
CANADA / JUDGMENT

R v. Smith

2017 BCCA 112

COURT

British Columbia Court of Appeal

DECIDED

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2017 BCCA 112 R. v. Smith

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Smith,

2017 BCCA 112

Date: 20170310

Docket: CA44120

Between:

Regina

Appellant

And

Frank Stanley Smith

Respondent

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Willcock

On appeal from: An order of the Supreme Court of British Columbia, dated November 21, 2016
(R. v. Smith, 2016 BCSC 2148,

Vancouver Registry Docket 27018).

Counsel for the Appellant:

W.P. Riley, Q.C.

Counsel for the Respondent:

E. Purtzki

Place and Date of Hearing:

Vancouver, British Columbia

January 27, 2017

Place and Date of Judgment:

Vancouver, British Columbia

March 10, 2017

Dissenting Reasons by:

The Honourable Madam Justice Newbury

Written Reasons by:

The Honourable Mr. Justice Harris (page 22, para. 48)

Concurred in by:

The Honourable Mr. Justice Willcock

Summary:

This is a Crown appeal from a six-month sentence for street-level trafficking in fentanyl by a first-time offender. The Crown argued that the sentencing judge had erred in principle, leading to a demonstrably unfit sentence, particularly given the inherent danger of accidental death associated with consuming fentanyl. The offence was committed in early 2015, but the offender was not sentenced until late 2016.

HELD: Appeal dismissed (Newbury J.A. dissenting). The majority concluded that the sentence was not demonstrably unfit given the circumstances that existed when the offence was committed, but accepted that the Court should identify a higher sentencing range than may previously have existed, given the development of the public health crisis associated with illicit fentanyl consumption. The majority agreed with the sentencing range proposed by Newbury J.A. of 18 to 36 months and possibly higher.

Newbury J.A., dissenting, would have substituted a sentence of 18 months on the basis the six-month sentence was demonstrably unfit.

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] The Crown appeals a sentence of six months' imprisonment pronounced after Mr. Smith pleaded guilty to one count of possession of cocaine and one count of possession of Fentanyl, both for the purposes of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act. The offences occurred in the downtown eastside of Vancouver on January 20, 2015, when the respondent tried to sell drugs to a person who turned out to be an undercover police officer. The respondent was immediately arrested and was found to have on him 13 flaps of Fentanyl (approximately 2.6 grams in total), 18 flaps of powdered cocaine (approximately 4.2 grams) and several rocks of crack cocaine weighing 3.2 grams in total. Mr. Smith told the author of a pre-sentence report that he had not been aware he was in possession of Fentanyl, but had thought the 13 flaps contained heroin.
- [2] The Crown, citing the dangers of Fentanyl and the tragic effects it is having not only in our community but in communities across Canada, argues that the sentencing judge made errors in principle and that he imposed an unfit sentence. In the Crown's submission, the mitigating factors considered by the Court in sentencing the respondent - here, the fact he was a first-time offender and had an addiction to, or dependence on, Tylenol 3 - should have been far outweighed by the sentencing goals of denunciation and deterrence. Indeed, the Crown urges us to establish a range of between 18 and 36 months' imprisonment for cases involving the street-level sale or distribution of Fentanyl "in order to address the public's legitimate sense of moral outrage over the systematic distribution of a pernicious drug responsible for grievous loss of life, immense and unsustainable strain on our public health system, and devastating impacts on the safety and integrity of our communities."

Factual Background

Trial Proceedings

- [3] A voir dire was held before the trial proper to determine, inter alia, the admissibility of the evidence seized from Mr. Smith when the police searched him incidental to arrest. Mr. Smith testified that he had had "heroin and cocaine" on his person at that time, but a formal written admission of facts entered into the record pursuant to s. 655 of the Code stated that he had been in possession of cocaine and Fentanyl.
- [4] The trial judge ruled (see 2016 BCSC 1725) in the voir dire that the evidence obtained in the search was admissible. Mr. Smith then changed his plea to guilty and a pre-sentence report was ordered.

The Sentencing Hearing

- [5] At the time of sentencing, Mr. Smith was age 59. He was raised in Carcross in Yukon Territory by his parents, both of whom were employed and worked hard to support their 11 children.

- [6] Mr. Smith told the author of the pre-sentence report that he had been bullied in high school. This fact, together with a desire to begin working, had led him to drop out after Grade 10. He began a period of work with his father on the railway and completed vocational training. He has worked as a landscaper, carpenter, security guard, cargo handler, and even as a special native constable for the R.C.M.P. Unfortunately, he suffered a serious knee injury in 1983 for which he had to have five operations. He was prescribed Tylenol 3 and says he became dependent on that narcotic. (Evidently, his pain would likely be alleviated if he received a knee replacement, but he has not pursued that option.) The sentencing judge found that the primary motivation for his offences was to support his dependence on Tylenol 3. (At para. 12.)
- [7] Mr. Smith was married in 1979 but the relationship ended after five years. He has one daughter, with whom he has a positive relationship and of whom he is justifiably proud. He asked that she not be contacted in connection with the preparation of the pre-sentence report because he had not yet informed her about the offences.
- [8] As mentioned, Mr. Smith told the author of the pre-sentence report that he was unaware that one of the drugs he was selling was Fentanyl. The sentencing judge wrote:

Mr. Smith does not deny the criminal activity for which he was charged and he says he takes full responsibility for his actions. He says he was engaged in drug dealing in order to obtain additional Tylenol 3s. He states he did not realize he was involved in the sale of fentanyl until after he was charged. He adds that if he knew everything he knows now about fentanyl, he would never have been involved. He expresses shame and embarrassment for what he has done. He states that he will not be involved in this type, or any other type, of criminal activity again. [At para. 14; emphasis added.]

The judge seems to have accepted that the respondent had been unaware he was selling Fentanyl, but made no express finding to that effect.

- [9] I pause to note that the Crown put into evidence at the sentencing hearing various reports dealing with illegal drug use in general, and Fentanyl use in particular, in British Columbia. Presumably, the purpose of this evidence was to show the dangers of Fentanyl, but it also demonstrates when and how those dangers came to be widely-known. A bulletin entitled British Columbia Drug Overdose and Alert Partnership Report, issued in September 2014, for example, stated:

BC has experienced a recent increase in fentanyl availability and fentanyl-detected deaths

On May 30th, 2013 in response to an increase in fentanyl-detected deaths in BC, a joint alert was issued by the Provincial Health Officer, BC Coroners Service (BCCS), healthcare and enforcement partners, warning the public of the increase in deaths and availability of fentanyl within the street drug market. After the alert fentanyl-detected deaths declined in June and July 2013, but have since increased. In 2012 there were 15 fentanyl-detected deaths; a total of 51 fentanyl-

detected deaths were identified in BC in 2013; most 2013 fentanyl-detected deaths occurred in Metro Vancouver region (15), Island (14), and Fraser (12) .

