THE LAW OF SENTENCING

TABLE OF CONTENTS

AVAILABLE SENTENCES

By virtue of s. 731 of the *Criminal Code*, a sentencing judge may impose only two of the following three sentencing options: a period of custody, probation, and a fine. Under that section, a period of probation may be added to either a fine or a period of custody but not both: *R v Berhe,* 2018 ONCA 930, at para 1

AGGRAVATING FACTORS

A. GENERAL PRINCIPLES

It is an error of law to rely on an aggravating fact on sentencing that has not been proven beyond a reasonable doubt by the Crown, contrary to s.718: *R v McIntyre*, 2016 ONCA 843 at para 18.

In *LeBreton*, 2018 NBCA 27, the New Brunswick Court of Appeal held that a sentencing judge can infer that the accused had an aggravating state of mind from undisputed facts at a guilty plea, even without a *Gardiner* hearing.

B. OUTSTANDING CHARGES

It is an error of law to rely on outstanding charges as an aggravating factor on sentencing, unless proven beyond a reasonable doubt (*R v Klammer*, 2017 ONCA 416 at para 3), or unless there is a nexus between the outstanding charges and the offences for which the accused is being sentenced: *R v Banovac,* 2018 ONCA 737 at para 4

C. BREACH OF TRUST

Breach of trust by a police officer is a significant aggravating factor on sentencing: *R v Hansen,* 2018 ONCA 46 at paras 56-57

D. LACK OF REMORSE/INSIGHT

While not in itself an aggravating factor, it may become one when it is considered because of its impact on the accused's potential danger to the community: *R v Hawley*, 2016 ONCA 143 at para 5; *R v JS,* 2018 ONCA 675 at para 83; *R v Shah,* 2017 ONCA 872 at paras 8-9. To use lack of insight as an aggravating factor is, absent unusual circumstances, an error of law: *R v Siddiqi*, 2015 ONCA 548 at para 21

E. LACK OF PRO-SOCIAL FACTORS

The absence of a pro-social life network might more appropriately be treated as relevant to the likelihood that the appellant could rehabilitate himself rather than being treated as an aggravating factor: *R v Banovac,* 2018 ONCA 737, at para 4

F. WEAPONS

The use of a firearm by itself cannot be an aggravating consideration in sentencing under s. 236(a) [use of a firearm during manslaughter], because this provision already takes into account that a firearm was used in the commission of a manslaughter: *R v Araya*, 2015 ONCA 854 at paras 24-25. However, the circumstances surrounding the use of the firearm can constitute an aggravating factor: *Araya* at para 26

ALLOCUTION: RIGHT OF

The failure to grant a right of allocution does not render the sentence unfit without any evidence that anything the appellant would have said would be different than what was already before the trial judge and considered by him/her in making the sentence: *R v. Silva*, 2015 ONCA 301

For a good example of the mitigating effect of a right of allocution on sentencing, see *R v Al Saedi,* 2017 ONCJ 204, in which the Court imposed a conditional discharge for the offence of impersonating an officer. The accused gave a powerful statement on sentencing in a courtroom full of grade 12 students, in which he delibered a heartfelt message of his remorse and efforts to make amends, sharing the lessons he learned with the students.

ANCILLARY ORDERS

A. INTERNET PROHIBITION: SECTION 161

The overarching protective function of s. 161 of the *Criminal Code* is to shield children from sexual violence. An order under s. 161 constitutes punishment and is not available as a matter of course: there must be an evidentiary basis upon which to conclude that the particular offender poses a risk to children; the specific terms of the order must constitute a reasonable attempt to minimize the risk; and, the content of the order must respond carefully to an offender's specific circumstances: *R v Schulz,* 2018 ONCA 598 at para 41

Section 161(1)(d) permits the courts to prohibit Internet use but does not provide the court with the power to restrict ownership of such Internet capable devices. Nor should such a power be inferred.

In cases involving first time offenders, the court must remain cognizant of the need to avoid an order under s. 161(1)(d) that might unduly prevent a first time offender from making serious rehabilitative efforts in light of his particular circumstances:

Because these orders can have a significant impact on the liberty and security of offenders and can attract a considerable degree of stigma, they will be justified where the court is satisfied that the specific terms of the order are a reasonable attempt to minimize the risk the offender poses to children. The terms of such orders must, therefore, carefully respond to an offender's specific circumstances: *R v Brar,* 2016 ONCA 724, see paras 17-28

In imposing a section 161 order, the Court must have regard to not only the circumstances of the offence and the offender, but also to whether the offender

poses a continuing risk to children upon his release into the community. If so, the Court may impose reasonable terms in an attempt to minimize that risk: *R v LC,* 2018 ONCA 311 at paras 5-8

See also *R v KRJ*, 2016 SCC 31

Given the discretionary nature of an order made under s. 161(1), an appellate court should not interfere absent an error in principle or the imposition of a prohibition that is demonstrably unfit and unreasonable in the circumstances: *Schulz,* at para 43

B. SEX OFFENDER REGISTRY ORDERS (SOIRA)

Section 490.013(2) of the *Code* deals with the duration of SOIRA orders:

An order made under subsection 490.012(1) or (2)

(a) ends 10 years after it was made if the offence in connection with which it was made was prosecuted summarily or if the maximum term of imprisonment for the offence is two to five years;
(b) ends 20 years after it was made if the maximum term of imprisonment for the offence is 10 or 14 years;
(c) applies for life if the maximum term of imprisonment for the offence is life.

There is no right to appeal a SOIRA order imposed pursuant to s. 490.012(1) of the *Code*. However, a trial judge has an inherent jurisdiction to correct an erroneous SOIRA order, and is not *functus* after the imposition of such an order. On appeal, an appellate court may issue a writ of mandamus, compelling the trial judge to correct an erroneous order: *R v RP,* 2018 ONCA 473 at paras 16-22

C. NON-COMMUNICATION ORDER: SECTION 743.21

A trial judge is not obliged to make his/her order under s. 743.21 conditional on an order made by the family court or any CAS proceedings: *R v Hoare,* 2018 ONCA 991, at para 5

In *R v McNeil,* 2016 ONCA 384, the Court varied a non-communication order to allow the appellant to communicate with his co-accused and partner following the expiration of her custodial sentence - given that his custodial sentence would expire several years after hers.

D. RESTITUTION ORDERS: SECTIONS 738 AND 739

An accused's status as the residual beneficiary under a will does not preclude the making of a restitution order in favour of the estate bequethed in that will: *R v Hooyer,* 2016 ONCA 44 at para 31

Large institutions may be less vulnerable than others, and that this can affect whether to make a restitution order. There is no requirement, however, that restitution orders must be lower for institutional victims: *R v Lawrence,* 2018 ONCA 676 at para 11

Where a breach of trust is particularly egregious, a restitution order may be imposed even where repayment does not appear to be likely: *R. v. Wa*, 2015 ONCA 117, at para. 12; *Lawrence* at para 13; *R v Wagar,* 2018 ONCA 931, at para 19

E. WEAPONS PROHIBITION ORDER: SECTION 109

Implied or perceived threats of violence will satisfy the criteria of mposing a weapons prohibition order under s.109(1)(a): *R v Mills,* 2016 ONCA 391 at para 14

Despite a weapons prohibition order being mandatory under s.109(1)(c), if no judicial order is made, no order shall issue: *R v. Shia,* 2015 ONCA 190 at paras 34-38

There is no deference owed to a trial judge's imposition of a lifetime weapons prohibition order where no reasons were provided for the imposition of that order: *R v Dow,* 2017 ONCA 233 at para 3

APPELLATE REVIEW

A. STANDARD OF REVIEW

The appellate court must defer to the sentence imposed by the trial judge, unless the trial judge:

1. Committed an error in principle
2. Failed to consider a relevant factor
3. overemphasized or failed to consider a relevant factor: *R v Wolynec*, 2015 ONCA 656, para 114; *R v RO*, 2015 ONCA 814 at para 56; *R v Rafiq*, 2015 ONCA 768 at paras 22-23

Furthermore, appellate intervention will only be warranted where any of these errors actually impacted the sentence. Intrevention will also occur where the trial judge imposed a manifestly unfit sentence: *R v Lacasse,* 2015 SCC 64

i. DEFERENCE: TRIAL OR SENTENCING JUDGE?

Where the sentencing judge is different than the trial judge, the trial judge's opinion as to the appropriate sentence may be entitled to deference. If the sentencing judge wishes to depart from the trial judge's opinion, s/he must, in fairness, provide notice to the parties and allow them to make further submissions: *R v Owen*, 2015 ONCA 462 at paras 47-58

B. ERROR IN PRINCIPLE

If the sentencing judge commits an error in principle, the sentence imposed is no longer entitled to deference and an appellate court may impose the sentence it thinks fit, provided the error had an impact on the sentence imposed: *R v Carreira*, 2015 ONCA 639 at para 25; *Lacasse*

C. MANIFESTLY UNFIT SENTENCE

The court of appeal can overturn a sentence where it is manifestly unfit – e.g., if the accused has significant mitigating factors and the sentence violates the parity principle: *R v Baks*, 2015 ONCA 560 at paras 2-6; see generally *Lacasse*

D. POST-SENTENCING CONSIDERATIONS ON APPEAL

A sentence which is nonetheless fit *may* be reduced on appeal on the basis of changed circumstances post-sentencing: *R v Fratia*, 2015 ONCA 460 at paras 8-10 [on consent]

The criteria for admitting fresh evidence on appeal of sentence are the same as those that apply on appeal of conviction: *R v Wolynec*, 2015 ONCA 656 at para 115

Fresh evidence of mental illness may be admissible to show that the appellants' mental health has deteriorated or would deteriorate significantly in jail and that an appropriate sentence would be a conditional sentence: *R v AE,* 2016 ONCA 243 at para 50

E. REINCARCERATION ON APPEAL

Review of governing principles on when it is appropriate to stay a sentence that has been increased on appeal rather than reincarcerate the accused (with v. good dissent): *R v Dufour*, 2015 ONCA 426 at paras 11-29; *R v HE*, 2015 ONCA 531 at paras 56-57; *R v Shi*, 2015 ONCA 646at para 13; see also e.g. in *R*

v Huh, 2015 ONCA 356; see generally, *R v Clouthier,* 2016 ONCA 197 at para 63

Relevant factors include:

- the risk of distorting the sentencing process and the parity principle
- the lenght of the sentence left to be served;
- rehabilitative steps taken by the offender, both before and after sentencing, and the degree to which those steps may be adversely affected by re-incarceration;
- the time that has elapsed from the imposition and completion of the sentences at trial
- responsibility for any delay in the appellate process;
- the potential for injustice if the sentence is served; and
- the seriousness of the offences in issue.

