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Judicial Discretion and the Rise of Individualization: The Canadian Sentencing Approach

Benjamin L. Berger[*]

"Who are courts sentencing if not the offender standing in front of them?"[1]

The epigraph to this paper points to the ethical heart of a distinctive and important development in Canadian sentencing law. It is drawn from a case in which the Supreme Court of Canada grappled with the signal societal trauma wrought by the operation of the criminal justice system – the travesty of Indigenous over-representation in Canadian prisons. This development involves an approach that has already disrupted certain elements of contemporary sentencing practice in Canada, and it is one that, depending on how sentencing judges embrace it, may open up new futures in Canadian sentencing. This development is the emergence of individualized proportionality as the fundamental principle of sentencing in Canada. One object of this paper is to explain and explore the rise, shape, and implications of this deep commitment to individualization as the defining feature of contemporary Canadian sentencing law.

[*] I wish to thank Kai Ambos, Kate Glover Berger, Lisa Kerr, David Cole, and Julian Roberts for their helpful comments on elements of this paper, and to Meghan Rand and Ramna Safeer for their superb research assistance.

[1] *R v Ipeelee*, 2012 SCC 13 at para. 86.

Significant though it is within the local frame of Canadian sentencing law and practice, the emergence of this approach should also be interesting and important to those studying sentencing law from a comparative perspective. The deep commitment to individualized proportionality in sentencing — even and explicitly at the expense of parity, as I will show — has taken place within a larger historical unfolding around sentencing law and practice in Canada that makes it a distinctive case in comparative perspective. Although there were periods in which Canadian discourse around sentencing reform urged the creation of a sentencing commission and guidelines, in the years after Parliament rejected this approach, Canadian courts have not only embraced judicial discretion as the defining feature of sentencing law in Canada, but have actively protected the discretion of the sentencing judge from both legislative and appellate fettering. In a transnational context in which most jurisdictions are working with various models of sentencing guidance — seeking the best means of securing parity, predictability, and consistency in sentencing — Canada has seen a deepening of its commitment to judicial discretion and what some might consider the *hyper*-individualization of sentencing. The Canadian model is, thus, an important case in the comparative study of criminal sentencing.

To provide a basis for this important comparative reflection, in the first sectioin, this paper begins by painting a picture of the sentencing process, and both the history and the current state of sentencing guidance, in Canada. With that foundation in place, the paper turns, in the second section, to explore the growth and implications of a unique (and, to this author, appealing though not uncomplicated) commitment to individualization that has emerged from this peculiar Canadian soil of judicial discretion.

1 An Overview of Sentencing in Canada

1.1 The Canadian Sentencing Process

In the Canadian constitutional order, legislative competencies are divided between the national ("federal") and provincial levels.[2] Unlike the United States — indeed, consciously designed in 1867 in contrast to the arrangement in the United States and with the goal of creating consistency across the country — criminal law and procedure, including the rules governing criminal sentencing, is a matter assigned to the federal government.[3] The constitution assigns responsibility for the administration of criminal justice to the provinces (including the running and management of courts),[4] and provinces run jails for the incarceration of offenders who are in pre-

2 *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].

3 *Ibid.*, sec. 91(27).

4 *Ibid.*, sec. 92(14).

trial detention or serving sentences of less than 2 years. However, the *Criminal Code*,[5] which sets out the available methods of punishment, the maximum sentences for criminal offences, and (since 1996) other provisions governing the sentencing process, is a piece of federal legislation.

The provinces and territories appoint inferior court judges, who sit without a jury, generally deal with less serious criminal offences ("summary conviction offences"), and sentence most offenders. In each province and territory, the superior courts (including the superior trial courts and courts of appeal for each province and territory) are staffed by federally appointed judges. Superior court judges deal with more serious criminal offences ("indictable offences") and administer all jury trials. The appellate courts in each province (e.g., the Court of Appeal for Ontario, the Alberta Court of Appeal, etc.) are the usual final court of appeal for most matters and their decisions are binding only within their province. As a result, jurisprudence — including on questions of sentencing — can develop in different ways across the country, subject only to the decisions of the Supreme Court of Canada. Sitting atop the judicial hierarchy, the Supreme Court of Canada hears appeals (either by right[6] or by permission of the Court) from across the country. The decisions of the Supreme Court bind all courts across the country.

The *Canadian Charter of Rights and Freedoms*[7] affords a right to trial by jury to anyone charged with an offence punishable by imprisonment for 5 years or more. Only a small fraction of criminal trials are conducted by jury trial, with most taking place in provincial courts and through "judge alone" trials in superior courts. However, the vast majority of cases in Canada (estimates lie in the range of 85-90% of cases) are dealt with by way of guilty plea. Whether following a trial and conviction, by judge alone or judge and jury, or as a consequence of a guilty plea, sentences are imposed by judges sitting alone in a sentencing hearing.

The Sentencing Hearing

Criminal trials in Canada are thus bifurcated procedures,[8] with proceedings (either a trial or the entry and acceptance of a guilty plea) that end with a conviction, followed by a sentencing hearing in which the judge hears evidence and submissions and imposes a sentence. Even in cases tried before a jury, it is the judge who imposes the sentence at the conclusion of a sentencing hearing, though in some circumstances

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[5] *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*]. Unless otherwise indicated, all references to sections in this Part refer to sections of the *Criminal Code*.

[6] For example, a person convicted of an indictable offence (or whose acquittal has been set aside by a court of appeal) may appeal to the Supreme Court of Canada "as of right" on any question of law on which a judge of the court of appeal dissents (sec. 691(1)(a)).

[7] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[8] For a number of helpful categories for the comparative study of sentencing, see *Hörnle*, Comparative Assessment of Sentencing Laws, 2019, p. 887.

juries, having rendered their verdict, may be permitted to provide input into periods of parole ineligibility.[9]

Often aided by a report prepared by a probation officer that canvasses the circumstances and key information about the accused[10] — or in the case of an Indigenous offender, a "Gladue report"[11] specifically attentive to the history and context of Indigenous persons and how that context has impacted the offender — the sentencing judge applies the purposes and principles of sentencing set out in ss 718-718.201 (discussed further below) to arrive at a sentence that complies with the "fundamental principle" of sentencing expressed in sec. 718.1: that the sentence be "proportionate to the gravity of the offence and the degree of responsibility of the offender." The sentencing hearing provides for the input of both the victim and the community by means of victim impact statements[12] and community impact statements,[13] which the sentencing judge must consider. Individuals offering such impact statements are permitted to present the statement orally to the court. The offender is also entitled to speak before the judge determines the sentence.[14]

When a sentencing hearing takes place following a guilty plea, there are often joint sentencing submissions that are the result of plea negotiations between the accused and the Crown prosecutor. The Supreme Court has described such joint submissions as "vitally important to the well-being of our criminal justice system, as well as our justice system at large."[15] The sentencing judge is not bound to follow the recommendation made by the Crown and the accused,[16] but such agreements are afforded considerable deference. The Supreme Court has held that sentencing judges ought only to depart from a joint submission if "the proposed sentence would bring the administration of justice into disrepute, or would otherwise be contrary to the public interest,"[17] and only then with clearly articulated reasons and having first given the accused the opportunity to withdraw his guilty plea. Given this deference and the prevalence of guilty pleas, despite the central role that judges play in setting

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[9] Sections 745.2, 745.21, and 745.3 provide that, where a jury has found an accused guilty of second degree murder or multiple murders, prior to discharging the jury, the judge must ask the jury whether it wishes to make any recommendations in respect of the number of years of parole ineligibility. For second degree murder, the mandatory sentence is life, with a legislative range of 10–25 years parole ineligibility. When an accused is found guilty of murder and has previously been convicted of murder, the *Criminal Code* (sec. 745.51) allows a judge to impose consecutive, rather than concurrent, periods of parole ineligibility. Sec. 745.21 requires a judge to seek a jury's recommendation on this decision as well.

[10] Sec. 721.

[11] These reports are named after *R v Gladue*, [1999] 1 SCR 688, the Supreme Court's first explanation of sec. 718.2(e) and the procedures and principles relevant to the sentencing of Aboriginal offenders.

[12] Sec. 722.

[13] Sec. 722.2.

[14] Sec. 726.

[15] *R v Anthony-Cook*, 2016 SCC 43, at para. 25.

[16] Sec. 606(1.1)(b)(iii).

[17] *R v Anthony-Cook*, 2016 SCC 43, at para. 5.

sentences, Crown prosecutors exercise significant structural influence over sentencing in Canada.