Preliminary data from the BCCS indicates 49 fentanyl-detected deaths occurred in the first eight months of 2014 (January 1st to August 31st) of these 10 occurred in the City of Vancouver and 18 in the Fraser region

In June 2014, the BCCS issued another public warning urging all [people who use drugs] to exercise extreme caution when consuming substances that may contain fentanyl.

[10] Similarly, a bulletin published in 2015 by the Canadian Centre on Substance Abuse and the Canadian Community Epidemiology Network on Drug Use recounted the crisis as it existed in January 2015, the time of the offences:

Between 2009 and 2014, there were at least 655 deaths in Canada where fentanyl was determined to be a cause or a contributing cause. This represents an average of one fentanyl-implicated death every three days over this time period. This figure is likely an underestimate.

Between 2009 and 2014, there were at least 1,019 drug poisoning deaths in Canada where post-mortem toxicological screening indicated the presence of fentanyl. More than half of these deaths occurred in the latter two years, 2013 and 2014. On average, this represents almost two deaths every three days over these two years. This figure is likely an underestimate.

In addition to overdose mortality, other significant harms associated with fentanyl include nonfatal overdoses and substance use disorders.

In June 2013, CCENDU first detected and advised network members and subscribers of the appearance of and potential for harms associated with fentanyl or fentanyl analogues that were for sale in the illegal marketplace . This first CCENDU alert about fentanyl was followed by a second in February 2014 warning of the dangers of the increasing availability of counterfeit oxycodone tablets containing fentanyl

Data provided by Health Canada's Drug Analysis Services indicate that seizures of fentanyl, both diverted prescription and illicitly produced combined, increased over 30 times from 29 in 2009 to 894 in 2014.

[11] As my colleague Mr. Justice Harris observes, later reports drew attention to increasing numbers of deaths and overdoses due to Fentanyl subsequent to January 2015. The reports quoted above demonstrate, however, that Fentanyl had emerged as a public health emergency in this province prior to the date of Mr. Smith's offences. In any event, the defence did not advance any argument on the "timing" issue, aside from a very casual remark by defence counsel below (not counsel on appeal) that he himself had not been aware of the crisis in 2015. In response, the sentencing judge expressed his disbelief and told defence counsel that public health alerts had been issued. The matter was not pursued - no 'Gardiner' hearing on the issue was requested, for example - and the Court did not find it necessary to make any finding.

[12] As mentioned, Mr. Smith had no criminal record at the time of sentencing. However, two days after his arrest for the subject offences, he was arrested for disobeying a bail term not to be in the downtown eastside area. On that occasion, he was found to have 15 packages of Fentanyl and 45 balls of cocaine on his person. He later pleaded guilty to possession of cocaine for purposes of trafficking and received a suspended sentence. The charge relating to Fentanyl was stayed. Later, on February 6, 2015, he was arrested in the same locale and had in his possession Tylenol 3 (and a prescription therefor) plus three tablets of Clonazepam. He was found guilty of breaching a geographical restriction but received an absolute discharge under s. 730(1) of the Code.

[13] The author of the pre-sentence report said this about Mr. Smith's attitude to the offences:

Attitude and Receptiveness to Previous and Proposed Interventions:

Community Corrections records on the subject are very limited due to no previous criminal history. Mr. Smith was co-operative and polite during the interview for the preparation of this report. The subject is currently involved in substance abuse counselling through the Native Health Center and he appears motivated to work towards achieving abstinence to his Tylenol 3 addiction. It appears Mr. Smith recognizes that his addiction was the primary factor resulting in his offence currently before the Court and he appears motivated to work towards abstinence.

Attitude and Understanding Regarding Offence:

The subject has [pleaded] guilty to the present offences before the Court. He expresses regret and appears to take responsibility for his criminal behaviour. He advises that he used poor judgment and was heavily into his addiction at the time of the offence. He informs that he was lured into partaking in criminal behaviour and that he failed to weigh the consequences of his actions. Mr. Smith appears to understand how his criminal behaviour is correlated with his addiction and negative associates. He claims to no longer associate with negative peers and has been attending counselling regularly through the Native Health Clinic.

[14] The Crown sought a term of imprisonment of 18 months, and suggested the appropriate "range" was between a suspended sentence to 36 months' imprisonment. The defence sought a suspended sentence and probation.

The Sentencing Judge's Reasons

[15] After reviewing Mr. Smith's personal circumstances, the sentencing judge reviewed the purposes and principles of sentencing as set forth in the Criminal Code, including s. 718.2(e), dealing with Aboriginal offenders. The judge quoted at length from this court's decision in *R. v. Elliot* 2015 BCCA 295. I will not reproduce the passages here, but I note in particular para. 16 of that case:

A sentencing judge must take judicial notice of the systemic and background factors that affect all Aboriginal persons in Canada, including lingering institutional racism and the historical effects of past policies and injustice. But this does not mean that every offence committed by an

Aboriginal offender is motivated by or a consequence of these factors to any extent. Nor does every offender with some Aboriginal heritage hold a worldview that reduces the rehabilitative effects of incarceration. In every case, the sentencing judge must create a fit sentence for this particular offender committing this particular crime. [Quoted at para. 20.]

The judge also noted *R. v. Lacasse* 2015 SCC 64, to which I will return below.

[16] In terms of aggravating factors, the judge stated that he had to consider the serious nature of cocaine and Fentanyl and the fact that immediately upon his release, Mr. Smith had returned to the downtown eastside and was selling "the same drugs" on the street, in breach of his bail restrictions. The judge also described the marked increase in deaths due to Fentanyl, or involving Fentanyl, that have taken place in British Columbia in recent years. As he stated:

The most recent figures from the B.C. Coroners Service show there have been on average two deaths a day in B.C. in 2016 from illegal drug overdosing. Over 600 people have died from such overdoses in the first 10 months of 2016 compared to 397 such deaths in the same period in 2015. Fentanyl was detected in at least 60% of these deaths, triple the number for the same period in 2015.

Fentanyl is 20 to 50 times more potent than heroin. A mere 2 milligrams is a lethal dose. This is as small as a grain of salt. Overdoses frequently occur in individuals who thought they were using heroin, oxycodone, cocaine or other similar substances but who unknowingly consumed fentanyl. When fentanyl is labelled and sold as other street drugs, such as heroin, users may not know what they are taking and may not understand the heightened degree of risk. The risk of death is thus heightened exponentially among users who do not reduce their dosage. [At paras. 23-4; emphasis added.]

