network of Drug Users ("VANDU") submits that in the context of the current opioid crisis, non-carceral sentences should "regularly be available for street-level fentanyl traffickers" who traffic to support their own drug use. VANDU says the principle of denunciation should not apply to these offenders, whose moral blameworthiness is diminished. From VANDU's perspective, "[h]arshly punishing these individuals for a crisis that claims them as its victims is perverse". VANDU further submits that street-level traffickers often have "little to no choice" between selling fentanyl and different drugs, because fentanyl is now found in nearly all drugs. As such, the intention in Smith to impose a higher sentencing range for fentanyl as opposed to other drugs should be reconsidered in light of this "material change in the surrounding circumstances".
- [57] The Independent Criminal Defence Advocacy Society ("CDAS") intervened to address the use of expert opinion evidence at sentencing. It asks the Court to endorse the admissibility of "general opinion evidence" for the purpose of assessing the moral blameworthiness of marginalized offenders "who would otherwise not be able to afford an individualized opinion". CDAS submits that a professional assessment specific to the offender is not necessary.
- [58] The West Coast Legal Education and Action Fund ("West Coast LEAF") submits that Ms. Ellis's position in favour of non-carceral sentences finds support in a "gendered and substantive equality-informed legal analysis". West Coast LEAF says the Court in Smith "did not engage with systemic evidence about gendered experiences of drug use, addiction and incarceration". This fact supports a reconsideration of the decision and a range that properly considers the "ineffectuality and harms of incarcerating marginalized, street-level drug dealers", particularly the disproportionate impact on women and people of marginalized genders.
- [59] I pause to note that Ms. Ellis did not advance a "gendered and substantive equality-informed legal analysis" in the Provincial Court. She did not ask the judge to consider this analytical path as a basis for revisiting Smith and the judge provided no analysis of it. Dr. McNeil's evidence did not focus on systemic evidence about gendered experiences of drug use, substance use disorder and incarceration.
- [60] While I appreciate that this is an important issue, West Coast LEAF has introduced a new issue in the appeal and in support of its analysis, seeks to expand the sentencing record with correctional statistics and investigational reports. This is something interveners are not ordinarily entitled to do. Indeed, the April 2022 order granting intervener status explicitly precluded the interveners (with one exception), from adducing evidence or otherwise supplementing the record. Consequently, I have considered West Coast LEAF's submissions only to the extent that they may be relevant to issues before the Court as framed by the Crown and Ms. Ellis.

- [61] The Canadian Drug Policy Coalition ("CDPC") intervened to emphasize the authority of a judge to depart from an established sentencing range without a fundamental change in the legal or social landscape. Consistent with the submissions of the other interveners, the CDPC also says that "people who are driven to selling drugs on the street to address their own drug dependence have significantly reduced moral blameworthiness". Moreover, sending them to jail can cause them significant harms, including disrupting their access to essential medical treatment and increasing the risk of relapse, overdose and re-offending.
- [62] The We Wai Kai Nation ("We Wai Kai") obtained intervener status and was granted leave to apply to adduce fresh evidence in the appeal. Ms. Ellis trafficked on or near a We Wai Kai reserve. It is We Wai Kai's position that "any development in the law of sentencing for opioid trafficking offences should be informed by the perspective of Indigenous communities, which bear a disproportionate share of the harm caused by illicit drugs". We Wai Kai does not oppose restorative sentences for street-level trafficking in fentanyl. However, "where there is evidence suggesting proximity between the offender and an Indigenous community, the risks and impacts to that community must be taken into account."

Discussion

- [63] To resolve this appeal, I find it helpful to pose four overarching questions:
- Was Dr. McNeil's evidence properly before the judge?
 - Did the judge use Dr. McNeil's evidence for an improper purpose?
 - Did the judge err in her approach to the Smith range?
 - If the judge committed material errors, what is a fit sentence for Ms. Ellis?
- [64] The specific issues raised by the parties and addressed by the interveners will be considered in the course of answering these questions.

Was Dr. McNeil's Evidence Properly Before the Judge?

- [65] As I understand the Crown's position, it accepts that the bulk of Dr. McNeil's evidence was admissible. However, parts of his testimony were improper. The Crown says Dr. McNeil testified about matters for which he was not qualified by the judge to give evidence. Furthermore, he wrongly engaged in "advocacy for the decriminalization of hard drugs", including expressing personal views on "how best to use public funds to combat the opioid crisis." The Crown argues that decriminalization was not an issue before the judge; in any event, public, private and non-profit initiatives aimed at the decriminalization of hard drugs have predominantly focused on possession, not trafficking, and it is up to the federal government, not the Provincial Court, to determine what conduct should be proscribed as criminal and the sanctions for it. A judge's role at sentencing is to assess and impose sentences in individual cases applying the existing legislative framework and established principles of sentencing (both codified and at common law), not to determine Canada's legislative and policy approach to the crime of drug trafficking.

- [66] The Crown says the judge relied on Dr. McNeil's improper testimony to erroneously conclude that she could revisit or reconsider the Smith range based on a material change in circumstances and render the principles of deterrence and denunciation to be of little or no relevance to street-level traffickers with a substance use disorder. The Crown says Dr. McNeil's improper testimony and the use made of it directly affected the sentence the judge imposed on Ms. Ellis and resulted in a demonstrably unfit sanction.
- [67] Ms. Ellis disagrees. She says Dr. McNeil's testimony was directly relevant to "assessing which sentencing principles ought to be prioritized when sentencing a certain class of offenders" (emphasis added). The issue of decriminalization was "relevant and inherent to the assessment of appropriate responses for any criminalized activity -- not just simple possession, and [this includes] drug trafficking."

General Principles on the Admissibility of Evidence at Sentencing

- [68] Before addressing the specifics of the complaints about Dr. McNeil's evidence, it is helpful to set out the general principles governing the admissibility of evidence at sentencing.
- [69] Section 723(2) of the Criminal Code allows a judge at sentencing to "hear any relevant evidence presented by the prosecutor or the offender." Hearsay evidence is admissible: s. 723(5). In *R. v. Gardiner*, [1982] 2 S.C.R. 368, the Supreme Court of Canada confirmed that sentencing judges have "wide latitude" in the types of evidence they may consider when determining a fit sentence (at 414):

the strict rules which govern at trial do not apply at a sentencing hearing and it would be undesirable to have the formalities and technicalities characteristic of the normal adversary proceeding prevail. The hearsay rule does not govern the sentencing hearing. Hearsay evidence may be accepted where found to be credible and trustworthy. The judge traditionally has had wide latitude as to the sources and types of evidence upon which to base his sentence. [They] must have the fullest possible information concerning the background of the accused if [they are] to fit the sentence to the offender rather than to the crime.

[Emphasis added.]

- [70] The "wide latitude" allows for the admission of social context evidence, which is how I characterize Dr. McNeil's testimony.
- [71] In *R. v. Le*, 2019 SCC 34, the majority defined social context evidence as a type of "social fact" evidence that provides "a frame of reference or background context" for resolving critical factual issues (at para. 83). At sentencing, this kind of evidence "ensures relevant systemic and background factors are integrated in the crafting of a fit sentence": *R. v. Anderson*, 2021 NSCA 62 at para. 114.
- [72] Social context can be established by way of direct evidence (testimony, expert opinion evidence or other professional reports), admissions (including agreed statements of fact), or judicial notice: *Le* at para. 83. It can also be introduced in the form of "authoritative studies,

research and articles": Le at para. 89. As aptly explained by David Tanovich in "Relevance, Social Context and Poverty" (2003) 9 Criminal Reports (6th) 348, social context evidence assists judges in understanding the social realities of witnesses or parties to the litigation, including the extent to which social conditions may have motivated or otherwise impacted their behavioural choices.