In contested sentencing hearings, judges hear submissions from both parties on the appropriate application of the sentencing principles, the relevant facts, and the fit sentence. The evidentiary standards in a sentencing hearing are much relaxed in comparison to the trial. A court is empowered to hear any relevant evidence, including hearsay, and may compel a person to testify before the court.[18] In addition to any information offered in the sentencing hearing, a sentencing judge may accept as proved any information accepted at trial or any facts agreed to by the prosecutor and the offender. Of course, juries do not issue reasons. If the accused was convicted by a jury, the sentencing judge is bound to accept the facts necessarily implied by the jury's verdict. Subject to the foregoing, a party wishing to rely on a fact in the sentencing hearing has the burden of proving it, and if the prosecutor wishes to rely on any fact that would *aggravate* the sentence, that fact must be established by proof beyond a reasonable doubt.[19]

Appellate Review of Sentences

The *Criminal Code* provides for appeals, by both the offender and the Crown, against sentences imposed by the sentencing judge. For summary conviction offences, appeals take place in the superior court,[20] and for indictable offences, appeals are heard, with leave of the court, in the provincial court of appeal.[21] The Supreme Court of Canada has explained that appellate courts play "a dual role in ensuring the consistency, stability and permanence of the case law;"[22] they act as a safeguard against errors and they ensure the coherent development of the law by formulating guiding principles and clarifying the law. As I will explore below, some provincial courts of appeal have sought to achieve this consistency in the sentencing realm by providing guidance in the form of judicially created guidelines, starting points, or sentencing ranges.

And yet sentencing courts are given significant deference on appeal, with the Supreme Court having emphasized on multiple occasions "that appellate courts may not intervene lightly, as trial judges have a broad discretion to impose the sentence they consider appropriate within the limits established by law."[23] The standard for interfering with the sentence imposed by a sentencing judge is a high one. In *R v M(CA)*, the Supreme Court articulated the threshold as follows: "absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if

18 Sec. 723.
19 Sec. 724(3)(e).
20 Sec. 813.
21 Sec. 675 and 676.
22 *R v Lacasse*, 2015 SCC 63, at para. 36.
23 *Ibid.*, at para. 39.

the sentence is demonstrably unfit."[24] The Court has justified this highly deferential posture in a way that reflects the Court's — and Canadian sentencing law's — relative comfort with forms of disparity in sentencing and its priority on individualization, which I draw out in the second part of this paper. It is, therefore, useful to reproduce at length one instance of that justification:

> *This deferential standard of review has profound functional justifications. [W]here the sentencing judge has had the benefit of presiding over the trial of the offender, he or she will have had the comparative advantage of having seen and heard the witnesses to the crime. But in the absence of a full trial, where the offender has pleaded guilty to an offence and the sentencing judge has only enjoyed the benefit of oral and written sentencing submissions …, the argument in favour of deference remains compelling. A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of both the Crown and the offender. A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly.*
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> *Appellate courts, of course, serve an important function in reviewing and minimizing the disparity of sentences imposed by sentencing judges for similar offenders and similar offences committed throughout Canada … But in exercising this role, courts of appeal must still exercise a margin of deference before intervening in the specialized discretion that Parliament has explicitly vested in sentencing judges. It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime … Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred …*[25]

[24] [1996] 1 SCR 500, at para. 90 [*M(CA)*].

[25] *Ibid.*, at paras. 91-92 [emphasis added].

Courts of appeal are, thus, only entitled to vary a sentence imposed by a sentencing judge if the sentence is demonstrably unfit, or if the judge made a legal error that had an impact on the sentence.[26] If an appellate court concludes that such an error has been made or that the sentence is, indeed, demonstrably unfit, that court must substitute its view of a fit sentence; an appellate court cannot remit the matter to the sentencing judge for reconsideration.[27]

1.2 Sentencing Guidance in Canada

The picture painted by this broad overview of the sentencing process in Canada is one in which individual sentencing judges hold substantial power in arriving at a fit sentence in a given case. This has always been so in the Canadian criminal process, but the question of how the discretion of sentencing judges should be controlled, constrained, or guided has been asked and answered in different ways — by policy-makers, Parliament, and the courts themselves. This section turns to consider this question of the management and status of judicial discretion in sentencing, and what guidance is and ought to be provided to sentencing judges — and by whom — as they discharge their sentencing function. The story is one of shifting emphasis in sentencing principles, as between parity and individualization, and changing (and sometimes competing) views on the purposes of sentencing.

History: Discretion and its Discontents

There are provisions throughout the *Criminal Code* that bear upon the question of sentencing. Virtually every offence-creating provision also includes an accompanying subsection that specifies the minimum (if there is one) or the maximum punishment relating to that offence. The *Criminal Code* also provides judges with a breadth of sentencing options. At one end of the spectrum are absolute and conditional discharges whereby, though there is a finding of guilt, no conviction is registered. Judges can also make orders for probation, require restitution, issue fines, and impose a period of imprisonment of less than two years to be served in the community (a "conditional sentence"). Of course, judges may also impose periods of incarceration. But, prior to the 1996 reforms explained below, the *Criminal Code* did not include provisions that addressed the purposes and principles of sentencing. The sentencing function was an exercise of judicial discretion subject only to the guidance and deferential oversight of appellate courts.

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[26] The error must have had an impact on the sentence: *R v Lacasse*, 2015 SCC 63, at para. 44.

[27] *R c Pelletier* (1989), 52 CCC (3d) 340 (Qc CA).

Amidst other reform activity taking place at the time on questions of sentencing,[28] in 1984 the federal government constituted a national sentencing commission devoted to studying and making recommendations about sentencing in Canada. The preamble of the Order in Council establishing the Canadian Sentencing Commission emphasized that "unwarranted disparity in sentences is inconsistent with the principle of equality before the law" and noted that "sentencing guidelines to assist in the attainment of those goals have been developed for use in other jurisdictions and merit study and consideration for use in Canada".[29] The terms of reference called on the Commission to examine a range of questions, but specifically "to examine the efficacy of various possible approaches to sentencing guidelines, and to develop model guidelines for sentencing and advise on the most feasible and desirable means for their use, within the Canadian context, and for their ongoing review for purposes of updating".[30] The Commission studied a range of approaches to sentencing guidelines, with particular attention to those in use in Minnesota.[31] In its final report, issued in 1987, the Commission recommended the establishment of a permanent sentencing commission and the adoption of a sophisticated scheme, with a set of four presumptive dispositions (qualified and unqualified presumptions of custody and non-custody), accompanied by a set of numerical sentencing guidelines, and a list of aggravating and mitigating factors on the basis of which judges could depart from a guideline, subject only to the duty to give reasons.[32]

The Commission's suggested reforms were received favourably in academic and professional circles, but "[a]lthough a wealth of research had demonstrated that unwarranted sentencing disparity exists, the government was apparently unconvinced that presumptive, or even advisory guidelines were necessary."[33] Instead of adopting the approach recommended by the Canadian Sentencing Commission, the federal government instead engaged in years of consultation with provincial governments, which resulted in a consensus that reform should focus on two issues: a statement of the purposes and principles of sentencing, and reducing reliance on incarceration.

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28 Most prominently, the Sentencing Project, launched by the Department of Justice and the Ministry of the Solicitor General in 1982, which resulted in a reform bill that died on the order paper when Parliament was dissolved in July 1984.

29 Canada, Canadian Sentencing Commission, Sentencing Reform: A Canadian Approach, 1987, p. 7.

30 *Ibid.*

31 See *Roberts*, FSR 9 (1997), p. 245.

32 Canadian Sentencing Commission, Sentencing Reform: A Canadian Approach, 198, pp. 558-561. The Commission provided a host of other important recommendations addressing issues including the maximum penalty scheme, plea bargaining, and alternatives to incarceration.

33 *Roberts*, FSR 9 (1997), p. 245.