Thus, the judge concluded:

Insofar as fentanyl-related drug offences are concerned, deterrence and denunciation is [sic] required in the strongest terms. Incarceration for this type of offence should be the norm unless there are highly exceptional circumstances. [At para. 25; emphasis added.]

[17] With respect to mitigating circumstances, the Court noted that Mr. Smith had no criminal record and had been employed, albeit not continuously, most of his adult life; and that his involvement in the drug trade was "recent, short-lived, and driven at least in part by an addiction to codeine in the form of Tylenol 3." With respect to Mr. Smith's 'claim' that he had been unaware he had been selling Fentanyl, the judge noted this court's statement in *R. v. Herrell* 2014 BCCA 114, a sentence appeal, that a seller of illegal drugs "must be assumed to recognize an inherent risk that the composition of the drugs may be unknown". (At para. 19.) Despite this, the sentencing judge in the case at bar said he was inclined to the view that actual ignorance might "lessen moral blameworthiness to some degree." (At para. 27.)

- [18] In the analysis portion of his reasons, the judge noted that s. 5(3)(a)(ii)(A) of the Code had prescribed a two-year minimum sentence for the subject offences where they took place in a public place usually frequented by young people. However, the mandatory provision had been declared unconstitutional in *R. v. Dickey* 2016 BCCA 177. Thus the sentencing judge proceeded, correctly, on the basis that no mandatory minimum applied.
- [19] The judge acknowledged that he was bound to consider Mr. Smith's Aboriginal heritage, but found little evidence that this background would lessen the offender's culpability or reduce the effectiveness of any prison sentence. The judge continued:

To the contrary, the only evidence before me was that Mr. Smith had a relatively unremarkable upbringing free of alcohol or physical abuse of any sort, and that he has led a productive life that included mostly continuous employment and a daughter of remarkable accomplishment. There is little in Mr. Smith's Aboriginal background or circumstances that might influence (i.e., decrease or moderate) the ultimate sentence in this case. [At para. 31.]

No challenge is made to this reasoning on appeal.

- [20] Turning next to some relevant authorities, the Court contrasted *R. v. Carrillo* 2015 BCCA 192, where this court upheld a suspended sentence and two-year probation order for a first-time offender who had pleaded guilty to possession of cocaine for the purposes of trafficking, with *R. v. Cloutier* 2014 O.J. No. 4783 (C.A.), where a first-time offender was sentenced to 27 months' imprisonment after pleading guilty to a single count of trafficking in Fentanyl.
- [21] The Court also referred to *R. v. Hambly* 2016 BCPC 215, the facts of which are very similar to those of the case at bar. Mr. Hambly received a sentence of six months' imprisonment for trafficking in heroin that was found to contain Fentanyl, cocaine and methamphetamine. Like Mr. Smith, he claimed that he had been unaware that the drug he was selling was Fentanyl. Herrell, supra, was also similar to this case: it involved a 39-year old first-time offender convicted of the possession of MDMA (Ecstasy) for purposes of trafficking. Like Mr. Smith, his involvement in the drug trade was short-lived and he had expressed remorse for his offence. He also asserted that he had been unaware the MDMA was laced with cocaine. This court upheld the six-month sentence of imprisonment in an appeal by the offender aimed at obtaining a conditional sentence. In the course of her reasons, Stromberg-Stein J.A. for the Court said this:

In my view, the circumstances of the offence, which were not disputed by the appellant, support the judge's characterization of the offence. Mr. Herrell does not allege the judge misapprehended the evidence of the circumstances of the offence. Those circumstances indicated that Mr. Herrell was selling drugs for profit. Mr. Herrell admitted that he was in possession of MDMA for the purpose of trafficking and his phone records corroborate that admission. Although Mr. Herrell claimed he was unaware the MDMA was laced with cocaine, the seller of a synthetic illegal drug must be assumed to recognize an inherent risk associated with distributing synthetic drugs, which is that the composition of the drugs may be unknown. [At para. 19; emphasis added.]

[22] The sentencing judge made no further comment on the foregoing authorities, but went on to conclude:

While Mr. Smith's efforts at rehabilitation must be acknowledged, the principles of deterrence and denunciation are the paramount considerations in this case. They require a sentence of incarceration and there are insufficient exceptional circumstances militating otherwise. Fentanyl is a pernicious drug responsible for far too many deaths in this province. Those who trade in such substances must be severely punished even if they are first-time offender[s] and even if they profess ignorance that the substances they were selling contained fentanyl. In my opinion, where a mandatory minimum does not apply, a fit range of sentence for such a first offender is quite properly 6 to 12 months' incarceration.

Mr. Smith's involvement in trafficking was short-lived. He appears to have been ignorant that fentanyl was involved. He has expressed genuine remorse. He has taken positive strides towards rehabilitation. All of these factors, as well as his Aboriginal background and other personal circumstances warrant a sentence at the low end of the range referred to above. [At paras. 37-8; emphasis added.]

The Court pronounced the sentence of six months' imprisonment on each count, to be served concurrently, and made ancillary orders that are not challenged on appeal.

On Appeal

Three Errors in Principle?

[23] The Crown advances four overlapping "errors in principle" on the part of the sentencing judge, and asserts that the sentence was unfit. Three of the alleged errors in principle relate to the degree of weight the judge gave to particular factors: the Crown says he did not properly consider the principle of proportionality, and in particular, the gravity of the dangerous effects of distributing Fentanyl; that he erred in 'holding' that the respondent's moral blameworthiness was reduced by his professed ignorance that he was in possession of Fentanyl; and that the judge placed undue emphasis on rehabilitation and failed to give proper weight to the other objectives of sentencing, including proportionality.

[24] In *Lacasse*, the majority of the Supreme Court of Canada re-affirmed that an appellate court may not intervene with a sentence "simply because it would have weighed the relevant factors differently." (At para. 49.) The Court quoted with approval the following passage from *R. v. McKnight* (1999) 135 C.C.C. (3d) 41 (Ont. C.A.):

To suggest that the trial judge commits an error in principle because in an appellate court's opinion the trial judge gave too much weight to one relevant factor or not enough weight to another is to abandon deference altogether. The weighing of relevant factors, the balancing process is what the exercise of discretion is all about. To maintain deference to the trial judge's exercise of discretion, the weighing or balancing of relevant factors must be assessed against the reasonableness standard of review. Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should an appellate

court interfere with the sentence on the ground the trial judge erred in principle. [Lacasse, at para. 35; emphasis added.]

The majority also emphasized the importance of the "fundamental principle of proportionality" and continued:

A sentence will therefore be demonstrably unfit if it constitutes an unreasonable departure from this principle. Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s. 718.2(a) and (b) of the Criminal Code. [At para. 53; emphasis added.]

