CANADIAN SENTENCING POLICY: A Look Back

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My interest in the theme of this conference stems not from my current judicial role, although I deal with sentencing issues as a member of the Court Martial Appeal Court of Canada and with prison law matters from time to time, but rather from my involvement for more than two decades in the development of Canadian criminal justice policy including the sentencing provisions of the Criminal Code.

I had the good fortune to be exposed to the work of the Law Reform Commission of Canada as a law student in the early 1970s and to take a criminology course from a member of the Commission, Professor Hans Mohr, a distinguished social scientist and member of the faculty of Osgoode Hall Law School. Following my call to the Bar, I represented the Ontario Crown Attorney's Association in consultations with the Commission in the Criminal Law Review process. In January 1982, I was seconded by the Ministry of the Attorney General, Ontario, to work on amendments to the *Criminal Code of Canada* at the federal Department of Justice. I remained there for another twenty-one years doing much the same work, until my appointment to the bench in 2003.

These remarks stem from a meeting I had last year with Professor Emeritus Anthony Doob of the Centre of Criminology at the University of Toronto. Professor Doob is one of the most widely cited scholars in the world. A prolific academic author and preeminent in his field,

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he has also devoted much of his career to advising government and Parliament on issues related to youth justice, sentencing and imprisonment. When we met in 2013, Professor Doob was interested in exploring why it appeared that we in Canada had "lost our balance", as he described it, in criminal justice policy, a research topic he is developing with Professor Cheryl Webster of the Department of Criminology at the University of Ottawa. For that purpose, they have been conducting interviews with persons who were involved in the policy process in past years. Professor Doob has elaborated on some of his thoughts on the topic in the 2014 lecture in honour of the founder of the Centre of Criminology at the University of Toronto, Professor John L. J. Edwards[2] and in an article in September 2012 in The Walrus Magazine, co-authored with Edward Greenspan, QC[3].

The notion of balance, or of restraint in the imposition of criminal sanctions and penalties, was an important element of the work that my colleagues and I did at the Department of Justice in the 1980s and 1990s. I thought it might be useful, therefore, to reflect upon how we got there and on the effect it may have had in the enactment of the resulting legislation and its interpretation by the courts.

The preamble to the conference program refers to a number of sentencing and corrections studies conducted in Canada prior to the founding of this Society and its inaugural conference in London in 1987. These included the 1938 Royal Commission to Investigate the Penal System of Canada chaired by Mr Justice Joseph Archambault, the 1969 Report of the Canadian Committee

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[2] A video of the lecture is accessible on-line at http://criminology.utoronto.ca/. I am grateful to Professor Doob for allowing me to make use of certain material referenced in his lecture.

[3] *The Harper Doctrine: Once a Criminal, Always a Criminal*, The Walrus, September 2012, http://thewalrus.ca/the-harper-doctrine/.

on Corrections, chaired by Mr Justice Roger Ouimet, the 1972 Report of the Task Force on the Release of Inmates, led by Mr Justice James K. Hugessen, and the 1974 Report of the Standing Senate Committee on Legal and Constitutional Affairs chaired by Senator Carl Goldenberg Q.C.

The Archambault Report emphasized crime prevention and the rehabilitation of prisoners. Its authors commented on the responsibility of society towards offenders as follows:

> The undeniable responsibility of the state to those held in its custody is to see that they are not returned to freedom worse than when they were taken in charge. This responsibility has been officially recognized in Canada for nearly a century but, although recognized, it has not been discharged. The evidence before the Commission convinced us that there are very few, if any, prisoners who enter our penitentiaries who do not leave them worse members of society than when they entered them. (p100)

As noted in the preamble to the conference program, the Ouimet Committee also followed Beccaria's precepts when it asserted that the proper function of the penal system is "to protect society from the effects of crime in a manner commanding public respect and support while at the same time avoiding needless injury to the offender". Among other things, the Ouimet Committee endorsed the principle of restraint. It recommended that:

> No conduct should be defined as criminal unless it represents a serious threat to society, and unless the act cannot be dealt with through other social or legal means.
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> No act should be criminally proscribed unless its incidence, actual or potential, is substantially damaging to society.
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> No act should be criminally proscribed where its incidence may adequately be controlled by social forces other than the criminal process.
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> No law should give rise to social or personal damage greater than that it was designed to prevent.
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> Imprisonment or confinement should be used only as an ultimate resort when all other alternatives have failed

