

Sentencing Principles, Pitfalls and Bill C-41

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The focus of this panel is the public perception of the sentencing process. This paper will address, in a general way, the current sentencing scheme, some of its frailties and some of the more significant changes proposed by Bill C-41, which is awaiting proclamation.

I. THE CURRENT SCHEME

Sentencing of those convicted of criminal conduct is obviously a vital aspect of the administration of justice. Indeed, it may be described as the ultimate application of justice and is a function which all members of the community can readily understand. Accordingly, it provides a means by which the public can measure the effectiveness of the process and such appraisals will have significant impact on the public's respect for and confidence in the administration of justice.

The public has a right to expect that the sentencing process, like the administration of criminal justice generally, will be applied fairly, equally and in keeping with established principles and policies. With respect, these expectations are not being met. Public discontent with the process is increasing because sentencing is seen as inconsistent, unprincipled and often unfair. It is submitted that this perception is justified. A brief examination of the current sentencing process will indicate why.

For decades, Parliament was content to leave the development of sentencing principles and objectives to the courts. With few exceptions, legislative guidance has generally been restricted to identifying the maximum penalty for the offence. For example, section 744 of the *Criminal Code* specifies the factors sentencing judges are to consider in determining parole ineligibility on conviction for second degree murder; section 85 of the *Criminal Code* prescribes a mandatory minimum sentence for using a firearm in the commission of an indictable offence; and section 753 identifies the factors which must be established to support an indeterminate sentence. By virtue of section 717 of the *Criminal Code*, Parliament has expressly conferred upon the sentencing judge the discretion to impose the punishment within the limits prescribed by law. For some common offenses such as robbery and housebreaking, for which the maximum penalty is life imprisonment without a mandatory minimum sentence, the sentencing judge has the widest possible discretion. Thus authorized, the sentencing judge and provincial appellate tribunals have identified general principles of sentencing and other factors to be taken into account in the determination of a fit sentencing.

Twenty-five years ago, in a leading judgment, Culliton, C.J.S. speaking for the Court in *R. v. Morrisette*¹ enunciated four objectives of sentencing :

1. Punishment
2. Deterrence (specific and general)
3. Protection of the public

1. *R. v. Morrisette* (1970), 13 Crim. L.Q. 268 (Sask. C.A.).

4. Reformation and rehabilitation of the offender.

Although these objectives are self-explanatory, they are the source of some confusion because Culliton, C.J.S. identified protection of the public as one of four goals, leaving the impression that all are roughly equal. With respect, that is not so. Rather, it is submitted that protection of the public is the paramount objective of all sentences and the other goals are simply means by which that primary objective may be achieved. For example, if deterrence is stressed in the imposition of a sentence, the objective is to persuade the offender and others who may think like him\her not to yield to the temptation to commit the offence. By meeting this goal the public is protected. Similarly, where a sentence is imposed which is designed to rehabilitate the offender, the attainment of that objective will also protect the public.

Another sentencing goal has recently emerged which is closely allied to punishment, and that is denunciation. See *R. v. Pettigrew*² and *R. v. R.P.T.*³

From time to time, these objectives have come under attack. For example, it has been said that punishment or retribution is merely an expression of vengeance which has no place in an enlightened sentencing scheme. Of general deterrence it has been said that studies have failed to establish that sentences imposed on an offender will deter others from similar misconduct or that a more severe custodial sentence has a greater deterrent effect than a lesser custodial sentence. Notwithstanding these challenges, the objectives identified by Culliton, C.J.S. have been affirmed by the Supreme Court of Canada, most recently by Lamer, C.J.C. in *R. v. Luxton*.⁴

While the recognized objectives of sentencing may have the same ultimate goal — the protection of the public — they are not all harmonious or complementary. To illustrate, general deterrence is often at odds with rehabilitation. This tension is most commonly observed in sentencing for driving offenses which have resulted in death or injury. In such cases the offender has often recognized the error and is remorseful, and it is reasonable to expect that he\she will not re-offend. In other words, rehabilitation has been achieved. Still, a significant jail term is imposed to deter others. This dilemma was addressed by MacKinnon, A.C.J.O. in *R. v. McVeigh*.⁵

It is true that many of those convicted of these crimes have never been convicted of other crimes and have good work and family records. It can be said on behalf of all such people that a light sentence would be in their best interest and would be the most effective form of rehabilitation. However, it is obvious that such an approach has not gone any length towards solving the problem. In my opinion, these are the very ones who could be deterred by the

2. *R. v. Pettigrew* (1990), 56 C.C.C. (3d) (B.C.C.A.).