- [73] This type of evidence can also play a critical role in ensuring that a judge's "relevance and probative value determinations are not compromised by stereotypes and biases" and lead to a discriminatory result: "Relevance, Social Context and Poverty" at 349. The risk of discriminatory reasoning is substantially ameliorated when a judge "factors in the larger political, legal and social context within which the evidence arises" (at 349, internal references omitted).
- [74] The proper use of social context evidence at sentencing was comprehensively considered by the Ontario Court of Appeal in *R. v. Morris*, 2021 ONCA 680.
- [75] In *Morris*, the Crown appealed a sentence imposed for a handgun offence. Mr. Morris is Black. He was almost 23 years old when he committed the offence. At sentencing, the judge admitted a report that provided a "scholarly, comprehensive, and compelling description of the widespread and pernicious effect of anti-Black racism" (at para. 42). A second report was also admitted, which included a review of Mr. Morris' social history and sought to link Mr. Morris' personal circumstances to the first report's commentary on systemic racism.
- [76] The Ontario Court of Appeal held that the first report, although not specific to Mr. Morris, was admissible as social context evidence. From the court's perspective, the first report could assist the sentencing judge in two ways. First, the information was relevant to assessing moral blameworthiness and "understand[ing] how Mr. Morris ended up where he did" (at para. 42). Second, the report provided "valuable insight" for applying the principles of deterrence and rehabilitation to Mr. Morris:

75 an offender's life experiences can certainly influence the choices made by the offender, and can explain, to some degree at least, why an offender made a choice to commit a particular crime in the specified circumstances. Those life experiences can include societal disadvantages flowing from systemic anti-Black racism in society and the criminal justice system.

79 social context evidence can provide a basis upon which a trial judge concludes that the fundamental purpose of sentencing, as outlined in s. 718 [of the Criminal Code], is better served by a sentence which, while recognizing the seriousness of the offence, gives less weight to the specific deterrence of the offender and greater weight to the rehabilitation of the offender through a sentence that addresses the societal disadvantages caused to the offender by factors such as systemic racism.

80 Blending the various objectives of sentencing is the essence of the sentencing process. There is seldom one and only one fit sentence. As long as the sentence imposed complies with the proportionality requirement in s. 718.1, trial judges are given considerable discretion to decide how best to blend the various legitimate objectives of sentencing. If trial judges operate within that band of discretion, the different weight assigned to different objectives may produce different but nonetheless equally fit sentences.

81 In the present case, the social context evidence provided a basis upon which the trial judge could give added weight to the objective of rehabilitation and less weight to the objective of specific deterrence. By doing so, the trial judge would not diminish the seriousness of the crime, but would recognize that the ultimate sentence imposed must be tailored to the specific offender and the potential rehabilitation of that offender. As long as the sentence ultimately imposed remains proportionate to the offence and the offender, the actual sentence imposed would be a fit sentence.

91 There can be no doubt that evidence on sentencing, describing the existence and effect of anti-Black racism in the offender's community and the impact of that racism on the offender's circumstances and life choices is part of the offender's background and circumstances. The evidence is not only admissible, it is, in many cases, essential to the obtaining of an accurate picture of the offender as a person and a part of society.

102 Social context evidence can also be relevant on sentencing even if it does not tend to mitigate the offender's moral culpability. As indicated earlier, social context evidence can provide valuable insight, both with respect to the need to deter the offender from future conduct, and the rehabilitative prospects of the offender. Evidence about an offender's background and circumstances allows the sentencing judge to more accurately assess how sometimes competing objectives of sentencing, such as rehabilitation and denunciation, can best be blended to produce a sentence that accords with the proportionality principle and serves the fundamental purpose of sentencing articulated in s. 718.

106 In summary, social context evidence, which helps explain how the offender came to commit the offence, or which allows for a more informed and accurate assessment of the offender's background, character and potential when choosing from among available sanctions, is relevant and admissible on sentencing

[Emphasis added.]

[77] I agree with the analysis in *Morris*, including the court's comment that "a generous gateway for the admission of objective and balanced social context evidence should be provided" at sentencing (at para. 13). As aptly submitted by CDAS, a restrictive approach to admissibility that requires an individualized assessment of each offender would likely impede access to justice for marginalized offenders who do not have the resources to obtain individualized expert opinions. It is not only in the interests of offenders, but also the administration of justice, that judges "have the fullest possible information concerning the background of the accused if [they are] to fit the sentence to the offender rather than [exclusively] to the crime":

Gardiner at 414.

- [78] In my view, the use of social context evidence for the purposes identified in *Morris* is consistent with long-standing sentencing practices and principles, and logically fits within the existing statutory and common law sentencing framework.
- [79] It has long been the case that an offender's background may properly affect a sentencing court's assessment of moral blameworthiness.
- [80] In *R. v. Gladue*, [1999] 1 S.C.R. 688 at paras. 66-69 and *R. v. Ipeelee*, 2012 SCC 13 at paras. 73-77, the Supreme Court of Canada affirmed the critical importance of this principle in the context of s. 718.2(e) of the Criminal Code specific to the sentencing of Indigenous offenders.
- [81] Non-Indigenous offenders are also entitled to present background information as a basis for a finding of diminished moral culpability. Lived experiences involving "social and economic deprivation, historical disadvantage, diminished and non-existent opportunities, and restricted options" can be highly relevant to assessing blameworthiness: *Anderson* at para. 146. As explained in *Morris*, "an offender's life experiences can influence the choices made by the offender, and can explain, to some degree at least, why an offender made a choice to commit a particular crime in the specified circumstances" (at para. 75).
- [82] It is also well-understood that judges have "significant, although not unfettered, discretion in weighing the principles of sentencing in determining a fit sentence that accords with the overarching principle of proportionality": *Anderson* at para. 154. In *R. v. Nasogaluak*, 2010 SCC 6, the Supreme Court of Canada confirmed that as a general rule and in the absence of a statutory mandate to the contrary, "[no] one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case" (at para. 43). Thus, the wording in *Smith*: "denunciation and deterrence must generally be given primacy in sentencing in cases involving Fentanyl" (at paras. 45, 48-49, emphasis added).
- [83] One of the questions addressed in *Morris* was whether an offender must establish a causal link between their offences and social context evidence adduced at sentencing before that evidence can properly be used to fashion a sentence. The Ontario Court of Appeal rejected the need for a strict causal relationship. However, it held that:

97 There must be some connection between the overt and systemic racism identified in the community and the circumstances or events that are said to explain or mitigate the criminal conduct in issue. Absent some connection, mitigation of sentence based simply on the existence of overt or institutional racism in the community becomes a discount based on the offender's colour. Everyone agrees there can be no such discount

[Internal references omitted; emphasis added.]

I agree with this approach. See also *Anderson* at para. 118.

[84] What social context evidence cannot do is reduce the gravity of an offence and obviate the principles and objectives of deterrence and denunciation in the sentencing process: *Morris* at paras. 78, 149. In *R. v. Hamilton* (2004), 241 D.L.R. (4th) 490, 2004 CanLII 5549 (O.N.C.A.), the "gravity" of an offence was described as:

90 the seriousness of the offence in a generic sense as reflected by the potential penalty imposed by Parliament and any specific features of the commission of the crime which may tend to increase or decrease the harm or risk of harm to the community occasioned by the offence

[85] On this point, I also agree with *Morris*:

[76] Evidence that an offender's choices were limited or influenced by [their] disadvantaged circumstances, however, speaks to the offender's moral responsibility for [their] acts and not to the seriousness of the crimes

[77] It is important to preserve the distinction between factors relevant to the seriousness or gravity of the crime on the one hand, and factors relevant to the offender's degree of responsibility on the other. Unless the distinction is maintained, the proportionality principle may be misapplied. A sentence, like the sentence imposed here, which wrongly discounts the seriousness of the offence to reflect factors which are actually relevant to the offender's degree of responsibility, will almost inevitably produce a sentence that does not adequately reflect the seriousness of the offence and, therefore, fails to achieve the requisite proportionality.

[Emphasis added.]

See also *Hamilton* at para. 139.

Application of Principles

[86] Applying the *Morris* framework to this case, I agree with Ms. Ellis and CDAS that Dr. McNeil's evidence was properly before the judge.

[87] Moreover, I accept that it was not necessary for Dr. McNeil to conduct an individualized assessment of Ms. Ellis before his evidence was available for use by the judge in crafting a fit sentence. As a matter of logic, common sense and inferential reasoning, a sentencing judge may find "some connection" between social context evidence and an offender's personal circumstances based on information provided about that offender through the offender's testimony, court-ordered or privately-retained reports specific to the offender, affidavit evidence, admissions or uncontested statements by counsel. If the Crown takes issue with social context facts adduced on behalf of an offender or their personal circumstances, it can invoke s. 724(3)(d) of the Criminal Code and the offender will bear the burden of proving the relevant facts.

