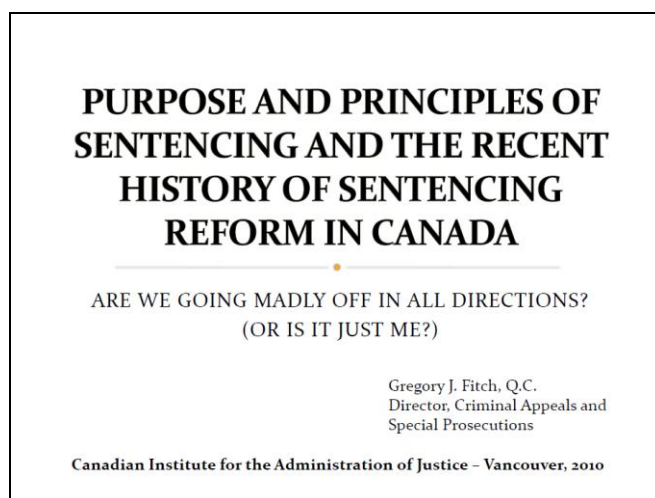


Purpose and Principles of Sentencing

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I've entitled my brief remarks, "Are we going madly off in all directions? (or is it just me?)" I will comment this morning on what I consider to be some irreconcilable trends in legislative initiatives relating to sentencing since the 1996 amendments to the *Criminal Code*.¹ But my intent is not to comment on the advisability of any particular policy course. I'm a prosecutor, not a policy maker. It's inconsistent with my role to favour, or be seen as favouring, one approach to the complex problem of sentencing over another. But to discharge my responsibilities, I need to be clear about what the principles are. I need to know how the sentencing calculus in an individual case takes its shape from the

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¹ R.S.C. 1985, c. C-46.

approach to sentencing that emerges from the whole of Part XXIII of our *Criminal Code*. Prosecutors need to be clear about these things not only to assist the sentencing judge, but to determine which sentences ought to be appealed by the Crown. So my remarks are not about advocating a particular approach to sentencing as much as they are a plea for coherence in articulation of the principles that guide sentencing.

The sentence is the gist of the
proceeding. It is to the trial
what the bullet is to the powder.

Sir James Fitzjames Stephen (1863)

Most of you will be familiar with this passage. Not only is the public interest (from both an individual and societal perspective) at its highest in the sentencing process, the public's interest in the administration of justice is also keenest at the sentencing phase. And it's always been so. The stakes are high. The shared system of values underlying our criminal law find their expression in the imposition of sentence. The public's evaluation of the criminal justice system is shaped through a lens that focuses largely on the sentencing of offenders.

**WHY WE NEED TO BE CLEAR ABOUT THE
PURPOSE AND PRINCIPLES OF
SENTENCING**

- **We have to know the answer to this question:**

WHY DO WE PUNISH?

- **In order to be able to answer this question:**

HOW SHOULD THIS OFFENDER BE
PUNISHED?

All of us would agree that we need to be clear about the overall purpose of sentencing and the objectives we seek to achieve through the imposition of sanctions. We have to answer the question, “Why do we punish?” before we are able to answer this question: “How should this offender be punished?”

PURPOSE OF SENTENCING: Section 718

- To promote 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:
 - denunciation;
 - specific and general deterrence;
 - isolation;
 - rehabilitation;
 - to provide reparations for harm done;
 - to promote individual responsibility.

By enacting *Bill C-41*² in 1996, Parliament sought to answer “why we punish.” We defined the overall purpose of sentencing and the objectives that may be called upon in determining a just and appropriate sanction. For a few offences, Parliament has expressed which of the objectives should be given primary consideration. In any other case, it is inevitable that the objectives of sentencing will jostle with another for priority and weight. In my view, we can’t expect more of Parliament than the guidance that was provided in 1996. I think Parliament was right to identify the guiding purpose and principles of sentencing but not prioritize them or adopt more formal sentencing guidelines. This closer type of direction would inevitably limit the discretion of sentencing judges to fashion just sentences in individual cases. Even if I was of the view that legislation more closely shaping the exercise of judicial discretion in sentencing was desirable, I wouldn’t be inclined to turn to the *Youth Criminal Justice Act*³ as a particularly useful model for adults. Sentencing youthful offenders engages very different, in some ways clearer, policy objectives that inform what the sanction should be. The framework for youth sentencing also occurs against the background of different constitutional imperatives and, in particular, the recognition that it’s a principle of fundamental justice that youthful offenders are not morally culpable to the same extent as adults.