Reform: Legislative Non-Guidance

In 1996, Parliament enacted Bill C-41. It came into force as the new part XXIII of the *Criminal Code*. The 1996 reform did not establish sentencing guidelines, nor did it establish a permanent sentencing commission to study and make recommendations about sentencing. Instead, in addition to creating certain non-carceral sentencing options and a set of new provisions governing the sentencing process, the central feature of the reforms introduced by Bill C-41 was the inclusion in the *Criminal Code* of a statement of principles and purposes that should guide sentencing. Section 718 set out the fundamental purpose of sentencing, which would be "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" in pursuit of "one or more" of six listed objectives: denunciation, deterrence, separation, rehabilitation, reparation, and promotion of a sense of responsibility in offenders. A new sec. 718.1 articulated the "fundamental principle of sentencing": "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." And sec. 718.2 provided a set of sentencing principles, including a list of aggravating circumstances, principles of parity, totality, parsimony, and restraint.[34]

Chief Justice Lamer observed that "[b]y passing [Bill C-41], Parliament has sent a clear message to all Canadian judges that too many people are being sent to prison".[35] The Court held that the Bill was passed with the goal of reducing the use of incarceration and expanding the use of restorative justice measures. Section 718.2(e) best captured Parliament's intention to reduce the use of incarceration, stating 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." This last clause reflected the atrocious history of Indigenous overincarceration in Canada. In *Gladue*[36] and *Ipeelee*[37] the Supreme Court of Canada described Indigenous overincarceration as a "crisis"[38] and interpreted sec. 718.2(e) as instructing sentencing judges to engage in a contextualized sentencing analysis, attentive to the way in which colonialism and the mistreatment of Indigenous peoples by the Canadian state might have affected the offender before the court, and whether alternative sentencing outcomes would be more appropriate. Despite this provision and these decisions, Indigenous overincarceration become worse, with Indigenous peoples accounting for almost 30% of the federal inmate population, while comprising just over 4% of the national population. The rates of

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34 These provisions have been subject to modest amendment in the intervening years. All of those revisions have focussed on "aggravating" considerations or factors. For the current provisions, see https://laws-lois.justice.gc.ca/eng/acts/C-46/section-718.html <02.06.2020>.

35 *R v Proulx*, 2005 SCC 5, at para. 1.

36 *R v Gladue*, [1999] 1 SCR 688.

37 *R v Ipeelee*, 2012 SCC 13.

38 For a critical reflection on the use of the language of "crisis" in this setting, arguing that it misleadingly represents an anomalous and contingent phenomenon, rather than the stable and structurally systemic pattern that it is, see *Arbel*, CJLS 34 (2019), p. 437.

overincarceration are even worse for Indigenous women and in provincial institutions; in Saskatchewan, despite representing only 14% of the provincial population, Indigenous peoples account for 74% of admissions to provincial custody.[39]

Not only have the reforms not produced a reduction in the use of incarceration in Canada (where the overall incarceration rate has remained reasonably stable at approximately 130 adults per 100,000 population),[40] the statement of purposes and principles of sentencing failed to provide meaningful guidance to sentencing judges or reduce disparity in sentencing. No priority was set among the six objectives listed in sec. 718 and, although the fundamental principle of sentencing was defined in sec. 718.1, the various principles of sentencing that followed are not ranked or prioritized.

Since the 1996 reforms, the Canadian sentencing framework can be described as one that involves very general and flexible legislative guidance, combined with substantial discretion for sentencing judges to arrive at a fit and proportionate sentence, and subject only to highly-deferential appellate review. Legislative guidance in respect of sentencing is limited to these broad provisions, maximum penalties set out for each offence, and a set of mandatory minimum sentences (the fate of which will be discussed more, below).

Public appetite for more legislative guidance in sentencing has not disappeared since the days of the Canadian Sentencing Commission. A Department of Justice study published in March 2018 indicated that 81% of Canadians thought that Canada should consider having set sentencing guidelines, and that 69% believed that an independent sentencing commission should be considered for Canada.[41] And yet Parliament has not emerged as an important decision-maker in the field of sentencing. Indeed, in the years since the 1996 reforms, the judiciary has not only embraced the discretion enjoyed by sentencing judges, but has defended it against legislative and appellate incursion.

Discretion Defended

The extent of the Canadian judiciary's embrace of discretion in sentencing, and the systemic commitment to the primary role of the sentencing judge in making decisions about criminal sanctions, is evident in two recent developments: constitutional challenges to mandatory minimum sentences and the relaxation of appellate guidance for sentencing.

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39 Statistics Canada, Adult and Youth Correctional Statistics in Canada, 2017/2018, May 9, 2019.

40 https://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00010-eng.htm <02.06.2020>. This is so despite a spike in the incarceration rate during Prime Minister Stephen Harper's conservative government, which pursued a "tough on crime" agenda, instituting a range of punitive measures and mandatory minimum sentences.

41 https://www.justice.gc.ca/eng/rp-pr/jr/rg-rco/2018/mar05.html <02.06.2020>.

The introduction of the *Charter* in 1982 added a new dimension to sentencing law, creating constitutional limits on criminal punishment. The guarantee most relevant to sentencing is sec. 12 of the *Charter*, which provides that "[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment." In the United States, the focus of debate and litigation on the equivalent provision of the US Bill of Rights (the Eighth Amendment, which prohibits cruel and unusual punishments) has been on prohibiting certain *methods* of punishment, centrally the death penalty. By contrast, in Canada — where the death penalty was formally abolished in 1976 (though the last executions took place in 1962) — the principal issues that have arisen in light of this constitutional prohibition have centred on the *severity* of sentences of incarceration, and mandatory minimum sentences in particular.[42] The constitutional standard under sec. 12 is that of gross disproportionality: "Section 12 will only be infringed where the sentence is so unfit having regard to the offence and the offender as to be grossly disproportionate."[43]

After an early case in which the Court ruled a mandatory minimum sentence unconstitutional,[44] this high threshold for constitutional intervention meant that courts were deferential to legislated mandatory minimum sentences.[45]

Indeed, it was 28 years before the Supreme Court next found a mandatory minimum sentence unconstitutional. However, during the period of Prime Minister Harper's Conservative government (2006–2015), mandatory minimum periods of imprisonment were added to a host of offences in the *Criminal Code* and the *Controlled Drugs and Substances Act*. As a result, the number of offences carrying mandatory minimum sentences grew from less than 15 in the 1980s to over 75 and courts in Canada were met with new and growing numbers of claims under sec. 12 of the *Charter*. A number of these courts began to rule that the mandatory minimum sentences were unconstitutional and, with its decision in *R v Nur*,[46] the Supreme Court of Canada ushered in a new constitutional posture toward mandatory minimum sentences.

The Court authoritatively set out a methodology whereby a mandatory minimum sentence must be ruled unconstitutional if "it imposes cruel and unusual punishment (i.e. a grossly disproportionate sentence) on the particular offender before the court, or failing this, on the basis that it is reasonably foreseeable that it will impose cruel and unusual punishment on other persons".[47] The use of these so-called "reasonable hypotheticals" as a metric against which to test mandatory minimum sentences was based on the idea that a law that imposes unconstitutional treatment on any individual is a law that ought to be of no force or effect.[48]

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42 On this distinction and its relevance in Canada, see *Kerr/Berger*, SCLR (2nd) 94 (2020), p. 235.
43 *R v Smith*, [1987] 1 SCR 1045, at para. 55.
44 *Ibid.*
45 See *Parkes*, SCLR (2nd) 57 (2012), p. 149.
46 *R v Nur*, 2015 SCC 15.
47 *Ibid.*, at para. 65.
48 See *R v Ferguson*, 2008 SCC 6, [2008] 1 SCR 96.

In the years since *Nur*, courts across the country, wielding the "reasonable hypothetical" test, have struck down a range of mandatory minimum sentences, although mandatory life sentences for murder remain in place. By some counts Canadian courts have ruled over three dozen such sentences unconstitutional for violating sec. 12.[49] In *R v Lloyd*, the Supreme Court effectively sounded the death knell for most mandatory minimum sentences, with Chief Justice McLachlin observing as follows:

> *[I]n light of* Nur, *the reality is this: mandatory minimum sentences that, as here, apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are vulnerable to constitutional challenge. This is because such laws will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional.*[50]

Chief Justice McLachlin suggested that if Parliament wished to continue to use mandatory minimum sentences as a tool of legislative guidance for sentencing, it could adopt one of two approaches: it could better define the reach of these mandatory minima, "so that they only catch offenders that merit the mandatory minimum sentences"[51] or it could "build a safety valve that would allow judges to exempt outliers for whom the mandatory minimum will constitute cruel and unusual punishment."[52]

The Court's muscular approach to the constitutional review of mandatory minimum sentences reflects one important recent instance of the courts pushing back on sentencing guidance that would constrain the discretion of sentencing judges, here guidance — albeit a clumsy form of guidance — offered by Parliament. One sees a similar reticence to accept strong constraints on sentencing discretion in the Court's response to judicial attempts achieve more consistency and predictability in sentencing, in the form of appellate guidance.