In reviewing the Ouimet Report, the distinguished American legal scholar Herbert L. Packer remarked that "a common-sensical attitude appears to influence official attitudes in Canada" and that the report exhibited "sensitivity and humanity"[4]. Packer found it surprising, for example, based on his experience in the United States, that the senior police official who was a member of the committee would have endorsed some of the recommendations. The attitudes of fairness and practicality were, I believe, characteristic of the approach taken in the studies and reports on sentencing policy and corrections in Canada throughout the 20th century. The reports were remarkably free of ideology or political partisanship and focused on identifying problems and proposing practical solutions. The committees who issued them were, for the most part, comprised of persons who had direct knowledge of and experience with the operation of the criminal justice system including jurists, senior police and correctional officials.

The Ouimet Report called on Parliament to establish a Royal Commission to examine the substantive criminal law. Among the reasons stated for this recommendation was the Committee's conclusion that "in prohibiting certain kinds of conduct and imposing criminal sanctions upon its occurrence, one may be providing the most effective and corrupting publicity for the practice rather than the prohibition."[5]

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[4] Packer, Herbert L. "Report of the Canadian Committee on Corrections." Osgoode Hall Law Journal 8.2 (1970): 411-413. Accessed at: http://digitalcommons.osgoode.yorku.ca/ohlj/vol8/iss2/18

[5] The older Canadian criminal justice reports can be accessed at: http://www.johnhoward.ca/research-policy/papers/corrections/

Parliament responded in 1970 by enacting legislation establishing the Law Reform Commission of Canada (LRCC). The Commission was mandated to develop new approaches to the law in keeping with and responsive to the changing needs of modern Canadian society.

A year later, 1971, following a series of disturbances at Kingston Penitentiary, a Commission of Inquiry determined that the situation had been aggravated by "a steady and continuous curtailment of so-called "privileges" and inmate programs, in order, allegedly, to achieve and assure security". The result the Commission found was "the ultimate failure of order and security."[6]

These concerns were taken up by a sub-committee of the Standing Committee on Justice and Legal Affairs of the House of Commons in 1976-77. The sub-committee, chaired by Liberal M.P. Mark MacGuigan,[7] was constituted with membership from both sides of the House, including well known Conservatives Erik Nielsen and John Reynolds. This was described "as a symbol of inter-party cooperation by members who were prepared to place the importance of the problem before all other considerations." I suggest this was also characteristic of the times as reflected in statements made in the House of Commons by leaders of both major political parties some of which are cited by Professor Doob in his September 2012 article.

In the preface of its Report to Parliament[8], the sub-committee cited the oft-quoted statement of Winston Churchill to the House of Commons on July 20, 1910:

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[6] *Report of the Commission of Inquiry into Certain Disturbances at Kingston Penitentiary During April 1971*, J.W. Swackhamer, QC Chairman

[7] Later Minister of Justice and Attorney General of Canada and member of the Federal Court of Appeal.

[8] Report of the Sub-Committee on the Penitentiary System in Canada, Second Session of the Thirtieth Parliament, 1976-77.

> The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country.

The sub-committee found that "nothing in the criminal justice system proceeds according to any clear or generally accepted principles defining the purposes of the penal system: who should be incarcerated, and why". The second of sixty-five recommendations in the report was that "[t]he criminal justice system should be carefully re-examined with a view to enlarging the alternatives to incarceration." The sub-committee called for a "thorough, open and necessarily painful candid assessment of what the criminal justice system ought to do."[9]

In the same time frame, the LRCC published *Studies on Sentencing* and *Principles of Sentencing and Dispositions* in 1974 and in 1976, a report on *Sentencing Guidelines* as part of its research program.

In its 1976 report entitled *Our Criminal Law*, the LRCC endorsed the principle of restraint adopted by the Ouimet Committee and offered these observations at pp 24-25:

> The cost of criminal law to the offender, the taxpayer and all of us must always be kept as low as possible. . . . The harsher the punishment, the slower we should be to use it. . . . The major punishment of last resort is prison. . . As such it must be used sparingly. . . . Positive penalties like restitution and community service orders should be increasingly substituted for the negative and uncreative warehousing of prison."