Where the accused is being reincarcerated, time spent on parole can be counted towards time served: *R v HE*, 2015 ONCA 531 at para 61

Where a conditional sentence is replaced with a custodial sentence on appeal, the accused is entitled to one-to-one credit for time served on his conditional sentence to the date of release of the appellate court's reasons: *R v. Rafiq,* 2015 ONCA 768

F. VARIATION OF PROBATION ORDER ON APPEAL

The failure to apply to the sentencing judge for a variation of the probation order under s.732.2(3) of the *Criminal Code* does not disentitle an appellant, as a matter of law, to the same relief on an appeal from sentence; however, the failure to apply under s. 732.2(3) is a factor the appellate court will consider on the appeal from sentence: *R v Hromek,* 2016 ONCA 109 at para 7

COLLATERAL CONSEQUENCES

The sentencing judge should take into account the collateral immigration consequences flowing from a sentence when determining a fit sentence.

Trial and appellate courts may (modestly) reduce an otherwise fit sentence in order to avoid collateral immigration consequences. However, in doing so the court cannot 1) impose an unfit sentence and 2) an artificial sentence that circumvents the scheme of the *Immigration and Refugee Protection Act.*

See, for example: *R v Edwards*, 2015 ONCA 537; *R v Ansari*, 2015 ONCA 891; *R v Frater,* 2016 ONCA 386; *R v Zagrodskyi,* 2018 ONCA 34 at paras 12-17; *R v Martinez-Rodriguez,* 2018 ONCA 178; *R v Al-Masajidi,* 2018 ONCA 305

A conditional sentence of imprisonment does not constitute a term of imprisonment for the purpose of the inadmissibility provisions of the *Immigration and Refugee Protection Act.* Further, the phrase "punishable by a maximum term of imprisonment of at least 10 years" refers to the maximum sentence an accused person could have received at the time of the commission of the offence: *Tran v Canada,* 2017 SCC 50

Vigilante violence against an offender for his or her role in the commission of an offence is a collateral consequence that should be considered — to a limited extent: *R v Suter,* 2018 SCC 34

Although the vigilante justice in Suter did not flow directly from the commission of the or from the length of the sentence or the conviction itself, it was nevertheless said to be a collateral consequence as it was inextricably linked to the circumstances of the offence.

The SCC held that there is no requirement that collateral consequences emanate from state misconduct in order to be considered as a factor at sentencing. That said, vigilante justice should only be considered to a limited extent. Giving too much weight to vigilante violence at sentencing allows this kind of criminal conduct to gain undue legitimacy in the judicial process. This should be avoided.

CONDITIONAL SENTENCES

A conditional sentence is generally more effective than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and community, and the promotion of a sense of a responsibility in the offender. Further, a conditional sentence is itself a punitive sanction capable of achieving the objectives of denunciation and deterrence. However, a focus on denunciation and deterrence in sentencing does not necessarily foreclose a conditional sentencing order in the circumstances: *R v Macintyre-Syrette,* 2018 ONCA 706 at para 16

The scope of s. 718.2(e) restricts the adoption of alternatives to incarceration to those sanctions that are "reasonable in the circumstances." In keeping with this principle, there are circumstances in which the need for denunciation and deterrence is such that incarceration is the *only* suitable way to express society's condemnation of the offender's conduct: A conditional sentence does not, generally speaking, have the same denunciatory effect as a period of imprisonment. Incarceration remains the most formidable denunciatory weapon in the sentencing arsenal: *Macintyre-Syrette* at para 19

An otherwise fit incarceral sentence will not be reduced to a conditional sentence for an individual who suffers from a variety of physical diseases absent evidence that accomodations cannot be made for him in accordance with the statutory obligations imposed upon provincial correctional authorities. *R v. R.C.,* 2015 ONCA 313

Where a conditional sentence is replaced with a custodial sentence on appeal, the accused is entitled to one-to-one credit for time served on his conditional sentence to the date of release of the appellate court's reasons: *R v. Rafiq,* 2015 ONCA 768

To impose a conditional sentence, the stautotry requirements under 742.1 of the *Criminal Code* must be met. Many offences do not qualify for a conditional sentence, for example, any offence prosecuted by way of indictment for which an offender may be punished by a maximum term of imprisonment of 14 years or life. It is, however, possible to impose probation alone as a sentence for these offences. The provisions which can be inserted into a probation order are very extensive and wide and can include virtual house arrest scenarios which bear a striking resemblance to a conditional sentence. However, probation conveys less denunciation and deterrence, and has fewer enforcement powers: *R v Veljanovski,* 2017 ONCJ 150

In *Veljanovski,* the court held that the unavailability of a conditional sentence for the offence of fraud over $5,000 would not be grossly disproportionate either for the accused or in the case of reasonable hypotheticals, and thus did not violate s.12 of the *Charter* (cruel and unusual punishment). Nor did the statutory bar violate s.7 for overbreadth or arbitrariness.

A trial judge's decision regarding the appropriateness of a conditional sentence is entitled to considerable deference: *R v Rage,* 2018 ONCA 211 at para 10

CONCURRENT V CONSECUTIVE

Generally, sentences for offences arising out of the same transaction or incident should be concurrent:. In reaching that determination, the court must determine if the acts constituting the offence were part of a linked series of acts within a single endeavour. If so, concurrent sentences are appropriate. There is an exception to that normal rule, however, which applies where the offences constitute invasions of different legally protected interests.

The decision to impose consecutive as opposed to concurrent sentences is a matter of discretion for the sentencing judge. An appellate court ought not to interfere with that decision unless it reflects an error in principle; *R v Sadikyov,* 2018 ONCA 609 at paras 13, 16; see also *R V JH,* 2018 ONCA 245 at para 50; *R v JS,* 2018 ONCA 675 at para 87

There is no absolute rule that drugs and weapons convictions must attract consecutive sentences in all cases: *Sadikyov* at paras 14, 15, 17

A trial judge does not have jurisdiction to bifurcate a sentence, such that one part of the sentences runs concurrent to another sentence and the reaminder of the sentence runs consecutively to that sentence. Section 719(1) stipulates that a sentence commences when it is imposed, and section 718.3(4) grants the trial judge discretion to order that the sentence run consecutively. There is no statutory jurisdiction to order part of the sentence to run consecutively and part to run concurrently: *R v Sadykov,* 2018 ONCA 296 at paras 8-15

DANGEROUS OFFENDER APPLICATIONS

A. GENERAL PRINCIPLES

For a thorough review of the principles governing the designation of dangerous offenders under s.753(1) of the *Criminal Code* and the imposition of indeterminate sentences under s.753(4.1) of the *Criminal Code,* see *R v Boutilier,* 2017 SCC 64; see also *R v Sawyer*, 2015 ONCA 602

To determine whether a lesser measure will adequately protect the public, there must be actual evidence before the sentencing judge that the dangerous offender can be safely released into the community. Mere hope, even a judicial assumption about the existence of community programs or other necessary resources, is inadequate to the task of addressing the reasonable expectation of protection of the public: *R v Radcliffe,* 2017 ONCA 176 at para 58; *R v Hess,* 2017 ONCA 220 at paras 29-45

The dangerous offender provisions form part of the sentencing process, and their interpretation must be guided by the fundamental purposes and principles of sentencing, including proportionality: *R v. Sawyer*, 2015 ONCA 602

The focus of the inquiry mandated by s. 753(4.1) is the nature and quality of the offender's propensity for committing violent crimes in the future, not the proportionality of the sentence to the relative severity of violent crimes committed in the past: *R v. H.A.K,* 2015 ONCA 905

On whether to impose an long term supervision order as a lesser alternative, see Long Term Supervision Orders

Once a DO designation has been made, in determining the length of the fixed-term custodial component of a composite sentence under s. 753(4)(b), the hearing judge is not restricted to imposing a term of imprisonment that would be appropriate on conviction of the predicate offence but in the absence of a dangerous offender designation. The hearing judge must take into account the statutory limits of the offence for which sentence is being imposed, the paramount purpose of public protection under Part XXIV, and other applicable

sentencing principles under ss. 718-718.2. This analysis may justify fixed term sentences lengthier than those appropriate outside the dangerous offender context: *R v Stillman,* 2018 ONCA 551 at para 32

While outside the dangerous offender environment, sentencing judges are disentitled to determine the length of a sentence of imprisonment solely by reference to the period of time necessary to complete essential or recommended rehabilitative program, in deciding the length of the custodial component of a composite sentence under s. 753(4)(b), a hearing judge is entitled to take into account access to rehabilitative programming in a penitentiary. In other words, a hearing judge may impose a fixed-term sentence that exceeds the appropriate range in the non-dangerous offender context, to ensure the offender has access to treatment programs in a penitentiary. The length of the sentence imposed, however, should be subject to three constraints.