As discussed above, despite the highly deferential standard adopted for appellate review of sentences, the Supreme Court has described appellate courts as performing an important role in ensuring coherent development and consistency in the law. Given the absence of legislative sentencing guidelines, appellate courts have employed various means to try to structure sentencing discretion and achieve greater parity and consistency in sentencing. Some courts adopted "starting-point" sentences for particular offences, but this approach received disapproving treatment from the Supreme Court of Canada, which tightly circumscribed their relevance and utility in appellate review of sentences.[53] More common has been the adoption of

[49] For an excellent resource tracking the fate of mandatory minimum sentences in Canada, see https://mms.watch <02.06.2020>.

[50] *R v Lloyd*, 2016 SCC 13, at para. 35.

[51] *Ibid.*, at para. 35.

[52] *Ibid.*, at para. 36.

[53] *R v McDonnell*, [1997] 1 SCR 948.

judicially-defined sentencing ranges, which prescribe a span in which a sentence for a given offence should normally fall. And yet the Supreme Court of Canada has, of late, emphasized the non-binding nature of these appellate guidelines, noting that "[t]here will always be situations that call for a sentence outside of a particular range" because "each crime is committed in unique circumstances by an offender with a unique profile".[54] The current Chief Justice affirmed the principal role of the sentencing judge who is responding to the specifics of the case before him or her, describing sentencing ranges as "nothing more than summaries of the minimum and maximum sentences imposed in the past," which should be regarded "as historical portraits for the use of sentencing judges, who must still exercise their discretion in each case".[55]

The end point is that the departure from a sentencing range set by an appellate court is not evidence of an error in principle, nor is a sentence that falls outside such a sentencing range necessarily unfit. The Supreme Court has thus put appellate guidance "in its place," affirming the fundamental role of the discretion of sentencing judges: "deviation from a sentencing range does not automatically justify appellate intervention".[56] The Court's understanding of, and comfort with, the implications of this stance are clear. The Court observes that although "[i]ndividualization and parity of sentences must be reconciled to be proportionate,"[57] "[t]he principle of parity of sentences … is secondary to the fundamental principle of proportionality."[58]

1.3 Sentencing in Canada, Summarized

As it has evolved over its common law history, across various reform projects that have been either abandoned or unsuccessful in providing meaningful guidance, and in light of the recent jurisprudence of the Supreme Court, sentencing in Canada is defined by its embrace of an enormous degree of judicial discretion. Decisions about criminal sanctions are made at judicially centred sentencing hearings, absent significant legislative guidance, only flexible appellate guidance, and with a highly deferential standard of appellate review. Although the existence of this approach was enabled in part by the failure of past reform efforts that sought to introduce a system of guidelines, the system has gone on to embrace and even defend this central role for judicial discretion.

In a common law world in which momentum is in the direction of sentencing guidelines of various forms, this casts the Canadian case in an interesting comparative light. The development of the Canadian approach has not been for want of

[54] *R v Lacasse*, 2015 SCC 63, at para. 58.
[55] *Ibid.*, at para. 57.
[56] *R v Suter*, 2018 SCC 34, at para. 25.
[57] *R v Lacasse*, 2015 SCC 63, at para. 53.
[58] *Ibid.*, at para. 54.

other options; rather, conscious that this highly discretionary system sacrifices parity and allows for disparity in sentencing, courts have nevertheless embraced judicial discretion for principled reasons that are, I will suggest in the next part of this paper, theoretically rich and defensible. This is not to say that legislative reform and sentencing guidelines will not be a part of Canada's sentencing future. But the Canadian priority on individualization and the principle of individualized proportionality, which has been allowed to emerge and develop in this ecosystem of discretion, has certain strengths and valuable lessons for the practice and theory of sentencing. I now turn, in Part II, to the emergence, shape, and practical and theoretical implications of this fundamental principle of individualized proportionality.

2 Individualized Proportionality in Canadian Sentencing

2.1 The Principle, Introduced

The claim for a new fundamental principle of individualized proportionality in Canadian sentencing law may seem incongruous for several reasons. First, there is nothing much new about the idea that some such version of proportionality ought to govern the legal practice of sentencing. Proportionality's core requirement, that the severity of a sanction should reflect the seriousness of the criminal conduct, anchors sentencing practices in jurisdictions around the world and has long occupied a central place in the philosophical literature on punishment,[59] though that core requirement has been underpinned by various justifications.[60] The commitment to calibrating punishment to the degree of blameworthiness of conduct is the heart of contemporary retributive theories of sentencing,[61] much discussed and explored in the literature, even as others have critiqued appeal to the principle as "chimerical as a basis for limiting punishment."[62]

In Canada, a version of this retributively-derived principle of proportionality has been absorbed into the *Criminal Code*. Section 718.1 articulates a "fundamental principle" of sentencing, namely that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."[63] And even prior to

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[59] As *Lacey* and *Pickard* note, "proportionality stands as the key concept in a much longer history of efforts to modernize and temper punishment, occupying as it does a central place in the work of Enlightenment thinkers of reformers across many nations: Beccaria, Bentham, Jefferson and Montesquieu" (MLR 78 (2015), p. 218).

[60] See, e.g., *von Hirsch/Ashworth*, Proportionate Sentencing, 2005 for a review of certain of those various justifications.

[61] *von Hirsch* and *Ashworth* explain that "[w]hat is distinctive about contemporary desert theory is that it moves the notion of proportionality from its peripheral role to a central one in determining sanctions" (*ibid.*, p. 131.). Consider, for example, *von Hirsch's* "censure" theory, which *von Hirsch* and *Ashworth* restate and summarize in *ibid.*, p. 9. See also *von Hirsch*, Censure and Sanctions, 1993.

[62] *Lacey/Pickard*, MLR 78 (2015), p. 227.

[63] *Criminal Code*, sec. 718.1.

the 1996 amendments to the *Criminal Code* that introduced this provision, proportionality had "long been a central tenet of the sentencing process".[64] Moreover, there is, to be sure, already a species of "individualization" at work in this brand of proportionality: the punishment is calibrated to the "degree of responsibility of the offender." This is a form of individualization in comfortable harmony with both the guilt phase of the criminal process and retributive theories of punishment, each of which is centrally focussed on the assessment of individual blameworthiness.

But the innovation in Canadian sentencing law that I am exploring in this paper lies in a fundamentally different understanding of individualization, of its centrality in just sentencing decisions, and of what its pursuit demands of the sentencing judge. This form of individualization involves drawing close to the offender, through and past questions of responsibility and blame, to reckon with the offender's experience of suffering as a consequence of their wrongdoing. In the Supreme Court of Canada's emergent approach, proportionality remains central to the task of sentencing, as do considerations of responsibility and blame, but the focus on the offender's experience of suffering and of the consequences of wrongdoing draws increased attention to the other side of the proportionality equation: a sensitive, contextualized assessment of what counts as part of "a sentence" or punishment, and of its true severity. The individualization at work here is this individualized gauging of the circumstances of the offender and their experience of suffering, in service of a more refined sense of the true fitness and justness of the sanction imposed. The priority given to this form of individualization reshapes and recolours the principle and practices of proportionality.

This approach to individualized proportionality has two provocative and interrelated features that this paper will lay bare, one conceptual and one methodological.

First, this turn toward serious regard for the offender's experience of punishment attacks a paradox at the heart of traditional sentencing practices. The customary approach has focussed judges' attention on the quantum and form of punishment in the pursuit of proportionality: the severity of a carceral "sentence" — that which must be made proportionate to the gravity of the offence and the degree of responsibility of the offender — lies in the duration of the sanction imposed by the Court. On this view, proportionality is an essentially quantitative assessment. And yet, this way of understanding proportionality is fundamentally at odds with the reality that the severity of a sentence lies not in the cool metrics of quantum alone, but in the experience of suffering — something driven by the real consequences and conditions of punishment, and their effects on a given person's life. Otherwise put, proportionality must be a qualitative inquiry. We know full well, for example, that whether an offender will serve his sentence in a maximum or minimum security facility is determinative of the real severity of a sentence; and yet the system proceeds

[64] *R v Ipeelee*, 2012 SCC 13, at para. 36.

on the fiction that a judge can be coherently agnostic as to classification when imposing a sentence.[65] The conceptual turn that I am tracing in the jurisprudence involves a kind of phenomenological sensitivity — a commitment to the idea that the lived experience of society's response to wrongdoing is what should interest us in sentencing. In this, it troubles the sustainability of the mis-fit between our prevailing sentencing practices and what is necessary to evaluate the true severity, and hence fitness, of a punishment.