3. *R. v. R.P.T.* (1983), 7 C.C.C. (3d) 109 (Alta. C.A.).

4. *R. v. Luxton* (1990), 58 C.C.C. (3d) 449 at 457; see also *R. v. Smith* (1987), 34 C.C.C. (3d) 97 at 139.

5. *R. v. McVeigh* (1985), 22 C.C.C. (3d) 145 (Ont. C.A.) at 150.

prospect of a substantial sentence for drinking and driving if caught. General deterrence in these cases should be the predominant concern, and such deterrence is not realized by over-emphasizing that individual deterrence is seldom needed once tragedy has resulted from the driving.

So, while the sentencing judge well knows the objectives, what remains unclear is how they are to be applied and what weight should be attributed to each in any given case. In *R. v. Lyons*,⁶ Mr. Justice LaForest accepted that the prominence of these goals will change from case to case :

*In a rational system of sentencing, the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime and the circumstances of the offender.*⁷

Chief Justice Culliton in *Morrisette*⁸ recognized that :

[...] the real problem arises in deciding the factors to be emphasized in a particular case.

An examination of the prevailing case law does not disclose any consistent trend except that rehabilitation or reformation is generally assigned a subordinate role in the sentencing of adults for serious crimes. For example, the courts have expressly stated that deterrence and denunciation are to be the primary considerations in sentencing offenders for :

1. trafficking cocaine — *R. v. Carvery*⁹
2. sexual assault — *R. v. Sandercock*¹⁰
3. sexual assault on children — *R. v. S.(W.B.); R. v. P.(M.)*¹¹
4. spousal assault — *R. v. Bonneteau*.¹²

6. *R. v. Lyons* (1987), 37 C.C.C. (3d) 1 (S.C.C.).

7. *Ibid.* at 22.

8. *Supra* note 1 at 309.

9. *R. v. Carvery* (1991), 10 C.R. (4th) 228 (N.S.C.A.).

10. *R. v. Sandercock* (1985), 22 C.C.C. (3d) 79 (Alta. C.A.).

11. *R. v. S.(W.B.); R. v. P.(M.)* (1992), 73 C.C.C. (3d) 530 (Alta C.A.).

12. *R. v. Bonneteau* (1994), 93 C.C.C. (3d) 385 (Alta. C.A.).

Indeed, expressions of support for rehabilitation are the exception in serious cases. An example is found in *R. v. Sweeney et al.*¹³ where Wood J.A., in a thorough analysis of the principles of sentencing, suggested that where the prospect of rehabilitation was significant and the benefit to society substantial, then a non-custodial sentence may outweigh the perceived benefit of general deterrence from a custodial sentence. Likewise, the court in *Pettigrew*¹⁴ discussed the importance of balancing the desire to denunciate the offence with the need to rehabilitate the offender, and in *R. v. Owen*¹⁵ the court noted that the trial judge erred in excluding rehabilitation as a factor in sentencing a first offender.

In addition to identifying which objectives to stress, the sentencing judge must also consider a variety of other "subjective" factors which will mitigate or aggravate the sentence to be imposed. These factors may generally be divided into three categories :

1. Personal circumstances of the offender, which include age, criminal record, employment history, physical and mental health, the presence of remorse, pre-trial custody, co-operation with police, guilty plea, etc.
2. The nature of the offence and the circumstances surrounding its commission, which include the degree of premeditation and planning, whether the accused acted alone or in concert with another, motive, provocation, opportunity for gain, the degree of dangerousness to others, and the popularity of the offence in the community, etc.
3. The impact of the crime on the victim and the community, which includes actual suffering or loss by the victim and the shock to the community.