These reports were a prelude to an agreement reached by the federal and provincial governments in October 1979, under the lead of Senator Jacques Flynn, P.C., O.C., Q.C., Minister of Justice and Attorney General of Canada, to undertake a thorough assessment of the

[9] Sub-Committee on the Penitentiary System in Canada; Report to Parliament, Ottawa 1977.

Criminal Code. This plan, endorsed by the Federal Cabinet, was to take the form of an accelerated review of substantial and procedural criminal law in three stages. The first stage was to see completion by the LRCC of its work on more than fifty projects by 1985. The second stage was to consist of an assessment by government of the LRCC proposals and the third, the presentation of legislative proposals to Parliament.

Senator Flynn was a member of the Progressive Conservative party. When that party was defeated, the work was continued under the Liberal government that followed. In August 1982, the Minister of Justice and Attorney General of Canada[10] published a position paper on behalf of the Government of Canada entitled *The Criminal Law in Canadian Society* or "CLICS" as it was known within the Department and among those consulted in the Criminal Law Review process.[11]

CLICS was the product of a number of dedicated justice professionals and public servants such as Roger Tassé O.C. Q.C., then Deputy Minister of Justice. In his recently published memoirs[12], Mr Tassé notes that:

> The object was to provide Canadians with an overview of the context within which criminal law policy should be viewed; it would discuss the appropriate scope of its application, its goals and principles, and the implications of the review process.

Following a discussion of the context, including references to the earlier reports mentioned above, and of the scope and purpose of the criminal law, CLICS contained a

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[10] The Rt. Hon. Jean Chrétien, PC, OM, CC, QC

[11] Department of Justice, The Criminal Law in Canadian Society (Ottawa: n.p. 1982)

[12] *Ma Vie, La Constitution et Bien Plus*, éditions Yvon Blais; *A Life in the Law –The Constitution and Much More;* Carswell, Toronto, 2014

statement of principles to guide the actions of the state in confronting criminal behaviour including:

1. Criminal law should be employed only when other means of social control are inadequate or inappropriate, and in a manner which interferes with individual rights and freedoms only to the minimum extent necessary;
2. The nature of conduct declared criminal, and the responsibility required to be proven for a finding of criminal liability, should be set out clearly and accessibly;
3. Criminal law should provide sanctions that are related to the gravity of the offense and the degree of responsibility of the offender, and that reflect the need for protection of the public against recidivism and for adequate deterrence of potential offenders;
4. Criminal law should also promote and provide for opportunities for the reconciliation of the victim, community, and offender, as well as for compensation for the harm done to the victim of the offense, and rehabilitation of the offender;
5. Persons found guilty of similar offenses should receive similar sentences where the relevant circumstances are similar;
6. Preference should be given to the least restrictive alternative sentence adequate and appropriate in the circumstances.[13]

[13] I have omitted several of the principles not relevant to the topic of this paper.

Roger Tassé observes in his memoirs that CLICS "did not pretend to supply all of the answers to the problem of crime. Its aim was instead to establish a framework for analysis and to lay out the general lines of solutions, to help guide decision-makers and shape policies in the crafting of legislation, and to assist administrators and legal personnel in the application of that legislation so as to bring about a greater degree of justice."

CLICS remains relevant to-day, in Roger's view. I agree. Until recently, the document was accessible on the Justice Canada website, for reference purposes. The removal of the document is regrettable.

CLICS served as a foundation document for every substantive criminal law amendment project that followed in the 1980s and 1990s notwithstanding the changes in government that took place in 1984 and 1993. The document was never far from my hands or those of my colleagues in the Criminal Law Policy Section of the Department of Justice as we prepared consultation documents, discussion and option papers and memoranda to Cabinet. Moreover, the principle of restraint in the application of the criminal law was endorsed in public statements by Ministers and Members of Parliament during debates in the House, committee proceedings and speeches in other public fora.