Second, this conceptual shift entails an important methodological or doctrinal implication for sentencing: a significant expansion of regard for what factors are salient in crafting a proportionate sentence. As I will show, factors that have no bearing on one side of the proportionality equation described in sec. 718.1 — "the gravity of the offence and the degree of responsibility of the offender" — and that reach well beyond quantum of punishment are now considered important in arriving at a fit sentence. The endpoint is that a sensitive reading of contemporary Canadian sentencing jurisprudence shows a style of proportionality at work that is not well captured by the text of sec. 718.1 alone. A very different brand of proportionality is emerging as the fundamental guide to Canadian sentencing, one in which the sentence is calibrated to the individualized experience of punishment, rather than resting on individualized assessments of responsibility and desert alone.

This development involves great intimacy and tremendous reach. "Intimacy" and "reach" may seem strange descriptive bedfellows. But in the context of sentencing they are facets of one another. This is attributable to the distinct nature of the sentencing project, which, when the doctrinal and managerial trappings — important though they are — are stripped away, is about the strategy of a political system, administered through a judiciary, to inflict suffering on an individual as a response to crime. In that unique kind of project, to be intimate, up close, and attentive to the experience of suffering is, indeed, an ambitious political move.

2.2 The Emergent Principle Described

In this section I trace the ascendancy of this approach to individualization, its effect on the jurisprudential understanding of proportionality, and its qualitative texture through a close consideration of three developments within the Supreme Court of Canada's sentencing jurisprudence of the last fifteen years. Each issue I discuss involves a discrete and sometimes technical point. However, once assembled and put in conversation with one another, the collected pieces paint a vivid picture of the Court's turn away from a more traditional and narrow responsibility-focussed understanding of proportionality and toward an individualized approach that treats the offender's experience of suffering as an essential yardstick for a fit sentence.

[65] I return to this example at the end of this paper.

Suffering at the Hands of Police

What is the relevance of pain and suffering, inflicted at the hands of the police during arrest, in arriving at a fit sentence? The question is an interesting one because, by the light of the fundamental principle of sentencing set out in the *Criminal Code*, the answer would appear to be "none." Police misconduct in the course of arrest bears on neither metric for proportionality stated in sec. 718.1. No matter how egregious, the treatment of the offender by the police does not affect the gravity of the underlying offence, nor does it alter the offender's responsibility for that offence. Proportionality, as it is described in the *Code*, seems to make such considerations irrelevant to the sentencing function.

This was the problem faced by the sentencing judge in *Nasogaluak*.[66] The police had violently subdued Mr Nasogaluak at the conclusion of a high-speed car chase, initiated because the police suspected that he was driving while impaired. In the course of arresting him for impaired driving and fleeing the police, the officers inflicted multiple punches to Mr Nasogaluak's head and two punches into his back while he was pinned face down on the pavement. These latter punches broke two of Mr Nasogaluak's ribs, resulting in a collapsed lung that required emergency surgery. Mr Nasogaluak, who pled guilty to both charges, argued that his sentence should be reduced as a consequence of this police misconduct, which breached his *Charter* rights. The sentencing judge agreed but, hemmed in by the conventional understanding of the ordinary sentencing principles, he believed he had to reach for an extraordinary solution and so used sec. 24(1) of the *Charter* to reduce the sentence as a constitutional remedy.

At the Supreme Court of Canada, Justice LeBel agreed that a reduction in sentence was appropriate. But of central interest to this paper was his finding that resort to sec. 24(1) was unnecessary: in the absence of a mandatory minimum sentence, the normal logic of sentencing could not only accommodate but might actually impel this result. How could this be?

In his reasons, Justice LeBel affirms the central role of proportionality and sec. 718.1 as the fundamental sentencing principle in Canadian law, emphasizing that attentiveness to proportionality means that judges will craft sentences that adequately reflect and condemn offenders' "role in the offence and the harm that they caused."[67] But this alone cannot explain the salience of Mr Nasogaluak's suffering to a fit sentence, given that the police misconduct bore on neither. Justice LeBel reaches past the four corners of sec. 718.1, providing a more expansive and political conception of sentencing than is normally found in the jurisprudence. He explains that "[p]rovided that the impugned conduct relates to the individual offender and the circumstances of his or her offence, the sentencing process includes consideration of society's collective interest in ensuring that law enforcement agents respect

[66] *R v Nasogaluak*, 2010 SCC 6.

[67] *Ibid.*, at para. 17.

the rule of law and the shared values of our society."[68] He draws support for this proposition from sec. 718's articulation of the fundamental purpose of sentencing, which includes contributing to "respect for the law and the maintenance of a just, peaceful and safe society." So perhaps this expansion of relevance is justified by something like a concern about society's "standing to blame."[69] By visiting serious disadvantage or inflicting social wrongs on an individual, the state may erode its authority to punish or even share responsibility for the crime *per se*, diminishing that of the offender.[70]

And yet this does not seem to provide an adequate account of why Mr Nasogaluak's "life-altering experience" is relevant to his sentence. Recall Justice LeBel's proviso: state misconduct may be factored into the sentence "*provided that the impugned conduct relates to the circumstances of the individual offender and the circumstances of his or her offence"*. Appalling though it was, there is no link between the misconduct of the police and the circumstances of the offence. And so the relevant link must be to Mr Nasogaluak's "circumstances." What is the nature of this link?

The provocative answer offered by this case is that we find this nexus in the pain that he experienced. His sentence is justifiably reduced because he has already suffered harm at the hands of the state in response to his misconduct. In arriving at a fit and proportionate sentence, the ways in which the offender has already suffered as a consequence of his misconduct are salient. That pain, experienced outside the usual colouring lines of duration and form of incarceration (and not digestible as part of the gravity of the offence or the degree of responsibility of the offender), is nevertheless relevant to reasoning about a just and appropriate sentence.

Justice LeBel describes the broad discretion created by ss. 718-718.2 of the *Code* as anchored by a foundational idea: that "the determination of a 'fit' sentence is … an individualized process".[71] The facts and reasons in *Nasogaluak* suggest something about the character of this individualization. It draws the judge out of the narrow understanding of punishment suggested by the *Code* and into contact with an offender's experience of suffering in response to wrongdoing.

Collateral Consequences of Sentencing

The more commodious sense of punishment drawn from *Nasogaluak* points the way to a second development in Canadian sentencing law relevant to the emergent principle of individualized proportionality: expansive regard for the "collateral consequences of a sentence." While sentencing judges have long considered certain factors

[68] *Ibid.*, at para. 49.

[69] *Duff*, Ratio 23 (2010), p. 123; *Duff*, Answering for Crime, 2009.

[70] For arguments in this vein surrounding poverty, see *Tadros*, JVI 43 (2009), p. 391; *Sylvestre*, McGilLJ, 55 (2010), p. 771. I discuss this concept in the law of mental disorder in *Berger*, Mental Disorder, 2012, p. 117.

[71] *R v Nasogaluak*, 2010 SCC 6, at para. 43.

that might be considered "collateral" to sentence, they have done so in circumstances in which the consequences at issue were tightly linked to the nature of the sentence itself, such as the impact of a custodial sentence on parenting or families.[72] Since 2013, however, the Supreme Court has embraced a capacious definition of collateral consequences and has justified this approach on grounds that highlight both the doctrinal priority and distinctive character of individualization in Canadian sentencing.

The first step in this development came with the Supreme Court of Canada's acceptance in *R v Pham*[73] that an otherwise fit sentence could and should be reduced in light of immigration consequences flowing from a criminal sentence. The *Immigration and Refugee Protection Act* stipulated that a non-resident sentenced to a term of imprisonment of two years or more lost their right to appeal a removal order.[74] Mr Pham applied to have his sentence of certain drug offences reduced by one day to avoid this significant consequence of his two year sentence. The Court of Appeal refused to vary the sentence but the Supreme Court found that these "collateral consequences" imposed by *IRPA* should be considered and reduced his sentence accordingly.