- [88] The point of requiring "some connection" is not to ensure a causal link between the social context evidence and the offender's crime; rather, it ensures that the sentencing assessment remains specific to the offender because the issues addressed by the evidence are consistent with or find form in the offender's background or personal circumstances. With a discernible nexus, the social context evidence can reasonably inform the individualization of the sentence: *Ipeelee* at para. 83.
- [89] I accept that Ms. Ellis's testimony provided a sufficient basis from which the judge could find "some connection" between Ms. Ellis and Dr. McNeil's evidence and use the doctor's testimony to inform her analysis of moral blameworthiness. I also accept that the judge could use Dr. McNeil's evidence to inform her application of the principles of deterrence and rehabilitation in the specific context of this case and to determine which of those principles merited the greatest weight: *Morris* at para. 102; *Nasogaluak* at para. 43.
- [90] The Crown contends that there were parts of Dr. McNeil's evidence that extended beyond the areas for which he was qualified to testify; in particular, decriminalization and his views of how best to spend public funds in addressing the opioid crisis.
- [91] It is not clear to me that such is the case, given the broadly defined areas for which Dr. McNeil was qualified to give evidence. It is also the case that some of the complained-of evidence was specifically elicited from Dr. McNeil by Crown counsel at the hearing. Thus, even if parts of Dr. McNeil's evidence transgressed permissible bounds, I cannot say that this fact -- standing alone -- rendered the sentencing hearing unfair and provides a principled foundation for appellate intervention with the sentence.
- [92] For ease of reference, Dr. McNeil was qualified to testify in four areas: (a) overdose risk, prevention and harm reduction; (b) demographics of drug users in British Columbia; (c) physiology of opioid addiction (including the effectiveness of denunciation and deterrence on drug users); and (d) drug jargon and slang.
- [93] During his testimony, Dr. McNeil was asked by counsel for Ms. Ellis whether research has been conducted on what the criminal justice system "can do to reduce the harm associated with the opioid crisis". In response to that question (not objected to by the Crown), Dr. McNeil testified that there are organizations, such as the United Nations Aids Program, that have "advocated for drug decriminalization". He said a "shift toward drug decriminalization" has also been "coming up more and more in a Canadian context". The relevant research is: all really pointing to the same conclusion, that our current approach to criminalizing drug use really does nothing but drive harm, including increasing overdose risks, while really not producing positive outcomes for people, and really calling into question whether or not it should continue to be pursued as a primary approach to substance use.
- [94] In cross-examination, Dr. McNeil was asked by the Crown what he would "suggest that we do" if trafficking in fentanyl at the street level is not addressed through incarceration or probation orders that mandate medication-based treatments. He responded this way:

Well, we, as a society? If I may take it there certainly the encouraging work that we've been doing around the implementation of safer supply programs suggest that there's a number of other pathways to address harms associated with drug selling be it treatment, be it a safer supply program, or something in between I think we could all agree there's this incredible tension right now in relation to the overdose crisis and how we're dealing with it, as a society, between public health or medical approaches and the criminal justice system, wherein we collectively, I think, have moved to the point where we identify opioid use and opioid use disorder as a medical condition. And yet, we're not treating it only as such and we need to further find ways to shift approaches to that it's a health issue and respond to it accordingly.

Which is to say it's for example, very expensive to incarcerate people and associated funds could likely go a long way to funding the types of evidence-based programs that could reduce these harms that I think we could agree about doing.

[Emphasis added.]

- [95] Finally, after Crown counsel finished cross-examining Dr. McNeil, the judge asked Dr. McNeil a number of questions. This included soliciting his opinion "about whether or not there's been any shifting of society's views about people" who use substances, including in British Columbia, and, more specifically, "over the last four or five years". In response, Dr. McNeil testified about various initiatives underway that are relevant to addressing the ongoing opioid crisis that reflect a growing awareness of the positive benefits arising from the de-stigmatization of substance use. In the course of his response, Dr. McNeil again mentioned decriminalization, describing it as an issue that is being discussed "at very high levels" and forms part of ongoing work that "shows a level of advancement that's highly encouraging."
- [96] As I read the references to decriminalization and Dr. McNeil's views on what would constitute an appropriate criminal justice response to street-level traffickers who suffer from substance use disorders, the impugned comments were largely made in response to questions directly put to him by Crown counsel and the judge, and within the context of a broader discussion of harm reduction and the effectiveness of deterrence on opioid drug users. These were areas for which the judge qualified Dr. McNeil to give evidence. In any event, as noted, even if parts of Dr. McNeil's evidence went beyond the qualifications ruling, I would not find that this fact, on its own, justifies a variation of sentence.
- [97] In my view, the important question is not whether Dr. McNeil's evidence was properly admitted. Rather, it is whether the judge used that evidence for an improper purpose.
- [98] I will now turn to that issue.

Did the Judge Use Dr. McNeil's Evidence for an Improper Purpose?

- [99] Based on her consideration of the evidence at sentencing, the judge concluded that since Smith, there has been a "fundamental shift" in how Canadian society views people who suffer from a substance use disorder.
- [100] Relying on Dr. McNeil's evidence, she found that "society, governments, medical professionals, and many others, [now] recognize that addiction is a complex health or medical condition caused by, or related to, numerous factors" (at para. 82). She accepted Dr. McNeil's evidence of "increasing calls to decriminalize [the] possession of illicit drugs and growing recognition that increased levels of resources are needed to effectively treat people suffering from a substance abuse disorder" (at para. 83).
- [101] From the judge's perspective, the developments in societal attitude impliedly "recogniz[e] that, in isolation, jail sentences and the involvement of the criminal justice system has not been effective in stemming the flood of fentanyl in the drug supply" (at para. 83).
- [102] The judge found a shift in both "societal and judicial attitudes and understanding about drug addiction and the factors that cause people to use and sell drugs" (at para. 86). She found there has been a "fundamental shift in societal understanding of drug addiction - the underlying causes, risk factors and the best evidence based treatment protocols and guidelines" (at para. 88). There has also been a "fundamental shift in understanding the consequences for those who are addicted", including the "low level or street level trafficking of those drugs" (at para. 88).
- [103] Based on these findings, the judge decided she was entitled to "revisit the sentencing range established in Smith for drug trafficking at the street level and to consider the role of deterrence and denunciation in assessing a fit sentence for these individuals" (at para. 88).
- [104] By "these individuals", the judge was referring to a specific category of offenders, namely: people who are "marginalized, poor and struggling with substance use disorders [and] who are selling small quantities of drugs for the primary purpose of ensuring their own drug supply" (at para. 112).
- [105] I agree with the judge that it was open to her to use Dr. McNeil's evidence to inform her analysis of Ms. Ellis's moral blameworthiness and to assist in the weighing of the principles of sentencing in the specific context of this case:
- [99] In my view, Dr. McNeill's evidence is relevant to my understanding of Ms. Ellis' circumstances: her drug addiction, its causes and why she committed the index offence[s]. This is relevant to her moral culpability. Dr. McNeil's expert evidence about the best clinical approaches to effectively treating substance use disorders, from which Ms. Ellis suffers, is also relevant to my assessment and determination of how to weigh and blend all the objectives of sentencing, including deterrence and rehabilitation.

See also paras. 97, 103, 121, 127-128, 135 of the Reasons for Sentence.

- [106] This use of the evidence is consistent with the Morris analysis and with long-standing sentencing practices and principles.
- [107] However, I agree with the Crown that in actuality, the judge did much more than this. She went beyond the acceptable two-fold use of Dr. McNeil's evidence to inform her sentencing determination and, by so doing, the judge erred in principle.
- [108] Apparently incentivized by Dr. McNeil's testimony and the "fundamental shifts" in societal attitude inferred from it, the judge expanded her sentencing analysis beyond an individualized assessment of Ms. Ellis's case and, effectively, conducted a general inquiry into the efficacy of the principles of deterrence and denunciation as applied to a particular class of offender. To be fair, this is what Ms. Ellis was encouraging the judge to do:
- [3] Ms. Ellis asks this court to revisit the efficacy and utility of deterrence and denunciation and the use of carceral sentences involving street-level trafficking and drug use
- [87] Ms. Ellis says that this Court should revisit the sentencing range established in Smith for those who sell fentanyl at the street level
- [112] Ms. Ellis is asking this court to revisit the sentencing range established in Smith as it applies to the individuals who are the most marginalized, poor and struggling with substance use disorders who are selling small quantities of drugs for the primary purpose of ensuring their own drug supply
- [123] As stated by Ms. Ellis in her submissions:

Addressing drug use and the corresponding opioid crisis first requires an end to stigma and criminalization, to be replaced by increased social supports: i.e. comprehensive, integrated health care that addresses physical and mental health needs, provides addiction treatment, such as housing and harm reduction. At the point of sentencing, rehabilitation must replace denunciation and deterrence as the primary sentencing principles.

