# TAB 4

# Sentencing in Canada Can be Aggravating (and Mitigating)

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CONTINUING LEGAL EDUCATION

*Sentencing in Canada can be aggravating (and mitigating)*

**By Paul Burstein and Breese Davies**

Unlike our neighbour to the South, we refuse to turn our sentencing determinations into a mathematical calculation. If anything, the Canadian approach to sentencing has often been criticized for being too "human" (or, perhaps, humane) and, thus, too opaque and arbitrary. As we all know, the offence provisions of the *Criminal Code* provide little guidance for the determination of the appropriate sentence in a given case. Sentence determinations are, the appellate courts tell us, a matter of judicial discretion. With the enactment of Bill C-2, the *Tackling Violent Crime Act*, a number of new mandatory minimum sentences have been added to the *Criminal Code*. In addition, Bill C-2 increased the minimum terms of imprisonment that must now be imposed for certain firearm offences. For example, the mandatory minimum term of imprisonment for possession of a loaded firearm (s. 95) has been increased from 1 year imprisonment to 3 years imprisonment if the Crown elects to proceed by indictment. Similarly, the mandatory minimum term of imprisonment for attempted murder when a restricted firearm is used in the commission of the offence is now 5 years for a first offence and 7 years for a second or subsequent offence (s. 239); see also new mandatory minimums in relation to ss. 85 (use of firearm during the commission of an indictable offence), 99 (trafficking in firearms), 100 (possession of firearm for the purpose of trafficking), 103 (exporting firearms), 244 (discharge firearm with intent), 272 (sexual assault with a weapon), 273 (aggravated sexual assault), 279 (kidnapping), 279.1 (hostage-taking), 344 (robbery) and 346 (extortion).

While there is an ever-growing number of offences for which a minimum punishment is prescribed, most criminal offences include only a reference to a maximum punishment that is so rarely imposed that it is virtually pointless. Instead, the guidance for the determination of the appropriate sentence has typically come from the courts themselves. For example, s. 718.1 of the *Criminal Code* directs sentencing judges to impose a sentence that is proportionate to the gravity of the offence and the degree of responsibility of the offender. Similarly, 20 years ago, the Supreme Court of Canada told

us that the basic elements of a sentencing calculation are "the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case".[1] While, at first blush, pronouncements like this may seem trite, the sentencing jurisprudence in Canada has created a relatively rational and understandable "system" of sentence calculation. Moreover, relatively recent additions to the *Criminal Code*, have now codified many features of the system which the jurisprudence has long since developed.

In brief compass, the Canadian approach to sentencing requires a judge to start by considering the various objectives of sentencing set out in s.718 of the *Criminal Code* and to impose the sentence that best reflects the objectives which seem to be most important in the particular case. Often, this first stage [2] helps a court to determine whether or not jail is necessary and/or whether or not a conditional sentence is appropriate. At the second "stage", the quantum of sentence is determined by having regard to a long list of factors to which the jurisprudence has accorded either a "plus" or a "minus" value in the sentence calculation.[3] As lawyers, we know these as aggravating and mitigating factors. Indeed, s. 718.2(a) of the *Code* now specifically requires sentencing judges to increase or reduce a sentence in accordance with the aggravating and/or mitigating factors[4] which may be present. However, not everything about an

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[1] *R. v. Smith* (1987), 34 C.C.C.(3d) 97 (S.C.C.)

[2] We do not suggest that the sentencing determination proceeds in "stages". The Canadian approach to sentencing is clearly an holistic one. However, for the purposes of explaining the mental exercise which goes in to the determination of sentencing, it might be helpful to break it down into "stages".

[3] For example, the following have been accepted as mitigating factors: first offender, prior good character, guilty plea and remorse, impairment by drugs or alcohol, post-offence rehabilitation, acts of reparation or compensation, provocation and duress, gap in criminal record, test case, and disadvantaged background. In addition to the ones expressly set out in S. 718.2 of the *Code*, the case law recognized the following as aggravating factors: previous convictions, violence or use of a weapon, cruelty or brutality, substantial physical injuries or psychological harm, offence committed while subject of judicially imposed conditions, multiple victims or multiple incidents, group or an activity, impeding victim's access to justice system, substantial economic harm, planning and organization, vulnerability of victim, and deliberate risk-taking.