Of central interest is how the Court justified this outcome. Justice Wagner (as he then was), writing for the Court, defined collateral consequences broadly: "the collateral consequences of a sentence are any consequences for the impact of the sentence on the particular offender." Such consequences "may be taken into account in sentencing as personal circumstances of the offender."[75] "However," Wagner J pauses to explain, "they are not, strictly speaking, aggravating or mitigating factors, since such factors are by definition related only to the gravity of the offence or to the degree of responsibility of the offender."[76] He thus positions the role of collateral consequences firmly outside the frame of sec. 718.1, but explains that "[t]heir relevance flows from the application of principles of individualization and parity."[77] Inasmuch as it informs the individualized "impact of the sentence," consideration of collateral consequences aids in ensuring that the sentence is truly "fit having regard to the particular crime and the particular offender"[78] and actually equivalent in severity to sentences imposed for similar crimes committed in similar circumstances. The two conventional sec. 718.1 metrics are still critical to arriving at a fit sentence but the relevance of collateral consequences is a function of close attention to a third

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[72] Consider, for example, the case law indicating that sentencing judges should account for the separation of a mother from her family (see, e.g., *R v Collins*, [2011] OJ No 978, 104 OR (3d) 241 (Ont CA)) or, more generally, the impact of incarceration on families (see, e.g., *R v Geraldes*, [1965] JQ no 22, 46 CR 365 (Que CA).

[73] *R v Pham*, 2013 SCC 15.

[74] SC 2001, c 17 [*IRPA*]. That threshold was since reduced to 6 months by the *Faster Removal of Foreign Criminals Act*, SC 2013, c 16, sec. 24.

[75] *R v Pham*, 2013 SCC 15, at para. 11.

[76] *Ibid.*, at para. 11.

[77] *Ibid.*, at para. 11.

[78] *Ibid.*, at para. 14.

focal point: the offender's personal circumstances and how these inflect the severity of the sentence imposed.

With its decision in *R v Suter*,[79] the Court committed itself even more deeply to this logic, with greater conceptual implications for sentencing. The accused accidentally drove his vehicle into a restaurant patio, killing a two-year-old boy. Although he was not impaired at the time of the accident, he was given improper legal advice that led him to refuse to provide a breath sample. He was charged with, and pled guilty to, refusing to provide a sample knowing that a death was caused. The poor advice was clearly relevant to the sentencing judge's decision to set the sentence well below the normal range, but the macabre twist was this: prior to sentencing, Mr Suter was abducted by three hooded men who drove him to a secluded area, beat him, and cut off one of his thumbs with pruning shears. Was the sentencing judge entitled to factor this vigilante action into his decision?

Justice Moldaver, for the majority, held that he was. Note the significance of this holding: both the police conduct in *Nasogaluak* and the immigration consequences at issue in *Pham* involved state action. Those cases thus suggest that the aggregate treatment of an accused at the hands of the state is relevant to sentencing. Factoring the vigilante action in *Suter* into the sentence significantly expands this already provocative proposition: the suffering need not be traceable to the state. Justice Moldaver offers a broadened definition of collateral consequences as including "any consequence arising from the commission of an offence, the convictions for an offence, or the sentence imposed for an offence that impacts the offender,"[80] whether or not they are foreseeable or natural.[81] All such consequences, irrespective of their nexus with the state, are relevant to a fit sentence. This is an expansive holding, the boundaries of which have yet to be worked out.

The Court is again clear that the relevance of such collateral consequences is not a function of the seriousness of the offence or the responsibility of the offender. Rather, the question is "whether the effect of those consequences means that a particular sentence would have a more significant impact on the offender because of his or her circumstances."[82] They must be considered "[t]o ensure that the principles of individualization and parity are respected".[83] The brand of individualization impelling this approach goes beyond questions of responsibility. It exceeds simply tailoring the sentence to the individual's objective characteristics. This touchstone principle of individualization, which colours and directs the search for proportionality, is about broad sensitivity to the factors that will shape an offender's experience of the consequences of their wrongdoing.

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79 *R v Suter*, 2018 SCC 34.

80 *Ibid.*, at para. 47.

81 *Ibid.*, at para. 49.

82 *Ibid.*, at para. 48.

83 *Ibid.*, at para. 51.

The Relevance of Hope

To complete the picture of this emerging sensitivity to the experience of punishment, I turn to the relevance of hope. This brings us closest yet to the offender's subjective and affective experience of punishment — a sensible place for us to be when assessing the fitness of a sentence, but somewhere that systems of punishment are loathe to go.

Unlike the others, this development was precipitated by legislative change. Section 743.6 introduced the ability of a sentencing judge to increase the period of parole ineligibility where the court is satisfied that "the expression of society's denunciation of the offence or the objective of specific or general deterrence so requires". Traditionally, there had been a tight seal between the judicial determination of the fit sentence and those responsible for overseeing the conditions and implementation of punishment. In this division of labour, decisions about parole were simply not part of the work of a judge: "[c]onsiderations relating to parole eligibility normally remained irrelevant to the determination of the fitness of a sentence".[84] Judges sentence; other actors are concerned with the conditions and implementation of this sentence.[85] However, as Justice LeBel explained in *Zinck*, "[t]he adoption of sec. 743.6 altered … significantly the nature and scope of sentencing decisions in Canadian criminal law."[86]

Section 743.6 was drafted in a way that "left many substantive and procedural questions unanswered."[87] The key substantive issue that emerged was the appropriate test for deciding whether the use of sec. 743.6 is warranted. In particular, a split had opened up in appellate courts as to whether extended parole ineligibility ought to be reserved for special or exceptional circumstances. In *Zinck*, the Supreme Court held that it should be. Justice LeBel, writing for the majority, held that "[t]he decision to delay parole remains out of the ordinary,"[88] and that "it should not be ordered without necessity, in a routine way."[89] This posture of relative restraint, he explains, is a product of an orienting duty: that "the sentencing decision must be alive to the

[84] *R v Zinck*, 2003 SCC 6, at para. 18. The one notable exception was sentencing for second degree murder, with a mandatory life sentence and a variable parole ineligibility period of between 10 and 25 years. Justice LeBel notes that "[w]hile some courts may have increased the length of a jail term to manipulate the term of parole ineligibility, such a practice is quite improper.".

[85] For a recent articulation of this standard division of labour, see *R v Passera*, 2019 ONCA 527, at para. 24: "Sentencing judges are charged with imposing a fit sentence for the offence and the offender, having regard to concerns which include rehabilitation, deterrence and denunciation. Correctional authorities take the sentence as imposed and are responsible for administering that sentence.".

[86] *R v Zinck*, 2003 SCC 6, at para. 22. In *Zinck*, the accused, who had an extensive criminal record including a number of firearm and alcohol offences, was charged with second degree murder in the drunk shooting of his neighbor. He pleaded guilty to manslaughter and was sentenced to a 12 year term of imprisonment with parole eligibility delayed for 6 years.

[87] *Ibid.*, at para. 24.

[88] *Ibid.*, at para. 33.

[89] *Ibid.*, at para. 31.

nature and position of delayed parole in criminal law as a *special, additional form of punishment*."[90]

This last phrase offers the key to unlocking the deeper significance of *Zinck* for this paper. What makes delayed parole eligibility a "special" as a form of punishment? The Court's core answer: in the manipulation of hope. Delaying parole brings a particular "harshness" to sentencing.[91] This harshness is not solely a matter of a longer period of time in custody; depending on the decisions of a parole board, an offender with an earlier parole eligibility date may well nevertheless remain detained. Rather, the "harshness" arises by depriving the offender, from the outset, of the prospect of earlier release, thereby altering the affective life of the offender. Justice LeBel observes that delaying parole "may almost entirely extinguish any hope of early freedom from the confines of a penal institution with its attendant rights or advantages."[92] A sentence served without such hope is a tougher sentence. This distinctive harshness is what is "special" about delayed parole as an aspect of punishment and calls for parsimony in its use. With deferred access to parole now "part of the punishment,"[93] sentencing judges are drawn out of abstract reflection on quantum into sympathetic engagement with the circumstances and conditions that will shape how an accused will experience their punishment. *Zinck* does not mean that parole eligibility is now a standard consideration in the sentencing process.[94] This remains a statutory exception. But on a full, attentive view of the sentencing system, one can no longer easily say what was once available as a claim: that the conditions of a sentence are never a court's concern. The seal has been broken.

Hope inflects the qualitative nature of a sentence. It gives flavour, character, and existential texture to the experience of punishment. To be sure, it is not alone in this. Fear, shame, loneliness, despair and a host of other internal states help determine the true harshness or leniency of punishment. Although sentencing cannot take full account of these emotional dimensions of an offender's experience, *Zinck* suggests that neither can it be wholly insensitive to them and remain a meaningful measure of punishment. And, indeed, we have seen Canadian courts pick up and develop this incipient concern about hope and the interior lives of offenders as they wrestle with

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90 *Ibid.*, at para. 31 [emphasis added].

91 *Ibid.*, at para. 24.