[25] An error by a sentencing judge in the balancing of relevant factors, then, will justify appellate intervention "only where it appears that such an error had an impact on the sentence" in the sense that it was demonstrably unfit (or "clearly unreasonable") or represented a "marked departure" from sentences imposed for similar offences committed in similar circumstances. (See Lacasse at paras. 40-55.)

Mitigation Due to Unawareness

[26] Before turning to the questions of fitness and 'marked departure', it is necessary to make some observations about the sentencing judge's treatment of Mr. Smith's statement, made to the author of the pre-sentence report, that he had not realized he was in possession of Fentanyl when he offered to sell "down" to the undercover officer. As I have already noted, the judge did not make a clear finding that this was the case (see paras. 14, 27 and 37), but he seems to have assumed it was true. Crown counsel at trial also seems to have made the same assumption; certainly it was not challenged.

[27] It may be that counsel did not expect Mr. Smith's claimed unawareness would be considered to be a (slight) mitigating factor by the sentencing judge. Given the importance it assumed on the appeal, however, it would have been preferable for the Crown either to have insisted on direct evidence, as opposed to a mere statement made to a third party, or to have informed the Court it accepted the truth of the statement. In this regard, I note this court's decision in *R. v. Pahl* 2016 BCCA 234, where the majority reviewed the law with respect to assertions made by an offender to the trial court via counsel's submissions on sentencing. These assertions had not been the subject of direct testimony. Frankel J.A. stated for the majority:

In my view, the sentencing judge erred in principle in accepting Mr. Pahl's explanation for why he committed the offence as there was no admissible evidence to support that explanation. When the factual disputes arose at sentencing, an evidentiary hearing should have been held; sometimes referred to as a "Gardiner hearing": *R. v. Khalid*, 2010 ONCA 861 at para. 2, 266 C.C.C. (3d) 405, leave to appeal ref'd [2013] 1 S.C.R. vii; *R. v. Paterson*, 2013 BCPC 5 at para. 5. As Madam Justice Conrad stated in *R. v. B.L.*, 2002 ABCA 44 at para. 36, 163 C.C.C. (3d) 404: "If either party

wants to challenge such facts, there should be a hearing where those facts should be established in the ordinary course." As an example, in *R. v. Tran*, 2007 BCCA 405 at para. 15, 245 B.C.A.C. 171, this Court stated that if Mr. Tran wished to rely on family dependency as described in a pre-sentence report as a mitigating factor in the face of the Crown's challenge to that fact, then Mr. Tran was required to call evidence to establish that dependency on a balance of probabilities. See also: *R. v. Dreger*, 2014 BCCA 54 at para. 45, 307 C.C.C. (3d) 566.

Although it is clear from s. 723(5) of the Criminal Code that hearsay evidence is admissible at a sentencing hearing, such evidence is only admissible if, as stated by Mr. Justice Dickson (as he then was) in *Gardiner* (at 414) it is "credible and trustworthy". Also, factual assertions counsel make in sentencing submissions are not "evidence". If factual assertions are challenged, then what is asserted must be proven through admissible evidence, which can include credible and trustworthy hearsay.

Counsel's podium is not the equivalent of the witness box. In speaking to sentence counsel make submissions, they do not give "evidence": *R. v. Cousins* (1981), 22 C.R. (3d) 298 at 301 (Nfld. C.A.); *R. v. Gobin* (1993), 85 C.C.C. (3d) 481 at 484 (Man. C.A.). However, this does not mean that sentencing judges can never accept information provided through submissions as factually accurate.

Sentencing judges routinely accept and act on information counsel provide to them through submissions. I agree with Mr. Pahl that it would unduly burden the courts to require proof of every factual assertion counsel make at a sentencing hearing. However, it is not open to a judge to accept as fact an assertion made by counsel that is disputed and unsupported by any admissible evidence. Put otherwise, a judge is entitled to accept a fact advanced solely through submissions only if that fact is non-contentious: *R. v. Asp*, 2011 BCCA 433 at para. 34, 278 C.C.C. (3d) 391; *Cousins* at 301.

There is an additional problem with accepting the submissions Mr. Pahl's counsel made as factually correct; namely, that what counsel related to the sentencing judge was no more than a version of the events that Mr. Pahl had told his counsel. Even if counsel's submission were to be treated as "hearsay evidence", on their face, Mr. Pahl's post-offence, out-of-court statements would not be admissible as they are neither credible nor trustworthy. [At paras. 53–7; emphasis added.]

(See also the Canadian Encyclopedic Digest, Sentencing, § V.1.(a) (online ed.))

[281] The Court in *Pahl* ultimately ruled that the sentencing judge below had erred in accepting an "explanation" offered by defence counsel, but not testified to by the offender (see para. 78); and ordered the appointment of a Provincial Court judge as a special commissioner to conduct a hearing on the question of whether "any of the aggravating or mitigating facts in dispute at the [sentencing] hearing exist." I acknowledge that the case at bar is distinguishable because the Crown here did not dispute Mr. Smith's alleged ignorance that it was Fentanyl he was attempting to sell, rather than heroin. Nevertheless, one is left in some uncertainty given the lack of any finding on the part of the sentencing judge. Looking at the

matter in retrospect, it would have been preferable to have made an explicit finding or, if the Crown had disputed the state of Mr. Smith's knowledge, to have held the kind of hearing referred to in Pahl.

- [29] I also have some doubt about the suggestion that, assuming Mr. Smith thought he was selling heroin rather than Fentanyl, his degree of moral blameworthiness should have been regarded as reduced, if only "to some degree." I have already mentioned Herrell on this point, and I also note *R. v. Sidhu* 2009 ONCA 81, where a first-time offender had pleaded guilty to importing almost 10 kilograms of heroin into Canada. He claimed not to have known he was importing an illegal drug. The Court of Appeal increased his sentence from seven years and nine months' imprisonment to 14 years and nine months. In the course of its reasons, the Court (per Moldaver, Borins and Blair JJ.A.) emphasized that heroin was, contrary to the trial judge's suggestion, considerably more dangerous than cocaine. The Court also ruled that since the offender had been "wilfully blind" to the nature of the substance he was importing, he could not rely on his lack of knowledge as a mitigating factor. (See para. 19.)
- [30] Although no finding was made in the case at bar that Mr. Smith was "wilfully blind" to the fact that he was in possession of Fentanyl rather than heroin, the case law suggests that even being genuinely mistaken about the true identity of the illegal drug in one's possession does not serve as a mitigating circumstance in sentencing, provided the offender knew he or she was in possession of an illegal drug: see *R. v. Giammarco* [2012] O.J. No. 1053 at paras. 25–31, *aff'd* 2014 ONCA 242. Here, there is no suggestion Mr. Smith did not know he was in possession of an illegal drug, albeit a different one than the drug he actually had in his possession for sale. To the contrary, he admitted he was trafficking in illegal drugs. He adduced no evidence demonstrating that he took reasonable steps to satisfy himself of his belief that the substance found in his possession was heroin rather than Fentanyl.
- [31] In my view, the sentencing judge did err in suggesting that the respondent's moral blameworthiness was, or 'might be', attenuated by his alleged ignorance of what exactly he was selling. However, the error would seem to have had only a slight impact on the ultimate sentence. Again, Lacasse instructs that an appellate court may not interfere with a trial judge's weighing of relevant factors such as moral blameworthiness, proportionality or rehabilitation unless the sentence in question is demonstrably unfit or departs markedly from sentences given in similar cases for similar offences.