First, any custodial sentence imposed as a component of a composite sentence under ss. 753(4)(b) or as a standalone disposition under s. 753(4)(c), cannot exceed the maximum term of imprisonment for the predicate offence.

Second, the sentencing objectives, principles and factors in ss. 718-718.2 cannot be entirely ignored – although the significance of factors such as the degree of responsibility of the offender and the gravity of the offence play a lesser role in determining a sentence under Part XXIV.

Third, the length of sentence imposed must be responsive to evidence adduced at the hearing. The evidence about treatment programs should be specific, preferably indicating an approximate length or range of time within which the offender may be expected to complete the programming said to be necessary to protect the public. There must be a clear nexus between that programming and future public safety, sufficient to support a "reasonable expectation" that the overall sentence will "adequately protect the public against the commission by the offender of murder or a serious personal injury offence": s. 753(4.1). And the evidence must account for the offender's "amenability to treatment and the prospects for the success of treatment in reducing or containing the offender's risk of reoffending": *Stillman* at paras 39, 51-54

Enhanced credit may be denied if it would unduly interfere with the length of custodial sentence deemed necessary by the trial judge to adequately protect the public from the risk of the appellant's recidivism: *Stillman* at para 59

B. RISK ASSESSMENT

In *A.H.*, 2018 NSCA 47, the Nova Scotia Court of Appeal upheld the decision of an application judge declining to extend the statutory 60-day limit for the Crown to obtain an expert assessment report in support of a dangerous or long-term offender application. The court held there was no reason to interfere with the application judge's discretionary decision not to extend the assessment period.

C. EVIDENCE IN DO PROCEEDINGS

A dangerous offender proceeding is part of the sentencing process and is governed by the same sentencing principles, objectives and evidentiary rules. the importance of the sentencing judge having access to the fullest possible information about the offender is heightened in the context of a dangerous offender application. As a result, the court must take a generous approach to admissibility in a dangerous offender proceeding: *R v Williams,* 2018 ONCA 437 at paras 42, 48

As with any sentencing hearing, hearsay evidence is admissible so long as it is found to be "credible and trustworthy." This common law principle is codified in s. 723(5) of the *Criminal Code*. Character evidence is also specifically admissible in a dangerous offender proceeding pursuant to s. 757 of the *Criminal Code*: *Williams* at para 49

Despite the broad approach to admissibility at the sentencing stage, it is not the case that the offender is deprived of all protections:. The Crown must prove disputed aggravating facts beyond a reasonable doubt. The corollary to this principle in a dangerous offender proceeding is that the Crown must prove the statutory elements of dangerousness beyond a reasonable doubt: *Williams* at para 53

Crown and police synopsis are admissible at DO hearings. However, once the evidence has been admitted, the court must then grapple with the appropriate weight to be accorded to the information contained within the synopses.

Police synopses are often prepared at the time of arrest, or in the early stages of a criminal prosecution. A fuller appreciation of the facts often emerges later, such that the facts set out in the synopses will often diverge from the facts proven at trial or admitted on a guilty plea:

It is difficult to conclude that a Crown synopsis, standing alone, is an accurate reflection of events. The court noted that the sources of information contained in the synopsis may not be specified and an assessment of the reliability and trustworthiness of the information contained within may be difficult or impossible: *Williams* at paras 42-45, 52

Some basic facts set out in the synopses can be used for the purposes of establishing details such as dates and ages. Other facts, where support can be found in other parts of the record, can likewise be relied upon. This does not, however, lead to the conclusion that the entire contents of the document can be taken as proven beyond a reasonable doubt: *Williams,* at para 54

Due to the evidentiary frailties inherent in the nature of a police synopsis, caution is required when the sentencing judge is considering whether the contents of those records can, along with the rest of the record, provide the basis for a finding that the statutory elements of dangerousness have been proven beyond a reasonable doubt. The incidents set out in the synopses must be considered in light of all of the evidence led at the hearing. Certain parts of a synopsis may find support and confirmation, either directly or by reasonable inference, in other parts of the record. If so, it is open to the sentencing judge to rely on those incidents as evidence in support of a finding that the statutory elements of dangerousness, such as the requisite pattern of behaviour, are made out: *Williams* at para 55

D. FUTURE RISK OF REOFFENCE

If the expert focuses on whether the offender is treatable only at the time he writes the report, this may be insufficient evidence to base a finding regarding the offender's risk of reoffending in the future: *R v. Sawyer*, 2015 ONCA 602 – see para 58

E. PROCEDURAL FAIRNESS

The indeterminate sentence allows for control of offenders found to be dangerous for the rest of their lives. This is a significant deprivation of liberty. As such, procedural fairness must be jealously guarded and strictly enforced in this

context. Subject to the right of the parties to agree otherwise, the closing arguments must therefore include oral submissions, held in open court, in the presence of the accused, counsel, the trial judge and the court reporter: *R v McDonald,* 2018 ONCA 369 at para 41

Section 650 of the *Criminal Code* gives the appellant the right to be present in court during the whole of his trial subject to exceptions that do not apply in this case. Closing arguments are part of an accused's trial, and thus are subject to the requirement that the accused be present. This right gives effect to the principle of fairness and openness that are fundamental values in our criminal justice system. Presence gives the offender the opportunity of acquiring first-hand knowledge of the proceedings leading to the eventual result. The denial of that opportunity may well leave the offender with a justifiable sense of injustice, which is the "implicit and overriding principle underlying" the right to be present: *McDonald* at para 42

F. APPEAL

Appellate review of a dangerous offender designation "is concerned with legal errors and whether the dangerous offender designation was reasonable." While deference is owed to the factual and credibility findings of the sentencing judge, appellate review of a dangerous offender designation is more robust than on a "regular" sentence appeal. Courts can review the imposition of an indeterminate sentence for legal error and reasonableness, but should defer to the factual and credibility findings of the trier of fact: *R v Sawyer,* 2015 ONCA 602

Deference is accorded to a sentencing judge on issues of fact-finding, including on the question of whether there is a reasonable possibility of eventual control of an offender in the community: *R v Hess,* 2017 ONCA 220 at para 26

The court may admit fresh evidence on an appeal from a dangerous offender designation when it is in the interests of justice to do so: ss. 759(7) and 683(1). The well-known *Palmer* test governs the admissibility of fresh evidence in this context: R v. Sawyer, 2015 ONCA 602

i. Fresh Evidence

Fresh evidence must be sufficiently cogent that it could reasonably be expected to have affected the result of the dangerous offender proceedings had it been adduced there along with the other evidence. An appellate court is not concerned with what the outcome might be were the proceedings held in the present - when the fresh evidence is adduced. For the most part, evidence of institutional progress since sentence, including participation in and completion of various programs, exerts no meaningful influence on the trial judge's sentencing determination: *Radcliffe* at para 59; see also *R v Williams,* 2018 ONCA 437

DISCHARGES

A conditional discharge is inappropriate for violent offences. Even if it is in the interests of the accused, it may not be in the interests of the public: *R v Huh,* 2015 ONCA 356

A person who receives a condition discharge is deemed, pursuant to s.730(3) of the *Criminal Code,* not to have been convicted of an offence. For the purpose of sentencing such a peson for a further offence, they are still deemed to be a first-time offender.

The Crown may, however, apply to revoke the discharge pursuant to s.730(4) if the offender is convicted of an offence while bound by the conditions of his probation order. If revocation occurs and a conviction is entered, the offender can then be treated as having a record: *R v Barclay,* 2018 ONCA 114 at para 44

DETERRENCE

Specific deterrence has little relevance in the context of suicide.

General deterrence is a factor of decreased significance when sentencing those whose behaviour is driven by mental illness: *R v Dedeckere*, 2017 ONCA 799 at para. 14

DOWNES CREDIT

Unlike predisposition custody, which is governed by s. 719(3) of the *Criminal Code*, no statutory provision explicitly authorizes or requires consideration of time spent subject to stringent predisposition bail conditions as a relevant mitigating factor on sentence. That said, it is beyond controversy that prior decisions of this court authorize a sentencing judge to take into account, as a relevant mitigating circumstance on sentence, time spent under stringent bail conditions, especially house arrest:

A sentencing judge should explain why she or he has decided not to take predisposition house arrest into account in determining the sentence that she or he will impose. The amount of credit to be given, if any, lies within the discretion of the trial judge. Unlike s. 719(3) in relation to predisposition custody, there is no formula the sentencing judge must employ. The amount of credit is variable, a function of several factors, including but not limited to:

i. the period of time spent under house arrest;
ii. the stringency of the conditions;
iii. the impact on the offender's liberty; and
iv. the ability of the offender to carry on normal relationships, employment and activity.

