CIAJ Annual Conference: How Do We Know What We Think We Know: Facts in the Legal System

Panel Presentation: Facts and Evidence in the Criminal Process

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Knowing What We Need to Know – Fact-Finding and Evidence in Sentencing

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The complexities of evidence law present significant challenges to busy criminal trial court judges. But it is worth keeping in mind that the vast majority of offenders plead guilty. Chief Justice Dickson in the Supreme Court's 1982 *Gardiner* decision observed that: "Sentencing is, in respect of most offenders, the only significant decision the criminal justice system is called upon to make."[1]

A sentencing hearing can look indistinguishable from a trial, although the vast majority of sentencings are characterized by far greater informality. This informality, while desirable, does mean that the sentencing judge can be faced with uncertainty about what she can take into account and rely upon. The sentencing process needs to have flexibility and adaptability but it is more challenging than the parties, the public, and even the judge may expect.

What Professor Dufraimont states at the conclusion of her paper in relation to trials is just as true for sentencing: "The law of evidence should operate as a tool in the pursuit of truth, fairness, and other crucial system objectives."[2]

I am going to discuss, in a relatively abbreviated fashion, how judges come to know what they need to know in a sentencing hearing. Our information may come from a variety of sources – the offender of course, and victims, and there can be questions about what is the nature of what is presented to us and what we are to do with it. There are also responsibilities and restrictions – what must we consider on sentencing and can we be criticized if we seek out information ourselves?

We have to start by reminding ourselves about the purpose of sentencing, and its principles.

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[1] *R v Gardiner*, [1982] 2 SCR 368, at 414.

[2] CIAJ Text 848.

What are the system objectives of sentencing?

They are, as provided for in section 718 of the *Criminal Code*,[3] "just" sanctions that contribute to respect for the law and the maintenance of a just, peaceful, and safe society… They are to serve one or more of the objectives of denunciation, deterrence, separation where necessary of offenders from society, rehabilitation, reparations for harm done to victims or to the community, and promotion of a sense of responsibility in offenders, and acknowledgment of the harm done.

It is well recognized that sentencing judges must have as much information as is reasonably possible concerning the accused person in order to tailor the sentence to the offender rather than the crime. But the court must also be able to determine the offender's moral culpability, which requires knowing the facts of the offence.

And so, the starting point for any sentencing judge is the question: what are the facts?

The facts in a sentencing are what have been proven either in a trial or a contested sentencing hearing, or that have been agreed to by the accused. At a sentencing following a guilty plea, what the Crown recites as the facts is a recital of evidence the Crown has in relation to the charges. If those facts are accepted by the offender, the requirement for them to be proven is removed. If they are disputed by the offender, then there may have to be a hearing to prove them. The guilty plea is an admission of the essential legal ingredients of the offence admitted by the plea and nothing more.

A contested sentencing hearing, often called a *Gardiner* hearing, is likely to resemble a trial with witnesses testifying and being cross-examined.[4]

Where there has been a jury trial, the court shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilt, and may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.[5]

Any facts not proven by the Crown or admitted by the defence are to be disregarded.

What about facts offered by the offender from the dock, in what is appropriately called an "in-dock statement."

Section 726 of the *Criminal Code* gives the offender the right to speak to the court before being sentenced, but what is to be made of any information he or she provides in that context? Justice

[3] RSC, 1985, c C-46 [*Code*].

[4] *Ibid*, s 724(3).

[5] *Ibid*, ss 724(2)(a)-(b).

Code of the Ontario Superior Court determined in *R v Nur*[6], a section 95(1) gun possession sentencing, that the right to make an "in dock" statement "cannot be used to circumvent the normal rules relating to proof of aggravating and mitigating circumstances…"[7] Justice Code noted that the "in dock" statement of an offender before being sentenced emerged from a time when the accused could not give evidence or call witnesses. It is an opportunity for a plea for clemency.