[4] Interestingly, while the Code has now codified some of the aggravating factors which the jurisprudence has long since recognized, it does not formally recognize any particular

offence or an offender is a relevant "factor" in the sentence calculation process. Generally speaking, aggravating and mitigating factors are ones which relate to the "gravity of the offence" (*i.e.*, the offender's level of blameworthiness and the harm caused by the offender) or to the objectives of sentencing (*e.g.*, an offender with an anti-social personality disorder is more likely to recidivate and less likely to rehabilitate).

There is a vast body of case law discussing the host of aggravating and mitigating factors. The jurisprudence is replete with debates about the relevance of certain factors to the sentencing process and about whether a factor should mitigate, as opposed to aggravate, a sentence (*e.g.*, alcohol or mental illness). In the brief discussion which follows, we certainly do not propose to review that jurisprudence, nor do we propose to identify all of the potential mitigating and aggravating factors. In this paper, we simply propose to outline a few of the more controversial mitigating and aggravating factors which newer lawyers may either overlook or get caught by surprise when the veteran judge raises them in the middle of a sentencing hearing.

## Some "Pluses" to the Sentencing Calculation – Aggravating Factors

### 1. Proving Aggravating Facts

The determination of the facts for the purposes of sentencing is governed by sections 723 and 724 of the *Criminal Code*. Section 723 governs the process by which "the facts" related to the sentencing determination are to be place before the sentencing judge. Section 724(1) permits the court to rely upon facts proven during the trial or agreed to by the parties. Section 724(2) requires the judge (where the trial was by judge and jury) to accept as proven any facts that were essential to the jury's verdict. Section 724(3) sets out the procedure to be followed where the facts are in dispute. In case the Supreme Court of Canada was not abundantly clear in its 1982 decision in *R. v.*

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mitigating factor. For example, evidence that an offence was motivated by bias or that the offender abused his/her spouse or that the offence is a terrorism offence are aggravating facts.

*Gardiner*[5], section 724(3)(e) makes clear that the Crown bears the burden of proving aggravating facts beyond a reasonable doubt:

> It should also be recalled that a plea of guilty, in itself, carries with it an admission of the essential legal ingredients of the offence admitted by the plea, and no more. Beyond that any facts relied upon by the Crown in aggravation must be established by the Crown. If undisputed, the procedure can be very informal. If the facts are contested the issues should be resolved by ordinary legal principles governing criminal proceedings including resolving relevant doubt in favour of the offender.

The United States Supreme Court has also held that aggravating facts must be proven beyond a reasonable doubt; however, the Court there further held that the offender has a constitutional right to have a jury determine whether those facts have been proven beyond a reasonable doubt (whenever the facts could materially affect the severity of the punishment)[6]. In light of a number of Canadian decisions, it seems that an accused would not be entitled to insist on having a jury determine those additional facts. In *R.* v. *Cooney*[7], the Ontario Court of Appeal reiterated the principles of law articulated by the Supreme Court of Canada in *R.* v. *Brown*[8], namely, that the sentencing judge is bound by the express and implied factual implications of the jury's verdict and that the Crown bears the burden of proving disputed facts beyond a reasonable doubt. The Court held, however, that in deciding which facts were implied by the jury's verdict, a trial judge should not ask the jury for clarification. The trial judge must make up his or her own determination as to what facts would be capable of supporting the jury's verdict.[9]

**2. Other Untried Offences**

The starting point for the use of evidence of other untried offences is section 725 of the *Criminal Code*. This provision was considered by the Ontario Court of Appeal in *R.* v. *Edwards*,[10] where the court held that because of the presumption of innocence, the

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[5] (1928), 68 C.C.C. (2d) 477 (S.C.C.)
[6] *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000) and *Ring* v. *Arizona*, [2002] SCT-QL 144 (2002)
[7] *R.* v. *Cooney* (1995), 98 C.C.C. (3d) 196 (Ont.C.A.)
[8] *R.* v. *Brown* (1991), 66 C.C.C. (3d) 1 (S.C.C.)
[9] See also *R.* v. *Lyons* (1987), 37 C.C.C. (3d) 1 (S.C.C.)
[10] *R.* v. *Edwards* (2001), 155 C.C.C. (3d) 473 (Ont.C.A.)