The failure to consider or give effect to an offender's predisposition bail conditions as a mitigating factor on sentence warrants appellate intervention only where it appears from the trial judge's decision that such an error had an impact on the sentence imposed: *R v Adamson,* 2018 ONCA 678 at paras 106-108

FINES

A. ABILITY TO PAY:

See section 734(2) of the Criminal Code

i. STANDARD OF PROOF

In determining whether the record contains sufficient evidence to "satisfy" the court that the offender can afford to pay the contemplated fine, the trial judge must be satisfied, on a balance of probabilities, of the offender's ability to pay: *R v Mahmood,* 2016 ONCA 75 at para 22

ii. ABILITY TO PAY VERSUS TIME TO PAY

An offender's ability to pay is inextricably linked with the time an offender has to pay the fine. If an offender shows on a balance of probabilities that s/he does not have the ability to pay immediately, s/he must be given sufficient time to pay that is reasonable in all the circumstances: *R v Mahmood,* 2016 ONCA 75 at para 23

B. FINES IN LIEU OF FORFEITURE

The purpose of a fine in lieu of forfeiture is to deprive an offender of the proceeds of crime. *Criminal Code*, s. 462.37(1) provides for the forfeiture of property that is the proceeds of crime. Pursuant to *Criminal Code*, s. 462.37(3), the fine in lieu of forfeiture is to be the value of the proceeds of crime. The value of the proceeds of crime is not necessarily the value of the property: *R v Lawrence,* 2018 ONCA 676 at para 14

Where funds are no longer available, s. 462.37(3) of the *Criminal Code* provides that the court may order the offender to pay a fine "equal to the value of the property" that ought to have been forfeited: *R v Way,* 2017 ONCA 745 at para 7

Trial judges may structure a fine in lieu of forfeiture and restitution order so that the restitution order takes priority over payment of the fine in lie of forfeture, which can be reduced by any amount paid toward the restitution order: *R v Dhanaswar,* 2016 ONCA 229 at paras 2-3

For a comprehensive review of the governing principles on fines in lieu of forfeiture, including the standard of review, the statutory scheme, the test for imposing a fine in lieu of forfeiture, the relevance of rehabilitation, ability to pay, and the availability of civil remedies for a victim, as well as the relevance of general sentencing objectives, see *R v Angelis,* 2016 ONCA 675.

For a review of the governing principles on a trial judge's discretion to refuse to order a fine in lieu of forfeiture, see also *R v Rafilovich,* 2017 ONCA 634

The fine is dealt with separately from, and in addition to, the punishment for committing a crime. The imposition of a fine in lieu of forfeiture is not punishment imposed upon an offender. It is also not part of the global sentence imposed upon an offender and accordingly it is not to be consolidated with sentencing on a totality approach: *R v Saikaley,* 2017 ONCA 374 at para 181; *R v Lawrence,* 2018 ONCA 676 at para 14

It is inappropriate to deduct the income tax paid on the income derived from the proceeds of crime subject to forfeiture: *R v Way,* 2017 ONCA 745 at paras 7-8

FORFEITURE

A. FORFEITURE OF OFFENCE RELATED PROPERTY UNDER THE CDSA

"Offence related property" is defined in s. 2(1) of the CDSA as any property

(a) by means of or in respect of which a designated substance offence is committed

(b) that is used in any manner in connection with the commission of a designated substance offence, or

(c) that is intended for use for the purpose of committing a designated substance offence

Section 16(1) of the CDSA provides that where a person is convicted of a designated offence, and the court is satisfied that any property is offence-related property, and that the offence was committed in relation to that property, the court shall order that the property be forfeited.

Section 19.1(3) of the CDSA provides that, if a court is satisfied that the impact of an order of forfeiture would be disproportionate to the nature and gravity of the offence, the circumstances surrounding the commission of the offence and the criminal record, if any, of the person convicted, a court may decide not to order forfeiture of the property or part of the property.

Section 19(3) of the CDSA provides for forfeiture of property following conviction. An order for forfeiture of property implies the loss of property and sale by the Crown to realize the value of the property. Section 16(1)(b) specifically provides that the property is to be disposed of by a province or Canada.

Quantifying the amount to be forefeited is not an exact science. A sentencing judge must calculate an amount that is proportionate to the nature and gravity of the offence, the circumstances surrounding the commission of the offence and the criminal record, if any, of the accused, and all non-financial considerations. A sentencing judge is not to be expected to embark on a detailed accounting of income and expenses related to the property or fluctuations in the property value, especially where no sufficient evidence is presented to the sentencing judge for consideration: *R v Rafilovich,* 2017 ONCA 634 *at para 37*

GLADUE PRINCIPLES

A. GENERAL PRINCIPLES

The *Gladue* factors are highly particular to the individual offender, and so require that the sentencing judge be given adequate resources to understand the life of the particular offender.

i. THE ABORIGINAL FACTOR MUST BE TAKEN INTO ACCOUNT AT SENTENCING

Absent express informed waiver, counsel has a duty to present the unique circumstances of an aboriginal offender on sentencing: *R v Radcliffe,* 2017 ONCA 176 at paras 54

A sentencing judge is obliged, under s. 718.2(e) of the Criminal Code, to consider the unique circumstances of Aboriginal offenders, and it is an error for a sentencing judge to fail to factor into a sentencing decision the accused's Aboriginal status: *R v Van Every,* 2016 ONCA 87 at para 87; *Radcliffe* at para 56; *R v Kreko* 2016 ONCA 367 at para 27

Section 718.2(e) of the *Criminal Code* provides that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered by a sentencing judge, with particular attention to the circumstances of Aboriginal offenders. The court is to give "serious consideration to a conditional sentence in these circumstances; a conditional sentence is generally more effective than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and community, and the promotion of a sense of a responsibility in the offender. Further, a conditional sentence is itself a punitive sanction capable of achieving the objectives of denunciation and deterrence. That being said, a focus on denunciation and deterrence in sentencing does not necessarily foreclose a conditional sentencing order in the circumstances: *R v Macintyre-Syrette,* 2018 ONCA 706, at paras 15-16

There is no general rule that in sentencing an Aboriginal offender the court must give the *most* weight to the principle of restorative justice, as compared to other legitimate principles of sentencing. The relative weight to be assigned to the goals of restorative justice as against the principles of denunciation or deterrence will be connected to the severity of the offence. The principles of denunciation and deterrence may predominate where the offence is sufficiently serious: *Macintyre-Syrette* at para 18

The application of *Gladue* factors is not a matter of weight, and the duty to apply *Gladue* factors does not vary with the offender. However, a sentencing judge can find that the circumstances of a particular accused do not diminish the moral culpability of his actions: *R v MacIntyre-Syrette,* 2018 ONCA 259 at para 18

When sentencing an Aboriginal offender, courts must consider:
(1) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts;
(2) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection: *R v FHL,* 2018 ONCA 83 at para 31

However, it is an error of law to require a causal connection between aboriginal status and the offences committed. Such a requirement "displays an inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples" and "imposes an evidentiary burden on offenders that was not intended by *Gladue:*" *R v Kreko,* 2016 ONCA 367 at paras 20-23; *FHL,* at para 32.

Instead, aboriginal factors must be tied to the particular offender and offence(s) in that they must 1) bear on his or her culpability or 2) indicate which types of sanctions may be appropriate in order to effectively achieve the objectives of sentencing. Merely asserting one's aboriginal heritage or pointing to the systemic factor affecting aboriginals in Canada generally is inappropriate: *Kreko; FHL* at paras 38-42.

Systemic and background factors may bear on the culpability of the offender, to the extent they illuminate the offender's level of moral blameworthiness: *Radcliffe* at paras 52-53

From a sentencing judge's perspective, adhering to this approach requires attention to two factors. First, a sentencing judge must take judicial notice of the systemic and background factors affecting Aboriginal peoples in Canadian society.

In conducting this inquiry, however, courts must display sensitivity to the "devastating intergenerational effects of the collective experiences of Aboriginal peoples", which are often difficult to quantify.

Systemic and background factors, however, do not operate as an excuse or justification for an offence. They are only relevant to assessing the "degree of responsibility of the offender", and to considering whether non-retributive sentencing objectives should be prioritized. They do not detract from the "fundamental principle" that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. What Gladue and Ipeelee recognize is that evaluating the degree of responsibility of an Aboriginal offender requires a "different method of analysis." A different method of analysis does not necessarily mandate a different result: *FHL* at paras 43-47

ii. GLADUE REPORTS

The following is the type of information a sentencing judge needs from a *Gladue* report:

1) Whether the offender is aboriginal

2) What band or community or reserve the offender comes from and whether the offender lives on or off the reserve or in an urban or rural setting. This information should also include particulars of the treatment facilities, the existence of a justice committee, and any alternative measures or community-based programs.
3) Whether imprisonment would effectively deter or denounce crime in the subject community. Within this heading it would be useful for the Court to determine whether or not crime prevention can be better served by principles of restorative justice or by imprisonment.
4) What sentencing options exist in the community at large and in the offender's community. For example, does an alternative measures program exist in the offender's community if he lives on a reserve?"