92 *Ibid.*

93 *Ibid.*, at para. 23. See also *R v Passera*, 2019 ONCA 527, at para. 23, Doherty JA: "when a sentence involves a term of imprisonment, the sentencing process can be viewed as encompassing both the term imposed by the sentencing judge and the statutory provisions under which the sentence will be administered by correctional authorities after it is imposed. *Together they describe and define the punishment imposed*" [emphasis added].

94 See *R v Passera*, 2019 ONCA 527, at para. 26, at which Justice Doherty explains that "[s]ubject to specific statutory exceptions (e.g. ss. 743.6 and 745.5) … [q]uestions relating to if, when, or how an offender might be released on some form of conditional release prior to the completion of the sentence are not for the sentencing judge to determine".

another emerging issue in sentencing: how to approach the "stacking" of parole ineligibility periods — and the prospect of "whole life sentences" — made possible by a legislative change made in 2011.[95]

Reflecting a significantly more qualitative understanding of punishment, this attention to the affective dimensions of the experience of punishment is another facet of the emergent principle of individualization at work in Canadian sentencing law.

The Principle Summarized

The three developments that I have drawn from the Court's contemporary sentencing jurisprudence each insist, in their own way, that the character, severity, and hence fitness of a sentence is ultimately derived from the offender's experience of suffering. *Nasogaluak* tells us that pain inflicted by police is part of the punishment; the cases on collateral consequences note that an offender's sentence is to be found in the aggregate ways in which the state and, indeed, society respond to an offender's wrongdoing; in its concern with hope, *Zinck* directs sentencing courts down and inward, into the affective dimensions of punishment. Assembled, these developments suggest a phenomenological turn in thinking about sentencing in Canada, one that is more attuned to the lived experience of criminal punishment.

The juridical expression of this turn is a unique marriage of proportionality and individualization. This paper began with an epigraph from *Ipeelee*, one that I described as expressing the ethical heart of this development. And, indeed, in *Ipeelee* the terms of this marriage are made clear. Justice LeBel describes proportionality as "the *sine qua non* of a just sanction"[96] but emphasizes that, "[d]espite the constraints imposed by the principle of proportionality,"[97] sentencing is "a highly individualized process."[98] When sentencing an Indigenous offender against the background crisis of the radical overrepresentation of Indigenous persons in Canadian prisons, this involves considering the unique circumstances of the offender, including not only their background experiences but the worldviews and values that they and their communities hold.[99] Despite the unique context of *Ipeelee*, Justice LeBel is insistent that this close attention to the personal circumstances of Aboriginal offenders is none other than the expression of "the fundamental duty of a sentencing judge"[100] in all cases: to "engage in an individualized assessment of all of the relevant factors and

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95 Section 745.51 of the *Criminal Code*, introduced in 2011, Bill C-5. See, e.g., *R v Klaus*, 2018 ABQB 97; *R v Vuozzo*, 2015 PESC 14.

96 *R v Ipeelee*, 2012 SCC 13, at para. 37.

97 *Ibid.*, at para. 38.

98 *Ibid.*, at para. 38.

99 *Ibid.*, at paras. 72, 74.

100 *Ibid.*, at para. 75.

circumstances, including the status and life experiences, of the person standing before them."[101]

This "fundamental duty" joins and modifies — and even controls — the "fundamental principle" found in sec. 718.1 of the *Code*. This is individualized proportionality. It is not the result of raw judicial innovation; rather, it is a principled judicial articulation of what is necessary in order to ensure that a sentence is truly fit and proportionate, as the *Code* requires. And what it demands is an imaginative engagement with how society's response to wrongdoing will be experienced by this person standing before the Court. As a legal matter, in view of these developments, I suggest that it would now be an error for a judge to invoke proportionality without emphasizing its essentially individualized nature, and then wrestling with the real effects of the criminal process and proposed sentence on the life lived by the offender.

2.3 The Promise and Challenges of the Principle

It is no coincidence, I suggest, that the development of this brand of individualization has been co-emergent with the Supreme Court's reckoning with Indigenous over-incarceration. The experience of this crisis has induced a sense of concern and wariness about the use of criminal punishment in ways that are undisciplined by the actual lives that such punishment produces. The *Report of the Royal Commission on Aboriginal Peoples*[102] and the *Report of the Truth and Reconciliation Commission of Canada*[103] lent urgency to this shift in attitude, while the introduction of sec. 718.2(e) and the Court's decisions in *Gladue* and *Ipeelee* gave it shape. The emergent principle of individualized proportionality participates in that same ethos. Its normative upshot is also a posture of caution and restraint, achieved by demanding a searching engagement with the range of circumstances that will affect how punishment will actually be experienced by the person standing before a sentencing judge.

Though it marks a departure from more familiar retributivist constructions of proportionality,[104] this development in Canadian sentencing law and practice is appealing for a number of reasons. It responds better to the humanity of the moment

[101] *Ibid.*, at para. 75. For a piece contrasting the Canadian and Australian approaches to individualized justice in the context of the sentencing of Indigenous offenders, see *Anthony/Bartels/Hopkins*, MULR 39 (2015), p. 47.

[102] Canada, Report of the Royal Commission on Aboriginal Peoples, 1996.

[103] Final Report of the Truth and Reconciliation Commission of Canada, 2015.

[104] Indeed, many retributivist theorists would likely balk at the form of individualization that I have identified in the Supreme Court's jurisprudence as an intolerable departure from the conceptual justifications that underpin proportional sentencing. On *von Hirsch's* censure model, for example, the "central justifying feature of punishment" is the "visitation of censure," and treating as relevant to sentencing factors that do not bear directly on "the degree of reprehensibleness" of the offender's conduct diminishes the legitimacy of state punishment (*von Hirsch/Ashworth*, Proportionate Sentencing, 2005, p. 134.). The focus of this paper has been on tracing and exploring this jurisprudential development; assessing whether this development can be reconciled with retributive theories of punishment is the task for a different piece. It bears noting, however, that retributivist theorists insist that proportionality depends on the accurate assessment of the severity of the sanction, though less attention is given to this point in the literature. (See, e.g., *ibid.*, pp. 147–148; *von Hirsch*,

of sentencing and what is morally and politically urgent about it: the extraordinary act — carried out by a judge — of the state effecting political ends by inflicting violence and suffering on an individual. It seems ethically crucial that the judge draw close to the individual in that moment in order to ensure that the character of this suffering is appreciated; only then can we speak intelligibly about the fitness of a punishment.

The developments that I have explored thus also contribute to a more satisfying sense of what constitutes a "sentence" or "punishment" and, with this, a more realistic approach to proportionality. Moving beyond questions of quantum and form, the inquiry takes on a thick qualitative dimension, with the measure of a sentence taken from the actual experiences of punishment and aggregate consequences that result from one's wrongdoing. This institutional sensitivity to the individualized realities of punishment may help "make the metaphor of proportionality meaningful, and punishment accordingly limited in real terms."[105] By contrast, failing to account for these lived realities, the exercise of seeking proportionality is consigned to fail ("in real terms"), and to do so in the direction of over-punishment. In this, this emergent approach is better equipped to offer up some resistance to the well-worn pattern of criminal punishment reproducing and exacerbating pre-existing disadvantage and marginalization.

We have already seen facets of the promise of individualized proportionality realized in elements of Canadian sentencing practice. This is most vivid in the notable story of judicial resistance to mandatory minimum sentences, described in Part I of this paper. The essential character of mandatory minimum sentences is that they place predictive floors on the exercise of individualization; as Chief Justice McLachlin emphasized in the case that signalled the Court's stand against mandatory minimum sentences, these minimums thus "affect the outcome of the sentence by changing the normal judicial process of sentencing."[106] The Court's method for assessing whether a mandatory minimum sentence is cruel and unusual, contrary to sec. 12 of the *Charter*, is essentially one of deep individualization: generating a reasonable hypothetical *crime* but also, crucially, *offender* who would be subject to the minimum. Mandatory minimum sentences have, indeed, not fared well before the courts. And it is notable that in the Supreme Court's most recent invalidation of a mandatory sentence — the victim fine surcharge — the analysis went well beyond the formal sentence. In *R v Boudreault*, the Court delved deeply into the impecunious offender's experience of the criminal process and — crucially and provocatively — the relationship between criminal punishment, poverty, and structural economic injustice.[107]

Censure and Sanctions , 1993, pp. 33-35.) As I have described it, the heart of this development in the Court's jurisprudence is a more expansive and phenomenological approach to how one understands the character and, hence, severity of the punishment itself. I note and discuss the subjectivist-retributivist debate on how to assess severity of punishment below.