The sentencing judge will also have regard to the binding authorities.

On consideration of all these factors, a fit sentence — one that adequately addresses the seriousness of the offence and the moral culpability of the offender — is expected to emerge. One can quickly appreciate that this task must be among the most difficult and challenging for a judge.

II. DISPARITIES — LOCAL & REGIONAL

While basic fairness demands a reasonably strong degree of consistency in sentencing, it is unrealistic to expect identical sentences for similar crimes. Indeed,

13. *R. v. Sweeney et al* (1992), 11 C.R. (4th) 1 (B.C.C.A.).

14. *Supra* note 2.

15. *R. v. Owen* (1987), 33 C.C.C. (3d) 275 (Ont. C.A.).

variation within reasonable limits is necessary to give proper weight to the subjective factors of each case. However, concern arises when disparity in sentencing is too great and when it cannot be justified by the subjective differences between cases.

Unfortunately, unjustified local and regional disparities in sentencing exist. Local or intra-provincial disparities can be effectively remedied by the provincial Court of Appeal as in Canada both the Crown and defence have similar rights of appeal. Thus truly unfit or anomalous sentences can be brought in line with provincial standards. The real disparities are regional or interprovincial, which persist largely because appellate tribunals have not shown any serious inclination to adopt a standard approach to sentencing.

Although discrepancies in provincial practices are usually resolved by the Supreme Court of Canada, that court has only occasionally heard cases involving questions of law relating to sentencing. For example, in *R. v. Gardiner*¹⁶ the court was asked to resolve conflicting provincial appellate decisions as to the standard of proof required to determine contested aggravating facts. While such guidance is rare, it should be noted that in *Galliger* the court's jurisdiction to entertain sentence appeals was canvassed at length and the majority agreed with Dickson J., as he then was, in his conclusion that :

[...] there is a positive collective interest in having federal law, in particular the criminal law, one and the same for all Canadians and in knowing that the country's highest court is in the background, in case of need, to illuminate difficult points of law arising in the sentencing process. Cases calling for the articulation of governing and intelligible principles bearing upon deprivation of personal liberty would seem rationally to be the paradigm of the type of case which should find its way to this court.

While it is not suggested that the Supreme Court of Canada can be used to determine the appropriate range of sentence, a general prescription to follow in determining fit sentences would be helpful since disparities are often the result of differing approaches to the sentencing process. To illustrate, over the past decade the Alberta Court of Appeal has shown a strong preference to approach the sentencing of a number of recurring offenses by determining a 'starting point' for that offence which may then be increased or decreased following a consideration of the aggravating and mitigating factors in each case. This involves identifying the classification of the offence in question, i.e. robberies of convenience stores or robberies of banks, and then determining an appropriate starting point sentence for that offence.

Kerans J.A., speaking for the court in *Sandercock*, described the purpose of this approach. He said that it was to offer a rational and justified structure for the exercise of the sentencing judge's discretion, which would guard against both disparity and inflexibility. He was concerned that appellate guidance not be so vague as to

16. *R. v. Gardiner* (1982), 68 C.C.C. (2d) 477 (S.C.C.).

permit unjustified disparity of sentences while, on the other hand, not be so rigid as to ignore the variety of circumstances which can be found in different cases involving convictions for the same offence. In following this approach he hoped that :

*We thus have not the injustice of uniform sentences but the justice of uniform approach. Dangerous rigidity is avoided because there are no arbitrary end-points. Nor is there real disparity, because all sentences of the same genre start at the same point and differences are rationally explained.*¹⁷

With a standardized sentence "starting point" the judge then uses his\her discretion in setting the actual sentence according to the subjective factors of each case. Though in a rare case a deviant or completely individualized sentence may be tolerated, appellate tribunals which have laid down starting point sentences generally demand that lower courts apply them and will not allow a sentencing judge to fix a sentence in keeping with the standards of another province.¹⁸

Few appellate tribunals have shown the same enthusiasm for this approach. For example, in *R.v. Glassford*,¹⁹ the Ontario Court of Appeal expressly declined to follow the approach taken in *Sandercock*. In those jurisdictions without starting point sentences, the judge is guided instead by a range of sentence which may be found following an examination of sentences imposed for similar offenses by the provincial court of appeal. The judge guided by a range of sentence has much greater discretion than the judge directed by a starting point sentence, which is a specific term. As a result, significant regional disparities as to quantum exist which the informed offender, or at least the offender's informed counsel, will wish to exploit.