See *R v MacIntyre-Syrette*, *2018 ONCA 259* at para 15, quoting from *R v Laliberte*, 2000 SKCA 27

It is an error for the sentencing judge to proceed with sentencing where the Gladue report gives insufficient assistance to determine the types of sentencing procedures and sanctions that would be appropriate given the offender's connection to his specific Aboriginal community. In such circumstances, it is an error for a sentencing judge to not identify these shortcomings and either order a

supplementary report or summon the author or other witnesses from the community to address these questions. Without this information, the sentencing judge is not in a position to meaningfully assess the appropriateness of a non-custodial sentence: MacIntyre-Syrette at paras 19, 24

iii. CRAFTING A FIT SENTENCE

Judges must craft sentences that are meaningful to Aboriginal people by emphasizing the use of principles of restorative justice and restraint: *Van Every* at para 88; *Radcliffe* at para 52

The sentencing judge must assess available sentencing procedures and sanctions. This requires an understanding of available alternatives to ordinary sentencing procedures and sanctions. If, for example, offender lives as a member of a discrete Indigenous community, the sentencing judge needs to be told what institutions exist within that community and whether there are specific proposals from community leadership or organizations for alternative sentencing to promote the reconciliation of the offender to his or her community. The ordinary source of this information is the *Gladue* report: *R v Macintyre-Syrette*, 2018 ONCA 259 at para 14

The trial judge need not particularize how the information of disadvantage was precisely factored into his analysis. The trial judge has no obligation to quantify the effect of each factor: *Van Every* at para 99

The "aboriginal factor" does not necessarily justify a different sentence for Aboriginal offenders. It provides the necessary context for understanding and evaluating the offender and the circumstances of the case. It is only where the unique circumstances of an offender bear on culpability, or indicate which sentencing objective can and should be actualized, that they will influence the ultimate sentence: *Radcliffe* at para 54-55

While the Gladue factors apply to all offences, even the gravest of offences, the more violent and serious the offence the more likely it is that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same: *Van Every* at para 88

B. DANGEROUS OFFENDERS

In the context of dangerous offender applications, aboriginal characteristics that make an offender "less blameworthy" generally have little impact.

However, where Gladue factors serve to establish the existence and availability of alternative Aboriginal-focused means aimed at addressing the environmental, psychological or other circumstances which aggravate the risk of re-offence posed by the Aboriginal offender, a sentencing judge must make reference to them. That being said, the failure to consider Aboriginal circumstances may be overcome by evidence regarding risk of re-offence and the absence of any reasonable possibility of eventually controlling that risk in the community: *Radcliffe,* at paras 57, 59.

Sometimes, the long-standing problems of a person declared a dangerous offender simply cannot be adequately ameliorated, the risk of re-offence reduced to an acceptable level, by Aboriginal programs or facilities alone.

C. PAROLE ELIGIBILITY

Section 718.2(e) and the principles enunciated in *R. v. Gladue,* [1999] 1 S.C.R. 688, apply to decisions on parole eligibility: *Van Every* at para 87

IMPACT OF INCARCERATION

In fashioning an appropriate sentence, a trial judge should consider exceptional difficulties that an offender will encounter while incarcerated, relating to physical injuries that cannot be easily accommodated by an institution and that, accordingly will mean that incarceration has a disproportionate impact on him: *R v Allen,* 2017 ONCA 170 at para 16

INTERMITTENT SENTENCE

A. THE STATUTORY SCHEME

Section 732(1) of the Criminal Code describes the circumstances in which a sentence of imprisonment may be served intermittently.
Section 719(1) of the Criminal Code provides that a sentence commences when it is imposed, except where a relevant statute provides otherwise.

B. CHAINING INTERMITTENT SENTENCES TOGETHER

Chaining intermittent sentences (i.e., imposing multiple sentences together) beyond the 90-day limit established by s. 732(1) is illegal as it defeats the object of the subsection and the correctional principles it was meant to serve: *R v Clouthier,* 2016 ONCA 197 at para 31 (citation ommitted)

Example: where an accused is conviced of several counts in the same information, and the trial judge imposes intermittent sentences at different times for those counts, together amounting to more than 90 days. This result is an effective sentence that defeats the object of s. 732(1): *Clouthier* at paras 38-40

However, since a conditional sentence imposed at the same time is not "a sentence of imprisonment" within the meaning of s. 732(3), it does not extend the intermittent sentence beyond the 90-day limit in s. 732(1) and is therefore lawful: *Clouthier* at para 31
Example: imposing a 90-day sentence of imprisonment to be served intermittently and concurrent sentences of 18 months to be served conditionally.

JOINT SUBMISSIONS

A. JUDGES SHOULD GIVE CAREFUL CONSIDERATION TO JOINT SUBMISSIONS

Joint submissions must be carefully considered and should be followed absent an articulable basis upon which the trial judge concludes that the proposed sentence would bring the administration of justice into disrepute or that it is otherwise contrary to the public interest: *R v Anthony-Cook,* 2016 SCC 43 at para 32; *R v McLellan,* 2016 ONCA 215 at para 2

A joint submission will bring the administration of justice into disrepute or be contrary to the public interest if, despite the public interest considerations that support imposing it, it is so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system". And trial judges should "avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts": *Anthony-Cook* at paras 33-34

Trial judges should approach the joint submission on an "as-is" basis. That is to say, the public interest test applies whether the judge is considering varying the proposed sentence or adding something to it that the parties have not mentioned, for example, a probation order. However, if counsel have neglected to include a mandatory order, the judge should not hesitate to inform counsel: *Anthony-Cook* at para 51

Trial judges should apply the public interest test whether they are considering "jumping" or "undercutting" a joint submission. The public interest criteria involved in considering whether to undercut a sentence are different, however.

From the accused's perspective, "undercutting" does not engage concerns about fair trial rights or undermine confidence in the certainty of plea negotiations. In addition, in assessing whether the severity of a joint submission would offend the public interest, trial judges should be mindful of the power imbalance that may exist between the Crown and defence, particularly where the accused is self-represented or in custody at the time of sentencing. These factors may temper the public interest in certainty and justify "undercutting" in limited circumstances.

At the same time, where the trial judge is considering "undercutting", he or she should bear in mind that the community's confidence in the administration of

justice may suffer if an accused enjoys the benefits of a joint submission without having to serve the agreed-upon sentence: *Anthony Cook* at para 52

B. COUNSEL'S OBLIGATIONS IN PRESENTING A JOINT SUBMISSION

When faced with a contentious joint submission, trial judges will want to know about the circumstances leading to the joint submission — and in particular, any benefits obtained by the Crown or concessions made by the accused. The greater the benefits obtained by the Crown, and the more concessions made by the accused, the more likely it is that the trial judge should accept the joint submission: *Anthony-Cook* at para 53

Counsel should provide the court with a full account of the circumstances of the offender, the offence, and the joint submission without waiting for a specific request from the trial judge. Counsel are obliged to ensure that they justify their position on the facts of the case and be able to inform the trial judge why the proposed sentence would not bring the administration of justice into disrepute or otherwise be contrary to the public interest. If they do not, they run the risk that the trial judge will reject the joint submission: *Anthony-Cook* at paras 54-55

C. WHEN A TRIAL JUDGE PROPOSES TO DEPART FORM A JOINT SUBMISSION

If the trial judge is not satisfied with the sentence proposed by counsel, the judge should notify counsel that he or she has concerns, and invite further submissions on those concerns, including the possibility of allowing the accused to withdraw his or her guilty plea, as the trial judge did in this case: *Anthony-Cook* at para 58

If the trial judge's concerns about the joint submission are not alleviated, the judge may allow the accused to apply to withdraw his or her guilty plea: *Anthony-Cook* at para 59

Trial judges who remain unsatisfied by counsel's submissions should provide clear and cogent reasons for departing from the joint submission: *Anthony-Cook* at para 60

Not only should the trial judge give the parties an opportunity to be heard when intended to depart from a joint submission on the *length* of the sentence, but also on the allocation of time served: *R v GE*, 2018 ONCA 740 at para 9

JUMPING A SENTENCE

For the law on a judge's proposal to jump a joint sentence, see Joint Submissions

It is an error of law for a judge to exceed the Crown's position on sentence without giving the defence an opportunity to make further submissions on the issue: *R v Ipeelee,* 2018 ONCA 13 at para 1; see also *R v Grant,* 2016 ONCA 639 at paras 164-166

JURISDICTION TO AMEND SENTENCE

A sentencing judge may amend a sentence after it has been imposed only where the amendment does not amount to a reconsideration of her original decision. The two step tests involves the following questions:

(1) Is the proposed amendment consistent with the judge's manifest intentions at the time the sentence was imposed?
(2) Does permitting the amendment give rise to a reasonable apprehension of taint and/or cause unfairness to the offender?

R. v. Krouglov, 2017 ONCA 197 (CanLII); see also *R v Hasiu*, 2018 ONCA 24 at paras 30-58

LONG TERM SUPERVISION ORDERS

A. IMPOSITION OF LTSO INSTEAD OF DO DESIGNATION

In order to impose an LTSO, there must be evidence of the availability in the community of the resources necessary to supervise the accused. The court can look to, and rely upon, the resources of the Parole Board of Canada, Correctional Services Canada, and the mental health care system, to make this finding: *R v Hess,* 2017 ONCA 224 at paras 58-64

B. COMMENCEMENT OF LONG TERM SUPERVISION ORDER

Where an offender is already serving a sentence, a long-term supervision order does not start until the offender's sentence is completed. Even if the offender is released from custody, his sentence continues until warrant expiry. On that date, the long-term supervision order takes effect: *R v MO,* 2016 ONCA 236 at para 32

C. STATUTORY CONDITIONS ON AN LTSO OFFENDER

Section 753.2(1) of the *Criminal Code* says that an offender who is subject to an LTSO shall be supervised in the community in accordance with the *Corrections and Conditional Release Act* [*CCRA*] when the offender has finished serving his sentence. Section 134.1 of the CCRA sets out the approach to conditions for individuals on LTSOs. The Parole Board may establish conditions it considers reasonable and necessary, including conditions to protect victims of crime.