Public Awareness

- [32] My colleague has raised another point – the degree of public awareness of the dangers of Fentanyl in January 2015 when the offences took place. Again, with respect, I note that aside from defence counsel's casual suggestion that was rejected by the Court, there was no argument that any lack of public awareness as at that time should have affected the sentence. Given this, I do not believe it is appropriate for us effectively to find now as a matter of fact that public awareness was at a particular level in January 2015 (see *supra* at

paras. 9 and 10), nor to use that "fact" to question the proportionality or fitness of the respondent's sentence.

'Range'

[33] The fourth error in principle advanced by the Crown is that the sentencing judge erred in delineating a "sentencing range" of six to 12 months for a first-time offender engaged in street-level trafficking in Fentanyl. This ground of appeal may be considered together with the final ground, which is that the six-month term of imprisonment was "manifestly unfit" given the seriousness of the respondent's offences and his degree of responsibility. The latter argument is founded upon the Crown's submission that in light of the deadly effects of Fentanyl, even a first-time offender should expect to receive a sentence in the range of 18 to 36 months' imprisonment. Since the sentencing judge found no exceptional circumstances justifying a sentence outside the otherwise appropriate range, the Crown seeks a term of at least 18 months' imprisonment in this case.

[34] Perhaps not surprisingly, Mr. Smith responds by emphasizing that:

Ranges are merely guidelines. They are not averages or straightjackets. And they cannot become, in effect, judicially-imposed mandatory minimum and maximum sentences. A sentencing judge always retains the discretion to sentence within the limits set by Parliament and the issue, on appeal, is one of fitness. Moreover, a sentencing choice of range is itself subject to deference [citing Lacasse at paras. 51, 56-72.]

Further, he submits in his factum that we are at an early stage in sentencing for offences involving Fentanyl and that:

the setting of a range may be a purely arbitrary exercise at this point, as it would not be grounded in the jurisprudence in this Province nor would it be steeped in a sufficient body of factual contexts that arise from this Province.

The Supreme Court of Canada described ranges as "nothing more than summaries of the minimum and maximum sentences imposed in the past." While sentences in other jurisdictions may be considered, there is no requirement of exact parity between Provinces and any suggested range should be arrived at with due consideration to the cases and factual scenarios from this Province.

[35] I certainly agree that ranges are "merely guidelines", not "straightjackets", and I did not understand Mr. Riley to suggest otherwise. It is trite law that ranges are not hard and fast categories and do not preclude lesser or greater sentences if the circumstances or applicable principles in a particular case warrant. (See for example the lengthy discussion of ranges in the three judgments delivered by this court in R. v. Bernier 2003 BCCA 134 at paras. 40-42, 73 and 105.) Each case must be assessed on its own facts and as Lacasse reminds us, the "fundamental principle of proportionality" must be the primary focus. That said, ranges are, as Mr. Purtzki submits, one of the "tools" available to sentencing judges. One hopes they are useful in most cases as courts search for a "single appropriate sentence for a similar

offender and a similar crime". (R. v. M. (C.A.) [1996] 1 S.C.R. 500 at para. 92.)

- [36] It is also indisputable that from time to time, sentencing ranges must be adjusted or re-aligned when they fail to reflect, in a general sense, changes in societal factors that are relevant to proportionality, whether in a particular region or in society generally. As stated by Mr. Justice Code in R. v. Nur 2011 ONSC 4874 (varied on another point, 2013 ONCA 677, aff'd 2015 SCC 15) in connection with certain firearms offences:

Second, social norms and judicial responses to them, have changed since the 1980s and 1990s. The proliferation of handguns has increased, homicides involving handguns have increased, and the justice system has responded to public alarm by stiffening its approach to sentencing in cases involving handguns. It is a common phenomenon, in the law of sentencing, for sentences to increase and decrease as societal and judicial knowledge and attitudes about certain offences change. In its seminal decision setting out the modern principles of sentencing, R. v. Willaert (1953), 105 C.C.C. 172 at 176 (Ont. C.A.), the Court of Appeal made it clear that appropriate sentences will change over time as the "needs of society" change:

I am respectfully of opinion that the true function of criminal law in regard to punishment is in a wise blending of the deterrent and the reformative, with retribution not entirely disregarded, and with a constant appreciation that the matter concerns not merely the Court and the offender but also the public and society as a going concern. Punishment is, therefore, an art - a very difficult art - essentially practical, and directly related to the existing needs of society. A punishment appropriate today might have been quite unacceptable two hundred years ago and probably would be absurd two hundred years hence. It is therefore impossible to lay down hard and fast and permanent rules. [At para. 49; emphasis added.]

(See also R. v. Holt 2015 BCCA 302; R. v. McVeigh (1985) 22 C.C.C. (3d) 145 (Ont. C.A.); Lacasse at paras. 87-103 regarding "local" needs and conditions; R. v. Su 2000 BCCA 480 at paras. 9-11.)