This is not to say that the governments during this period always acted according to the CLICS principles. There were then, as always since the coming into force of the *Criminal Code* (*Code*) in 1892, social issues that attracted media attention and generated pressure on government to respond by being seen to do something. Often, when the financial resources to address the root conditions of the problem were not available due to competing priorities, the only lever that appeared open was an amendment to the *Code*. Nonetheless, the decisions taken

were informed by consideration of how and to what extent the amendments would be consistent or inconsistent with the CLICS principles.

This was also the era of implementation of the *Canadian Charter of Rights and Freedoms*[14] (*Charter*). The courts were given the extraordinary constitutional duty to declare of no force or effect laws enacted by Parliament or the provincial legislatures that are inconsistent with the rights and freedoms guaranteed by the *Charter*. A number of statutes were subsequently struck down and substantive rights were read in to what had been meant to be a procedural due process clause.[15] Adherence to the CLICS principles was consistent, however, with the legal rights guaranteed under the *Charter*.

CLICS has been cited in a number of reported decisions: *R v McDougall,* [1990] OJ No 2343, 42 OAC 223 (ONCA) at para 49 and *R v Greenwood*, [1991] OJ No 1616, 51 OAC 133 (ONCA) [*Greenwood*] at paragraph 27; *R v Hinchey*, [1996] 3 SCR 1128; *R v Arcand*, 2010 ABCA 363 at para 23; *R v Lee*, 2012 ABCA 17 at para 11; *R v Stevens*, [1995] MJ No 87, [1995] 100 Man R (2d) 178 (MBCA); *R v Lake*, [1990] NJ No 152 (NLSC); *R v Catholique*, [1990] NWTJ No 164 (NWTSC); *R v Malmo-Levine*; *R v Caine,* 2003 SCC 74 at para 122.

In *Greenwood*, above, at p 246 Justice David Doherty of the Ontario Court of Appeal stated that the role of the courts in interpreting the language used by Parliament should be informed by certain concerns:

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

[15] *Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] 2 SCR 486.

> In addition to these specific interpretative aids, the general underlying purpose of the criminal law must inform the interpretation of any provision which creates a crime. The criminal law is essentially a means whereby society seeks to prevent, and, failing that, punish blameworthy conduct which strikes at the fundamental values of the community. The criminal law is, however, a weapon of last resort intended for use only in cases where the conduct is so inconsistent with the shared morality of society so as to warrant public condemnation and punishment: see The Criminal Law in Canadian Society (Government of Canada, 1982), Libman v. R., [1985] 2 S.C.R. 178, 21 C.C.C. (2d) 369, at p. 212 (S.C.R.), p. 231 (C.C.C.).

The Criminal Law Review launched by Senator Flynn and his provincial counterparts continued through the 1980's. The Department of Justice published a consultation paper on sentencing in February 1983 as part of Phase II of the Criminal Law Review process based on the CLICS principles. A Government of Canada White Paper on Sentencing was published in February 1984 at the same time as a massive effort to enact reforms to the criminal law based on the LRCC recommendations and CLICS was introduced into Parliament.[16] Bill C-19 contained the first legislative effort to enunciate a statement of the purpose and principles of sentencing. It was not enacted and died on the Order Paper due to the federal election and change in government that year. A reduced version of the bill, without the sentencing proposals was reintroduced and enacted in 1985.

The Canadian Sentencing Commission, chaired[17] by Judge Omer Archambault of Saskatchewan, was created in May 1984 and published its report in 1987. In support of its work, the Commission conducted an extensive research program led by Professor Jean-Paul Brodeur of

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[16] Bill C-19, Criminal Law Reform Act, 1984, Bill C-19, 32nd Parl, 2d sess, 1983-84.

[17] *Canadian Sentencing Commission: Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services Canada, Canadian Government Publishing Centre, 1987.) The Hon. William Sinclair, formerly Chief Justice of Alberta, chaired the Commission for its initial six months.

the Université de Montréal. A brief reference in a paper such as this cannot adequately reflect the scope of the work undertaken by the Commission and its many recommendations. Among many other things, however, the Commission advocated application of the principle of restraint throughout its report and called for it to be included in a legislated Declaration of Purpose and Principles of Sentencing. The Commission identified the overuse of imprisonment as a key problem in the criminal justice system. It called for the abolition of mandatory minimum sentences in favour of presumptive sentencing guidelines and greater use of alternatives to incarceration.