Section 134.1(1) says that every offender who is required to be supervised by an LTSO is subject to prescribed conditions under s. 161(1) of the *Corrections and Conditional Release Regulations* ["CCRR"]. Section 161(1)(a) of the CCRR says that when an offender is released on parole or statutory release, the offender must "travel directly to the offender's place of residence, as set out in the release certificate respecting the offender, and report to the offender's parole supervisor immediately and thereafter as instructed by the parole supervisor".

Under s. 161(1)(b) of the CCRR, the parole officer can fix territorial boundaries within which the offender must remain. Other mandatory provisions include a prohibition against possessing weapons, reporting to the police if instructed to do so by a parole supervisor, and a condition to obey the law and keep the peace. Any breach of those provisions could result in a warrant for the offender's arrest.

Pursuant to s. 753.3(1) of the *Criminal Code,* an offender who breaches an LTSO is guilty of an indictable offence and liable to imprisonment for up to ten years: *R v Hoshal,* 2018 ONCA 914, at paras 36-40

MANDATORY MINIMUM SENTENCES

A. CONSTITUTIONAL CHALLENGES

For a review of the jurisprudence on section 12 of the *Charter,* see Charter: Section 12.

For a review of mandatory minimum sentences for specific offences, see Sentencing: Sentences for Specific Offences

A mandatory minimum sentence may be unnecessary where the uripsprudence already emphasizes the importance and primacy of denunciation and deterrence for the specific offence in issue: *R v John,* 2018 ONCA 702 at para 41

B. OTHER REMEDIES

i. FOR CHARTER RELIEF

While state misconduct can mitigate a sentence, the general rule is that a sentence reduction outside statutory limits is not an appropriate remedy under s.24(1) unless the constitutionality of the statutory limit itself is challenged. Such a remedy would only be appropriate in exceptional cases: *R v Gowdy,* 2016 ONCA 989; *R v Donnelly,* 2016 ONCA 998

ii. FOR STRICT BAIL CONDITIONS

Time spent under strict bail conditions is a mitigating factor on sentence, but it cannot be used to reduce a sentence below the statutory minimum: *R v. Shi*, 2015 ONCA 646

MITIGATING FACTORS ON SENTENCING

A. GENERAL PRINCIPLES

i. First Time Offenders

A first sentence of imprisonment should be as short as possible and tailored to the individual circumstances of the accused rather than solely for the purpose of general deterrence: R v. Laine, 2015 ONCA 519

ii. Young Offenders

In the case of a youthful first offender, the paramount sentencing principles are individual deterrence and rehabilitation. The Trial Judge must impose the shortest term of imprisonment that is proportionate to the crime and responsibility of the offender: *R v. Laine,* 2015 ONCA 519; *R v. Sharif*, 2015 ONCA 694

Individual deterrence and rehabilitation will always be paramount. However, for very serious offences, general deterrence and denunciation will gain prominence: *R v Brown,* 2015 ONCA 361

Youthfulness refers not only to chronological aid but includes maturity. A 21 year old, for example, can still be considered youthful, although he may not be a youth legally speaking: *R v. Laine*, 2015 ONCA 529

iii. Cultural Norms

Cultural norms that condone or tolerate conduct contrary to Canadian criminal law must not be considered a mitigating factor on sentencing: *R v HE,* 2015 ONCA 531

iv. Contributory Negligence

A victims' awareness of the danger involved in certain working conditions or the absence of overt coercion would ignore the reality that a worker's acceptance of dangerous working conditions is not always a truly voluntary choice: *R v Kazenelson,* 2018 ONCA 77 at paras 38-39

v. Mental Limitations

a) Mental Illness

A causal link between mental illness and the criminal offence can be considered as a mitigating factor in sentencing: *R v Hart*, 2015 ONCA 480

In *R v Leer,* 2017 BCPC 235, the British Columbia Provincial Court discussed at length the role of the accused's mental health as a factor in sentencing, as well as the impact of his mental health on whether the provincial or federal correctional system would be more appropriate. The Court began its reasons by stating: Name one of the larget providers of mental health in this province; if you guessed the criminal justice system and our jails you guessed right."

b) Addiction

In order for a sentence to be proportionate to the accused's moral blameworthiness, a court must take into account the fact that the accused is driven to crime to feed his addiction: *R v Colasimone,* 2018 ONCA 256 at para 18

c) Diminshed Intelligence

Evidence of diminished intelligence can be important in identifying the moral fault and hence the degree of responsibility that should be ascribed to the offender for his acts: *R v Plein,* 2018 ONCA 748 at para 83

vi. Racism

The principles that are generally applicable to all offenders, including African Canadians, are sufficiently broad and flexible to enable a sentencing court in appropriate cases to consider both the systemic and background factors that may have played a role in the commission of the offence and the values of the community from which the offender comes: *R v Rage,* 2018 ONCA 211 at para 13 [quoting *Borde,* (2003), 63 OR (3d) 417 (CA).

PAROLE INELIGIBLITY

A. GENERAL PRINCIPLES

Principles of sentencing set out in ss. 718-718.2 of the *Criminal Code* may be applicable to decisions regarding parole ineligibility: *R v Rosen,* 2018 ONCA 246 at para 67

B. INELIGIBILITY FOR CRIMINAL ORGANIZATION AND TERRORISM OFFENCES

Section 743.6(1.2) of the *Criminal Code* provides that, in the case of criminal organization or terrorism offences for which the offender receives a sentence of two years or more, a trial judge shall impose an order of ineligibility for parole for ten years or half the total sentence, whichever is less, unless denunciation and deterrence objectives do not require it.

In imposing an order under s.743.6(1.), the trial judge cannot apply it to a global sentence received for criminal organization/terrorism offences and other offences not captured by s.743.6(1.2). The order must be limited to the sentence imposed for the criminal organization or terrorism offences: *R v Saikaley,* 2017 ONCA 374 at paras 167-174

C. INELIGIBILITY FOR SECOND DEGREE MURDER

Section 745.4 of the Criminal Code provides that a judge may increase parole ineligibility above the normal ten-year period for an offender convicted of second degree murder up to 25 years, having regard to: the character of the offender, the nature of the offence and the circumstances surrounding its commission, and the recommendation of the jury, if any.

To justify such an order, the court may consider the future dangerousness of the offender and denunciation, as well as deterrence: *R v Van Every,* 2016 ONCA 87 at para 86; *R v Sinclair,* 2017 ONCA 338 at para 149

Appellate intervention should only occur where a party demonstrates the application of an erroneous principle that has resulted in a period of parole ineligibility that is clearly or manifestly excessive or inadequate: *Sinclair,* at para 151

In assessing the fitness of the period of parole ineligibility to be fixed, the court must be mindful of the sentencing objective of assisting the accused's rehabilitation. However, the court also take into account that the mandatory sentence of imprisonment for life and the mandatory ten-year minimum period of parole ineligibility circumscribe the weight that can be accorded to the accused's prospects of rehabilitation: *R v Rosen,* 2018 ONCA 246 at para 68

D. CONSECUTIVE SENTENCES OF PAROLE INELGIBILITY

Section745.51 of the *Criminal Code*, which permits the court to order that periods of parole ineligibility for multiple murders be served consecutively rather than concurrently, does not violate ss.7 or 12 of the Charter: In *Granados-Arana*, 2017 ONSC 6785

POSTPONING SENTENCE

A sentencing judge has the discretion to postpone sentencing provided the discretion is not exercised for an illegal purpose, for example, to see whether the offender would make restitution, aid in the investigation of others, or help police recover stolen property: *R v Clouthier,* 2016 ONCA 197 at para 34

Any postponement of sentencing beyond a month or two may be taken as prima facie evidence of the exercise of judicial discretion for an improper purpose: *Clouthier* at para 34

An example of an improper purpose arises in *Clouthier.* The trial judge imposed multiple intermittent sentences, totalling more than 90 days, for

different counts on the same information. Her Honour did so by postponing sentencing on one of those counts until the accused finished serving the first intermittent sentence of 90 days. The accused then returned for sentencing on the second count and received an additional intermittent sentence of 60 days. The ONCA held that this potponement was improper and illegal as its sole purpose was "to circumvent the restrictions imposed on the length of an intermittent sentence by s.732(1)": *Clouthier* at paras 38-40

PRE-TRIAL CUSTODY

A. CREDIT FOR PRE-TRIAL CUSTODY

The loss of remission alone is a circumstance justifying enhanced credit at a rate of 1.5 to 1 pursuant to s.719(3.1) of the *Criminal Code: R v Summers,* 2014 SCC 26

The criminal record exclusions to enhanced credit under s.719(3.1) violates s.7 of the *Charter* due to overbreadth. An accused cannot be denied enhanced credit where the justices' reasons indicate that bail was refused primarily because of a previous conviction: *R v Safarzadeh-Markhali,* 2016 SCC 14

The bail misconduct exclusion to enhanced credit under s.719(3.1) also violates the *Charter* due to overbreadth. An accused cannot be denied enhanced credit where s/he was detained pursuant to s.524 of the *Criminal Code*: *R v Meads, 2018 ONCA 146*

Note, however, that the fact that an offence was committed on bail may be taken into account in determining the appropriate amount of pre-sentence credit. In conducting this analysis, the extent to which the breach has already been punished must also be considered. Where an offender is simultaneously being sentenced for breach charges and the charges that led to the recognizance or court order that was breached, it will ordinarily be preferable for the sentencing judge to deal with the breach by imposing a sentence commensurate with the seriousness of the breach: *R v Hussain*, 2018 ONCA 147 at paras 20-21.

