1 General Principles

This chapter will outline the principles, purpose, and objectives of sentencing. Many sentencing hearings are relatively brief and take place in busy provincial courts. Nonetheless, each sentencing decision a court makes, even on routine cases, can contribute to building a just, peaceful, and safe society. It is our hope that in thinking about these principles, you'll consider them in the larger context of the thousands of sentencing hearings that occur across Canada every day. We encourage you to consider that in the aggregate, the choices our courts make in responding to crimes, including which objectives to emphasize in each situation, are enormously powerful and concrete expressions of Canadian values.[1] A deep understanding of the broader principles is the first step in properly analyzing the sentencing issues, interests, and dynamics of any particular case. No matter your role in the administration of justice (Crown, defence, judge), you must understand the macro level before you can truly apply yourself to the micro of any one case.

I. The Purpose of Sentencing

The fundamental purpose and principle of sentencing in relation to adult offenders[2] are established in sections 718 and 718.1 of the *Criminal Code*.[3] The purpose of sentencing is to impose a just sanction that fulfills the objectives of denunciation, deterrence, separation of the offender from society, rehabilitation, reparations to victims and the community, and the promotion of a sense of responsibility in offenders. Sentencing must be done in accordance with its fundamental principle: proportionality.

> 718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.
>
> 718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

1 *R v M (CA)*, [1996] 1 SCR 500, 1996 CanLII 230 at para 81.

2 The sentencing principles applicable to youth are discussed in Chapter 11, Sentencing Young Persons.

3 RSC 1985, c C-46.

II. The Fundamental Principle of Sentencing: Proportionality

Proportionality is the fundamental principle of sentencing that must prevail in every case.[4] A sentence must be proportionate to "the gravity of the offence committed and the moral blameworthiness of the offender."[5] "The more serious the crime and its consequences, or the greater the offender's degree of responsibility, the heavier the sentence will be."[6] "The sentence must be severe enough to denounce the offence but must not exceed 'what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence.'"[7]

Proportionality is the "organizing principle"[8] of sentencing that guides courts toward the goal of a "fair, fit and principled sanction" in every case.[9]

Proportionality is central to the maintenance of public confidence in the criminal justice system. "[S]entences that are too lenient and sentences that are too harsh can undermine public confidence in the administration of justice."[10] Proportionality demands that the punishment "speaks out against the offence and punishes the offender no more than is necessary."[11] In this way, the principle of proportionality balances the principles of restraint and the importance of holding offenders accountable for their actions.[12] By speaking directly to the moral blameworthiness of the offender, Parliament has made it clear that those offenders who intentionally cause harm should be subjected to a greater punishment than those who did not intend the harm that flowed from their conduct.[13] Proportionality requires that every sentence be individualized and crafted to meet the unique circumstances of the case.[14]

Section 7 of the *Canadian Charter of Rights and Freedoms*[15] states:

4 *Criminal Code*, s 718.1; *R v Suter*, 2018 SCC 34 at para 56.

5 *M (CA)*, *supra* note 1 at para 40, citing *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 533, 1985 CanLII 81; *Suter*, *supra* note 4 at para 4; *R v Friesen*, 2020 SCC 9 at para 30; *R v Hills*, 2023 SCC 2 at para 57.

6 *R v Lacasse*, 2015 SCC 64 at para 12.

7 *R v Bissonnette*, 2022 SCC 23 at para 50, quoting *R v Nasogaluak*, 2010 SCC 6 at para 42 and referencing *R v Ipeelee*, 2012 SCC 13 at para 37.

8 *R v Parranto*, 2021 SCC 46 at para 10.

9 *Ibid* at para 10.

10 *Lacasse*, *supra* note 6 at para 12.

11 *Nasogaluak*, *supra* note 7 at para 42.

12 *Ibid* at para 42.

13 *M (CA)*, *supra* note 1 at para 40.

14 *R v Jacko*, 2010 ONCA 452 at para 52.

15 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The overlapping language in section 718.1 of the *Criminal Code* and section 7 of the Charter, combined with the fact that sentencing frequently results in the deprivation of liberty, might suggest that proportionality is a constitutionally protected principle of fundamental justice. LeBel J in *R v Ipeelee* went so far as to state that "proportionality in sentencing could aptly be described as a principle of fundamental justice under s. 7 of the *Charter*."[16] However, the Supreme Court of Canada has since described LeBel J's comments as *obiter* and held that proportionality is not a principle of fundamental justice.[17] In *R v Bissonnette*, the Supreme Court reiterated that none of the sentencing principles or objectives, including proportionality, have constitutional status.[18] The only reference to proportionality in the Charter is in section 12, which protects everyone from "cruel and unusual punishment," thus prohibiting the imposition of a sentence that is "grossly disproportionate."[19] There is no lesser standard of proportionality contained in section 7.[20] The Supreme Court held that to elevate proportionality to a principle of fundamental justice would unduly constrain Parliament's "broad discretion in proscribing conduct as criminal and in determining proper punishment."[21]

III. The Objectives of Sentencing

A. Denunciation

Denunciation describes the objective of expressing society's condemnation of the offender's conduct.[22] "[A] sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law."[23] Emphasis on the denunciatory aspect of a sentence is typically reflected in a longer term of imprisonment.[24]

16 *Ipeelee*, *supra* note 7 at para 36. See also *R v Anderson*, 2014 SCC 41 at para 21.

17 *R v Safarzadeh-Markhali*, 2016 SCC 14 at para 71; *Bissonnette*, *supra* note 7 at para 52.

18 *Bissonnette*, *supra* note 7 at paras 52, 53.

19 *R v Lloyd*, 2016 SCC 13 at para 22; *Safarzadeh-Markhali*, *supra* note 17 at para 71.

20 *Lloyd*, *supra* note 19 at para 42, citing *R v Malmo-Levine*; *R v Caine*, 2003 SCC 74 at para 160.

21 *Lloyd*, *supra* note 19 at para 45, citing *R v Guiller*, 1985 CanLII 5996, [1985] OJ No 1717 (QL) (Dist Ct); *Bissonnette*, *supra* note 7 at para 53.

22 *Lacasse*, *supra* note 6 at para 45, citing *R v Proulx*, 2000 SCC 5; *M (CA)*, *supra* note 1; *Bissonnette*, *supra* note 7.

23 *Proulx*, *supra* note 22 at para 102, citing *M (CA)*, *supra* note 1 at para 81; *R v Morrisey*, 2000 SCC 39 at para 47.