- [37] On this occasion, the change we must consider is the proliferation of Fentanyl and the fatal consequences of its illegal sale and distribution. These consequences inform the "circumstances of the offence" and the culpability of the offender. The Crown submits that the sentence imposed in this case was clearly unfit given these circumstances. It also argues that a substantial discrepancy exists between sentences and sentencing ranges in cases involving the sale or distribution of Fentanyl by courts in this province, and those pronounced elsewhere in Canada. (It will be recalled that the judge himself suggested such a discrepancy when he contrasted the cases of Cloutier and Carrillo, *supra*.)
- [38] Indeed, Mr. Riley argues that sentences in British Columbia for trafficking in Fentanyl are "markedly out of step" with those in other jurisdictions. He referred us to various trial level decisions from Ontario, including R. v. Klammer 2016 ONSC 4038, in which a sentence of 33 months' imprisonment was imposed on a first-time offender who was addicted to painkillers; Cloutier, *supra*, in which the accused, who was 47 years old and had no record, received a sentence of 27 months on one count of trafficking in Fentanyl; R. v. Srokosz, a decision of the Ontario Court of Justice, dated December 12, 2014, imposing a sentence of 30

months' imprisonment; and *R. v. Parsons*, also a decision of the Ontario Court of Justice, dated July 6, 2016, imposing a sentence of 40 months on an accused who had a minor unrelated record. From other provinces, we were also referred to *R. v. Ulmer-Bulser*, a decision of the Provincial Court of Saskatchewan dated 4 February 2016 (a sentence of 24 months); and *R. v. Reid* 2015 NSSC 276 (a sentence of 30 months). Both involved street-level trafficking. Finally, we were referred to various other cases from other provinces in which the circumstances of the offender or the offence were more egregious. Those are of limited relevance to this case.

[39] Another helpful authority brought to our attention was *R. v. Fyfe* 2017 SKQB 5, in which Danyiuk J. reviewed various Canadian cases at some length and ultimately imposed a sentence of five years' imprisonment (less credit for time served) on a young first-time offender whose addiction to Oxycontin had developed into an addiction to Fentanyl. Mr. Fyfe pleaded guilty to two counts of trafficking in Fentanyl in March 2016. One of his customers had died after buying one Fentanyl pill.

[40] Danyiuk J. began his reasons by noting that "perdition is precisely the correct term for the ultimate destination of purveyors and users of [Fentanyl]." (At para. 2.) At paras. 36-58 he described at some length the dangers of Fentanyl abuse, and observed in summary:

From all of this information, the obvious and unavoidable inference is that fentanyl is a dangerous and powerful drug, highly lethal when used in a non-clinical setting on the street. There can be no gainsaying that fentanyl is lethal, that its unauthorized use is causing deaths in this province, and that these problems are growing rapidly. As will be discussed below when an appropriate sentence is considered, fentanyl must at least be treated as seriously as other hard drugs (e.g. cocaine) and arguably more seriously, given the substantial risks posed by this substance. [At para. 58.]

[41] Crown counsel in *Fyfe* referred the Court to "two other bodies of contested sentencing case law" in the form of cases from British Columbia on the one hand, and from Ontario on the other. The British Columbia cases - also reviewed in *R. v. Derycke* 2016 BCPC 291 - suggested a range of between six and 18 months, which range was said by Crown counsel in *Fyfe* to be "out of sync" with the case law in Saskatchewan. (See para. 108.)

[42] After a careful review of sentencing principles and cases involving not only Fentanyl but trafficking in other serious drugs, the Court in *Fyfe* said this:

The Crown has suggested that sentences for crimes involving fentanyl (trafficking, or possession for that purpose) ought to start at 30 months. Respectfully I disagree. Sentencing is not a mathematical calculation. Fentanyl is 100 times more powerful than morphine. Should the sentences then be 100 times higher? Clearly that would be unacceptable. It must be proportionate to the seriousness of the crime and the offender's culpability.

As well, there is a distinction between the low-level street dealer and the commercial or wholesale distributor in terms of a sentencing starting point.

In my view the trade in fentanyl needs to be discouraged in the strongest fashion. Specific and general deterrence and denunciation are the most important factors to consider with respect to the illegal trade in this drug. The havoc wreaked by opioids in terms of death and serious harm is now widely known. It is a street epidemic.

That aim of deterrence and denunciation, tempered and balanced by all the other factors as discussed above, can be accomplished through a sentencing starting point of two years. This means that absent some circumstance that takes a particular offender below that starting threshold, penitentiary time is called for in cases of fentanyl trafficking.

I am not prepared to suggest an upper limit to the general range of sentences. I can envisage cases where, as in Chukwu, offenders in possession of significant amounts of fentanyl, involved significantly in the overall distribution and sales network, and with criminal records could receive sentences of ten years or more. Thus I am not setting any notional "cap" on this range, but rather suggesting that an appropriate starting point for fentanyl-related offences at a lower level (street dealers) is two years. Commercial level dealers and suppliers would start at a higher point, possibly three years.

Circumstances may carry an offender's actual sentence above or below that point, although to go below two years will likely require an exceptional situation, as was the case in Corbett. As stated above, this is not intended to be a minimum sentence. It is for Parliament to decide on those matters. My analysis is akin to the well-established starting point from our Court of Appeal for sexual assaults with significant aggravating factors. The Saskatchewan Court of Appeal has repeatedly said that the starting point is three years, with a careful assessment of relevant sentencing factors (including aggravating and mitigating factors) moving the ultimate sentence higher or lower than the starting point.

Thus no one should be of the view that two years is a minimum. Sentencing is a highly individualized process. Courts create appropriate sentences for offenders, not offences. Neither Crown nor defence should treat this decision as any sort of "magic answer". The various factors leading to the correct sentence must be assessed with care. [At paras. 157-63; emphasis added.]

[43] The Crown in the case at bar invites us to consider setting a range of between 18 and 36 months rather than the range of between six and 12 months identified by the sentencing judge (see para. 37) for street-level trafficking in Fentanyl. (The latter range does appear to be regarded by British Columbia courts as an appropriate range in cases involving heroin: see *R. v. Voong* 2015 BCCA 285 at paras. 44, 59.) In Mr. Riley's submission, the six-month jail term imposed on Mr. Smith constitutes a "marked departure" from the sentences being imposed in similar cases elsewhere in Canada involving Fentanyl, and was thus unfit.

[44] While I am mindful of the majority's comments at para. 51 of Lacasse to the effect that the choice of a sentencing range falls within the discretion of a trial judge and cannot in itself constitute a reviewable error, it is of concern that British Columbia courts are arriving at sentences that are "markedly out of step" with those imposed in other jurisdictions facing the problem of Fentanyl abuse. This is particularly troubling given that according to

statistics prepared by the Canadian Centre on Substance Abuse, British Columbia has one of the worst, if not the worst, problems of Fentanyl abuse in Canada. This public safety emergency has prompted various media campaigns, public alerts and outreach efforts by police and social workers who are involved in seeking to contain this scourge – yet Fentanyl abuse continues to claim lives every day in our communities. The danger posed by such a drug must surely inform the moral culpability of offenders who sell it on the street, and obviously increases the gravity of the offence beyond even the gravity of trafficking in drugs such as heroin and cocaine.