If the fact that an offender is charged with Canadian offences contributes to a decision to detain on other matters in another country, the custody related to those other matters may, in some circumstances, be characterized as being a result of the offences. In those circumstances the court may consider granting the offender credit for time spent in pre trial custody abroad: *R v Zegil,* 2017 ONSC 1459

Even if the sentencing judge erred in principle in calculating the credit ratio for time spent in custody, appellate intervention is only justified where the Court concludes that any error that may have occurred had an impact on the fitness of the sentence ultimately imposed: *R v Newton,* 2018 ONCA 723, at para 3; *R v Hoshal,* 2018 ONCA 914 at para 28-29

B. DENIAL OF CREDIT FOR PRE-TRIAL CUSTODY

In some circumstances, such as where an offender attempts to "game the system" by causing delays in order to accrue additional enhanced pre-sentence credit, the denial of enhanced credit in addition to the sentence imposed for the breach may be justified: *Hussain* at para 22

A trial judge is also entitled to refuse to grant pre-trial credit where an accused is unlikely to be released before warrant expiry. See, for example, *R v McClung,* 2017 ONCA 705

It is an error in law to deny enhanced credit to an offender who was a statutory release violator in the federal system where the sentencing judge has no evidence of institutional misconduct which would likely lead to a loss of earned remission under the provincial system. Federal corrections authorities may revoke statutory release given to an offender serving time in a penitentiary for a breach or apprehended breach of a condition of his release, including anything from being out past curfew and consumption of alcohol to serious additional criminality. In contrast, in the provincial system, inmates are entitled to "earned remission", which is credited at 15 days per month – leading in the majority of cases to inmates being released after serving two thirds of their sentence. It is only where serious institutional misconduct occurs that an inmate may be forced to forfeit remission – and even then, the inmate is subject to forfeit a portion or all

of the remissions, and no such forfeiture shall exceed 15 days without the Minister's approval.

Hence, it is wrong to equate re-committal for violation of the terms of statutory release under the federal system with misconduct while serving a sentence within a provincial institution that would lead to a loss of earned remission under the provincial system: *R v Plante,* 2018 ONCA 251; *R v Pitamber,* 2018 ONCA 518

C. LOCKDOWN CREDIT

In the appropriate circumstances, particularly harsh presentence incarceration conditions can provide mitigation apart from and beyond the 1.5 credit referred to in s. 719(3.1). In considering whether any enhanced credit should be given, the court will consider both the conditions of the presentence incarceration and the impact of those conditions on the accused. There should be evidence of the time the appellant spent in lockdown credit and of any adverse on the appellant flowing from the locked down conditions: *R v Duncan,* 2016 ONCA 754 at paras 6-7

The Crown is not entitled to cross-examine the accused at large at a sentencing hearing where s/he has filed an affidavit about the harsh conditions of pre-sentence custody in order to seek a reduction in sentencing. The Crown isnot entitled to use the cross-examination to elicit evidence of aggravating factors on sentencing: *R v. Browne*, 2017 ONSC 5062

There is no one formula or approach to determining credit for harsh conditions. In *Kizir,* the Court of Appeal upheld the trial judge's decision to apply a certain mathematical formula (not detailed in the judgment) to grant a credit of 90 days for 321 days spent in partial or complete lockdown: *R v Kizir,* 2018 ONCA 781, at paras 12-15

A court's decision as to the credit, if any, to be granted to account for harsh presentence custodial conditions is a discretionary one to which deference is owed: *R v Ledinek,* 2018 ONCA 1017, at para 13

PRINCIPLES OF SENTENCING

A. DENUNCIATION AND DETERRENCE

The courts have very few options other than imprisonment to achieve the objectives of denunciation and general deterrence: *R. v. Lacasse*, 2015 SCC 64 at para. 6; *R v Inksetter,* 2018 ONCA 474 at para 17

Probation has traditionally been viewed as a rehabilitative sentencing tool. It does not seek to serve the need for denunciation or general deterrence: *Inksetter* at para 18

By enacting s. 718.01 of the *Criminal Code*, Parliament made clear that denunciation and general deterrence must be primary considerations for any offence involving the abuse of a child: *Inksetter* at para 16

B. PROPORTIONALITY

Pursuant to s.718.1 of the *Criminal Code, t*he fundamental principle of sentencing is that the sentence imposed must be proportionate to the gravity of the offence and the degree of responsibility of the offender: *R v Clouthier,* 2016 ONCA 197 at para 53

Evidence of diminished intelligence can be important in identifying the moral fault and hence the degree of responsibility that should be ascribed to the offender for his acts: *R v Plein,* 2018 ONCA 748 at para 83

C. TOTALITY

i. Definition

The totality principle requires that a combined sentence must not be unduly long or harsh in the sense that its impact simply exceeds the gravity of the offences in question or the overall culpability of the offender: *R v Johnson*, 2012 ONCA 39 at paras 15-18

The Court may being by deciding which sentence to impose for which count, or, alternatively, the Court may begin by determining what global sentence is fit, and then divvying out the appropriate sentence for each charge within that total sentence. In some circumstances where the offences are sufficiently interrelated, a trial judge may determine a global sentence first and then impose concurrent sentences of equal length; however, such an approach is not to be endorsed where the counts are of varying seriousness: *R v JH,* 2018 ONCA 245 at para 49-51

ii. Totality Principle and Consecutive Sentences

The totality principle applies where:

- a single judge must deal with a series of offences, some of which require the imposition of consecutive sentences having regard to the criteria for such sentences.
- a sentencing judge must impose a fit sentence on an offender convicted of one or more offences where that offender is at the same time serving the remainder of a sentence for a previous conviction or convictions.
- the subsequent sentencing judge will determine how much weight to give to the existing remaining sentence by assessing whether the length of the proposed sentence *plus* the existing sentence will result in a "just and appropriate" disposition that reflects as aptly as possible the relevant principles and goals of sentencing in the circumstances: *R v Johnson,* 2012 ONCA 39

iii. The Totality Principle and Pre-Existing Sentences

The totality principle applies where part of the total term of incarceration includes a pre-existing sentence: R v. Nwagwu, 2015 ONCA 526

D. PARITY PRINCIPLE:

Parity in the sentencing of similar offenders who have committed similar offences is a recognized principle of sentencing: Criminal Code s. 718.2(b): *R v Hawley,* 2015 ONCA 143 at para 8

The principle of parity means that any disparity between sentences for different offenders in a common venture requires justification. *R v. Sahota*, 2015 ONCA 336

Over time, the operation of the parity principle gives rise to ranges of sentences for similar offences committed by similar offenders. However, there will always be situations that call for a sentence outside a particular range, in light of the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded: *R v Hawley,* 2015 ONCA 143 at para 8

The parity principle is not to be applied in a rigid fashion; it is one of several principles applied in the sentencing of an offender: *R v Kizir,* 2018 ONCA 781, at para 9

It is not inappropriate for a trial judge to consider that a guilty plea in the face of an overwhelming case may not be accorded the same weight as one in which an accused pleads guilty and gives up significant litigable issues. *R v. Sahota*, 2015 ONCA 336

The principle of parity between similarly situated accused does not apply to the accused with respect to the two sentences imposed for his own similar crimes: *R v Caporiccio,* 2017 ONCA 742 at paras 34-35

E. JUMP PRINCIPLE

The jump principle recognizes that, although a sentence may be increased for a subsequent similar offence, the sentence should be increased incrementally.

subsequent sentences passed should not be disproportionate to the prior offence (i.e., a "jump" in sentence.")

The court may also take into account a jump in the length of any previous sentence imposed. For example, in *Colasimone*, the Court of Appeal found it noteworthy that "the subject sentence exceeds any previous sentence imposed by 6 years:" *R v Colasimone,* 2018 ONCA 256 at para 24

That being said, where the circumstances of the case are sufficiently blameworthy, the jump principle may have more limited application: *R v ECVN,* 2018 ONCA 149

F. REHABILITATION

The objective of rehabilitation has much to say in the determination of the nature and length of sentences to be imposed upon youthful and first offenders to ensure that a sentence of imprisonment is not so lengthy as to extinguish or substantially diminish any realistic rehabilitative prospects: *R v Rosen,* 2018 ONCA 246 at para 68; *R v Williams,* 2018 ONCA 367 at para 9

For more on rehabilitation in the context of young offenders, see Young Offenders

PROBATION

A. AVAILABILITY OF A PROBATION ORDER

A probation order cannot be imposed where the sentence ordered is more than two years: see s. 731(1)(b); *R v Labelle,* 2016 ONCA 110 at para 13

B. GENERAL PRINCIPLES OF PROBATION

Probation has traditionally been viewed as a rehabilitative sentencing tool and that conditions imposed to punish rather than rehabilitate the offender have been struck out: *R v Faucher,* 2018 ONCA 815s, at para 4

C. OPTIONAL CONDITIONS OF PROBATION ORDER

It is within the sentencing judge's discretion to order, under section 732.1(3), that the defendant remain in Ontario (unless written permission is obtained). This does not amount to banishment from another province: *R v Corby,* 2016 ONCA 040

A banishment condition in a term of probation is rarely reasonable under section 732.1(3): R v. Menard, 2015 ONCA 512

SENTENCING FOR SPECIFIC OFFENCES

A. GENERAL PRINCIPLES

The accused must be sentenced only on the basis of the offence for which s/he was convicted. It is an error of law to effectively sentence the accused for an uncharged offence: *R v Suter,* 2018 SCC 34

Although sentencing ranges are used mainly to ensure the parity of sentences, they reflect all the principles and objectives of sentencing. Sentencing ranges are nothing more than summaries of the minimum and maximum sentences imposed in the past, which serve in any given case as guides for the application of all the relevant principles and objectives. However, they should not be considered “averages”, let alone straitjackets, but should instead be seen as historical portraits for the use of sentencing judges, who must still exercise their discretion in each case*; R v Lacasse,* 2015 SCC 64; *R v Tahir,* 2016 ONCA 136 at para 2

While sentencing ranges can be helpful in determining the appropriate sentence in a given case, "the ultimate question is not what range does or does not apply, but whether the sentence imposed is appropriate in the specific circumstances of the case:" *R v SMC,* 2017 ONCA 107 at para 7.