use of untried offences in sentencing must be limited. Evidence that discloses the commission of other untried offences will be admissible for the purpose of showing the background and character of the offender, as those relate to the objectives of sentencing. A trial judge retains discretion to refuse to admit this type of evidence where it is necessary to ensure that the accused has a fair hearing. The factors to be considered in exercising that discretion include the nexus between the evidence and the offence where the offender was convicted, the similarity between the evidence and the offence, the difficulty the offender may have in defending against the allegations, the danger that the sentencing hearing will be prolonged, whether the accused has adduced evidence of good character and the cogency of the evidence adduced.

This issue was also considered by the Supreme Court of Canada in *R. v. Angelillo* in the context of an application to adduce fresh evidence on appeal. Charron J., writing for the majority, wrote as follows:

> The presumption [of innocence] does not constitute a general exclusionary rule of evidence that precludes the admission of all extrinsic evidence relevant to sentencing for the offence in issue on the basis that it might establish the commission of another offence. This does not mean that the offender has no procedural protection where extrinsic evidence is concerned. There are a number of other principles that assure the offender's right to a fair trial. I will explain this.
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> If the extrinsic evidence is contested, the prosecution must prove it. Since the facts in question will doubtless be aggravating facts, they must be proved beyond a reasonable doubt (s. 724(3)(e)). The court can sentence the offender only for the offence of which he or she has been convicted, and the sentence must be proportionate to the gravity of that offence. In addition, the judge can and must exclude otherwise relevant evidence if its prejudicial effect outweighs its probative value such that the offender's right to a fair trial is jeopardized. Finally, the court must draw a distinction between considering facts establishing the commission of an uncharged offence for the purpose of punishing the accused for that other offence, and considering them to establish the offender's character and reputation or [page749] risk of re-offending for the purpose of determining the appropriate sentence for the offence of which he or she has been convicted. In my example, the sentence imposed on a violent offender may well be more restrictive than the sentence imposed on an offender who has committed an isolated act, but this is in no way contrary to the presumption of innocence. The sentence may also be more restrictive in

> the case of a repeat offender if the Crown presents evidence of the offender's criminal record, but this does not violate the offender's right, guaranteed by s. 11(h) of the Charter, not to be "punished ... again". In both cases, again from the standpoint of proportionality, the more severe sentence is merely a reflection of the individualized sentencing process.[11]

In the end, the Court held that although the evidence of the untried offences was relevant, it was not admissible as fresh evidence on appeal as the Crown had not exercised due diligence.

Evidence of untried offences ***is*** often admitted in cases of family violence. For example, one of the most commonly cited cases in support of the admission of this kind of evidence on sentencing is *R.* v. *Roud and Roud*[12], a case where the sentencing judge considered the offender's long history of prior abuse of his step-son as a factor to justify the long penitentiary sentence imposed. Without specifically accepting that the prior abuse was an "aggravating factor", the Court of Appeal clearly agreed that it was a relevant factor:

> Nothing could be more prejudicial to an accused on the issue of sentence than evidence which tends to be general and perhaps more so if examples are injected in the general setting. How can a convicted man defend himself from what is said in such circumstances? Yet in such a case as this one on the issue of sentence, where the question of individual deterrence and rehabilitation of the convicted man are central issues along with the question of the protection of the public, it seems logical that such evidence must be dealt with, for the background and character of the accused man are necessary information for the sentencing Court. The accused must be given every opportunity to cross-examine and to call whatever evidence he chooses.
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> In my respectful view, the evidence was relevant and admissible and I do not think the learned trial Judge erred in the use he made of it. He did not, as he must not do, punish the appellant for past acts, but on the other hand I think he properly sought to understand the appellant in determining the quantum of sentence appropriate for the offence of which he had been convicted by the jury. He had a duty to the public, and he had a duty to the appellant. I do not see how he could have discharged either without fairly complete information as to the appellant, his background and his character.

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[11] *R. v. Angelillo*, [2006] 2 S.C.R. 728 at paras. 31 - 32

[12] R. v. *Roud and Roud* (1981), 58 C.C.C. (2d) 226 (Ont.C.A.)