An anecdotal example will illustrate the point. Earlier this year, a resident of Calgary was charged with the sexual assault of his stepdaughter, years ago in Montreal when she was a child and he stood in *loco parentis*. The assaults continued over a long period of time and regularly included acts of intercourse. Following the prevailing sentencing decisions of the Alberta Court of Appeal, most notably *R. v. S.(W.B.)*; *R. v. P.(M.)*²⁰ and *R. v. Spence*; *R. v. D.L.F.*,²¹ the accused could reasonably expect the imposition of a custodial sentence in the range of six to eight years.

The Quebec Court of Appeal had not identified a starting point sentence for such crimes and counsel was advised that in view of all of the circumstances including the offender's age and poor health, the matter would most likely be disposed of in

17. *Supra* note 10 at 83.

18. *R. v. Jackson* (1994), 87 C.C.C. (3d) 56 (Sask. C.A.) and *R. v. Crazybull* (1994), 141 A.R. 60 (Alta. C.A.).

19. *R.v. Glassford* (1988), 42 C.C.C. (3d) 259 (Ont. C.A.).

20. *Supra* note 11.

21. *R. v. Spence*; *R. v. D.L.F.* (1992), 78 C.C.C. (3d) 451 (Alta. C.A.).

Quebec by way of a suspended sentence and probation following a guilty plea. Faced with these two extreme alternatives the accused understandably pleaded guilty in Montreal and, as predicted, received a suspended sentence and probation.

While this example, though true, is extreme, other significant regional disparities exist and explain the popularity of interjurisdictional waiver of charges. The problem is not resolved by insisting that the Crown refuse an offer of a guilty plea contingent on a consent to waive. Even if that course were followed, the fact remains that the child molester in Quebec is being treated far more leniently than his counterpart in Alberta. The disparity principle which requires that accused persons engaged in joint ventures should receive similar sentences, should logically also apply to similarly situated offenders across the country. This is not a matter of placating an unreasonable public expectation. It is simply adhering to basic principles of justice.

If we accept, and surely we must, that a fit sentence must reflect the seriousness of the offence and the moral culpability of the offender, then it appears that at least one of the alternative sentences available in the example cited is unfit. While it is conceded that individual factors may result in sentences that vary somewhat, the extreme disparity in that case cannot be rationally justified.

Law-abiding citizens and offenders have a right to expect that sentencing will be applied in a principled manner and within acceptable limits, uniformly across the country. It is submitted that such grossly unequal treatment is so unfair as to bring the administration of justice into disrepute. It is also difficult to imagine that these sentencing practices are consonant with either section 7 or section 15 of the *Canadian Charter of Rights and Freedoms*.

It is not only differing approaches to sentencing which has led to unjustified disparities. At least two provisions of the *Criminal Code* deserve mention as they may also be contributing to the problem. They are section 735(1.1), which permits a trial judge to consider a victim impact statement, and section 743, which allows juries to make recommendations as to parole ineligibility on returning a verdict of guilty to second degree murder. These provisions were apparently introduced to give the public some input, or at least perceived input, to the sentencing process. With respect, this concept is flawed. It has been our tradition in the administration of criminal justice, in particular in the sentencing process, that sentences be determined according to established principles dispassionately applied by a trained jurist rather than in response to public reaction.