Observing that section 726 directs the sentencing judge to ask the offender if he "has anything to say," Justice Code found that Nur attempted to use the opportunity "to advance a mitigating explanation for his possession of the gun". This was an explanation which would have had to be given in the witness box so that Nur could have been cross-examined. Nur declined Justice Code's invitation to testify to his explanation and consequently, Code J. concluded that he had "no proof, one way or the other, as to when and in what circumstances the accused Nur came into possession of the gun."[8]

A disputed fact must be proven on a balance of probabilities before the court can rely on it to determine sentence unless the Crown is seeking to establish the existence of an aggravating fact, in which case the standard of proof is proof beyond a reasonable doubt.[9] These rules can have an important effect. In *Nur*, Justice Code found the Crown had not proved their version of the aggravating facts beyond a reasonable doubt, and the defence did not prove their mitigated version on a balance of probabilities.[10]

Evidence excluded from the jury has no special status and will have to be proven beyond a reasonable doubt if the Crown intends to advance it as an aggravating factor.[11]

This is where it can be seen that evidence comes into a sentencing hearing under somewhat less stringent conditions than those that operate in a trial: "credible and trustworthy" evidence, including hearsay, can be advanced to prove an aggravating factor at sentencing, e.g., a larger fraud than admitted by the offender.[12]

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[6] 2011 ONSC 4874, [2011] OJ No 3878 (SCJ) [*Nur*].

[7] *Ibid* at para 63.

[8] *Ibid* at para 66.

[9] *Code*, *supra* note 3 ss 724(3)(d)-(e).

[10] *Nur*, *supra* note 6.

[11] *R v Lau*, [2004] AJ No 1348, at para 42.

[12] *R v Angelis*, [2012] OJ No 5161 (SCJ), at para 4.

"Credible and trustworthy" hearsay "protects the offender from being prejudiced by information that is wholly unreliable."[13] I can see no reason why the principled approach to hearsay evidence could not be required in a contested sentencing hearing.

The court can compel testimony where appropriate, if the court considers it to be in the best interests of justice.[14]

A sentencing court may also, on its own motion, after hearing from the Crown and Defence, require the production of evidence that would assist in the determination of the appropriate sentence.[15]

That is what Justice Casey Hill endeavoured to do in the 2004 *Hamilton*[16] case Justice Pomerance referred to in her presentation at this conference, and he was resoundingly criticized for it by the Ontario Court of Appeal. At least one set of scholars saw Justice Hill's provision of social context and statistical material to counsel as a demonstration of his "methodological commitment to ensuring that the relevant information needed to properly contextualize the circumstances of the offence was considered."[17]

As we know, in appropriate cases, sentencing judges must lift our eyes from the minutiae of facts and consider the relevance and influence of systemic factors. This has been a particular concern in the sentencing of Aboriginal offenders. It is knowledge critical to a judge's responsibilities under section 718.2(e) of the *Criminal Code* which states that "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."

<u>So what do we need to know about systemic factors?</u>

There has been a special recognition by Parliament and the courts that judges must acquire a much better informed understanding of the systemic and background factors affecting Aboriginal people in Canadian society. In *Gladue*,[18] the Supreme Court of Canada found it "reasonable to assume" that Parliament had singled out Aboriginal offenders for distinct sentencing treatment in an attempt to redress to some degree the "sad and pressing social problem" of overrepresentation

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[13] *R. v. Paxton*, [2013] A.J. No. 1442, para 24 (Q.B.)

[14] *Code, supra* note 2, s 723(4).

[15] *Code, supra* note 2, s 723(3).

[16] *R v Hamilton* [2003] O.J. No. 532 (SCJ) rev'd on this point [2004] O.J. No. 3252 (CA)

[17] Richard Devlin & Matthew Sherrard, "The Big Chill?: Contextual Judgment after *R. v. Hamilton and Mason*" (2005) 28 Dal LJ 409.

[18] *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385 [*Gladue*].

of Aboriginal peoples within both the Canadian prison population and the criminal justice system.[19] The *Gladue* court viewed Parliament as providing direction to the judiciary "to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process."[20]

Gladue establishes that sentencing judges have a duty to apply section 718.2(e) of the *Code*: "There is no discretion as to whether to consider the unique situation of the Aboriginal offender; the only discretion concerns the determination of a just and appropriate sentence."[21]

The essential nature of this knowledge has been most recently commented on in the Supreme Court of Canada's decision in ***R v Ipeelee.***[22] Judicial notice is required of such matters as

> …the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.[23]

The Court has called information of this nature "indispensable" to the sentencing judge. It provides the necessary context for understanding and evaluating the information specific to the offender before the court and it is information that the Court in *Ipeelee* recognized as "helpful to all parties" at a sentencing hearing for an Aboriginal offender.[24]

Plainly judges are expected not only to know about the systemic factors that have had such a pernicious effect on Aboriginal people but also to use that knowledge in a remedial way.

In *Gladue*, the Supreme Court identified that sentencing judges

> …are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a

[19] *Ibid* at para 64.