[Emphasis added.]

- [109] Relying on Dr. McNeil's evidence, the judge concluded that this Court's emphasis on deterrence and denunciation in Smith is no longer appropriate, as a matter of law, for traffickers who struggle with a substance use disorder and "sell small quantities of drugs at the street level for the primary purpose of ensuring their own drug supply and to avoid the severe effects of withdrawal" (at para. 138). Consequently, the judge removed this category of offender, including Ms. Ellis, from application of the 18-36 months sentencing range in Smith.
- [110] The Crown has persuaded me that in so doing, the judge lost sight of the case-by-case nature of the sentencing process and its inherently individualized focus. Instead, her judgment sought to displace the Smith emphasis on deterrence and denunciation, or render it inapplicable, for all street-level traffickers who suffer from a substance use disorder and sell fentanyl to ensure their own drug supply. The judgment effectively declares the

principles of deterrence and denunciation -- and the use of incarceration to achieve their objectives -- as ineffective and therefore unavailable for this category of offender.

- [111] Respectfully, in taking this approach, I consider the judge to have committed the same type of error that the Ontario Court of Appeal found to exist in Hamilton. In that case, two Black single mothers pleaded guilty to importing cocaine from Jamaica. At sentencing, they sought conditional sentences and adduced expert opinion evidence "to the effect that general deterrence had little or no value in sentencing offenders like [them]" (at para. 5). The sentencing judge took a keen interest in the issues raised by the case and introduced over 1000 pages of his own research into the proceedings for counsel's consideration and response. The Ontario Court of Appeal concluded that the judge wrongly assumed the "combined role of advocate, witness, and judge" (at para. 65):

65 No doubt, the trial judge's extensive experience in sentencing cocaine couriers had left him with genuine and legitimate concerns about the effectiveness and fairness of sentencing practices as applied to single poor black women who couriered cocaine into Canada for relatively little gain. The trial judge unilaterally decided to use these proceedings to raise, explore, and address various issues which he believed negatively impacted on the effectiveness and fairness of current sentencing practices as they related to some cocaine importers. Through his personal experience and personal research, the trial judge became the prime source of information in respect of those issues. The trial judge also became the driving force pursuing those issues during the proceedings.

[Emphasis added.]

- [112] The judge in this case was not the "prime source" of the information adduced at sentencing, although I note she did independently reach out to counsel four months after the sentencing hearing to seek their "comments" about a provincial government announcement regarding safe drug supplies that was not part of the record before her.
- [113] Nor can it be said that the judge was the "driving force" behind the suggestion that emphasizing deterrence and denunciation in cases involving street-level fentanyl traffickers is ill-advised. This suggestion came directly from Ms. Ellis, supported by the evidence of Dr. McNeil.
- [114] However, in my view, the way the judge used Dr. McNeil's evidence had essentially the same effect as the approach taken in Hamilton. Ms. Ellis's sentencing proceeding, which should have focused exclusively on the determination of a fit sentence for Ms. Ellis, became a generalized "inquiry by the judge into much broader and more complex issues", including the efficacy of deterrence and denunciation for a particular type of offender and appropriate systemic responses to the opioid crisis: Hamilton at para. 3. I am satisfied the judge stepped outside of her proper role to establish a new, non-Smith sentencing approach for all street-level traffickers who suffer from a substance use disorder and who share some, many or all of the characteristics identified by Dr. McNeil.

[115] As noted by Justice Doherty, writing for the Ontario Court of Appeal in Hamilton:

[2] As difficult as the determination of a fit sentence can be, that process has a narrow focus. It aims at imposing a sentence that reflects the circumstances of the specific offence and the attributes of the specific offender. Sentencing is not based on group characteristics, but on the facts relating to the specific offence and specific offender as revealed by the evidence adduced in the proceedings. A sentencing proceeding is also not the forum in which to right perceived societal wrongs, allocate responsibility for criminal conduct as between the offender and society, or "make up" for perceived social injustices by the imposition of sentences that do not reflect the seriousness of the crime.

[Emphasis added.]

See also Morris at para. 56.

Did the Judge Err in Her Approach to the Smith Sentencing Range?

[116] In addition to an erroneous use of Dr. McNeil's evidence, I have concluded that the judge committed two errors in principle specific to her consideration of Smith.

"Exceptional Circumstances" are Not Required

[117] First, even though the judge instructed herself that sentencing ranges function as guidelines only (at paras. 115-118), she appears to have been of the view that Smith tightly circumscribes a court's discretion and that before a judge can properly impose a sentence of less than 18 months' imprisonment for street-level fentanyl trafficking, there must be "exceptional circumstances" that demonstrate rehabilitative progress since the commission of the offence:

[124] Unless there are exceptional circumstances such as someone remaining abstinent from drugs, completion of treatment programming or who has completely turned their lives around, a first time offender may well find themselves sentenced to jail for one and a half years.

[Emphasis added.]

[118] Exceptional circumstances are not required to justify a departure from the Smith range, including a sentence that is substantially below 18 months' imprisonment or even non-carceral. Justice Fitch emphasized this point in Choi (at paras. 22-24):

[22] This case was argued, in the trial court and on appeal, on the footing that the trial judge was required to find exceptional circumstances to impose a sentence below the bottom end of the range identified in Smith. Neither counsel referred to R. v. Parranto, 2021 SCC 46 at para. 40 [Parranto], where the Court emphasized that an appellate court should not artificially constrain the ability of the sentencing judge to impose a proportionate sentence by requiring a demonstration of "exceptional circumstances" when departing from a range (see also Friesen at paras. 111-112.)

[24] Friesen and Parranto provide helpful analytical clarity in cases where exceptional circumstances are raised as justifying a departure from a generally applicable range. The task of the sentencing judge in such cases is not to determine whether the offender has met some ill-defined exceptional circumstances threshold test, but to fashion a proportionate sentence.

[Emphasis added.]

See also *R. v. Graham*, 2022 BCCA 252 at paras. 10-12; *R. v. Kodimyala*, 2020 BCCA 275 at para. 24.

[119] At the sentencing hearing, the Crown correctly took the position that the "individualized approach to sentencing [provided the judge] sufficient latitude to allow [her] to arrive at a fit and appropriate sentence without the need to revisit the sentencing range set out in *Smith*" (Reasons for Sentence at para. 139). The CDPC has made this same point in its written statement in the appeal:

As the Supreme Court of Canada recently explained in *R. v. Parranto*, sentencing ranges are "navigational buoys" that "generally represent a summary of the case law that reflects the minimum and maximum sentences imposed by trial judges in the past". They "reflect[] individual cases, but do[] not govern them". They "are not and cannot be binding in theory or in practice". Sentencing judges may order a sentence outside the range identified by a higher court whenever necessary to achieve proportionality--even absent a change that fundamentally shifts the parameters of the debate.

[Footnotes omitted.]

[120] I agree. In *Schneider*, decided after *Smith*, this Court set aside the equivalent of 26 months' imprisonment for trafficking in heroin and substituted a suspended sentence with three years' probation. Mr. Schneider was "homeless, living on the streets, and addicted to heroin" (at para. 1). He sold heroin containing fentanyl to an undercover police officer. The Court reduced the sentence even though it recognized the primacy of deterrence and denunciation in these cases (at para. 22).

[121] There have been other cases post-*Smith* in the trial courts in which a suspended sentence and probation has been imposed for fentanyl-related offences. See, for example: *R. v. Lindsay*, 2020 BCSC 1815; *R. v. McMillan*, 2020 BCSC 2269; *R. v. Appell*, 2019 BCSC 2110; *R. v. Clementi*, 2019 BCSC 2316; *R. v. Medley*, 2019 BCSC 2384; *R. v. Knudsen*, 2019 BCPC 198; and *R. v. Dewat*, 2019 BCPC 183. This is not an exhaustive list.