It is hard to imagine how this type of evidence could be "relevant and admissible" to a sentencing judge's "duty to the public" if it is not properly considered as an aggravating factor.

**3. Prevalence of the Crime in the Community**

The prevalence or absence of a particular crime in a community is a factor which may aggravate a sentence. In the Ontario Court of Appeal's 1978 decisions in *R.* v. *Sears*[13], the Court held that it was "appropriate to consider whether in that particular community at that particular time, there appears to be an unusual amount of that type of crime" which will require a sentence that reflects the need for general deterrence. In subsequent decisions[14], the Court has reaffirmed that while not dispositive of the sentence determination, it is a factor which my properly be considered.

An "exemplary" sentence, one which still falls within the range for the particular offence but which refuses to take into account the mitigating factors particular to the accused, may be imposed to reflect the prevalence of an offence with a particular community[15] . Nevertheless, an offender should not be made a scapegoat for others who have committed similar crimes but have not been caught. Furthermore, the particular sentiments or emotions of a community is not a factor which should be considered by the sentencing court; that is, no "community impact" statements. Community outrage, expressed through petitions demanding jail terms or non-jail terms is not an appropriate consideration in the sentence determination process as "[i]t smacks of vigilantism and a 'get out of town' approach that, simply put, has no place in our system. It would result in unfairness and capriciousness in sentencing."[16]

**4. Victim Impact Statements**

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[13] *R.* v. *Sears* (1978), 39 C.C.C. (2d) 199 (Ont.C.A.)
[14] *R.* v. *Rhor* (1978), 44 C.C.C. (2d) 353 (Ont.C.A.); *R.* v. *Priest* (1996), 110 C.C.C. (3d) 289 (Ont.C.A.); *R.* v. *Redekopp*, [1998]O.J. No. 5366 (C.A.)
[15] *R.* v. *Vatour* [1987], N.B.J. No. 13 (N.B.C.A.)
[16] *R.* v. *Hardy*, [2002] M.J. No. 238 (Prov.Ct.)

Section 722 of the *Criminal Code* provides that the Victim Impact Statement (VIS), when filed with the Court, may be considered in determining the sentence to be imposed on an officer. To be admissible, the following criteria must be met:

(1) the statement must be prepared in writing;

(2) the statement is in the prescribed form and is in accordance with the procedures established by a program designed for that purpose by the province;

(3) the statement is authored by the "victim", as set out in s. 722(4);

(4) the statement describes the harm done to, or loss suffered by the victim;

(5) the statement is filed with the court;

(6) pursuant to s. 722.1, a copy of the statement has been provided by the clerk to the prosecution and the defence.

According to section 722.(2.1), the sentencing court must permit a victim to read aloud in court the victim impact statement. However, before permitting this, the statement should obviously be vetted to ensure that it complies with the *Code*.

Pursuant to s. 722(3), the sentencing court has the discretion to consider other evidence concerning the victim of an offence, beyond that contained in the VIS. However, this section does not allow for an alternative method of placing victim impact evidence before the court where the proper procedure could have been, but was not followed.[17]

A "victim" is defined in section 722(4). In *R.* v. *Curtis*[18], the New Brunswick Court of Appeal held that for the purposes of section 735 [the predecessor to s. 722], the definition of "victim" in subsection (4) is limited to the direct victim, except where subsection (4)(b)(*i.e.*, victim is dead, ill, or otherwise incapable of making a statement) applies. A contrary view was expressed in *R.* v. *Philips*[19], where the court allowed the partner and fiancé of a murdered police officer, as well as the chair of the local police community organization, to file victim impacts statements.

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[17] *R.* v. *Jackson* (2002), 163 C.C.C. (3d) 451 (Ont.C.A.)
[18] *R.* V. *Curtis* (1992), 69 C.C.C. (3d) 385 (N.B.C.A.)
[19] *R.* v. *Phillips*, [1995] O.J. No. 3617 (Gen Div.)

In *R.* v. *Gabriel*,[20] when deciding what weight to be attributed to the victim impact statement, Justice Hill cautioned that the views of the victim are only one factor to be considered and should not be given undue weight:

> Without, in any fashion, diminishing the significant contribution of victim impact statements to providing victims a voice in the criminal process, it must be remembered that a criminal trial, including the sentencing phase, is not a tripartite proceeding. A convicted offender has committed a crime – an act against society as a whole. It is the public interest, not a private interest, which is to be served in sentencing.