[20] *Ibid.*

[21] *Ibid* at para 82.

[22] 2012 SCC 13, [2012] SCJ No 13.

[23] *Ibid* at para 60.

[24] *Ibid*.

> stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.[25]

But the information about systemic oppression and marginalization still has to be tied into the particular offender and his or her offence[26] although a causal link does not have to be established.[27] It was not intended by *Gladue* that an evidentiary burden of this kind be imposed on the offender.[28]

Courts have been inclined to require evidence linking systemic disadvantage to the particular offender. The Alberta Court of Appeal did so in *R v Stimson*,[29] finding there was "no evidence linking the effect of residential schools on [the offender]"[30] with the result that the sentencing judge was held to have erred in relying on this as a factor in determining the sentence.[31]

On *Ipeelee*, this approach is apparently incorrect, although I think it remains difficult for sentencing judges to tease out of the Supreme Court of Canada jurisprudence precisely how the knowledge of systemic factors is to be applied in a particular case. It is not enough to merely know about the experience of Aboriginal people in Canada, and while knowing is required so that the sentencing process is a fully informed one, sentencing judges still have to know what to do with what they know.

And a final comment here: the obligations to know and understand systemic factors and their tie-in to the offender, and apply that knowledge and understanding, are threatened by the gathering storm of mandatory minimum sentences. The Supreme Court of Canada in *R v Anderson* rejected the argument by the accused that it is a principle of fundamental justice that all state actors (in this case the Crown seeking a mandatory minimum sentence) must consider Aboriginal status where a decision affects the liberty interest of an Aboriginal person. The Court stated at para. 25:

> Importantly, both *Gladue* and *Ipeelee* speak to the sentencing obligations of *judges* to craft a proportionate sentence for Aboriginal offenders. They make no mention of prosecutorial discretion and do not support Mr. Anderson's argument

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[25] *Ibid* at para 61.

[26] *Ibid* at para 83.

[27] *Ibid* at para 81.

[28] *Ibid* at para 82.

[29] 2011 ABCA 59, [2011] AJ No 156.

[30] *Ibid* at para 24.

[31] *Ibid*.

> that *prosecutors* must consider Aboriginal status when making a decision that limits the sentencing options available to a judge. Mr. Anderson's argument in effect equates the duty of the judge and the prosecutor, but there is no basis in law to support equating their distinct roles in the sentencing process. It is *the judge's* responsibility to impose sentence; likewise, it is *the judge's* responsibility, within the applicable legal parameters, to craft a proportionate sentence. If a mandatory minimum regime requires a judge to impose a disproportionate sentence, the regime should be challenged.[32]

Sometimes, in a different context I am now going to discuss, a sentencing judge may decide his or her prior knowledge about a topic relevant to sentence is enough.

What about a judge's choice not to know the specifics of relevant evidence at sentencing?

The Ontario Court of Appeal accepted a sentencing judge's decision not to view the pornographic images that formed the basis for the child pornography charges. The Court accorded the judge considerable discretion, saying: "…The trial judge, by reason of "experience and judgment from having served on the front lines of our criminal justice system", is in the best position to decide what evidence is required to determine a fit sentence and to decide how, and in what manner, the evidence should be received."[33]

The Crown in *PM* had raised the issue of whether the trial judge has the discretion to refuse to admit relevant evidence at a sentencing hearing. The Court of Appeal noted that section 726.1 of the *Criminal Code* provides that, in determining sentence, the court "shall" consider any relevant evidence placed before it. However the Court decided that a sentencing judge should exclude otherwise relevant evidence proffered by the Crown where the prejudicial effect of the evidence outweighs its probative value.[34] Recognizing the highly relevant nature of the video material, the Court of Appeal held that "ordinarily the judge should view this kind of evidence if asked to do so."[35] The case was viewed by the majority as unique: the pornographic images included the offender's daughter who was present in the courtroom and the judge had made his decision based on extensive experience viewing pornographic images as the lawyer for a Children's Aid Society for 15 years, and then in his capacity as a judge for 20 years. It was felt that this prior exposure to similar images sufficiently informed the judge for sentencing purposes. The Court of Appeal

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[32] 2014 SCC 41. The Court noted in its conclusion that the constitutionality of the statutory scheme was not pursued on the appeal (para. 64).

[33] *R v PM*, 2012 ONCA 162, [2012] OJ No 1148 (ON CA), at para 29 [*PM*]. The application for leave to appeal was dismissed 2012 CanLII 66218 (SCC)

[34] *Ibid* at para 25.