24 *Lacasse*, *supra* note 6 at paras 74, 75, citing *R v Lépine*, 2007 QCCA 70 at paras 19-21, and *Brutus v R*, 2009 QCCA 1382 at para 18.

B. Deterrence

Deterrence refers to the "imposition of a sanction for the purpose of discouraging the offender, and anyone else, from engaging in criminal activity. When the deterrence is aimed at the offender brought before the court, it is called 'specific deterrence,' when it is aimed at other people, it is called 'general deterrence.'"[25]

1. Specific Deterrence

The theory behind specific deterrence is that when courts impose harsh consequences, offenders will be less likely to commit offences in the future because they will learn from the sentence and seek to avoid similar penalties.[26] Critics of specific deterrence point to research that indicates that "those who are sent to prison for the first time are more likely to re-offend than are equivalent offenders sentenced to a community punishment."[27] One study suggested that the "lesson learned from prison is to commit more crime."[28]

The Supreme Court has observed that as a principle of sentencing, specific deterrence refers to the goal of preventing the offender from committing another criminal offence. When considered broadly, there can be considerable overlap between specific deterrence and other goals of sentencing. Indeed, rehabilitation and reintegration of the offender in society may be the best way to ensure that the young person does not reoffend.[29]

These comments were made in the context of the application of the *Youth Criminal Justice Act;*[30] however, the comments are also applicable to many adult offenders (particularly younger adults), first-time offenders, or offenders for whom the "prospect of successful rehabilitation is real."[31] Courts that have considered the practicality of accomplishing specific deterrence have recognized that to effectively craft a sentence that teaches the offender the lessons necessary to prevent future crimes, the sentencing court must consider the unique qualities of the offender, such as "his record and

25 *R v BWP; R c BVN*, 2006 SCC 27 at para 2.

26 Anthony N Doob, Cheryl Marie Webster & Rosemary Gartner, "The Effects of Imprisonment: Specific Deterrence and Collateral Effects: Research Summaries Compiled from Criminological Highlights" (14 February 2014), Centre for Criminology & Sociolegal Studies, University of Toronto at A-2.

27 *Ibid* at A-3.

28 *Ibid* at B-7, citing Daniel P Mears, Joshua C Cochran & William D Bales, "Gender Differences in the Effects of Prison on Recidivism" (2012) 40:5 J Crim Justice 370.

29 *BWP; BVN*, *supra* note 25 at para 39.

30 SC 2002, c 1.

31 *Lacasse*, *supra* note 6 at paras 132-34, citing *R v Leask*, 1996 CanLII 17936, 113 Man R (2d) 265 at para 3 (CA).

attitude, his motivation and his reformation and rehabilitation."[32] Whether a court needs to impose a significant jail sentence to prevent a particular offender from committing further offences will be matter of balancing all the factors. As the Saskatchewan Court of Appeal observed almost 50 years ago,

> the public can best be protected by the imposition of sentences that punish the offender for the offence committed, that may deter him and others from committing such an offence and that may assist in his reformation and rehabilitation. If the offender is one for whom reformation is beyond question, then the public can be protected only by depriving him of his freedom. In the case of other offenders, and particularly young offenders, the principal element for consideration, consonant with the maintenance of public confidence in the effective enforcement of the criminal law, should be the offenders reformation and rehabilitation.[33]

Certain offences and types of conduct demand a particular focus on specific deterrence. For example, in the context of sexual assaults on an intimate partner, it has been held that

> "persistence in testing the waters" in the face of the complainant's communicated lack of consent, and his assertion of innocence based on common rape myths were indicators of a need to "deter" and that the sentence imposed must give effect to that.[34]

The theory that if we send people to jail, it will be sufficiently unpleasant that they will learn to avoid criminality in the future appeals to common sense and logic. It is also a well-established principle of sentencing. However, the growing social scientific body of evidence to the contrary cannot be ignored. Furthermore, we know that some people are not able to overcome the underlying causes of criminality on their own. In our view, the best sentencing plans are based on a thoughtful consideration of offenders' circumstances and the underlying causes of their criminal behaviour. Such plans answer the question of how best to prevent a particular person from reoffending by demonstrating that they have learned from their experience with the criminal justice system and sincerely want to avoid criminality in the future. Successful sentencing plans also include the rehabilitative tools necessary to give the court and ultimately the community confidence that the offender will be able to avoid committing future offences.

2. General Deterrence

When general deterrence is factored in the determination of the sentence, the offender is punished more severely, not because they deserve it, but because the court decides to send a message to others who may be inclined to engage in a similar

32 *R v Morrissette*, 1970 CanLII 642, 1 CCC (2d) 307 at para 10 (Sask CA); *R v BO2*, 2010 NLCA 19 at para 51.

33 *Morrissette*, *supra* note 32 at para 11.

34 *R v TSC,* 2022 SKCA 1 at para 78, leave to appeal to SCC refused, 2022 CanLII 67620.

criminal activity.[35] In *R v Morrisey,* the Supreme Court left open the possibility that the need for general deterrence might "serve as a justification under s. 1 if it were ever necessary to justify a violation of s. 12."[36]

The extent to which the imposition of significant jail sentences is actually effective at preventing people from committing crimes is the subject of "controversy and speculation."[37] In *R v Proulx,* the Supreme Court observed that "[t]he empirical evidence suggests that the deterrent effect of incarceration is uncertain."[38] More recently, the Supreme Court recognized that

> legitimate reservations notwithstanding, the fact remains that the certainty of punishment, together with the entire range of criminal sanctions, does produce a certain deterrent effect, albeit one that is difficult to evaluate, on possible offenders.[39]

Opponents of general deterrence argue that "there is no evidence that it actually contributes to the prevention of crime."[40] Those who support it focus on society's reliance on general deterrence to influence behaviour—for example, as a tool to encourage young people to make responsible choices concerning the use of cigarettes, alcohol, drugs, and motor vehicles.[41] Notwithstanding the dubious efficacy of general deterrence, the Supreme Court has recognized that the inclusion of deterrence as a sentencing principle is a policy choice for Parliament to make. Parliament has clearly stated that deterrence is an objective of sentencing.

When specific and/or general deterrence are emphasized, they are likely to increase the severity of the sentence. Courts have concluded that a long jail term is most likely to be effective in preventing criminal activity among people who are intelligent, well aware of potential consequences, and "accustomed to weighing potential future risks against potential benefits before taking action,"[42] such as persons who may be inclined to engage in complex fraudulent activity. Following similar logic, the Supreme Court has held that harsh sentences are more likely to impact the choices made by otherwise law-abiding citizens, such as those who may drive while impaired, as compared to chronic offenders.[43]

35 *BWP; BVN*, *supra* note 25 at para 2.