² *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, 1st Sess., 35th Parl., 1995 (assented to 13 July 1995), S.C. 1995, c. 22 [*Bill C-41*].

³ S.C. 2002, c. 1.

WHY CODIFY THE PURPOSE AND PRINCIPLES OF SENTENCING?

- Transparency
- Clarity
- Uniformity in Approach: Structuring Sentencing Discretion
- Reducing Unjustifiable Disparity
- As a means of Attaining *Remedial Objectives*

The enactment of new Part XXIII achieved a number of important goals. First, it made transparent to offenders and to the public at large the animating principles behind the imposition of sentence and the objectives that would apply. Because sentencing, at its core, involves the exercise of a very broad discretion, it's fundamentally important that the public understand that the exercise of that broad discretion occurs in every case against the background of a settled framework of principles—which is not to say that each of those principles apply in every case to the same extent. But it does make the rules of the game accessible to the public which, in turn, facilitates public understanding and more informed commentary on how the justice system is working. Second, we've achieved some clarity about the legitimacy of some of the principles. General deterrence is an important goal of sentencing. Again, that doesn't mean that it applies equally to all types of offences or offenders. But it gets us beyond the debate about whether general deterrence is a legitimate goal. Third, Parliament provided a structure for the exercise of discretion that promotes uniformity in approach. Recognizing that sentencing must remain an individualized process, structuring sentencing discretion facilitates achievement of a broad but related goal—that similarly situated offenders receive similar sentences for similar offences.

But, the 1996 amendments were not a mere codification of existing common law principles. *Bill C-41* was intended to be remedial. It was intended to lessen reliance upon incarceration as a sanction for criminal behaviour and to promote restorative justice goals.

“The enactment of the new [Criminal Code of Canada] sentencing regime was a watershed, marking the first codification and significant reform of sentencing principles in the history of Canadian criminal law.”

Regina v. Gladue
Supreme Court of Canada (1999)

As our Supreme Court noted in *Regina v. Gladue*⁴ in 1999, the enactment of this Part in the *Criminal Code* was a watershed marking the first codification and significant reform of sentencing principles in the history of our criminal law.

THE REMEDIAL OBJECTIVES OF SENTENCING REFORM

- to mandate restraint in the use of incarceration as a sentence;
- s.718.2(d) – offenders should not be deprived of liberty if less restrictive sanctions may be appropriate;
- s.718.2(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;
- the conditional sentence of imprisonment was designed to facilitate achievement of this objective.

⁴ [1999] 1 S.C.R. 688.

One of the remedial objectives was to legislatively mandate restraint in the use of incarceration as a sanction. The two provisions on this slide were enacted to reinforce the generally applicable principle that offenders not be incarcerated in the face of reasonable alternative sanctions.⁵ The conditional sentence of imprisonment was the principal vehicle through which reduced reliance on incarceration was to be achieved. We've legislatively emphasized the principle of restraint even with respect to those offenders who pose the gravest risk of future harm to our community. For offenders who meet the definition of a "dangerous offender," Parliament has decided that an indeterminate sentence should not be imposed if there is a reasonable possibility that the risk posed by that offender can be controlled adequately through the imposition of a fixed term sentence, plus a period of long-term community supervision.

PROPORTIONALITY AS THE ORGANIZING PRINCIPLE

- s.718.1 – A sentence must be proportionate to the gravity of the offence and the degree of responsibility [moral culpability] of the offender.

As importantly, Parliament accepted the proposition that at the heart of sentencing lies this fundamental principle—that the sentence must be proportionate to the gravity of the offence and the moral culpability of the offender.

So the 1996 amendments provided, in large measure, a broad but workable framework through which just sanctions could be meted out.

⁵ See ss. 718.2(d), 718.2(e) *Criminal Code*.

1996 – 2010: MADLY OFF IN ALL DIRECTIONS?

- maintenance of the general principle of restraint in resorting to incarceration;
- increasing reliance on mandatory minimum sentences;
- restricting the availability of conditional sentences of imprisonment;
- increasing maximum sentences to enable longer terms of imprisonment, including for non-violent offences.