[122] In *R. v. Livingston*, 2020 NSCA 5, it was noted in the Nova Scotia context that suspended sentences in trafficking cases, when imposed, generally reflect a finding that: (a) the mitigating factors in the case substantially outweigh the aggravating factors; (b) a community-based sentence will satisfy the principle of deterrence; and (c) a custodial sentence will negatively impact the offender's prospect of rehabilitation (at para. 24). In my view, the same can generally be said about British Columbia's jurisprudence.

- [123] In *Graham*, for example, a recent decision of this Court, a six-month jail sentence was reduced to the equivalent of 32 days' imprisonment (reflecting the amount of time already served). Ms. Graham was convicted of possessing methamphetamine for the purpose of trafficking. She faced considerable barriers in her life and at the time of sentencing, was a "dependent methamphetamine user" (at para. 5). Fentanyl does not appear to have been involved in Ms. Graham's offending; however, the approach taken by the Court in the unique circumstances of that case show that notwithstanding the grave nature of trafficking offences, a finding of significantly diminished moral blameworthiness and specific barriers to rehabilitation may justify a sentence that is substantially different from the generally applicable range (in *Graham*, the range at issue was six to 18 months' imprisonment).
- [124] The Crown is correct: a judge does not need to find "exceptional circumstances" or, importantly, revisit or reconsider a sentencing range based on a material change in societal attitude to depart from it.

Sentencing Ranges Reflect the Gravity of an Offence

- [125] A second and more significant error is that the judge appears to have misunderstood what a sentencing range represents. Respectfully, this same misunderstanding of sentencing ranges manifests itself in Ms. Ellis's position in the appeal, as well as in VANDU's submissions.
- [126] The Supreme Court of Canada's most recent discussion of ranges is found in *Parranto*. The following principles emerge from the majority judgment and are particularly germane to this appeal:
- Sentencing ranges reflect "judicial consensus on the gravity of the offence" (at paras. 20, 44, emphasis added).
 - They provide judges with a "place to start" in crafting a fit sentence (at para. 16).
 - Sentencing ranges are established based on "strictly offence-based considerations" (at para. 47, emphasis added).
 - Ranges do not factor in the characteristics of the offender (at para. 47).
- [127] The *Parranto* majority cautioned against creating sentencing ranges based on a type of offender:
- [47] Any inclusion of characteristics of an archetypal offender could impede individualization of sentences, rendering the guidance inconsistent with the standard of review and with Parliament's express choice to vest sentencing judges with the discretion to determine a fit sanction. While this Court's role is not to dictate how provincial appellate courts should establish sentencing ranges and starting points, we emphasize that those tools are applicable only inasmuch as they solely speak to the gravity of the offence. By restricting starting points and ranges to strictly offence-based considerations, they will continue to be

useful to sentencing judges without fettering their discretion or impeding individualization in a way that could produce clustering of sentences.

[Internal references omitted; emphasis added.]

- [128] This same point was made by Justice Doherty in *Hamilton*. He noted that ranges reflect the "objective seriousness" of the crime (at para. 111), not the type of offender that is before the court.
- [129] The objective seriousness of an offence is generally assessed with reference to its essential elements, including the requisite mens rea, the degree of harm that can flow from the prohibited conduct, and the legislated penalty provisions: *Morris* at para. 67.
- [130] The assessment of gravity is focused on "the normative wrongfulness of the conduct and the harm posed or caused by the conduct": *Morris* at para. 68, citing *Friesen* at paras. 75-76. See also *R. v. Okimaw*, 2016 ABCA 246, wherein the court stated that the:
- [14] "gravity of the offence" is directed to what the offender did wrong. It includes two components: (1) the harm or likely harm to the victim; and (2) the harm or likely harm to society and its values
- [131] The gravity of an offence is not focused on the circumstances of the offender, including their personal characteristics or aspects of the offender's social context or background that may provide an explanatory context for the choice to commit the offence: *Morris* at para. 75. Those factors are relevant to an assessment of the offender's personal responsibility or blameworthiness, which represents a different aspect of the proportionality analysis.
- [132] The majority decision in *Smith* made it clear that the 18-36 months range was driven by greater social awareness of the seriousness of the offence of trafficking and its inherent risk of palpable harm to people who purchase the drugs:
- [48] I have had the privilege of reading the draft reasons for judgment of my colleague, Madam Justice Newbury. I agree that it would [be] helpful for this Court to identify a sentencing range for street-level dealing in fentanyl as a result of the public health crisis caused by unintentional overdosing by people who use drugs, particularly since typically they do not know that the drugs they are consuming contain fentanyl. As my colleague has clearly explained, fentanyl is a scourge. It poses intolerable risks of accidental overdosing because it is so much more powerful than morphine. Illegally manufactured fentanyl can be particularly and unpredictably potent, even tiny amounts of fentanyl mixed into other drugs such as cocaine or heroin may be fatal; often street drugs have fentanyl cut into them, and it is practically impossible for drug users to recognize whether the drugs they buy contain fentanyl. I endorse the sentencing range my colleague proposes in her judgment in para. 45; namely, a range beginning at 18 months' imprisonment that might exceed 36 months.

[Emphasis added.]

- [133] The judge recognized that fact, explicitly noting that the increased range responded to the "justifiable concern and outrage over the increasingly large rates of overdose deaths and harm caused by fentanyl, carfentanil and their analogues" (at para. 77). See also paras. 74 and 78 of the Reasons for Sentence.
- [134] However, in deciding that she needed to revisit Smith to appropriately sentence Ms. Ellis, the judge erroneously treated Smith as representing this Court's perspective on both the gravity of the offence and the moral blameworthiness of street-level traffickers in fentanyl, generally. In other words, she appears to have viewed the emphasis on deterrence and denunciation in Smith as assuming high moral blameworthiness for all street-level traffickers in fentanyl, regardless of their personal background and circumstances.
- [135] This misunderstanding of Smith led the judge to sentence Ms. Ellis, in large part, based on a conclusion that Ms. Ellis falls within a certain class of offenders to whom the principles of deterrence and denunciation and the use of carceral sentences have little or no societal value or effect, notwithstanding the gravity of their crimes and the harms associated with their conduct.
- [136] Indeed, this was the stated basis on which the judge was asked to depart from Smith. Ms. Ellis asked the judge to "revisit the sentencing range in Smith as it applies to the individuals who are the most marginalized, poor and struggling with substance use disorders who are selling small quantities of drugs for the primary purpose of ensuring their own drug supply" (Reasons for Sentence at para. 112, emphasis added).
- [137] Before us, counsel for Ms. Ellis acknowledged that at the sentencing hearing, she sought to have the judge set aside the primacy of deterrence and denunciation for Ms. Ellis and similarly situated offenders. According to her written statement in the appeal, Ms. Ellis "made a strategic decision at [sentencing] to ensure that the application of Dr. McNeil's expert evidence could extend beyond Ms. Ellis to a specific class of offenders" (emphasis added). She says the focus of this case is "which sentencing principles ought to be prioritized when sentencing a certain class of offenders" (emphasis added).
- [138] VANDU makes essentially the same submission in its written statement in the appeal, advocating for "structurally vulnerable drug users" to be exempt from the Smith range:

To fulfill its symbolic purpose, denunciation must be directed to an appropriate object. Denunciation of the overdose crisis, the distinctive harm of fentanyl trafficking, simply cannot be done by punishing drug users. Given how frequently drug users are also street-level dealers, the sentencing range for street-level fentanyl trafficking must take into account the inapplicability of denunciation for these offenders.

[Emphasis added.]

- [139] In agreeing with Ms. Ellis's suggested approach, it is my view the judge engaged in precisely the type of analysis that Parranto warns against: she reconsidered Smith in the attempt to create a new sentencing range for street-level fentanyl traffickers who struggle with a

substance use disorder based on the characteristics of an archetypal offender. Indeed, at the hearing of the appeal, counsel for Ms. Ellis was asked by the division whether removing Ms. Ellis and similarly-situated offenders from the Smith range and, instead, sentencing them based on their shared personal characteristics and an assumption of reduced moral blameworthiness is consistent with the Parranto approach to sentencing ranges. She candidly acknowledged that it is not.