As the *Code* suggest, victim impact statements should only describe the harm done, or loss suffered by the victim as a result of the commission of the offence. They should not contain criticisms of the offender nor recommendations as to the severity of the punishment. Expressions of a desire for personal revenge or of opinions on the offender's mental health are also inappropriate uses of the VIS[21]. Similarly, a victim ought not give evidence about causes or incidence of the crime, or about the facts of other offences, which are not otherwise in evidence before the court[22].

It is, of course, worth noting that victim impact statements may sometimes mitigate the punishment, such as where victims have asked for restraint in sentencing[23]. Counsel must, therefore, consider carefully whether to challenge any statements in a victim impact statement.

**5. Absence of Remorse**

While it is true that ***some*** behaviours which connote an absence of remorse may aggravate a sentence – such as, impeding the victim's access to the justice system or the

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[20] *R.* v. *Gabriel* (1999), 137 C.C.C. (3d) 1 (Ont. Sup. Ct.)
[21] *R.* v. *Bremner* (2000), 146 C.C.C. (3d) 59 (B.C.C.A.)
[22] *R.* v. *Jackson, supra*
[23] *R.* v. *Piche*, [1993] A.J. No. 799 (C.A.); *R.* v. *Jover* (1977), 41 C.C.C. (2d) 24 (Ont.Prov.Div.); *R.* v. *Grant*, [1998] O.J. No. 1511 (C.A.); *R.* v. *R.(M)*, [1998] O.J. No. 737 (C.A.)

commission of multiple offences – appellate courts have made clear that an offender who fails to demonstrate remorse cannot be treated more harshly because of it. The fact that an offender pleaded "not guilty" at trial should not be used to aggravate the sentence, for otherwise the offender is being penalized for having exercised the constitutional right to be presumed innocent unless and until the Crown proves him guilty. On the other hand, most trial courts will typically circumvent this constitutional impediment to "punishing" the "not guilty" plea of a convicted offender by distinguishing any favourable sentencing precedent which involved a guilty plea on the basis that those other offenders were purportedly entitled to substantial credit for their showings of remorse. Indeed, even the Ontario Court of Appeal has seemed to accept that a "not guilty" plea is only a non-factor when it has somehow been vindicated by even partial success[24]. The Ontario Court of Appeal has, however, held that the manner by which an offender has conducted the trial which follows the "not guilty" plea should not be held against him when it comes time to determine the appropriate sentence[25] nor should the manner by which the offender conducted himself during the police investigation. In *R.* v. *Wristen*, the Court of Appeal said:

> The appellant was not legally obliged to assist the police. He was entitled to exercise his right to silence and require the prosecution to prove the case against him beyond a reasonable doubt. Exercising this right is not an aggravating consideration on sentence.[26]

In cases where there has not been a showing of remorse, what other options does a sentencing judge have apart from refusing to credit the offender in the sentencing determination? In *R.* v. *Pine*, the offender had been convicted of an historical sexual assault[27]. He was an elderly aboriginal offender who the trial judge determined should receive a conditional sentence as punishment for his offence. One of the conditions imposed by the judge was that the offender write a letter of apology to the victim, even though the offender had pleaded "not guilty" at the trial and maintained his innocence during the sentencing process. The Ontario Court of Appeal set aside this condition on

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[24] *R.* v. *Osbourne* (1994), 94 C.C.C. (3d) 435 at 441 (Ont.C.A.)
[25] *R.* v. *Kozy*, [1990] O.J. No. 954 (C.A.)
[26] *R.* v. *Wristen*, [1999] O.J. No. 4589 (C.A.)
[27] R. v. *Pine*, [2002] O.J. No. 200(C.A.)

the basis that a sentencing court cannot, and should not, extract a showing of remorse from the offender.