- [45] I agree with the many judges who have stated that denunciation and deterrence must generally be given primacy in sentencing in cases involving Fentanyl. To this end, I would suggest a normal range beginning at 18 months' imprisonment, as the Crown suggests. I would place Mr. Smith's offences at the bottom of this range, in light of the mitigating factors discussed by the court below. I do not believe it is necessary for us to specify the top of the range, although I would suggest it might well exceed 36 months, especially where the offender has a substantial record involving the sale of Fentanyl or otherwise demonstrates an indifference to the human lives he or she is putting at risk. This is a matter that can be worked out in future cases. Obviously, the 'range' may also increase beyond 36 months, or a different range will apply, where the offender is higher up the chain of sale or distribution.
- [46] In this instance, I do not believe the circumstances of the offence or offender were "exceptional" or otherwise justified a sentence lower than the bottom of the normal range for trafficking in Fentanyl at the street level. Even if Mr. Smith was unaware he was in possession of Fentanyl, it appears he took no steps to ensure he was selling "only" heroin. The onus was on him to prove mitigating factors such as this - otherwise it would be open to offenders simply to claim ignorance of what they are selling, thus placing an impossible onus on the Crown to prove knowledge on their part. (See *Pappajohn v. The Queen* [1980] 2 S.C.R. 120 at 148; and *R. v. Johnston* 2000 CarswellOnt 234 (Sup. Ct. J.) at para. 4.) As stated by the Ontario Court of Appeal in *Sidhu*, supra:

As a matter of principle and policy, we ought not to be sending a message to would-be couriers that if they wear blinders, they will receive a lower sentence than if they actually learn the nature and quantity of the substance they are importing. In assessing degrees of moral blameworthiness, we see no meaningful distinction between the two. [At para. 17.]

- [47] I would allow the appeal and substitute a term of imprisonment of 18 months for the six-month term imposed by the sentencing judge on the two charges. The other features of the sentence would remain undisturbed.

"The Honourable Madam Justice Newbury"

Reasons for Judgment of the Honourable Mr. Justice Harris:

- [48] I have had the privilege of reading the draft reasons for judgment of my colleague, Madam Justice Newbury. I agree that it would 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.
- [49] In my opinion, these facts warrant recognizing a sentencing range for street-level dealing in fentanyl which is materially higher than the sentencing range applicable to other dangerous drugs such as heroin. The range for street-level dealing in those drugs seems to start in British Columbia at six-months' imprisonment. As matters stand today, other dangerous drugs do not kill as frequently, accidentally, or as unpredictably as fentanyl, but the risks posed by those drugs should not be minimized even by comparison with fentanyl. Heroin, crystal meth and cocaine can have devastating consequences. They may not kill as often as fentanyl, but very large numbers of accidental deaths are associated with their consumption (indeed the majority of accidental overdose fatalities involve a mixture of illicit drugs) and they destroy lives and wreak social havoc. The existing sentencing range for them is intended to reflect, amongst others, the sentencing principles of deterrence and denunciation. Recognizing a different and markedly higher sentencing range for street-level dealing in fentanyl turns on the enhanced risks associated with that activity and the individual responsibility of dealers given those risks and public knowledge of them.
- [50] Where I part company from my colleague is on the question whether we should defer to this sentence imposed by the sentencing judge. In my view, we should. Here the offender was not sentenced until late November 2016, but the offence was committed in January 2015. In the interim there has been a profound and enormous escalation in the extent of the fentanyl crisis and public awareness of it. Unlike my colleague, I am not persuaded that the sentence was demonstrably unfit given the circumstances regarding fentanyl as they existed in January 2015, when the offence was committed.
- [51] The Supreme Court of Canada reminds us in *R. v. Lacasse*, 2015 SCC 64, that the choice of a sentencing range is a matter for the sentencing judge. As a result, an "appellate court may not therefore intervene on the ground that it would have put the sentence in a different range or category. It may intervene only if the sentence the trial judge imposed is demonstrably unfit" (at para. 51).

- [52] A variety of terms is used to capture what it means to say that the sentence is demonstrably unfit. These include "clearly unreasonable", "clearly or manifestly excessive", "clearly excessive or inadequate", or representing a "substantial and marked departure". As the Court observes in *Lacasse* at para. 52, "[a]ll these expressions reflect the very high threshold that applies to appellate courts when determining whether they should intervene after reviewing the fitness of a sentence."
- [53] At the core of the review exercise is the fundamental principle of proportionality. A proportionate sentence is one which is proportionate to the gravity of the offence and the degree of responsibility of the offender: see para. 53, quoted by my colleague at para. 24. This involves, in my view, an assessment of the circumstances of the offence at the time it was committed. Evaluating the circumstances of an offence may well involve assessing changes in social circumstances, public knowledge, and changes in societal and judicial knowledge and attitudes about certain offences. I agree with the substance of the point made by Mr. Justice Code in *R. v. Nur*, 2011 ONSC 4874, referred to by my colleague at para. 36.
- [54] Material facts about the public health crisis associated with fentanyl have been evolving rapidly in recent years. They have evolved significantly since Mr. Smith committed the offence in January 2015. I think that evolution is relevant to the question whether the sentence imposed on Mr. Smith is demonstrably unfit given the circumstances that existed at the time he committed the offence. I turn, therefore, to the evidence that was before the sentencing judge bearing on a proportionate sentence at the time the offence was committed and what that evidence supports in terms of an appropriate sentencing range in current circumstances.
- [55] I do not mean to suggest that fentanyl was not a very serious problem before January 2015. In 2012, there had been 15 fentanyl-detected deaths and that number jumped to 51 in 2013. In a report published in September 2014, by the BC Centre for Disease Control, "BC Drug Use and Alert Partnership Report, 2014", ("BC DUAP Report") 49 fentanyl-detected deaths were identified as having occurred in the first eight months of 2014, including 10 in the city of Vancouver.
- [56] As early as May 30, 2013 public health authorities in British Columbia warned the public of the increase in deaths and availability of fentanyl within the street drug market. Illicit fentanyl was found in tablet form as counterfeit oxycodone tablets, but it was also being distributed as a white powder. In February 2014, the Canadian Community Epidemiology Network on Drug Use ("CCENDU") warned of the increasing availability of counterfeit oxycodone tablets containing fentanyl. In June 2014, the BC Coroners Service had issued a public warning urging all people who use drugs to exercise extreme caution when consuming substances that may contain fentanyl.