[140] There are multiple problems with the judge's approach.

[141] Establishing a new sentencing range based on offender-type rather than offence-based considerations raises a realistic risk of offenders who are shown to fall within a particular category being sentenced with reference to generalizations about their behaviour and the reasons for it, rather than their actual background and personal circumstances.

[142] The judge's approach also presents challenges for the principle of parity because it singles out a specific, defined group of offenders for unique treatment. Offenders who share the same vulnerabilities as Ms. Ellis but who traffic drugs at the street-level for different reasons, or who commit crimes other than trafficking in fentanyl to ensure their own drug supply (such as robbery or break and enter), would be treated in a fundamentally different way than those in the specially-defined group. Not everyone who suffers from a substance use disorder also traffics. Dr. McNeil testified that 40% to 50% of "people who are using also report engagement in drug selling."

[143] The judge's approach would also introduce a troublesome degree of uncertainty and unpredictability into the sentencing process, with the potential for myriad categories of offenders based on shared personal characteristics, and carries the potential to overwhelm sentencing proceedings with the need to consider whether a particular offender falls in or outside the scope of a particular category.

[144] Finally, and significantly, the judge's approach suffers from the problem identified in Morris, namely, it fails to maintain a distinction between offence-based considerations (as reflected in the sentencing range) and factors relevant to an offender's moral culpability (determined with reference to their background and personal circumstances), raising the potential for a skewed proportionality analysis.

[145] That is what happened in this case. At para. 128 of her reasons, the judge acknowledged that "[s]elling fentanyl is a serious offence". As Ms. Ellis has correctly pointed out, there are other references in the reasons that also show the judge was alive to this issue. See, for example, para. 140: "Providing or selling fentanyl is serious in that this drug is killing people."

- [146] However, by removing the Smith range from consideration based on evidence specific to the social context and personal circumstances of street-level traffickers who suffer from a substance use disorder, the reasons why they traffic in drugs and what is likely to best achieve their rehabilitation, the judge's proportionality analysis focused predominantly (if not exclusively) on Ms. Ellis. The gravity of the offence of street-level trafficking in fentanyl, including the profound harms it gives rise to, became a peripheral consideration.
- [147] As aptly noted in Hamilton, "factors which may accentuate the gravity of [a] crime cannot blind the trial judge to factors mitigating personal responsibility. Equally, factors mitigating personal responsibility cannot justify a disposition that unduly minimizes the seriousness of the crime committed" (at para. 93, emphasis added).
- [148] It is incontrovertible that trafficking in hard drugs is a grave offence: R. v. Lloyd, 2016 SCC 13 at para. 26; R. v. Kang-Brown, 2008 SCC 18 at para. 184. The fact that someone who engages in that crime "is an addict does not lessen the harm done to society by [their] trafficking activity": R. v. Matias-Pedro, 2003 BCCA 590 at para. 18 (emphasis added). A trafficker who is motivated by the need to support their substance use disorder is nonetheless personally and objectively responsible for facilitating the distribution of drugs into the community. As explained by Justice Moldaver in Parranto (concurring in the result), trafficking in hard drugs causes multiple direct and indirect harms to society. Those harms include: facilitating substance use disorders, adverse health effects and death by overdose (at para. 88); increased crime by those who seek to finance their own use of substances, as well as organized crime groups (at para. 89); devastation to families and intergenerational trauma (at para. 90); and significant costs in health care and law enforcement expenses (at para. 91). See also R. v. Lynch, 2022 ONCA 109 at para. 17.
- [149] When the drugs contain fentanyl and its analogues, people's lives are realistically at risk. The opioid crisis in British Columbia has tragically and starkly brought home that reality.

What is a Fit Sentence for Ms. Ellis?

- [150] Having found errors in principle that impacted Ms. Ellis's sentence, it is not necessary for us to address the Crown's argument that, standing alone, a cumulative sentence of 12 months' probation with minimal conditions was demonstrably unfit. The errors in principle entitle this Court to conduct its own sentencing analysis to determine a fit disposition for Ms. Ellis: Friesen at para. 27.
- [151] In doing so, we must apply the principles of sentencing afresh to the factual findings made in the court below: Friesen at para. 27. Those findings include the ones set out at para. 126 of the Reasons for Sentence:
- [Ms. Ellis] was selling drugs to support her own need for drugs rather than purely for greed or money;

- She was exposed to substances at an early age (Grade 3) which led to her addiction and which I consider severe;
- The relationship between her addiction and her life circumstances which include significant past trauma, poverty, mental health challenges, MCFD involvement in her family, unstable employment and unstable housing;
- She is at the lower level of those who sell drugs;
- She was selling small quantities of drugs and in a very unsophisticated manner - for example, she used her own name and was driving her mother's car;
- This offence occurred only three months after the death of her long time partner when she was particularly emotionally vulnerable;
- It was shortly after her partner's death that she was given drugs by her supplier on credit and ended up selling drugs to maintain her own supply and avoid withdrawal; and
- Her many, but ultimately unsuccessful, attempts at treatment in abstinence based programs.

[152] The judge's findings led to a conclusion of significantly diminished moral blameworthiness on the part of Ms. Ellis: "She is someone who suffers from the myriad of underlying factors that plague those with addictions: a traumatic childhood and adult life marked by domestic violence and trauma, poverty, few resources and unstable housing" (at para. 133). Ms. Ellis's moral culpability "is at the lower end of the spectrum" (at para. 135).

[153] I take no issue with the latter finding, which is reasonably supported by the evidence. I note, parenthetically, that the finding is not extraordinary. As conceded by the Crown at sentencing, this Court has long recognized that people with substance use disorders who traffic to support their own drug dependence are less morally culpable than those who traffic for profit. See, for example, *Matias-Pedro* at para. 18.

[154] The judge also found that Ms. Ellis was "at the very low end of offending for this kind of offence. She was operating a dial-a-dope operation but it was extremely unsophisticated" (at para. 134).

[155] Ms. Ellis's guilty pleas were appropriately viewed as mitigating (at para. 132). The fact that she had her young daughter in the car during one of the transactions with the undercover officer is an aggravating factor (at para. 131). However, the judge found it was attenuated by the fact that the child was in the car for less than one minute (at para. 131).

[156] Finally, the judge accepted Dr. McNeil's evidence that "evidence-based treatment is the most effective deterrent for people suffering from a substance use disorder" (at para. 127), and found that "[c]onventional treatment including abstinence based programs have not been effective for [Ms. Ellis]" (at para. 135, emphasis added).

- [157] Ms. Ellis has a previous conviction for possession for the purpose of trafficking. That offence was committed in September 2002. In 2003, Ms. Ellis received a three-month conditional sentence for the offence, followed by six months' probation.
- [158] According to the criminal record adduced at sentencing, Ms. Ellis also has two convictions for possession of a controlled substance. Those offences were committed in March 2015 and January 2017.
- [159] In addition to her drug offences, Ms. Ellis has numerous other convictions, including for offences of theft, possession of stolen property and fraud. Her criminal record dates back to the early 2000's.
- [160] Sentencing for drug offences is governed by the CDSA and, by incorporation, relevant provisions of the Criminal Code. Sections 10(1)-(2) of the CDSA read:

Purpose of sentencing

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

Factors to take into consideration

- (2) 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
- (a) in relation to the commission of the offence,
 - (i) carried, used or threatened to use a weapon,
 - (ii) used or threatened to use violence,
 - (iii) trafficked in a substance included in Schedule I, II, III, IV or V, or possessed such a substance for the purpose of trafficking, in or near a school, on or near school grounds or in or near any other public place usually frequented by persons under the age of 18 years, or
 - (iv) trafficked in a substance included in Schedule I, II, III, IV or V, or possessed such a substance for the purpose of trafficking, to a person under the age of 18 years;
 - (b) was previously convicted of a designated substance offence, as defined in subsection 2(1) of this Act, or a designated offence, as defined in subsection 2(1) of the Cannabis Act;
 - (c) used the services of a person under the age of eighteen years to commit, or involved such a person in the commission of, the offence.