In 1987, the House of Commons Standing Committee on Justice and Solicitor General (the "Daubney Committee") undertook a comprehensive inquiry into sentencing, conditional release and related aspects of the federal correctional system. The committee conducted hearings across the country and heard from dozens of witnesses. It tabled its report *Taking Responsibility* in 1988.

The Standing Committee endorsed the principles of restraint and proportionality in sentencing. Among the nearly 100 recommendations were proposals for the enactment of a statutory statement of purpose and principles of sentencing, the creation and use of advisory sentencing guidelines and the greater use of community sanctions, particularly those that involved restorative justice approaches.

The Chair and Vice-chairs of this committee were members of the Progressive Conservative party, Mr David Daubney and Mr Rob Nicholson respectively. They were joined by several other distinguished members of their party; none known for being soft on crime or criminals such as Dr. Robert Horner, a former RCMP officer. Dr. Horner was quoted as saying in another context, a report on crime prevention:

> From the evidence presented…the members of the Committee are convinced that threats to the safety and security of Canadians will not be abated by hiring more police officers and building more prisons.[18]

Dr. Horner was also quoted as saying that "there was a lot of agreement that we can't just continue to build more jails…if anyone had told me when I became an MP nine years ago that I'd be looking at the social causes of crime, I'd have told them they were nuts…I'd have said "Lock them up for life and throw away the key." Not anymore.[19]

In furtherance of the work of the Standing Committee and the Sentencing Commission, the Progressive Conservative government of the day issued a discussion paper on sentencing and parole in 1990 entitled *Directions for Reform: A Framework for Sentencing, Conditional Release and Corrections.* Justice Minister Kim Campbell followed that paper with Bill C-90, proposing, among other things: a statement of purpose and principles for sentencing and a diversion scheme for adult offenders (alternate measures to incarceration). The Bill received second reading approval in May 1993 but died with the dissolution of Parliament for the General Election of that year.

Work on these legislative initiatives was done by a Sentencing Team in the Criminal Law Policy Branch which I led at the time. The initial leader of the Sentencing Team was the late Vincent Del Buono, the founder and first President of this Society. After Vincent left for assignments with the United Nations, the Team was led by Gordon Parry, a public servant very experienced in corrections policy. David Daubney joined the team as General Counsel in 1991

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[18] Standing Committee on Justice and the Solicitor General, 1993, p.2

[19] Vienneau, D. (1993, February 13) Canada must fight crime's social causes panel of MP's urges. *Toronto Star* p.A1.

and became its head after Gordon retired in the mid-1990s. Considerable evidence in support of the sentencing initiatives was amassed by the Research and Statistics Section of the Department under its Directors Bill Wilson and Neville Avison. What that research told us and the Parliamentary bodies studying the issues was that increased incarceration rates did not result in safer streets or higher levels of public satisfaction with the justice system.[20]

As a result of this research and the in-depth studies into the criminal justice system referred to above there was a broad consensus among Parliamentarians, justice officials, academics and practitioners by the mid-90s that restraint in the use of the criminal law authority of the state was both appropriate and justified by the evidence. This was a view commonly held across the political spectrum.

In 1994, Justice Minister Allan Rock, a member of the Liberal Party cabinet led by Prime Minister Jean Chrétien, introduced Bill C-41 a comprehensive sentencing reform package of amendments to the *Criminal Code* and related statutes building on the content of Bill C-90. The Bill was passed and received Royal Assent on July 13, 1995[21]. The amendments created a new Part XXIII of the *Code* which included for the first time, a statement of the purpose and principles of sentencing and a statutory code of procedure and evidence for sentencing hearings.

Among the other sentencing principles enacted at that time, the sentencing court was required by s 718.2 (e) to consider all available sanctions other than imprisonment that are reasonable in the circumstances, **with particular attention to the circumstances of aboriginal**

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[20] See for example Sprott, Webster and Doob, *Punishment Severity and Confidence in the Criminal Justice System*, 2013 CJCCJ/RCCJP 279.