- [57] I should not be taken to minimize either the significance of these numbers or the fact of the warnings that had been broadcast into the community. Indeed, data published in August 2015, after the date of the offence, indicated that accidental or undetermined fentanyl-detected deaths had increased sevenfold between 2012 and 2014 and accounted for 25% of all illicit drug deaths in 2014, an increase from 5% in 2012. This post-offence information is consistent with, although somewhat higher, than the information published in September 2014 (BC DUAP Report).
- [58] There is however some further elaboration of these data to be provided. A CCENDU Bulletin in August 2015 clarified the distinction between "fentanyl-detected deaths" and "fentanyl-implicated deaths". A fentanyl-detected death is defined as a drug poisoning death in which fentanyl was detected in the body during post-mortem toxicological screening. It is noted that for many of these deaths substances in addition to fentanyl were present. A fentanyl-implicated death is defined as a death in which fentanyl was determined to be the cause or a contributing cause of death. As the report explains, the number of fentanyl-detected deaths is likely greater than the number of fentanyl-implicated deaths. As a result the view was expressed in the Bulletin that, in relation to British Columbia, "while the number of cases where fentanyl was detected did increase significantly, the role of fentanyl in overall illicit drug overdose deaths cannot be determined at this time. The majority of fentanyl-detected deaths in British Columbia involved mixed illicit drug overdose circumstances."
- [59] I take from this that, even in August 2015, while there was a clear association between increasing availability of illicit fentanyl and increasing numbers of accidental overdoses, there remained some uncertainty about the role of fentanyl in causing or contributing to accidental drug overdose deaths. Secondly, the majority of deaths involved mixed illicit drug overdoses. I take from this that there was uncertainty about the contribution of illicit fentanyl to overdose deaths as opposed to the contribution made by other illicit dangerous drugs. In my view, this has some bearing on the question of identifying a sentencing range for fentanyl which is materially different from the sentencing range for other dangerous drugs which appear also to play a role in accidental overdose deaths. Finally, in June 2014 an information bulletin from the BC Coroners Service, footnoted to the September Report referred to above, warned illicit drug users of the dangers of fentanyl, but identified the area of particular concern to be within the Fraser Health Authority, while in other regions of the province (presumably including where the offence occurred), deaths related to fentanyl appeared to be stabilizing or decreasing.
- [60] As I see the matter, as matters stood in January 2015, there may well have been good reason for a sentencing judge to consider imposing a sentence that would have reflected an increased sentencing range for street-level dealing in fentanyl above that of other dangerous drugs. Cases from other jurisdictions suggesting a higher range were available as comparators. It is not clear how much of an increase in the range would have been justified at that time, though as instructed by Lacasse that would have been a matter for the sentencing judge. Equally, in my view, it would not have been an error in principle for a

judge to have continued to select the same sentencing range applicable to other dangerous drugs. Illicit trafficking in fentanyl was a serious problem, but still an emerging one and knowledge about it recent. There was considerable latitude in those circumstances open to sentencing judges to craft an appropriate response. Indeed, I have no doubt, either, that a significantly higher sentence for Mr. Smith would have been fit, but I am unable to conclude that the sentence that was imposed was so unreasonable given the prevailing circumstances that existed in January 2015 as to warrant appellate interference on the basis that it is demonstrably unfit as a manifestly inadequate sentence. The threshold for appellate interference is very high, and I am not persuaded it was crossed in this case.

- [61] Since January 2015, there have been a number of changes which would render the sentence imposed on Mr. Smith demonstrably unfit had the offence occurred later, particularly if it had occurred late in 2016.
- [62] First, in February 2015 a major public health campaign was launched in the media. This campaign "Know Your Source" appears to have been explicitly targeted at the drug-using public and included posters distributed in high-risk areas. In addition, or as part of the same campaign, it is unclear, the BC Centre for Disease Control partnered with the RCMP and the Vancouver Police Department in initiating a public message campaign intended to increase awareness of fentanyl-related overdoses and recommended precautionary strategies. In my view, the inevitably heightened public awareness of the risks associated with illicit fentanyl must increase the responsibility or culpability of anyone dealing in the product.
- [63] Second, the numbers of fentanyl detected deaths in British Columbia and the Lower Mainland continued to grow at a frightening rate. The magnitude of the public health crisis increased dramatically. The evidence accepted by the sentencing judge demonstrates an explosion in the number of illicit drug overdose deaths in 2015 and 2016 and the proportion of those deaths in which fentanyl was detected. Whereas in 2014 fentanyl-detected deaths amounted to 25% of illicit drug deaths - by 2016 the percentage had risen to 60%. In addition, the absolute number of illicit drug deaths increased dramatically. According to the September 2014 Report (BC DUAP Report) the number of accidental illicit drug deaths in each year between 2011 and 2013 remained reasonably constant. There were 278 deaths in 2011, 261 in 2012, and 299 in 2013. In the first eight months of 2014, the number of accidental illicit drug deaths was 211, consistent with the earlier years: see p. 68, table 5.10. Within those absolute numbers, however, the proportion of fentanyl-detected deaths had increased to 25% by 2014. The sentencing judge noted that in 2015 there were 397 illicit drug deaths and over 600 in the first 10 months of 2016. The resulting picture is one of both a dramatic and rapid escalation in illicit drug deaths in 2015 and 2016, together with a dramatic increase in the proportion of fentanyl-detected deaths within the total. In my view, the landscape in 2015 and 2016 was transformed and is now qualitatively different from what it had been at the time of the offence in terms of the severity of the crisis and recognition of the role of fentanyl in it.

- [64] Thirdly, as a result of the forgoing it is most doubtful, in my view, that the statement that "the role of fentanyl in overall illicit drug overdose deaths cannot be determined at this time" (August 2015), would accurately reflect the state of opinion today. The role of fentanyl in overall illicit drug overdose deaths seems perfectly clear.
- [65] In sum, the continuing escalation in the number of fentanyl-detected deaths, the enormity of the total numbers of accidental overdosing, the increasing percentage of fentanyl detected deaths as a proportion of the total, and the currently ubiquitous awareness of the risks posed by illicit fentanyl, in combination, justify a recognition of a very substantial increase in the sentencing range applicable to street-level dealing in fentanyl. I agree that the range proposed by my colleague is appropriate. As I hope I have made clear, I differ only in respect of whether the sentence imposed on Mr. Smith was demonstrably unfit in light of the relevant circumstances as they existed at the time he committed the offence, all of which bear on his responsibility in crafting a proportionate sentence. Accordingly, I would not disturb the sentence.
- [66] I want to add only one further comment. The sentencing judge placed little or no weight on the suggestion that Mr. Smith thought he was selling heroin and did not know that the powder he was selling was fentanyl. His state of knowledge played no material role in the sentence imposed. Accordingly, I prefer not to comment on the relevance of his alleged personal knowledge of what he was selling. I would prefer to leave that issue, insofar as there is any lack of clarity in the law, to a case in which it is material to the outcome.
- [67] I would dismiss the appeal.
- "The Honourable Mr. Justice Harris"
- I agree:
- "The Honourable Mr. Justice Willcock"

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