- [161] Cocaine and fentanyl, the drugs sold by Ms. Ellis, are both Schedule I substances under the CDSA. Her offences carry a maximum sentence of life imprisonment (CDSA, s. 5(3)(a)).
- [162] It is not necessary to set out all of the objectives and principles of sentencing that properly inform the sentencing analysis in this case. (In addition to s. 10 of the CDSA, see ss. 718, 718.1 and 718.2 of the Criminal Code.) For the purpose of these reasons, it is sufficient to note that the most fundamental (or "cardinal") principle of sentencing is proportionality: Choi at para. 23, citing *R. v. L.S.N.*, 2020 BCCA 109 at para. 50; *R. v. Lacasse*, 2015 SCC 64 at para. 12.
- [163] In *R. v. Safarzdeh-Markhali*, 2016 SCC 14, the Supreme Court of Canada described the principle of proportionality as "grounded in elemental notions of justice and fairness, and indispensable to the public's confidence in the justice system" (at para. 70). The meaning of proportionality was explained this way in *Nasogaluak*:
- [42] For one, it requires that a sentence not exceed what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence. In this sense, the principle serves a limiting or restraining function. However, the rights-based, protective angle of proportionality is counter-balanced by its alignment with the "just deserts" philosophy of sentencing, which seeks to ensure that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused. Understood in this latter sense, sentencing is a form of judicial and social censure. Whatever the rationale for proportionality, however, the degree of censure required to express society's condemnation of the offence is always limited by the principle that an offender's sentence must be equivalent to his or her moral culpability, and not greater than it. The two perspectives on proportionality thus converge in a sentence that both speaks out against the offence and punishes the offender no more than is necessary.
- [Internal references omitted; italics in the original.]
- [164] As Ms. Ellis trafficked in fentanyl at the street-level, the sentencing range established in *Smith* is engaged. To reiterate, that range speaks to the objective seriousness of Ms. Ellis's offences. It reflects "judicial consensus on the gravity of the offence" of street-level trafficking in fentanyl and is intended to ensure that the significant harms associated with this offence are "consistently accounted for in sentencing": *Parranto* at para. 20 (emphasis added). This is done through an emphasis on deterrence and denunciation.
- [165] The range of 18-36 months' imprisonment provides a "place to start" the sentencing analysis: *Parranto* at para. 16. The *Smith* range is a tool, not a "judicial straitjacket": Choi at para. 3. It guides (but is not dispositive of) a sentencing judge's consideration of one component of the proportionality analysis, namely, the need to "ensure that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused": *Nasogaluak* at para. 42 (emphasis added). Any findings specific to the manner in which Ms. Ellis carried out her offences, both aggravating and mitigating, are also relevant to this analysis.

- [166] The second aspect of the proportionality analysis requires a consideration of the judge's findings relevant to Ms. Ellis's background, her personal circumstances and her level of moral culpability as informed by common sense, inferential reasoning and the evidence adduced at sentencing. It is through this part of the analysis that we ensure Ms. Ellis is punished "no more than is necessary": *Nasogaluak* at para. 42.
- [167] At the sentencing hearing, the Crown sought a sentence of three years' imprisonment. On appeal, it has modified its position, suggesting that "18 months' jail is the least restrictive sanction available to denounce and deter [Ms. Ellis's] crimes".
- [168] In light of the judge's findings, including (but not limited to) Ms. Ellis's significantly diminished moral blameworthiness as someone who suffers from a long-standing and severe substance use disorder, and who trafficked to ensure her own supply, I am satisfied a substantial departure from the Smith range is justified and that a suspended sentence with probation constitutes a proportionate and therefore fit sentence for Ms. Ellis.
- [169] I accept that deterrence and denunciation properly carry substantial weight in these cases given the potentially devastating consequences of trafficking in fentanyl. I also accept that in achieving the objectives of deterrence and denunciation, a sentence of imprisonment will generally be required.
- [170] However, there will also be cases in which the circumstances, considered as a whole, allow deterrence and denunciation to be given adequate effect without a custodial term. There is nothing about Smith that prohibits this result. In those cases, a finding of significantly diminished moral blameworthiness arising from the offender's social context, background and their personal circumstances, including a substance use disorder, are likely to play a pivotal role. There will likely also be evidence, as was the case in *Schneider*, *Graham* and here, that a community-based sentence carries the greatest potential for the offender's rehabilitation, or evidence about particular harms the offender may suffer if incarcerated, including an exacerbated risk of re-offending.
- [171] Contrary to the judge's apparent perception, this is not a novel concept. More than twenty years ago, in *R. v. Preston*, 1990 CanLII 576 (BCCA), a five-member division of this Court was asked to consider "[w]hether either general or specific deterrence must necessarily outweigh rehabilitation as a factor in the sentencing of a non-violent addicted substance abuser" (emphasis added). The Court held that:

When the benefit to be derived to society as a whole, as a result of the successful rehabilitation of a [person who suffers from a substance use disorder], is balanced against the ultimate futility of the short-term protection which the community enjoys from a sentence of incarceration it is right to conclude that the principle of deterrence should yield to any reasonable chance of rehabilitation which may show itself to the court imposing sentence. To give the offender a chance to successfully overcome his or her addiction, in such circumstances, is to risk little more than the possibility of failure, with the result that the cycle of addiction leading to crime leading to incarceration will resume, something that is inevitable, in any event, if the chance is not taken.

On the other hand, as has already been pointed out, if the effort succeeds the result is fundamentally worthwhile to society as a whole.

[Emphasis added.]

See also *R. v. Niederhumer*, 2022 BCCA 88 at paras. 46-47 and the cases cited therein.

[172] In concluding that a suspended sentence and probation is a proportionate and therefore fit sentence in this case, I have assigned considerable weight to the fact that Ms. Ellis has already served eight months of her 12-month sentence and that incarcerating her is likely to substantially interfere with her rehabilitation. This Court is generally "reluctant to allow a Crown sentence appeal and [to] substitute a custodial sentence for a non-custodial one when to do so would interfere with an offender's demonstrated efforts at rehabilitation: *R. v. Charlie*, 2008 BCCA 44 at para. 33.

[173] On appeal, Ms. Ellis applied to introduce evidence from a physician in Campbell River confirming that as at May 2, 2022, Ms. Ellis has been residing in a supportive living environment in Campbell River and is engaged with opioid agonist treatment, receiving monthly injections to assist with her substance use disorder. She has presented consistently for those injections since December 2021, has diligently attended appointments scheduled between injections and, to my understanding, she has been free of illicit substances. The physician's letter indicates that Ms. Ellis is "communicating honestly about her triggers and challenges" and "appears very motivated to remain on a healthy trajectory".

[174] Applying s. 683(1)(d) of the Criminal Code and *R. v. Palmer*, [1980] 1 S.C.R. 759, I consider it appropriate to admit this evidence to inform the Court's sentencing analysis.

[175] In response to Ms. Ellis's application to adduce fresh evidence, the Crown brought its own application. Among other things, the Crown's evidence confirms that opioid agonist treatment is available in the provincial corrections system. I would also admit this evidence for the purpose of informing the sentencing analysis; however, in the circumstances, it does not sufficiently meet my concern about interrupting the already-established support system and treatment relationship in place for Ms. Ellis, such that I would consider it appropriate to impose a jail sentence. The judge found that the type of arrangements now in place carry the greatest prospect of rehabilitation for Ms. Ellis, who has been incarcerated in the past and has made several attempts at treatment, including residential, with little to no success because of the severity of her illness and multiple and compounding personal hardships.

[176] Given the gravity of Ms. Ellis's offences, deterrence and denunciation are live issues in this case. In this context, it is appropriate to impose a probation order for Ms. Ellis that is substantially longer than the one imposed in the Provincial Court. In my view, no less than a three-year probation order is required. Probation orders are principally intended to facilitate rehabilitation. However, the law recognizes that "they can also have a deterrent and denunciatory effect, particularly if they contain terms that significantly curtail liberty":

R. v. McCrimmon, 2022 YKCA 1 at para. 61, citing Kodimyala at para. 42; R. v. Aguilera Jimenez, 2020 YKCA 5 at para. 52; R. v. Diedricksen, 2018 BCCA 336 at para. 44; R. v. Voong, 2015 BCCA 285 at para. 61.