36 *Supra* note 23 at para 45.

37 *R v Drabinsky*, 2011 ONCA 582 at para 159, leave to appeal refused, [2011] SCCA No 491.

38 *Proulx*, *supra* note 22 at para 107; *BWP; BVN*, *supra* note 25 at para 3.

39 *Bissonnette*, *supra* note 7 at para 47.

40 *BWP; BVN*, *supra* note 25 at para 3.

41 *Ibid*.

42 *Drabinsky*, *supra* note 37 at para 159, citing *R v Gray*, 1995 CanLII 18, [1995] OJ No 92 (QL) (CA), leave to appeal refused, [1995] SCCA No 116.

43 *Lacasse*, *supra* note 6 at para 73.

3. Statutory Obligation to Emphasize Denunciation and Deterrence

Parliament has prescribed that where sentencing the following offences or types of offences, courts shall emphasize denunciation and deterrence. As indicated above, such emphasis will increase the sentence.

TABLE 1.1 Statutory Obligation to Emphasize Denunciation and Deterrence

Criminal Code Provision	Applicability
• s 718.01 Offences against children	• Offences that involve the abuse of a person under the age of 18
• s 718.02 Offence against peace officer or other justice system participant	• s 270(1) Assaulting a peace officer • s 270.01 Assaulting peace officer with weapon or causing bodily harm • s 270.02 Aggravated assault of peace officer • s 423.1(1)(b) Intimidation of a justice system participant or a journalist
• s 718.03 Offence against certain animals	• s 445.01(1) Killing or injuring certain animals
• s 718.04 Offence against vulnerable person	• Offences that involve abuse of a person who is vulnerable because of personal circumstances, including because the person is Aboriginal and female

C. Separation from Society

There are some offenders who must be separated from society. The only way to completely separate a person from society is incarceration. Where there is evidence that a person is a danger to public safety, the duration of the sentence must be sufficient to "give the correctional authorities the necessary time to properly treat the offender and for the National Parole Board to assess the risk of his reoffending."[44] An absence of information about the likelihood of reoffending or the person's rehabilitative prospects is relevant to the need to separate that person from society, particularly where there is "compelling evidence of dangerousness."[45]

44 *R v Khawaja*, 2012 SCC 69 at para 122, quoting *R v Downey and Thompson*, 2010 ONSC 1531 at para 31.

45 *Khawaja*, *supra* note 44 at paras 122, 123.

Custodial sentences are generally imposed for a specified period. The separation of an offender from the community is therefore only for the duration of the sentence, subject to the parole provisions, the notable exception being those offenders who are found to be "dangerous offenders" within the meaning of part XXIV of the *Criminal Code*. Where an offender is found to be a dangerous offender, and the court is not satisfied that a lesser measure will adequately protect the public in the future from the offender committing a murder or other serious personal injury offence, the court may sentence the offender to an indeterminate period of incarceration.[46] Where the objective of separation is emphasized by the court, the length of the jail sentence is likely to be increased.

It may be possible to reduce the need to separate some offenders entirely from the community through incarceration or to reduce the period of incarceration by imposing conditions through court orders that reduce the risk of the offender committing future offences—for example, weapons prohibitions, orders prohibiting contact with victims or persons who may have been connected with prior criminal activity, or other types of rehabilitative efforts that reduce recidivism.

D. Rehabilitation

Rehabilitation refers to the process of addressing the underlying causes of the criminal behaviour, thus preventing the commission of crimes in the future. For example, if an offender steals to obtain money to buy drugs, the likelihood of them committing future offences is reduced if they can address their addiction. The Supreme Court has described rehabilitation as "one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world."[47]

Rehabilitation is a relative latecomer to the sentencing analysis.[48] Historically, incarceration was the tool used to achieve all of the sentencing objectives.[49] However, in *R v Gladue,* the Supreme Court acknowledged that imprisonment has not been successful in achieving the sentencing goals.[50] The Supreme Court held that Parliament mandated an increased emphasis on restorative-justice approaches to sentencing that

> remedy the adverse effects of crime in a manner that addresses the needs of all parties involved. This is accomplished, in part, through the rehabilitation of the offender, reparations to the victim and to the community, and the promotion of a sense of

46 *Criminal Code*, s 753(4.1). Further reference may be made to Chapter 6, Dangerous and Long-Term Offenders.

47 *Bissonnette*, *supra* note 7 at para 48, quoting *Lacasse*, *supra* note 6 at para 4.

48 See *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 at para 42.

49 *Ibid* at paras 42, 57.

50 *Ibid* at para 57.

responsibility in the offender and acknowledgment of the harm done to victims and to the community.[51]

The Supreme Court made clear in *Bissonnette* that "Parliament may not prescribe a sentence that negates the objective of rehabilitation in advance, and irreversibly, for all offenders."[52] Rehabilitation is "intimately linked to human dignity in that it reflects the conviction that every individual has the capacity to reform and re-enter society."[53]

A sentence that emphasizes rehabilitation will minimize the jail sentence if incarceration is imposed and will increase the terms and duration of probation and other court orders to support the offender in overcoming the underlying causes of their criminal behaviour.

E. Reparations

Pursuant to section 718(e) of the *Criminal Code,* it is an objective of sentencing to provide reparations to victims or to the community. The purpose of this objective is to use the sentencing process to, where possible, ameliorate or undo the harm done by the crime. In cases involving property or financial crimes, this may be accomplished by reimbursing the victims for financial losses or costs of repairs. In other contexts, partial reparations may be made by compensating victims for the losses associated with their injuries, such as lost wages or medical expenses. In some cases, performing community service is another appropriate way to make amends for the harm caused to a community. Courts may order offenders to make restitution or perform community-service hours as part of a probation order or conditional sentence. The court may also order that restitution be paid pursuant to what is commonly called a free-standing restitution order, pursuant to section 738. Such an order is so called because it is not a part of any other court order. The *Canadian Victims Bill of Rights* also states that every victim "has the right to have the court consider making a restitution order against the offender."[54] While the criminal courts are not collection agencies or appropriate venues for the resolution of civil disputes, where offenders have prior to sentencing made restitution to the victim or taken other steps to repair the harm caused, this generally has a mitigating effect on sentencing. While it is always more persuasive at the sentencing hearing to refer to acts of reparation that have been done as compared to those that are intended, where the offender has not made reparations prior to sentencing but has demonstrated a willingness to do so and consents to the inclusion of such orders in their sentencing, this is also a mitigating factor.