105 *Lacey/Pickard*, MLR 78 (2015), p. 228.

106 *R v Nur*, 2015 SCC 15, at para. 44.

107 *R v Boudreault*, 2018 SCC 58.

Below the constitutional register, the promise of individualization can be found in the softening of the Court's approach to judicially-created sentencing ranges, discussed in Part I.[108] It is similarly found in a recent instance of a judge using the expansive approach to "collateral consequences" as authority for factoring an offender's disability into the fitness of a sentence not because it was "relevant to the seriousness of the offence or the blameworthiness of the offender,"[109] but because the medical condition would inflect the experience of the sentence imposed on him or her. And, with *Boudrealt* in hand, perhaps it will be a tool by which sentencing practices can become more sensitive to questions of mental health and poverty.

And yet there are challenges involved in the embrace of individualized proportionality, ones that may affect or limit the role of this emergent principle in the future of Canadian sentencing.

The first is conceptual in nature. With a turn to the individual experiences of the offender as an important barometer for the fitness of a sentence, we come up against a significant problem related to the scope, and normative risks, of this approach. In contemporary theoretical debates about punishment, critiques of subjectivist theories that focus in this way on the experience of punishment point to the risk that this will involve us in the unattractive exercise of adjusting sentences to account for expensive tastes and insensitive offenders.[110] And so, concerned with the individualized experiences of the person before the court, would we have to account, for example, for the offender who would suffer more in prison because he is used to silk sheets or because of the shame of conviction given his social standing? Or, seeking a due measure of subjective suffering, might we have to punish more severely the offender who is inured to deprivations, having lived a particularly harsh life? This is a point of significant conceptual vulnerability in the approach that I have described. As von Hirsch and Ashworth note in their critique of subjectivist approaches to gauging the severity of punishment, "[s]ome convicted persons are tough, others are tender, so that greater deprivations might be visited on the tough ones (irrespective of the seriousness of their offences) because they would feel them less keenly."[111] Such outcomes are surely troubling and pose a problem naturally generated by the acknowledgment of suffering as the phenomenological essence of punishment.

[108] See *R v Lacasse*, 2015 SCC 63, at para. 25; *R v Suter*, 2018 SCC 34, at para. 25.

[109] *R v Polanco*, 2019 ONSC 3073, at para. 37.

[110] See, e.g., *Gray*, VandLRev 63 (2010), p. 1619. For a defence of the relevance of the subjective sensitivity of offenders to assessments of punishment severity, see *Kolber*, ColLRev 109 (2009), p. 182. Although I share his view that "any successful justification of punishment must take subjective experience into account" (p. 235), my response to the problem of the sensitive offender differs from his.

[111] *von Hirsch/Ashworth*, Proportionate Sentencing, 2005, p. 147. For key pieces in the subjectivist-retributivist debate in punishment theory, discussing whether the severity of punishment should be indexed to the subjective experience of offender, including his or her particular abilities, sensitivities, baseline conditions, and the burdens he or she experiences from non-state sources, see, e.g., *Bayern*, NewCrimLRev 12 (2009), p. 1; *Bronsteen/Buccafuso/Masur*, UChicagoLRev 76 (2009), p. 1037; *Markel/Flanders*, CalLRev 98 (2010), p. 907; *Bronsteen/Buccafuso/Masur*, CalLRev 98 (2010), p. 1463; *Markel/Flanders/Gray*, CalLRev 99 (2011), S. 605.

My sense is that the proper response is not to resile from this truth and the challenge it presents by retreating into the comfort of a quantitative retributivism that blinds itself to the expanded range of factors and considerations that affect the contextualized experience — and, hence, true severity — of a punishment.[112] Instead, the conceptual and doctrinal challenge is to generate a principled basis on which to distinguish the kinds of features and experiences that we think ought to concern us in the task of individualization. I am not able to take up this challenge fully here, but a plausible starting point — one drawn from an underlying commitment to ensuring that sentencing contributes to a more just and equitable society — would be that we ought to exclude from consideration those circumstances whose effect would be to exacerbate systemic inequality.

And yet however significant this conceptual challenge, it vanishes in comparison with the second limit facing the future and impact of individualized proportionality, one that is systemic and institutional in character.

That challenge is as follows: however robust the commitment to individualized proportionality as the measure of fitness in the sentencing process, at the conclusion of the sentencing hearing the offender is deposited into a system that is manifestly not driven by this ethic, but the practices of which can fundamentally alter the true nature of the punishment. Far from being organized around principles of individualized proportionality, practices of prisons and correctional authorities are governed by an approach that approximates what Simon and Feeley famously described in their article, "The New Penology."[113] This approach is not centrally concerned with "responsibility, fault, moral sensibility, diagnosis, or intervention and treatment of the individual offender. Rather it is concerned with techniques to identify, classify, and manage groupings sorted by dangerousness."[114] The conditions produced by those decisions and techniques are what most directly affect the experience of punishment and with this, as I have argued, they control the true nature of the sentence imposed. The sharpest example is the operation of classification systems that sort offenders into institutions with diverse conditions of constraint, access to programming, and living conditions. No matter how sensitively arrived at, the ultimate character of a sentence is determined by the decisions and practices of non-judicial actors that the sentencing judge does not control and, indeed, about which she is usually

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[112] Acknowledging the essential nature of the task of gauging the severity of punishment to a coherent approach to proportionality, *von Hirsch* and *Ashworth* (Proportionate Sentencing, 2005, pp. 147-148) propose a ranking penalties based on "how they typically impinge on persons' *living standard*" — a kind of "interests analysis" rather than an approach focused on the experience of punishment. Not only is this approach at odds with the phenomenological approach to understanding the severity of a sanction defended in this paper, it is confined, for *von Hirsch* and *Ashworth*, to ranking the severity of non-custodial sanctions. With respect to custodial sanctions, they are breezily quantitative, stating only that "prison sanctions can be compared by their duration" (p. 147).

[113] *Feeley/Simon*, Criminology 30 (1992), p. 449. *Feeley* and *Simon* subsequently qualified many of their claims in The Form and Limits of the New Penology, 2003, p. 75, but their description of the orientation of modern penal practices is still heuristically useful.

[114] *Feeley/Simon*, Criminology 30 (1992), p. 452.

left ignorant. This is the paradox that darkens the promise of individualized proportionality, one that flows from attention to the institutional context of sentencing.

Although judges have made some efforts to engage with the conditions of incarceration for sentencing purposes,[115] this paradox is a product of the administration of sentences, and prisons themselves, being largely treated as a "black box"[116] by not just sentencing theory, but by contemporary sentencing practices. Yet, perhaps we can begin to imagine new possibilities in these practices that can respond to the ethic and duty of individualized proportionality. Seized with the inescapable salience of the conditions and consequences of punishment to their duty to craft a fit sentence, perhaps sentencing judges will begin to insist on more information about the real conditions and foreseeable experiences that an offender will face: the carceral institution at which the sentence will be served, but also the living conditions, practices of confinement, available programing, and extant levels of violence at that institution, to name but a few crucial factors. And met with an inability or resistance to supply that information, perhaps a judge will inaugurate a practice of sentencing an offender on the basis of a "reasonably worst hypothetical" — explicitly assuming, for example, incarceration in a maximum security facility with poor conditions and limited programming — so as to ensure that the sentence she authorizes does not prove unfit. Though innovative, even disruptive, such a step would be faithful to Parliament's command for parsimony in the use of sanctions[117] and would honour the fundamental duty and principles as articulated by the Supreme Court in the cases I have discussed.

It may be that the systemic membrane (made of inertia, bureaucracy, and administrative difficulty) between sentencing courts and those responsible for administering sentences will prove too thick to readily pierce, resisting such innovations. But a judge who made such efforts — one who sees that the seal between the quantum of sentence and the experience of punishment cannot be coherently maintained and has, indeed, already been broken by force of the principle of individualization — would, in my view, stand on firm ground, both ethically and legally. Moreover, the cost of failing to try is simply too high. Once seen, the role of sensitive regard for the actual experience of punishment in properly discharging the burdens of sentencing cannot be readily put out of mind. To then acquiesce to the character of that experience being determined entirely by correctional bureaucracy is to turn one's back on the salutary moral sensibilities that have informed the emergent principle of individualized proportionality, and to foreclose the futures of sentencing that it might inspire.

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[115] *Kerr*, CJLS 32 (2017), p. 201.

[116] See *Kerr*, UTLJ 69 (2018), p. 85.

[117] *Criminal Code*, sec. 718.2(d).

Legislation

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