[21] Chapter 22 of the *Statutes of Canada*, 1995.

offenders. This clause, which was included deliberately in an effort to reduce the high level of aboriginal imprisonment in Canada, was endorsed by the Supreme Court of Canada in the landmark case of *R v Gladue*, [1999] 1 SCR 688. The Court noted that the provision was not simply a codification of existing jurisprudence. It was remedial in nature and designed to ameliorate the problem and to encourage judges to have recourse to a restorative approach to sentencing.

The credit for the inclusion of the *Gladue* amendment in the legislation is largely due, in my view, to the efforts of the Deputy Minister of Justice at the time, George Thomson, to try to find a solution to the problem of aboriginal over-incarceration. George was also a strong supporter of the whole initiative; in particular of those aspects promoting alternative measures.

The inclusion of another new feature of the legislation, the conditional sentence of imprisonment, was an afterthought in the last days of preparing the amendment proposals for consideration by Ministers. As I recall, it was proposed by Gordon Parry, based on a somewhat similar United Kingdom model, in an effort to bolster the alternatives to incarceration available to sentencing judges for non-violent property related offences. The idea was that an individual who had been convicted of an offence for which the sentencing judge had determined that a sentence of less than two years was appropriate would be ordered to serve the sentence in the community under court-mandated terms and conditions. For the most part, the provision has had the desired effect of reducing the use of custodial detention for minor, non-violent offenders and has reduced the population of provincial prisons. However, largely as a result of a few atypical cases, the use of the conditional sentence has become a contentious issue and has led to subsequent legislative efforts to restrict its scope. Such measures have been upheld by the courts: see *R c Perry*, 2013 QCCA 212 leave to appeal to SCC ref'd [2013] SCCA no 126.

The conditional sentence and aboriginal offender provisions attracted very little attention as Bill C-41 was proceeding through Parliament in 1994 and 1995. What did generate considerable debate was the inclusion in s 718.2 (a) (i) of a reference to sexual orientation, among other personal characteristics such as race, disability or religion. Evidence that such characteristics motivated an offence could be considered an aggravating factor. This was intended to address the evidence of hate crimes against members of what is now collectively known as the LGBTQ community that had been collected by police services and provided to the Department. For reasons which I never fully understood, the amendment was perceived by a few members in each of the two major parties in the House as promoting a homosexual "lifestyle" and was vigorously opposed.

In the same session of Parliament, Bill C-68[22] was approved. The *Firearms Act* created a series of mandatory minimum sentences of imprisonment for a number of offences. The minimum is at least four years in prison for ten offences committed with a firearm, including robbery which in itself accounts for a significant number of cases each year. Minimums were also prescribed for a considerable number of other lesser possessory and handling offences. This was a significant increase over the number of existing minimum penalties in the Code. It has been said that this did not sit easily with the statutory framework of sentencing created by Bill C-41. I recall that when we were asked some five years later to produce statistical evidence that the amendments had achieved the desired effect of reducing gun-crime, we were unable to find any.

The constitutionality of the mandatory minimum sentence of three years for possession of a loaded prohibited firearm came before the Ontario Court of Appeal in *R v Nur*, 2013 ONCA

[22] *Firearms Act,* 1st Sess, 35th Parl, 1994 (assented to 5 December 1995, SC 1995, c 39).

677 [*Nur*] and five other cases heard together in 2013. Doherty J.A., for a five member panel, observed at paras 25-26, that in order for s 12 of the *Charter* (cruel and unusual treatment or punishment) to be infringed the mandatory minimum must be "grossly disproportional". Proportionality, he wrote, "describes a relationship between two things. In the present case, it is the relationship between the length of the mandatory minimum penalty demanded by the statutory provision on the one hand, and the purpose of the statute, the nature of the prohibited conduct, and the circumstances of the offender on the other hand."

The Court noted that until relatively recently, mandatory minimums were a rarity in Canadian criminal law. The mere fact that they restrict judicial discretion, "long the centrepiece of the sentencing process in Canada" did not, in itself mean that the minimums offended the constitutional norm in s 12 of the *Charter*. To arrive at such a finding, rarely done in Canada, required consideration of a number of factors relating to the nature of the offence, the characteristics of the offender and sentencing principles. Applying the gross disproportionality standard, the Court of Appeal held that the three year minimum sentence required by s 95(2)(a) of the *Criminal Code* infringes s 12 of the *Charter*, cannot be saved by s 1, and therefore must be declared of no force or effect. Leave to appeal to the Supreme Court was granted: [2014] SCCA No 17.