51 *Proulx*, *supra* note 22 at para 18.

52 *Bissonnette, supra* note 7 at para 141.

53 *Ibid*.

54 SC 2015, c 13, s 2, s 16.

F. Promotion of Responsibility Among Offenders and Acknowledgment of the Harm Done to Victims or the Community

It is important that offenders accept responsibility for their actions and acknowledge the harm caused to victims. Victims may describe this harm to the court by filing a victim impact statement pursuant to section 722 of the *Criminal Code*. Offenders may accept responsibility and acknowledge the harm they caused by writing a letter of apology. Alternatively, section 726 requires that before a court imposes sentence, it must ask the offender if they have anything to say. The offender may apologize at that time.[55]

One of the most significant ways an offender can accept responsibility for their actions is to enter a guilty plea as early as possible. By entering a guilty plea, particularly an early plea, the offender not only accepts responsibility for their actions; they also express remorse for them and mitigate the impact on the victim and community by avoiding the necessity of victims having to testify at trial and saving the community the resources associated with a trial.[56] An early guilty plea or other expressions of remorse and responsibility are generally considered mitigating factors. "A plea entered at the last minute before the trial is not deserving of as much consideration as one that was entered promptly."[57]

The absence of remorse is generally not an aggravating factor on sentence.[58] An offender's decision to exercise their right to make full answer and defence, coupled with reliance on the presumption of innocence, should never be considered an aggravating factor.[59] It may be that where an offender demonstrates a "substantial likelihood of future dangerousness,"[60] such as acknowledging having committed the act in question but maintaining that they "did nothing wrong," this may be viewed as increasing their dangerousness, thus warranting a more significant sentence and thereby acting as an aggravating factor.[61] In those circumstances, it is not the lack of a guilty plea that pushes the sentence toward the higher end of the range but rather

55 Further reference may be made to Chapter 3, The Sentencing Hearing, Section IX, and the discussion of the offender's statement.

56 Even a "late" guilty plea saves the witnesses the discomfort of testifying. In difficult cases, this may be a point worth emphasizing, even when the guilty plea is late breaking. For further discussion, reference may be made to the discussion of the guilty plea as a mitigating factor in Chapter 4, Aggravating and Mitigating Factors.

57 *Lacasse*, *supra* note 6 at para 81.

58 *Nash v R*, 2009 NBCA 7 at para 30, leave to appeal refused, [2009] SCCA No 131; *R v Keats*, 2018 NSCA 16 at para 46.

59 *R v Valentini*, 1999 CanLII 1885, [1999] OJ No 251 (QL) at para 83 (CA).

60 *Ibid* at para 82.

61 *Nash*, *supra* note 58 at para 34; *R v Shah*, 2017 ONCA 872 at para 8.

the increased dangerousness of the offender that translates into an increased need for emphasis on separation and specific deterrence.[62]

IV. Parity (Section 718.2(b)) and Individualization

The principles of parity and individualization demand that a sentence be both the same as ones imposed on similar offenders for similar offences[63] and highly individualized.[64] These principles may initially appear contradictory; however, because each case is different, the two in fact work together. The collection of previously imposed sentences provides guidance regarding the range of sentence that may be appropriate for certain offences.[65] Nonetheless, the court must also consider the unique factors of the case and not assume that there is a "precise range that will apply to every case."[66] In this way the sentencing process is informed by the sentences imposed in similar cases and refined by the unique circumstances of the offender.

"Parity is important where two or more offenders commit the same offence together."[67] It would appear unfair if two people commit the same crime in the same circumstances and receive different sentences. Furthermore, where the offenders are involved in group or gang-like crime, it is

> inappropriate to draw fine distinctions between one member of a gang carrying out a co-ordinated activity in pursuit of the aims of the gang from another member of the gang engaged at the same time in roughly the same activity carrying out the aims of the gang.[68]

In this way parity gives a practical application to proportionality.[69]

However, even co-accused—those charged together for the commission of the same offence—do not always stand in the same circumstances. They may have different roles in the offence or different antecedents (such as prior criminal activity), or they may have taken different rehabilitative or restorative steps. Therefore, co-accused persons may receive different sentences to reflect their different circumstances.[70]

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62 For a review of the ethical and strategic considerations associated with a guilty plea, please see Chapter 2, Resolution Discussion and Process. Further consideration of the guilty plea as a mitigating factor on sentence may be found in Chapter 4, Aggravating and Mitigating Factors.

63 *Criminal Code*, s 718.2(b); *Friesen*, *supra* note 5 at para 31.

64 *R v McDonnell*, [1997] 1 SCR 948, 1997 CanLII 389 at para 29; *Suter, supra* note 4 at para 46.

65 *R v Stone*, [1999] 2 SCR 290, 1999 CanLII 688 at paras 244-45.

66 *Ibid* at para 244, citing *R v Archibald*, 1992 CanLII 834, 15 BCAC 301 at 304.

67 *R v Mahoney*, 2018 NLCA 16 at para 26, citing *R v Terry*, 2015 NLCA 23 at para 7.

68 *R v Miloszewski* (*sub nom R v Nikkel*), 2001 BCCA 745 at para 19 [*Miloszewski*]; *R v Crawford* (*sub nom R v Brar*), 2014 BCCA 175 at para 28. Further reference may be made to the discussion of parties in Chapter 3, The Sentencing Hearing, Section XIV.

69 *Friesen*, *supra* note 5 at paras 31, 32.

70 *Mahoney*, *supra* note 67 at paras 25-26.

Courts have cautioned against reliance upon sentences imposed following a joint submission and made clear that the principle of parity will give way to dynamics of joint submissions. Joint submissions lose "much of their value as comparators" because they are not evaluated for fitness. In *R v Anthony-Cook,* the Supreme Court made clear that a sentencing court "should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest."[71]

Appellate courts in Canada have traditionally offered guidance with respect to the appropriate quantum of sentence by way of starting points or sentencing ranges. "These tools are best understood as 'navigational buoys' that operate to ensure sentences reflect the sentencing principles prescribed in the *Criminal Code.*"[72] Neither starting points nor sentencing ranges should be viewed as binding precedents.[73] Sentencing judges "must still exercise their discretion in each case."[74] They may be altered "deliberately, after careful consideration, by the courts. Or, they may be altered practically, as a consequence of a series of decisions made by the courts which have that effect."[75]

Sentencing ranges are a summary of the case law reflecting "the minimum and maximum sentences imposed in the past."[76] They "assist sentencing judges by providing a place to start in the form of either a single number or a range."[77] However, the Supreme Court has been clear that "there is no such thing as a uniform sentence for a particular crime."[78] Nor may starting points be considered to be binding precedents.[79] Only Parliament may create specific maximum and minimum penalties; the courts are not authorized to do so.[80]

Alberta[81] recognizes specific starting points for offences that may be adjusted in either direction with regard to the aggravated or mitigating facts of a case. For

71 *R v Buffone,* 2021 ONCA 825 at paras 26-29, leave to appeal to SCC refused, 2022 CanLII 64338 (SCC), referencing *R v Anthony-Cook,* 2016 SCC 43 at paras 32, 46-48; *R v MacLeod*, 2018 SKCA 1 at para 21.