There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. Everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case. Thus, the fact that a judge deviates from a sentencing range established by the courts does not in itself justify appellate intervention: *R v Lacasse,* 2015 SCC 64; *R v Suter,* 2018 SCC 34

It is appropriate for a trial judge to consider a range of sentence for a particular offence committed in particular circumstances from which he or she may deviate after considering the particular facts of the case, including the circumstances of the victim, the particulars of the crime, and the history and circumstances of the offender. Where facts or circumstances exist that distinguish the situation significantly from other cases where sentences were imposed in the range, the trial judge is entitled to impose a sentence that adequately reflects the significance of those facts: R v. Jones-Solomon, 2015 ONCA 654 at para 82

In reviewing a sentence, the court is concerned with fitness and not the accuracy of the range of sentence identified by the trial judge: *R v Dow,* 2017 ONCA 233 at para 1

A sentence at the upper end of the range for a first time offender who was gainfully employed throughout the proceedings may not be warranted: *R v McIntyre,* 2016 ONCA 843 at para 20

B. ATTEMPT MURDER

The sentencing range for attempt murder is six years to imprisonment for life. Double digit prison sentences for attempted murder have been imposed in cases of planned executions involving the use of firearms: *R v Forcillo,* 2018 ONCA 402 at paras 131, 132

C. CHILD LURING

The mandatory minimum sentence of one year incarcearrtion for the offence of child luring was struck down by the Ontario Court of Appeal in *R v Morrison,* 2017 ONCA 582

For general commentary on the range of sentence on child luring, see *R v AH,* 2017 ONCA 677 at paras 46-52

D. CHILD PORNOGRAPHY

Denunciation and general deterrence are the primary principles of sentencing for offences involving child pornography. Courts have been signaling that more significant sentences for these offences are appropriate: *R v Inksetter,* 2018 ONCA 474 at paras 16, 25; *R v JS,* 2018 ONCA 675 at para 57

A longer sentence on the count of "make available" child pornography than for the count of "possession" is warranted because by making images and videos the accused downloaded available to others via the internet, the accused contributes to the further victimization of the children depicted in the pornographic images: *Inksetter* at para 27

For a review of sentences in a number of cases involving child sexual abuse and making child pornography: *R v JS,* 2018 ONCA 675, at para 106-114

A mandatory minimum sentence of six months' incarceration (increased to one year incarceration since July 17, 2015) for possession of child pornography is grossly disproportionate and violates s.12 of the *Charter*: *R v John,* 2018 ONCA 702 at paras 40-41

E. CRIMINAL HARRASMENT

Criminal harassment is a serious offence and usually requires the court to send a message to the offender and the public that harassing conduct against innocent and vulnerable victims is not tolerated by society, and that such conduct must be deterred: *R v Sabir,* 2018 ONCA 912, at para 45.

Three years is within the range for serial harassers: *R v Myles,* 2017 ONCA 375 at para 9

F. DRIVING OFFENCES

The predominant sentencing objectives in determining a fit sentence for alcohol-driving offences, especially those in which bodily harm is caused to a fellow human being, are general deterrence and denunciation. As a general rule, custodial sentences are required where bodily harm is caused: *R v Clouthier,* 2016 ONCA 197 at para 54

The range of sentence for such offences varies significantly. Within that range are sentences in the mid to upper reformatory and lower end penitentiary range: *Clouthier* at para 56

The range of sentence for dangerous driving causing bodily harm involving drug use is a conditional sentence to two years less a day. Denunciation and deterrence are paramount, even for youthful first time offenders, because such offences are frequently committed by such people, who are otherwise of good character: *R v Currie,* 2018 ONCA 218

G. DRUG OFFENCES

i. General Principles

The quantity of drugs involved is relevant to the sentencing process: *R v Sidhu,* 2009 ONCA 81 at para 14; *R v Kusi,* 2015 ONCA 639 at para 14

ii. HEROIN

First offender couriers who import large amounts of high-grade heroin into Canada for personal gain should expect to receive jail sentences in the 12 to 17-year range. Lesser amounts will often attract similar, if slightly lower, penalties: *R v Sidhu,* 2009 ONCA 81 at paras 14, 20; *R v Deol,* 2017 ONCA 221 at para 48

The appropriate range for first time offenders convicted of trafficking one kilogram of heroin is 9-11/12 years: *R v Pannu,* 2015 ONCA 677 at para 192; *R v Kusi*, 2015 ONCA 639 at paras 14-15

The appropriate range for offences involving trafficking of between approximately 0.5 to 1 kilograms of heroin is 6 to 12 years. A sentence of three years in such circumstancs is demonstrably unfit: *R v DiBenedetto*, 2016 ONCA 16 at paras 7-9

iii. COCAINE

For couriers who are first time offenders and smuggle large quantities of cocaine (upwards of 3kg) into Canada, the appropriate sentence falls within the range of six- to eight-years: *R v Jackman,* 2016 ONCA 121 [reference to *Cunningham*] at para 57

While the range for importers of multi-kilograms of cocaine is generally 6-8 years, a sentence for a youthful, first-time offender, convicted of importing close to 2kg of cocaine, of 5 years and 3.9 months, less credit for pre-sentence custody, is not unfit: *R v Zeisig,* 2016 ONCA 845 at para 13

The accepted range for conspiracy to traffic in cocaine for mid-level dealers trafficking in quantities that include the kilogram level is eight to fourteen years,

but five years may suffice in appropriate circumstances: *R v McGregor,* 2017 ONCA 399 at para 13

iv. Marijuana

In *R v Vu,* 2018 ONCA 436 the Court of Appeal declared the production of marijuana provisions found in ss. 7(2)(b)(iii), (v), (vi) and 7(3)(c) as unconstitutional

H. FAIL TO PROVIDE THE NECESSARIES

The appropriate range for the offence of manslaughter by means of failing to provide the necessaries of life is 7 to 16 tears, with 16 years being the upper end of the range for cases involving ongoing horrendeous and fatal abuse of persons by individuals responsible for their care: *R v Hawley,* 2016 ONCA 143 at para 6-7

However, in a particularly egregious case, a sentence of 20 years may nontheless be fit: *Hawley* at paras 9-11

I. FRAUD OFFENCES

The appropriate range for the offence of manslaughter by means of failing to provide the necessaries of life is 7 to 16 tears, with 16 years being the upper end of the range for cases involving ongoing horrendeous and fatal abuse of persons by individuals responsible for their care: *R v Hawley,* 2016 ONCA 143 at para 6-7

However, in a particularly egregious case, a sentence of 20 years may nontheless be fit: *Hawley* at paras 9-11

J. HOME INVASIONS

The sentencing range for home invasions is four to thirteen years' imprisonment, with the high end being applicable for offences involving violence or sexual assaults: *R v Hejazi,* 2018 ONCA 435

K. MANSLAUGHTER

In *R v NJ,* 2017 ONCA 740, the Court of Appeal upheld a sentence of ten years for manslaughter where a mother brutally beat her three-year-old daughter, resulting in her death.

The range of sentence for aggravated manslaughter is 8 to 10 years: *R v Punia,* 2018 ONCA 1022, at para 2

L. SEXUAL OFFENCES

The appropriate range for the offence of manslaughter by means of failing to provide the necessaries of life is 7 to 16 tears, with 16 years being the upper end of the range for cases involving ongoing horrendeous and fatal abuse of persons by individuals responsible for their care: *R v Hawley,* 2016 ONCA 143 at para 6-7

However, in a particularly egregious case, a sentence of 20 years may nontheless be fit: *Hawley* at paras 9-11

In cases of multi-victim sexual abuse where the offender was engaged in a pattern of conduct over many years with various victims, there may be good reason to impose concurrent sentences of equivalent length, after the court considers an appropriate global sentence: *R v JH,* 2018 ONCA 245 at para 50

The range for the regular and persistent sexual abuse by a person in a position of trust of young children over a substantial period of time is mid to upper single digit penitentiary terms: *JH* at para 52

For a review of sentences in a number of cases involving child sexual abuse and making child pornography: *R v JS,* 2018 ONCA 675, at para 106-114

VICTIM FINE SURCHARGE

The Victim Fine Surcharge does not violate ss. 7 or 12 of the *Charter: R v Tinker,* 2018 ONCA 552

A court cannot order a victim surcharge to be paid out of funds forfeited to the Crown as proceeds of crime. *R v. Shearer*, 2015 ONCA 355

The Criminal Code does not permit the imposition of concurrent victim fine surcharges: *R v Fedele,* 2017 ONCA 554

POST-SENTENCING CONSIDERATIONS

In *Ewert v. Canada*, 2018 SCC 30, the Supreme Court of Canada held that Correctional Service Canada (CSC) breached its enabling statute by using actuarial risk-assessment tools to determine the security classification of Indigenous offenders, despite a lack of empirical evidence that the tools were accurate when applied to Indigenous persons. The remedy was a declaration that the Act had been breached; any particular decisions based on the impugned tools would need to be judicially reviewed.