The right of the victim to seek revenge or vengeance through the imposition of criminal sanction was lost in the 12th century when crimes were recognized as public wrongs or offenses against "the King's peace". From then on those offenses were prosecuted by the state and not by the victim or the victim's family. A system of criminal justice was developed which emphasized fairness and equality. Public demands for quick justice or rough justice, which occasionally followed a brutal or shocking crime, were ignored in favour of a principled and consistent approach.

III. SECTION 735(1.1) — VICTIM IMPACT STATEMENTS

Legislation permitting sentencing judges to consider victim impact statements was first introduced in 1988 in response to concerns that victims of crime were being excluded, or at least ignored, from the administration of criminal justice. This proposal was advanced by the Canadian Federal-Provincial Task Force on Justice for Victims of Crime (1983). It is not disputed that victims of crime have a special interest in the prosecution of that offence. It is also acknowledged that in many cases a specific crime cannot be put in its proper context without an appreciation of the impact the crime has had on the victim. The question is whether the victim impact statement is the best or most appropriate means by which to place that information before the court. The difficulties with these statements are many. Firstly, the procedure is purely optional so some victims of crime will prepare a statement while others, victimized by similar crimes, will not. In addition, experience has shown that where victim impact statements are prepared, they often are thinly veiled, emotionally charged pleas for vengeance. Furthermore, when a victim has accepted the invitation to submit a victim impact statement he/she will reasonably expect a sentencing judge to act on it and to impose a more severe sentence than otherwise had been contemplated.

Is that fair? Should, for example, similarly situated convenience store robbers receive disparate sentences simply because in one case the clerk chose to submit a victim impact statement describing the cruel effects of the crime on him/her, while the other clerk said nothing? Surely disparate sentences cannot be based on the presence or absence of a victim impact statement.

A more prudent course, consistent with our legal traditions, would compel the sentencing judge to recognize that certain crimes, in particular crimes of violence such as sexual assault, leave victims traumatized and insecure.²² To ensure that the court is made aware of any unusual trauma, the prosecutor should be required to canvass the impact of the specific crime on the victim, and where appropriate, on others such as the victim's family members. Where such inquiries disclose that the impact of the crime exceeded what might usually be anticipated, the prosecutor should advise the court accordingly. In this way the sentencing judge would be able to receive the necessary information in a more appropriate, reliable and dispassionate fashion. Of course, should these submissions be challenged by the defence, then as is the case with all contested submissions as to aggravating factors, the Crown would be required to call *viva voce* evidence — in these circumstances usually the victim — to confirm the information.

IV. SECTION 744 — JURY RECOMMENDATION AS TO PAROLE INELIGIBILITY

22. See for example *supra* notes 10 and 11.

In 1976 the *Criminal Code* was amended to formally remove the death penalty in favour of sentences of life imprisonment with long periods of parole ineligibility. Specifically, on conviction of second degree murder the mandatory minimum sentence was set at life imprisonment, with the parole ineligibility to be fixed by the sentencing judge for a period of not less than 10 years and not more than 25 years. In those cases where the accused was convicted of second degree murder by a jury, the trial judge was (and still is) required to ask the jury for their recommendation as to a fit period of parole ineligibility.

While at first blush this might seem a laudable approach, it gives rise to a number of questions and some concerns. For example, one wonders why, if such input is valuable, this procedure should not also be followed where the accused is convicted of other crimes of violence and for which the offender must be sentenced to a substantial period of incarceration, such as manslaughter and aggravated sexual assault. One might ask what is so unique about second degree murder cases that the sentencing judge requires this help?

In fact, the procedure is restricted to offenses of second degree murder, but only when the accused is convicted by a jury. Where the accused is found guilty of second degree murder by a judge alone, no representatives of the community are asked for a recommendation.

In addition, the jury is asked to make a recommendation in a complete vacuum. Important information, such as the accused's criminal record, the presence of mitigating or aggravating circumstances, the principles of sentencing normally relied on in such cases, the quantum of sentence (parole ineligibility) imposed in similar cases, the provisions of section 745 which allow for a reconsideration of the parole ineligibility after the offender has served 15 years, is not provided. In effect, what is being requested can be no more than the jury's "gut reaction."