72 *Parranto*, *supra* note 8 at para 16.

73 *Ibid* at para 28. See also *Friesen*, *supra* note 5 at paras 36-39.

74 *Lacasse*, *supra* note 6 at para 57.

75 *Parranto*, *supra* note 8 at para 26, quoting *R v Wright*, 2006 CanLII 40975 (Ont CA), [2006] OJ No 4870 (QL) at para 22. See also *R v Anderson*, 2021 NSCA 62, on the impact of race on sentencing ranges.

76 *Parranto*, *supra* note 8 at para 55, quoting *Lacasse*, *supra* note 6 at para 57; *Friesen*, *supra* note 5 at para 36.

77 *Parranto*, *supra* note 8 at para 16.

78 *Ibid* at para 54, quoting *M (CA)*, *supra* note 1 at para 92.

79 *Parranto*, *supra* note 8 at para 28; *Friesen*, *supra* note 5 at para 37.

80 *McDonnell*, *supra* note 64 at para 33; *Lacasse*, *supra* note 6 at para 61.

81 The starting point approach is "used mainly in Alberta but sometimes also in other Canadian provinces." See *Lacasse*, *supra* note 6 at para 57.

example, the "starting point" for a "major sexual assault upon a child, by a person in a position of trust, is four years."[82] The starting point for home invasion robberies is eight years.[83] For trafficking in cocaine, the starting point is three years.[84]

Starting-point sentencing is a three-step process.[85] First, the court defines the category of offences—for example, home-invasion robbery. Second, the court sets the starting-point sentence based on the "collective court experience, comparisons to other cases, and a consensus view of the social values and policy considerations relating to the category of crime in question. All are applied in determining the gravity of the offence and degree of responsibility typically associated with it."[86] "The third step is for the sentencing judge to refine the sentence to the specific facts of the individual case and offender."[87]

Other provinces, rather than using starting points, have developed sentencing ranges appropriate for certain types of cases. For example, Saskatchewan and British Columbia have created sentencing ranges for the offence of impaired driving causing death. Quebec has gone so far as to subdivide the sentencing range of impaired driving causing death into categories. By contrast, the Ontario Court of Appeal has not defined a range of sentencing for cases of impaired driving causing death because the crime can be committed in an "infinite variety of circumstances."[88]

> 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.[89]

The Supreme Court has recognized that starting points like sentencing ranges create the benefit of uniformity[90] and may be most useful "in circumstances where there is the potential for a large disparity between sentences imposed for a particular crime because the range of sentence set out in the *Code* is particularly broad."[91]

82 *R v SLW*, 2018 ABCA 235 at para 28.

83 *R v Souvie*, 2018 ABCA 148 at para 48, citing *R v Matwiy*, 1996 ABCA 63 at para 30.

84 *R v Giroux*, 2018 ABCA 56 at para 14.

85 *Parranto*, *supra* note 8 at para 18.

86 *R v Arcand*, 2010 ABCA 363 at para 104.

87 *Ibid* at para 105.

88 *R v Junkert,* 2010 ONCA 549 at para 40, quoting *R v JL,* 2000 CanLII 15854, 147 CCC (3d) 299 (Ont CA).

89 *Lacasse, supra* note 6 at para 57.

90 *Proulx*, *supra* note 22 at para 86.

91 *Ibid* at para 87.

The Supreme Court summarized the key principles related to starting points and sentencing ranges as follows:

1. Starting points and ranges are not and cannot be binding in theory or in practice (*Friesen,* at para. 36);
2. Ranges and starting points are "guidelines, not hard and fast rules," and a "departure from or failure to refer to a range of sentence or starting point" cannot be treated as an error in principle (*Friesen,* at para. 37);
3. Sentencing judges have discretion to "individualize sentencing both in method and outcome," and "[d]ifferent methods may even be required to account properly for relevant systemic and background factors" (*Friesen,* at para. 38, citing *Ipeelee,* at para. 59); and
4. Appellate courts cannot "intervene simply because the sentence is different from the sentence that would have been reached had the range of sentence or starting point been applied" (*Friesen,* at para. 37). The focus should be on whether the sentence was fit and whether the judge properly applied the principles of sentencing, not whether the judge chose the right starting point or category (*Friesen,* at para. 162).[92]

In its recent consideration of the role of sentencing ranges and starting points, the Supreme Court observed that

> [s]entencing is a "profoundly subjective process," and the sentencing judge "has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record" (*R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 46). The sentencing judge also has "unique qualifications of experience and judgment from having served on the front lines" and "will normally preside near or within the community which has suffered the consequences of the offender's crime" (*M. (C.A.)*, at para. 91).[93]

The imposition of sentence is the court's last word to the offender and the community on how they will move forward from the crime. Those words must reflect our communities' values. At a minimum, we must do all we can to ensure they do not perpetuate inequalities. Appellate guidance, whether in the form of sentencing ranges or starting points, is a valuable tool for counsel and trial judges. However, we ask you to look beyond the precedents to look at the people impacted by the crime and those who will be impacted by the sentence. We invite you to consider the contexts in which precedents were decided and follow the lead of the Supreme Court in *R v Friesen* and the Nova Scotia Court of Appeal in their acknowledgement that sentence ranges developed without the "benefit of a fully contextualized analysis" will have to be re-evaluated.[94]

92 *Parranto*, *supra* note 8 at para 36.

93 *Ibid* at para 13.