- [177] In *Schneider*, this Court noted that one of the ways a probation order can have a deterrent and denunciatory effect is that it may "provide a longer period of supervision than an appropriate term of imprisonment" (at para. 24). Such would be the case here. On appeal, the Crown seeks a cumulative sentence of 18 months' imprisonment. A three-year probation order allows for supervision and monitoring of Ms. Ellis's conduct for twice that length. In Ms. Ellis's own words, probation orders have kept her "accountable" in the past. The order I would impose will demand accountability of Ms. Ellis until November 2024. She does not have a demonstrated history of non-compliance with court orders. As such, there is no principled basis from which to conclude that a three-year order will only serve to set her up for failure. We have been told and the evidence substantiates that Ms. Ellis is motivated to rehabilitate and is taking steps to do so.
- [178] If Ms. Ellis is convicted of an offence while subject to the probation order, including breach of that order, the Crown can apply for revocation of the suspended sentence and a re-sentencing: Criminal Code, s. 732.2(5). A breach of the order, established beyond a reasonable doubt, can also result in a new conviction and sentence independent of the existing order.
- [179] I also consider it appropriate to impose conditions as part of the probation order that are more stringent than the ones Ms. Ellis is currently subject to and will place greater restrictions on her liberty. The order imposed in the Provincial Court requires very little of Ms. Ellis and, in my view, does not adequately respond to or reflect the gravity of the offences committed by her. Accordingly, Ms. Ellis should be ordered to:
1. keep the peace and be of good behaviour;
 2. appear before a court when required to do so by that court;
 3. notify the court or her probation officer in advance of any change of name or address and any change in her employment status;
 4. report in person to a probation officer at 128-1180 Ironwood Street, Campbell River, British Columbia by no later than August 31, 2022 and thereafter as and when directed by the probation officer;
 5. reside at an address approved of by a probation officer and not change that address without the advance written approval of the probation officer;
 6. provide a probation officer with her phone number and keep the probation officer informed of any changes to that number;

7. present herself immediately at the door of her residence or answer the phone when any peace officer or probation officer attends at her residence or calls to check on her to ensure compliance with the terms of the probation order;
8. carry a copy of the probation order and any written permission from a probation officer with her at all times when outside of her residence. If a peace officer stops her for any reason, Ms. Ellis must immediately provide the peace officer with a copy of the probation order and any written permission of the probation officer;
9. having consented, Ms. Ellis may be referred for a medical assessment for the purpose of assessing and arranging for evidence-based medical treatment specific to substance use;
10. attend, participate in, and successfully complete any intake, assessment, counselling or program including, with her consent, any residential treatment program as directed by a probation officer. Without limiting the general nature of this condition, the intakes, assessments, counselling and programs may relate to substance use or to mental health. Any decision to direct Ms. Ellis to these resources shall be made by the probation officer in consultation with Ms. Ellis;
11. if not gainfully employed, the proof of which rests with Ms. Ellis, she must complete 50 hours of community work service under the direction of and to the satisfaction of a probation officer. Any such community work service must be completed by no later than November 30, 2023;
12. not attend at the Quinsam Reserve without the prior written approval of a probation officer, such approval to be determined by the probation officer, where practicable, in consultation with a representative of the We Wai Kai Nation's elected band council or their designate. If approval to attend at the Quinsam Reserve is granted by a probation officer on conditions, Ms. Ellis must obey those conditions.

[180] The last of these conditions is warranted in light of the impact of Ms. Ellis's offending on or near the Quinsam Reserve (a community of approximately 300 members). We Wai Kai filed an affidavit in these proceedings to speak to that impact. Its admission into evidence is not contested by the parties.

[181] I agree with We Wai Kai's submission that where there is evidence suggesting proximity between the offender and an Indigenous community, the impacts of the offending behaviour on that community should be considered at sentencing. In its words, without considering the impacts, "courts will not have the full picture and context necessary to determine whether the 'needs' of the community (or the offender) will be met by a particular sentencing decision". We Wai Kai suggests that accounting for community impact is important even where a sentencing judge concludes that an offender's sentence should be primarily restorative in nature (as was the case here). As We Wai Kai explains in its written statement in the appeal: "If rehabilitation is not realistic given the offender's history or a lack of resources in the community, then a sentence without appropriate conditions may

serve to entrench and exacerbate the disproportionate impact of the opioid crisis on Indigenous communities".

- [182] In response, Ms. Ellis accepts that the impact of trafficking on Indigenous communities is a relevant factor at sentencing. However, she cautions that it "must remain an evidence-based exercise, and not a means to invite or justify subjective, unevidenced views on drug traffickers and appropriate responses".
- [183] In Parranto, the majority noted that in assessing what constitutes a fit sentence, judges may "give special consideration to the disproportionate harm caused to particularly vulnerable groups and/or vulnerable and remote locations, where escaping traffickers is more difficult and resources for combating addiction are more sparse" (at para. 71, emphasis added).
- [184] Consideration specific to the impact on Indigenous communities is not only consistent with Parranto, but supports the principle of reconciliation by recognizing and giving meaningful effect to the importance of maintaining a mutually respectful relationship between the criminal justice system, Indigenous peoples and their communities.
- [185] Evidence of harms to a specific community is most easily obtained and presented through use of a community impact statement, allowed for by s. 722.2(1) of the Criminal Code. See, for example, R. v. Young, 2021 BCCA 462 at paras. 11-12. In this case, no such statement was obtained. The Crown should have made efforts to do so, particularly in light of the fact that it made the following submission at sentencing:

While Ms. Ellis may be an addict, she is also contributing to the victimization of others in the community. She acknowledges that she sells to Indigenous peoples, and that she sells to homeless people. Ms. Ellis' opioid addiction does not give her license to prey upon other vulnerable members of the community. No member of the public's life is worth less than another's, but preying on the most vulnerable members of society is particularly concerning.

[Emphasis added.]

- [186] For the purpose of sentencing Ms. Ellis, We Wai Kai has agreed that the affidavit it filed as an intervener can serve as a community impact statement.
- [187] In that affidavit, an elected band councillor of We Wai Kai has deposed that in the past five years, at least four We Wai Kai members on the Quinsam Reserve have died due to accidental opioid overdose. The loss of those community members has "caused immeasurable pain, and [We Wai Kai knows] that the continued circulation of opioids in [its communities] will only cause more". We Wai Kai has done considerable work to keep opioids out of Quinsam, including: seeking court orders to remove individuals who are known to regularly visit the reserve to use and sell drugs; installing security gates to control access to roads that are frequented by individuals to buy and sell illicit drugs; and installing security cameras to deter property crime committed by opioid users. Those efforts have been made in recognition of the fact that when "reserves are targeted by drug traffickers as places to sell addictive and dangerous opioids, Indigenous people, who are already

disproportionately represented in opioid overdose deaths, are exposed to further risk."

[188] In light of We Wai Kai's concerns, and the fact that the entirety of Ms. Ellis's offending at issue in this case occurred on or near the Quinsam Reserve, I consider it appropriate that there be control and supervision over her attendance at the Reserve during her probation. While fully appreciating that Ms. Ellis's mother and youngest daughter live on the Reserve and this type of a term must be imposed with caution, I am nonetheless of the view there is a logical nexus between the condition, Ms. Ellis, protection of the public (namely, members of the Quinsam Reserve), and Ms. Ellis's rehabilitation: *R. v. Duguay*, 2019 BCCA 53 at para. 65. Indeed, when she testified, Ms. Ellis explained that previous attempts at treating her substance abuse disorder have not worked, at least in part, because she returned home to the Quinsam Reserve with "the same problems" and the "same chaos" (Reasons for Sentence at para. 19). See also paras. 32, 135.

Disposition

[189] For the reasons provided, I would admit the fresh evidence adduced by Ms. Ellis, the Crown and We Wai Kai Nation.

[190] I would grant the Crown leave to appeal against sentence; allow the appeal from sentence; and vary the sentences, concurrent on both counts, to a suspended sentence with three years' probation (commencing on November 29, 2021). The conditions of the probation order would be as set out in these reasons.

[191] I would leave the ancillary orders in place and not interfere with the judge's decision to exempt Ms. Ellis from paying a victim surcharge.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Mr. Justice Marchand"

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Prepared on 29 October 2026 · Esheria