As discussed in *Nur,* above, Bill C-41 established the fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. This has been recognized by the Supreme Court in decisions such as *R v Proulx*, 2000 SCC 5, *R v Knoblauch*, 2000 SCC 58, *R v Wust*, 2000 SCC 18 and *R v Ipeelee*, 2012 SCC 13.

In *R v Nasogaluak*, 2010 SCC 6, [2010] 1 SCR 206 the Supreme Court provided guidance as to how the principles and objectives of the sentencing framework set out in the *Criminal Code* operate and affirmed the central importance of the principle of proportionality. The proportionality principle requires that every sentence must reflect the gravity of the offence and the degree of responsibility of the offender, but must not exceed the degree of censure required to express society's condemnation of the offence or punish the offender more than is necessary.

This principle has been affirmed in the recent decisions of *R v Summers*, 2014 SCC 26 [*Summers*] and *R v Carvery*, 2014 SCC 26 [*Carvery*] dealing with the *Truth in Sentencing Act*, SC 2009, c 29, adopted in 2009, which amended the *Criminal Code* to cap pre-sentence credit at a maximum of 1.5 days for every day in custody.

In an article published in the Canadian Criminal law review, Professors Doob and Webster[23] argued that the *Truth in Sentencing Act* legislated a presumptive lack of parity whereby those detained prior to sentence would spend more time in prison than offenders deserving of the same sentence but who did not spend any time in presentence custody. This, they said, was the result of presumptively determining the credit for time in presentence custody without considering the effect of earned remission and conditional release on the proportion of a custodial sentence that offenders actually serve in prison.

In *Summers* and *Carvery*, the issue was whether ineligibility for early release and parole while on remand was a "circumstance" that can justify granting enhanced credit for pre-sentence custody under s 719(3.1) of the *Criminal Code*. Justice Karakatsanis, writing for the court, noted

[23] *The "Truth in Sentencing" Act: The Triumph of Form over Substance* 17 CCLR 365

that s 719(3.1) must be interpreted in a manner consistent with the principles and purposes of sentencing in sections 718, 718.1 and 718.2. She affirmed that reliance on the principle of proportionality was appropriate stating at paragraph 65:

> However, it is difficult to see how sentences can reliably be "proportionate to the gravity of the offence and the degree of responsibility of the offender" (s. 718.1) when the length of incarceration is also a product of the offender's ability to obtain bail, which is frequently dependent on totally different criteria.

At paragraph 67 Justice Karakatsanis concluded as follows:

> A system that results in consistently longer, harsher sentences for vulnerable members of society, not based on the wrongfulness of their conduct but because of their isolation and inability to pay [for bail], can hardly be said to be assigning sentences in line with the principles of parity and proportionality. Accounting for loss of early release eligibility through enhanced credit responds to this concern.

Conclusion

There are varying perspectives on the question of whether Canada has lost its balance in the field of criminal justice policy. I have referred above to comments of Professor Doob, who is very much of that view. The former Minister of Justice, Rob Nicholson PC, QC, MP, was quoted as saying in 2012 that the "goal [of harsher measures] is to restore a sense of balance so Canadians can continue to be confident in our justice system." [24]

[24] Galloway, Gloria Sept 10, 2012: *Tough-on-crime trio hails imminent passage of controversial Tory Bill.* Globe and Mail. http://m.theglobeandmail.com/news/politics/ottawa-notebook/tough-on-crime-trio-hails-imminent-passage-ofcontroversial-tory-bill/article551728/?service=mobile.

It is not for me to say which perspective is correct. The issue is fundamentally one of a political nature and a debate in which it is inappropriate for a sitting member of the bench to engage. However, I have attempted to demonstrate in this paper that, historically, restraint in the imposition of sanctions and penalties has long been a feature of Canadian criminal justice policy for which there has been a broad consensus of support. Proportionality, an aspect of restraint in the practical application of sentencing policy, has become a fundamental principle of sentencing in Canada linked to the *Charter* right to protection against cruel and unusual treatment or punishment.