94 *Anderson*, *supra* note 75 at para 132. Anderson concluded that sentencing ranges that were developed without the benefit of a proper understanding of the impact of anti-Black racism

V. Totality: Section 718.2(c)

Section 718.2(c) mandates that "where consecutive sentences are imposed, the combined effect should not be unduly long or harsh."[95] It requires that the "sentence not exceed the overall culpability of the offender."[96] The totality principle "has its genesis" in the principle of proportionality[97] and requires that where a court is sentencing an offender for multiple offences and imposing consecutive sentences, the court should take a final look once the sentencing analysis is complete to ensure that the total sentence imposed is proportionate to the "gravity of the offence and the degree of responsibility of the offender."[98] The cumulative sentence

> may offend the totality principle if the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offences involved, or if its effect is to impose on the offender "a crushing sentence" not in keeping with his record and prospects.[99]

Section 718.3(4) states that sentencing courts shall consider imposing consecutive terms of imprisonment when the offences do not arise out of the same event or series of events.[100] Where the offender is being sentenced for multiple offences, the court must first determine the appropriate sentence for each offence, then consider whether the sentences should be served consecutively or concurrently, and finally take "one last look at the combined sentence to determine whether it is unduly long and harsh, in the sense that it is disproportionate to the gravity of the offence and the degree of responsibility of the offender."[101]

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may need to be re-evaluated. Further reference may be made to Chapter 4, Aggravating and Mitigating Factors, Section XVII on systemic racism and Chapter 10 on sentencing Indigenous offenders. In *Friesen*, *supra* note 5, the Supreme Court of Canada addressed the gravity of sexual offences against children and at para 107 suggested, "Upward departure from prior precedents and sentencing ranges may well be required to impose a proportionate sentence." Further reference may be made to Chapter 4, Aggravating and Mitigating Factors, Section I.C.

95 *R v Keshane*, 2005 SKCA 18 at para 53.

96 *Khawaja*, *supra* note 44 at para 126; *M (CA)*, *supra* note 1 at para 42.

97 *Mahoney*, *supra* note 67 at para 28; *R v Hanna*, 2013 ABCA 134 at para 16.

98 *Criminal Code*, s 718.1; *Mahoney*, *supra* note 67 at para 28.

99 *M (CA)*, *supra* note 1 at para 42, referencing Clayton C Ruby, *Sentencing*, 4th ed (Toronto: Butterworths, 1994).

100 *Criminal Code*, s 718.3(4) also directs courts to consider consecutive sentences if one of the offences occurred while the offender was on judicial interim release or fleeing from a police officer. For further consideration of consecutive versus concurrent sentences, see Chapter 5, Types of Sentences, Section VI.

101 *Mahoney*, *supra* note 67 at para 28; *M (CA)*, *supra* note 1 at para 42; *R v Johnsrud*, 2014 ABCA 395 at para 4; *R v Peterson*, 2017 NBCA 29 at para 15, citing *R v Daye*, 2010 NBCA 53.

Section 725[102] allows an offender to plead guilty to multiple offences on multiple informations or indictments at the same time, allowing for them to be sentenced globally on all outstanding charges. In some cases, it is beneficial for an offender to resolve all charges before the same judge rather than separately before multiple judges because by bringing the charges together, the offender allows the court to take that one last look and reduce the total punishment if the combined effect of all sentences is unduly harsh. If the offender is sentenced separately, they may not get the benefit of that final last look.

VI. Restraint: Sections 718.2(d) and (e)

The principle of restraint is contained in sections 718.2(d) and (e) of the *Criminal Code*, mandating that

> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

The language of sections 718.2(d) and (e) makes clear that the consideration of sanctions other than imprisonment requires a balancing of the other sentencing principles, specifically the harm done to victims and the community.[103] Parliament directed that particular attention be paid to the circumstances of Indigenous offenders. (See Chapter 10, Sentencing Indigenous Offenders, for a discussion of the sentencing principles applicable to Indigenous offenders as well as the particular responsibilities of both defence and Crown counsel in sentencing proceedings relating to Indigenous offenders.)

Sections 718.2(d) and (e) go beyond merely codifying the principle of restraint that may have existed in the common law prior to their enactment. They are remedial in nature[104] and "specifically enacted, along with s. 742.1, to help reduce the rate of incarceration in Canada."[105] Sections 718.2(d) and (e) together with 718(f) (promotion of responsibility in offenders and acknowledgment of the harm done to victims and the community) embody the concept of restorative justice. "[R]estorative justice involves some form of restitution and reintegration into the community … Restorative sentencing goals do not usually correlate with the use of prison as a sanction."[106]

102 *Criminal Code*, s 725 is discussed in more detail in Chapter 3, The Sentencing Hearing, Section IV.

103 *Proulx*, *supra* note 22 at para 96.

104 *Gladue*, *supra* note 48 at para 41.

105 *Proulx*, *supra* note 22 at para 90.

106 *Gladue*, *supra* note 48 at para 43.

The Supreme Court has concluded that through the enactment of these provisions, Parliament has indicated its intention to "expand the parameters of the sentencing analysis for all offenders."[107] Judges are being encouraged by Parliament to be creative and look for ways to achieve the sentencing objectives without jail. However, even creativity must be tempered with restraint. For example, a jail sentence cannot be increased beyond what is otherwise appropriate to allow for an offender to get treatment in jail.[108] In this way, the principle of restraint trumps even that of rehabilitation.

VII. Retribution

The Supreme Court has recognized that retribution is an accepted and important principle of sentencing.[109] A theory of retribution centred on a person receiving their "'just deserts' or 'just sanctions' provides a helpful organizing principle for the imposition of criminal sanctions."[110] In the words of Lamer CJ,

> [r]etribution, as an objective of sentencing, represents nothing less than the hallowed principle that criminal punishment, in addition to advancing utilitarian considerations related to deterrence and rehabilitation, should also be imposed to sanction the moral culpability of the offender. In my view, retribution is integrally woven into the existing principles of sentencing in Canadian law through the fundamental requirement that a sentence imposed be "just and appropriate" under the circumstances.[111]

Retribution is not the same as vengeance. Vengeance "has no role to play in a civilized system of sentencing."[112] It

> represents an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person. Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the *moral culpability* of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and *nothing more*.[113]

107 *Ibid*.

108 *R v RL*, 2013 ONCJ 743 at paras 27-28, citing *R v Wilson*, 1996 ABCA 283 at para 20; *R v Luther*, [1971] OJ No 1723 (QL) at para 15, 5 CCC (2d) 354 (CA).

109 *M (CA)*, *supra* note 1 at para 77. See also *Miloszewski*, *supra* note 68 at paras 14-15.

110 *M (CA)*, *supra* note 1 at para 78.

111 *Ibid* at para 79.

112 *Ibid* at para 80.