But we are 15 years from the enactment of these new sentencing provisions. And I ask this: Are we as clear now as we were then about the principles to be applied in sentencing? Or, have legislative developments since 1996 tended to move us away from the course we set in 1996. Since 1996, we have seen increasing reliance on mandatory minimum sentencing. Mandatory minimum sentences of imprisonment carry with them a strong denunciatory message and affirm important, collectively held social values—including that we will not tolerate the scourge of gun-related crime in our communities. But, as Julian Roberts has observed, they also stand as exceptions in an overall sentencing framework that privileges proportionality.⁶ In the absence of an escape valve (by which I mean the ability to make exceptions in extraordinary cases) mandatory minimums risk creating distinctions in sentencing which have little to do with the measurement of moral culpability. So the drunk who carelessly kills his friend while cleaning his gun is subject to a four year mandatory minimum term of imprisonment for manslaughter while the offender who viciously beats someone to death (but without proof beyond a reasonable doubt of the intent for murder) is not.

Mandatory minimums also run counter to the principle of restraint in relying upon incarceration. They have (at least in theory) an

⁶ See s. 718.1 *Criminal Code*.

inflationary impact on sentences of imprisonment imposed for that type of offence. The applicable range should move up from the mandatory minimum floor. Conditional sentences of imprisonment have been restricted by amendments to the *Criminal Code*. The last 15 years have also been witness to amendments increasing the maximum term of imprisonment for a number of offences, including non-violent offences. Such amendments reflect Parliament's concern about the seriousness (or perhaps prevalence) of a particular type of offence and have generally been understood as a direction to sentencing judges to impose longer sentences of imprisonment. These developments, all of them, suggest a legislative turning away from the principle of restraint in the use of imprisonment. And we've done this all the while maintaining these two general rules: first that judges must regard imprisonment as a sanction of last resort, and second, that they must be guided by the proportionality principle. If restraint remains the general rule, if proportionality remains the organizing principle in sentencing, is it fair to say that the exceptions to these general rules are now so many that their legitimacy is now in issue—or at least that the *Criminal Code* is beginning to resemble a patchwork quilt of conflicting philosophical approaches to sentencing?

WHERE ARE WE NOW?

- Are the applicable sentencing principles easier to identify in individual cases?
- If not, what are the implications for appellate review for “fitness”?
- Both the volume and severity of police-reported crime fell in 2009, continuing a downward trend seen over the past decade. (Statistics Canada)
- Although relatively stable, the incarceration rate rose modestly in 2008/2009 – the fourth straight annual increase after a decade of steady decline. (Statistics Canada)

So what are the consequences of this? Have we achieved clarity and uniformity in approach? Coherence? Are the applicable sentencing principles easier to identify in individual cases now? Or, is our overall

approach to the question of sentencing being pulled in opposite directions? Are we now like the fly fisherman whose line, with each cast, moves forward and backward at once?

What are the implications for appellate review of sentences imposed in the trial courts? We approach with appellate deference the manner in which sentencing judges exercise their discretion in individual cases. Absent clear error in principle or some clearly unreasonable disposition of the matter, appellate courts will not interfere. The weight to be assigned to a particular objective in a particular case is not an error in principle. The rule of appellate deference in sentencing matters has a long lineage in our criminal law and it's a good rule. What lies at its core is a recognition of the institutional advantages trial judges have in determining a just sentence. Those advantages flow not only from being a firsthand observer of the trial but also because judges very often live in the community in which the offence has occurred and have a closer appreciation of its impact. But the principle of appellate deference rests on another important assumption and it's this: that sentencing judges will proceed from a well understood, uniform framework as to the objectives that Parliament is seeking to achieve in the sentencing of individual offenders. If that assumption is false, then a risk arises that sentencing judges will proceed, in similar cases, on different conceptions about the sentencing objectives that ought to govern. That can only be productive of unjustifiable disparity. If that's happening, then the appellate deference principle risks accomplishing little more than insulating from review unexplainably divergent results. Obvious and unjustified disparity, whether in the eyes of an offender or in the eyes of the community can only undermine public confidence in the way we administer criminal justice.

Let me end where I began. I'm a prosecutor. Not a policy-maker or legislator. I just want the business of sentencing to be as clear as it can be—and I want it to be as clear to the offender and the public as it is to me.

I was never much of a fly fisherman. I just can't cope with my line going in opposite directions at once. As often as not, the hook ends up in the seat of my pants. And (figuratively speaking) that's what I want to avoid in the sentencing process. My job is hard enough. I don't need it to be harder. And I certainly don't need it to be unclear on the fundamentally important issue of why and how we punish. Worse yet, I

don't want to live between the devil and the deep blue sea—in the gap between the direction of Parliament to seek alternatives to incarceration and the expectation of the public that sentences will become increasingly harsh.