[35] *Ibid* at para 31.

was satisfied his experience meant he could "fully appreciate the sickening horror of such pornography…"[36]

This case is particularly interesting because of the dissenting judgment by Justice Gloria Epstein. She felt the judge had erred and remarked on how the differences between trials and sentencings should mean that, "…if relevant to the admissibility analysis at all, the potential prejudice of the evidence in issue should be given less weight."[37]

Justice Epstein viewed relevance as the dominant factor in determining admissibility at a sentencing hearing. This is emphasized in section 726.1 of the *Code* as I mentioned earlier. Characterizing prejudice as a trial issue, she made the following trenchant comments about sentencing:

> Parliament's specific focus in [section 726.1] is consistent with the unique context of sentencing. The dominant concern addressed by the weighing of prejudice against probative value for the purposes of determining admissibility during the trial itself is that the evidence in issue may lead to impermissible reasoning, either as a result of the evidence being used for an improper purpose or having the potential to inflame the trier of fact - either of which has the potential of rendering the accused's trial unfair. At the sentencing stage, the trier of fact is always a judge and the issue is no longer guilt but the determination of a fit sentence - a determination for which the trial judge should have as much relevant information as possible.[38]

Justice Epstein was critical of the sentencing judge's stance that his previous exposure as a lawyer and a judge to child pornography removed the need for him to view the evidence. She considered the nature of the offender's specific offences to be an adjudicative fact, the assessment of that conduct being central to the determination of his sentence. Reaching outside the record and into one judge's prior professional experience was, in her view, impermissible and amounted to an error in principle.[39] Justice Epstein herself viewed the visual and audio components of the evidence and found the contents of the disc highly probative to the central issue at sentencing – the moral culpability of the offender. It was her opinion that the agreed-

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[36] *Ibid* at para 33.

[37] *Ibid* at para 70.

[38] *Ibid* at para 74.

[39] *PM, supra* note 32 at para 83.

upon facts did not adequately convey what the judge needed to know to determine an appropriate sentence.[40]

Justice Epstein understood the highly individualized nature of sentencing and the considerable latitude judges have with respect to the sources and types of evidence that can be used in the determination of a sentence. She took the strong position that in the circumstances of this case, "…the important aspects of the nature and gravity of the sexual offences could only have been obtained by direct observation of the contents of the disc."[41]

So, some prior knowing may not be good enough or at all appropriate to rely upon, depending on which view of this issue you take.

Victim impact statements – what are they?

A discussion about evidence in sentencing cannot be complete without reference to Victim Impact Statements and their role in the sentencing process.

Are victim impact statements "evidence"?

Victim impact statements are governed by section 722 of the *Criminal Code*. They must comply with the procedural and substantive requirements of the Code and are to describe "the harm done to, or loss suffered by, the victim arising from the commission of the offence." The Ontario Court of Appeal has held that the purpose of victim impact statements is to help the judge "understand the circumstances and consequences of the crime more fully, and to apply the purposes and principles of sentencing in a more textured context."[42]

Justice Hill has emphasized that the sentencing process is not a tripartite proceeding: "…A convicted offender has committed a crime - an act against society as a whole. It is the public interest, not a private interest, which is to be served in sentencing."[43] Justice Hill considered it implicit that a victim impact statement constitutes evidence to be considered in arriving at a fit and just sentence. Does this mean it can be subject to cross-examination?

The answer is yes, although an untrammeled cross-examination will not be permitted. As the Ontario Court of Appeal has held:

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[40] *Ibid* at para 86.

[41] *Ibid* at para 103.

[42] *R v Taylor*, [2004] OJ No 3439, at para 42 (CA).

[43] *R v Gabriel*, [1999] OJ No 2579, at para 26 (SCJ) [*Gabriel*].