113 *Ibid* at para 80 (emphasis in original).

VIII. Weighing the Factors

Sentencing is much more an art than a science.[114] Pursuant to section 718.3, judges have a great deal of discretion regarding the sentence they impose and the weight to be accorded to any one of the sentencing objectives.[115] This discretion is subject to the limitations and directions created by Parliament and binding case law. However, whatever weight a court may choose to place on any one of the section 718 objectives, the sentence "must respect the fundamental principle of proportionality."[116]

A. Emphasis on Denunciation and Deterrence

Parliament has directed that denunciation and deterrence are to be given primary consideration in offences against persons under age 18 (s 718.01), offences against peace officers or other justice participants (s 718.02), and offences against animals (s 718.03). By mandating that courts give primary (although not exclusive)[117] consideration to denunciation and deterrence, Parliament is indicating that these offences should be met with significant penalties.[118] Furthermore, the Supreme Court has directed that denunciation and deterrence must be emphasized in cases involving large-scale commercial frauds[119] and impaired driving causing bodily harm and death "in order to convey society's condemnation" of these crimes.[120] In addition, several provincial appellate courts have indicated that "the primary objectives in imposing a sentence for a terrorist act are denunciation and general deterrence."[121] The Alberta Court of Appeal further indicated that courts should emphasize denunciation and general deterrence in cases involving hate crimes directed against property.[122] An emphasis on denunciation and deterrence is likely to result in an increased sentence.

IX. Repeat Offenders: The Jump Principle, the Gap Principle, and the Coke Rule

An offender's prior criminal history will inform the weighing of the sentencing principles and objectives. The extent to which rehabilitative efforts have been tried or jail sentences have failed to deter will influence the sentencing judge in their

114 *R v Pilon*, 2014 ONCA 79 at para 18.

115 *Lacasse*, *supra* note 6 at para 1.

116 *Nasogaluak*, *supra* note 7 at para 40.

117 *R v Branton*, 2013 NLCA 61 at paras 24-25.

118 *Ibid* at paras 19-25. See also *R v KM*, 2012 SKCA 95 at para 16; *R v Woodward*, 2011 ONCA 610 at para 75.

119 *Drabinsky*, *supra* note 37 at para 160.

120 *Lacasse*, *supra* note 6 at para 5.

121 *R v Sandouga*, 2002 ABCA 196 at para 27; *R v Balian*, [1988] OJ No 1692 (QL), 29 OAC 387 (CA); *R v Atwal*, 1990 CanLII 168, [1990] BCJ No 1526 (QL) (CA).

122 *Sandouga*, *supra* note 121 at para 29.

consideration of the need to increase the sentence to effect specific deterrence—that is, to teach the offender a lesson or make a more general statement of the court's denunciation or deterrence of an offender's repetition of criminal activity. The nature of the criminal record will greatly inform this process. Recent similar offences are likely to have a greater influence on the court. A large gap in an offender's record may indicate rehabilitative efforts have (at least until or with the exception of the current offence) been successful. Furthermore, a sentencing court is likely to increase the sentence beyond what previous courts have imposed. These considerations have been described as the jump principle (sometimes called the step principle) and the gap principle:

> While the so-called "jump," "step," and "gap" factors are not explicitly codified in s. 718, their application has become part of the sentencing lexicon. These three factors may be deduced from what the *Criminal Code* terms the "fundamental principle" of sentencing in s. 718.1, that is, that the sentence "must be proportionate to the gravity of the offence and the degree of culpability of the offender."[123]

A. The Jump Principle

The jump principle suggests that sentences for repeat offenders should increase gradually rather than by large jumps.[124] The jump principle is closely tied to the principle of restraint and requires that courts adopt a measured approach, even when dealing with repeat offenders.[125] To the extent weight is placed on the jump principle, the sentencing court is likely to increase the sentence by a moderate amount and thereby not discourage rehabilitation efforts by imposing a sentence seen by the offender "to be a dead weight on his future life."[126] This principle will probably be given little emphasis if the current offence "represents much more culpable and serious criminal conduct than the previous offence."[127]

B. The Gap Principle

The gap principle recognizes that "if a man with a criminal record has not had any convictions for a number of years, he is to be treated if not as a first offender, then almost as a first offender."[128] The logic is that "barring the outcome of lucky non-detection, the trouble-free period shows that the offender is not a committed criminal

123 *Peterson*, *supra* note 101 at para 19, citing *R v Bernard*, 2011 NSCA 53 at para 36.

124 *Johnsrud*, *supra* note 101 at para 9.

125 *R v Kory*, 2009 BCCA 146 at para 6, citing *R v Willier*, 2005 BCCA 404 at para 30.

126 *Kory*, *supra* note 125 at para 6.

127 *Ibid*, quoting *Willier, supra* note 125 at para 30.

128 *R v De Aquino*, 2017 BCCA 266 at para 13, citing *R v Mulvahill*, 1991 CanLII 5765 at para 34, 69 CCC (3d) 1 (BCCA).

such that the public needs less protection than might otherwise be the case; there is some hope of rehabilitation."[129] Where an offender has a lengthy record but that record is very "dated," meaning it is in the past, and the offender has shown that they have "turned their life around" between the previous offences and the one before the court, it may be possible to effectively argue that less weight should be placed on the previous criminal activity and thus effectively advocate for a lower sentence.

C. The Coke Rule

The Coke rule states that the offender does not face the higher penalty by reason of previous conviction unless they had been convicted of and sentenced for the first offence at the time they committed the second one.[130]

The following rules arise from this principle:

1) The number of convictions per se does not govern in determining whether the Coke rule applies.
2) The general rule is that before a severer penalty can be imposed for a second or subsequent offence, the second or subsequent offence must have been committed after the first or second conviction, as the case may be, and the second or subsequent conviction must have been made after the first or second conviction, as the case may be.
3) Where two offences arising out of the same incident are tried together and convictions are entered on both after trial, they are to be treated as one for the purpose of determining whether a severer penalty applies, either because of a previous conviction or because of a subsequent conviction.
4) The rule operates even where two offences arising out of separate incidents are tried together and convictions are entered at the same time.[131]

The rule is particularly important in the context of offences for which Parliament has mandated increased penalties for persons who have previous convictions for the same offences, such as in the case of impaired driving offences. The minimum penalty for a first offence is a $1,000 fine; for a second, 30 days in jail; and for each subsequent, 120 days in jail.[132] *R v Robertson* illustrates the importance of the timing of the convictions relative to the commission of the offences in determining whether the minimum penalties apply (see Table 1.2). The case also illustrates the application of these rules in the context of impaired four times, though Elizabeth Robertson was only ever sentenced as a first- and second-time offender.