With respect, this cannot be a meaningful exercise. It is submitted that an uninformed, intuitive recommendation has no place in a rational sentencing process and difficulty arises when a sentencing judge or appellate tribunal treats the recommendation as meaningful or informed and places reliance upon it. When that happens, the offender is treated differently than one convicted of the same crime by a judge alone. Again, it is submitted that this type of disparity, resulting from unequal application of the law, is unfair and contrary to the basic principles of our judicial system.

V. BILL C-41

Parliament has recently passed an act to amend the *Criminal Code* as it relates to the sentencing process — Bill C-41.²³ These amendments include a statement of the purpose and principles of sentencing, which are expressed as follows :

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

- (a) *to denounce unlawful conduct;*
- (b) *to deter the offender and other persons from committing offenses;*
- (c) *to separate offenders from society, where necessary;*
- (d) *to assist in rehabilitating offenders;*
- (e) *to provide reparations from harm done to victims or to the community;*
and
- (f) *to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.*

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

This legislation codifies the principles and objectives of sentencing developed by the courts. A notable omission is any express reference to punishment or retribution, although the recognition of other principles such as denunciation, separation of the offender, and promoting a sense of responsibility in the offender suggest the concept is very much alive.

While recognizing that each case will have mitigating and aggravating circumstances, the amendments also require the judge to take into account certain factors deemed to be aggravating :

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

23. Bill C-41 *An Act to Amend the Criminal Code (Sentencing) and other Acts in Consequence Thereof*, L.C. 1995, c. 22.

- (a) *a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender and, without limiting the generality of the foregoing,*
- (i) *evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factors,*
- (ii) *evidence that the offender, in committing the offence, abused the offender's spouse or child, or*
- (iii) *evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim shall be deemed to be aggravating circumstances.*

The new legislation also recognizes what has been referred to in the past as the totality or global principle :

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

In addition, by these amendments, Parliament has apparently accepted two of the recommendations of the Report of the *Canadian Sentencing Commission*, 1987, also known as the *Archambault Commission*, endorsing "restraint" in imposing custodial sentences :

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

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

Finally, the amendments address disparity of sentences, recognizing that :

718.2 (b) a sentence should be similar to sentences imposed on similar offenders for similar offenses committed in similar instances.

It is submitted that while these amendments emphasize certain existing sentencing principles, they do not introduce any new or radically different concepts. A possible exception is section 718.2(d) and (e) which requires that the least onerous but effective sentence be imposed. Although this concept has occasionally been acknowledged in sentencing decisions, it is not routinely followed in practice. The direction that a non-custodial sentence be imposed where appropriate may give rehabilitation and other mitigating circumstances greater prominence than they have received in the past.

In keeping with its desire that only the least onerous but effective disposition be applied, Parliament has also introduced an Alternatives Measures Program for adults, section 717, and what is referred to as "conditional sentence of imprisonment," section 741. The latter provision allows a sentencing judge, who imposes a sentence of imprisonment for less than two years for an offence which does not require a mandatory minimum sentence, to order that the offender serve the sentence in the community, subject to any reasonable conditions which would ensure the good conduct of the offender. It is not easy to discern any significant conceptual difference between this scheme and the current practice of suspending the passage of sentence for a fixed period during which the offender is subject to a probation order with strict conditions.

Finally, the amendments also provide rules of evidence and procedure which are to be followed at sentence hearings (section 723-729).

CONCLUSION

Over the decades the courts have identified certain principles and objectives of sentencing. While appellate tribunals have established approaches to sentencing which are followed in that province, interprovincial differences in these approaches prevail with the result that significant regional disparities as to quantum of sentences exist.

In addition, the *Criminal Code* contains at least two provisions which provide for public input to the sentencing process which, it is submitted, enhance the possibility that disparate sentences will be imposed. For the public to have respect for and confidence in the sentencing process, it must be, and be seen to be, effective and fair. Although the amendments introduced by Bill C-41 clarify the objectives of sentencing and the rules to be followed at sentencing hearings, they do not address some practices which contribute to disparity in sentencing.