> Conferring an automatic or unconstrained right to cross-examine would risk undermining the very purpose of victim impact statements, namely, to give victims a voice in the criminal justice process, to provide a way for victims to confront offenders with the harm they have caused, and to ensure that courts are informed of the full consequences of the crime. Conferring an open-ended right to cross-examine might discourage victims from offering such statements and re-victimize those who do. On the other hand, an absolute bar on cross-examination would unduly interfere with offenders' procedural rights.[44]

Courts have had to circumscribe the content of victim impact statements and assess the admissibility of the information and statements being made, always with a view to whether the statement conforms to the legislated requirements. The victim impact statement cannot include criticisms of the offender, assertions as to the facts of the offence, or recommendations about the sentence.[45]

It is understood that judges are accustomed to sifting out of their minds information that should not be before them and should not be considered and are careful not to let such information influence their judgment.[46]

Even given the ability to resist improper influences, some material that victims may want to present to properly express their loss, will not be permitted. The British Columbia Court of Appeal dealt with this issue earlier this year in *R v Berner*.[47] The sentencing judge's role is to try and understand a victim's experience but that is not all. The judge

> …must craft a fit sentence by taking into consideration all relevant legal principles, and the circumstances of the offence and the offender. In emotionally charged cases such as this, a sentencing judge must keep in mind his or her position of impartial decision maker. The sentencing judge must be wary of the risk of valuing victims, based on the strength of feelings expressed in the victim impact statement. In our view, this risk was intensified by the video material and ten photographs placed before the sentencing judge in this case. The personal characteristics of the victim should play no part in crafting a fit sentence, however tragic the

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[44] *R v VW*, [2008] OJ No 234, at para 28 (ONCA) [*VW*].

[45] *Gabriel, supra* note 43 at para 35.

[46] *R v Labrash*, [2006] BCJ No 1768, at para 14 (BC CA).

[47] 2013 BCCA 188.

> circumstances. It is in the public interest to deter and denounce all unlawful deaths.
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> As we noted earlier, s. 722 of the *Criminal Code* holds that victim impact statements are admissible "for the purpose of determining the sentence to be imposed on an offender". Where there is some question as to the admissibility of an impact statement, a sentencing judge should consider whether the statement, or a component thereof, furthers this purpose, keeping in mind the statutory scheme as a whole and in particular the principles of sentencing in s. 718 of the *Criminal Code*.[48]

The Court in *Berner* also identified the risk that heightened emotions may lead to unjust consequences and the danger that permitting victims "to pay tribute to their loved ones in the public forum of the courtroom" may raise expectations and encourage the belief that "the tribute will influence the length of a sentence…"[49]

In England and Wales, victim impact statements constitute evidence. The English Practice Direction provides that it must be a formal witness statement, that may be challenged in cross-examination, and that may give rise to disclosure obligations. The English Court of Appeal has held that a "truly inconsistent statement" in a victim impact statement, whether made before or after a trial, may be introduced into evidence at the trial or even considered as possible fresh evidence after conviction, if it has any relevance to the issues at trial or if, there has been a conviction, to the safety of the conviction.[50]

It certainly is possible to see the tensions inherent in the status of victim impact statements as evidence – what catharsis may be achieved by describing the harm done would no doubt be undone by cross-examination. The British Columbia Court of Appeal's view is compelling: that an offender would have to scale an "air of reality" threshold to satisfy a sentencing judge that a fact in the victim impact statement is "disputable and that the request to cross-examine is not specious or empty."[51]

Cross-examinations on victim impact statements will, in all likelihood, continue to be very rare, but fairness will require sentencing judges to be alive to the content of these statements and the importance of ensuring that they comply with the codified requirements. Victim impact statements cannot be used for what they are not intended for. Justice Georgina Jackson of the

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[48] *Ibid* at paras 25-26.

[49] *Ibid* at para 24.

[50] *R v Perkins*, [2013] EWCA Crim. 323, at para 64.

[51] *VW*, *supra* note 43 at para 29.

Saskatchewan Court of Appeal emphasized this point in a dissenting judgment: "A sentencing court may not rely upon information in the victim impact statements to augment the facts of the offence presented by the Crown, and thereby increase the gravity of the offence."[52] It would seem the majority took the same view, stating that it is the role of the parties to present the relevant facts to the Court not that of the victims. However the Defence counsel's failure to object to the Crown's reliance on portions of the statements was held to be acquiescence to the admissibility of these additional facts.[53] Justice Jackson was not impressed with this conclusion. She said that defence counsel's failure to object "cannot turn inadmissible statements into reliable evidence."[54]

I will conclude my meanderings through some of the evidentiary issues in the sentencing process by observing that the challenges faced by sentencing judges extend well beyond the anxious reflection on what constitutes a fit and proper consequence. Judges who sigh with relief once the trial is concluded, believing that the evidentiary issues are behind them, may be in for a nasty surprise.

[52] *R v Revet*, [2010] SJ No 303 at para 53.

[53] *Ibid* at para 7.

[54] *Ibid* at para 59.