129 *De Aquino*, *supra* note 128 at para 14, citing *R v Moreau*, 2007 BCCA 239.

130 *R v Skolnick*, [1982] 2 SCR 47, 1982 CanLII 54; *R v Andrade*, 2010 NBCA 62 at para 14; *R v Robertson*, 1998 CanLII 18042, [1998] NJ No 83 (QL) at para 7 (CA), leave to appeal refused, [1998] SCCA No 211, citing *Skolnick* at 58-59.

131 *Robertson*, *supra* note 130 at para 7, citing *Skolnick*, *supra* note 130 at 58-59.

132 *Criminal Code*, s 320.19.

TABLE 1.2 R v Robertson: Illustration of the Coke Rule

Offence Date	Conviction Date	Classification of Offence to Determine Minimum Penalty
May 9, 1995	June 6, 1995	First offence.
May 29, 1995	June 6, 1995	Also first offence because, per rule 4, if convicted at the same time of two offences committed on separate days, both are treated as first.
January 24, 1997	February 21, 1997	This was considered a second. She had been convicted of her first offence prior to committing this one.
February 14, 1997	May 5, 1997	This was also considered a second offence because at the time she committed the offence, she had been convicted of her first impaired, not her second.

Counsel should pay close attention to the dates of the offences in relation to the dates of any previous convictions to determine whether the offender had been convicted of the first offence when they committed the second. Often these details are not apparent on the criminal record provided by the Crown in disclosure. Where the sequence requires clarity, the best course is to request copies of the relevant informations from the court. Where that is impractical, local police databases or case tracking can assist in clarifying the facts.

On their face, sections 745.21 through 745.51 allow judges to order that people who are convicted of multiple murders serve parole ineligibility periods consecutively; however, in the decision of *Bissonnette,* the Supreme Court held these provisions to be unconstitutional. They were found to "bring the administration of justice into disrepute" and thus be "contrary to s. 12 of the Charter." The Court declared the provisions to be invalid immediately, striking them down retroactively to their enactment in 2011.[133] *Bissonnette* did not deal with section 745(b) or 745.6(2).

Section 745(b) provides that where a person is convicted of second-degree murder and has previously been convicted of murder, that person must be sentenced to life imprisonment without eligibility for parole for 25 years. To engage section 745(b), the person must have been convicted of the first murder before the second was

133 *Bissonnette, supra* note 7 at paras 139-43.

committed.[134] However, it is open to a sentencing judge to impose 25 years of parole ineligibility following a first conviction for second-degree murder where the circumstances of the case warrant it.[135]

Section 745.6(2) prohibits a person convicted of multiple murders from applying for a reduction in their parole in the way that persons who are sentenced to life sentences with parole ineligibility greater than 15 years would otherwise be entitled to do.[136] It was argued in *R v Hamilton* that this provision offended the Coke rule as articulated in *R v Skolnick*. The Court held that the Coke rule was not engaged in this context because "s. 745.6(2) makes no reference to second or subsequent offences, and because this provision does not concern the imposition of a more severe penalty."[137] The Court further considered that this conclusion was consistent with the context and purpose of the provision.[138]

There is some conflict in the law regarding the application of the Coke rule outside of circumstances where Parliament has specified an increased sentence for repeat offenders. Some courts have held that the Coke rule is more of a principle of statutory interpretation rather than a principle of sentencing[139] and that, outside of the situations involving mandatory minimum penalties, courts may consider offences the accused committed but had not been convicted of at the time of sentence.[140] (For example, the fact that the offender has committed other offences may be relevant to character or their rehabilitative efforts or prospects.)[141] Other courts have held that *Skolnick* and the Coke rule prohibit imposing a harsher sentence for a second offence unless the offender was convicted of the first offence when they committed the second.[142] The underlying policy reason for not considering offences that the accused had committed but had not been convicted of is that "the person has not had the effect of the earlier sentence to deter his conduct."[143]

Ultimately, the Coke rule is most important in the context of mandatory sentences for repeat offenders. The extent to which the court will consider offences committed

134 *R v Baumgartner*, 2013 ABQB 761 at para 47, citing *R v Harris*, 1993 CanLII 4275, 86 CCC (3d) 284 (Qc CA) and *R v Falkner*, 2004 BCSC 986. See also *R v Okkuatsiak*, 1994 CanLII 10360, 120 Nfld & PEIR 79 at para 8 (SC (TD)); *R v Cousins*, 2004 NLCA 14 at para 22.

135 *Cousins*, *supra* note 134 at paras 22, 33.

136 *Criminal Code*, s 745.6.

137 2018 ONSC 2085 at para 17.

138 *Ibid* at paras 21-41.

139 *Andrade*, *supra* note 130 at paras 15-20.

140 *Ibid* at paras 18-20.

141 *R v Finelli*, [2008] OJ No 2537 (QL) at paras 31-34, 77 WCB (2d) 835 (Sup Ct J), citing *R v Johnston* (*sub nom R v J (HJ)*), [1989] BCJ No 1542 (QL) (CA) in Ruby, *supra* note 99.

142 *R v Auger*, 2017 ABCA 304 at para 9.

143 *R v Stoddart*, [2005] OJ No 6076 (QL) at para 12, 68 WCB (2d) 372 (Sup Ct J).

prior to sentencing but for which convictions were not entered is likely to depend on the circumstances of the case and range of appropriate sentences. For example, a person convicted of multiple historical sexual assaults on children is not likely to avoid having the court consider the repeated nature of their conduct. Even if the court considers itself bound by Coke and does not impose a sentence outside the range for a first offender, it may impose a sentence at the range's higher end, owing to the character of the offender, their need for specific deterrence, and their prospects for rehabilitation.[144]

X. What Will the Sentence Be?

Understandably, most people charged with or impacted by crime are primarily interested in the bottom line. The principles outlined above will guide the sentencing process, but they do not contain within them the answer to the bottom-line question: What will the sentence be? These principles define the process of determining what the sentence will be. They may not provide the type of certainty individuals trying to arrange their affairs may desire, but ideally they provide Canadians with the confidence that the sentences imposed by our courts reflect Canadian values regarding crime and punishment. Overwhelmingly, these principles are designed to achieve a balanced outcome with a clear emphasis on fairness to the offender within the broader societal goals and interests of the community.

144 *Finelli*, *supra* note 141 at paras 44-49.