**Mitigation litigation**

### 1. Credit for Time Served in Custody or on Bail

Section 719(3) of the *Criminal Code* provides that in determining sentence, a sentencing judge "may take into account any time spent in custody by the person as a result of the offence." The Supreme Court of Canada has held that pursuant to section 719(3), a sentencing judge may even deduct time spent in pre-trial custody from a mandatory minimum sentence[28]. Although the provision in the *Code* is permissive, provincial appellate courts have held that it is an error in principle for a sentencing judge to not give credit for pre-trial custody without good reason.[29]

In *R. v. Francis*, the Court of Appeal for Ontario set out three considerations which inform the practice of giving enhanced credit for pre-trial custody:

> (1) that other than for life sentences, legislative provisions for parole eligibility and statutory release do not take into account time spent in pre-sentence custody; (2) that there are few rehabilitative, educational or retraining programs available in **detention** centres; and (3) that the conditions in **detention** facilities are often more crowded and more onerous than in correctional facilities.[30]

The Court accepted that, while there is no mechanical formula for crediting pre-trial custody, as a general practice trial courts give 2-for-1 credit for adult pre-sentence custody.[31]

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[28] *R.* v. *Wust* (2000), 143 C.C.C. (3d) 129 (S.C.C.); *R.* v. *Arrance* (2000), 143 C.C.C. (3d) 154 (S.C.C.); *R.* v. *Arthurs* (2000), 143 C.C.C. (3d) 149 (S.C.C.)

[29] *R.* v. *Francis*, [2006] O.J. No. 1287 (C.A.) at para. 7; *R.* v. *Rezaie* (1996), 112 C.C.C. (3d) 97 (Ont.C.A.): *R.* v. *Mills* (1999), 133 C.C.C. (3d) 451 (B.C.C.A.)

[30] *R. v. Francis, supra* at para. 14

[31] *R. v. Francis, supra* at para. 13; see also *R. v. Pangman* (2001), 154 C.C.C. (3d) 193 (Man. C.A.)

Different formulas have also been used to reflect the harshness of the offender's pre-trial or pre-sentence incarceration. In assessing the circumstances of the offender's incarceration, courts have considered a wide range of factors including the following:

- horrible conditions at the Metro West Detention Centre: overcrowding, poor health conditions, excessive lock downs, high incidence of violence, and absence of recreational programs: See *R.* v. *Kravchov*, [2002] O.J. No. 2172 (C.J.) [credit of 24 months given for 7 months served due to poor conditions at the Metro West Detention Centre] and *R.* v. *Hancock*, [2001] O.J. No. 4608 (Ont. C.J. [credit given on three for one basis].

- "middle age" like conditions at the Don Jail, such as overcrowding, minimal recreation time, absence of counseling, absence of educational facilities and prevalence of diseases such as tuberculosis and Hepatitis B: see *R.* v. *Jabbour*, [2001] O.J. No. 3820 (C.J.) [credit of 42 months for 17 months, and 46 months for 20 months given to each accused] and *R.* v. *Poirier*, [2001] O.J. No. 2320 (C.J.) [credit of three months for one month].

- waiver of preliminary hearing and conditions of detention including imposition of frequent lock-downs which interfered with recreation, accessibility of prison programs and presumably with visits: see *R.* v. *Whittaker*, [2001] A.J. No. 1356 (Q.B.) [credit given on three for one basis] and *R.* v. *Taylor*, [2002] A.J. No. 323 (Q.B.) [credit given on three for one basis].

- period of sentence served during labour dispute where that labour disruption affected the care of the prisoners and their transportation to court: see *R.* v. *W.C.D.*, [2002] O.J. No. 1623 (S.C.J.) [credit given on three for one basis].

- harshness of pre-trial custody as compared with conditional sentence imposed upon guilty pleas and the fact that pre-trial custody will not be taken into account in determining parole eligibility: see *R.* v. *Buggins*, [2002] A.J. no. 96 (Q.B.) [credit given on three for one basis].

- lengthy period of time spent in solitary confinement by youthful offender serving his first sentence of imprisonment: see *R.* v. *M.J.B.*, [2001] B.C.J. No. 2638 (Prov. Ct.) [credit given on three for one basis].

- the effect of pre-trial custody on a particular prisoner due to age, infirmity, or mental illness: see *R.* v. *Gray*, [1995] O.J. No. 236 (Gen. Div.) [linguistic or cultural isolation], *R.* v. *Perrambalam*, {2001] O.J. No. 3520 (S.C.J. [credit of one and a half years given for six or seven months served in pre-trial custody] and *R.* v. *Rajakulasingham*, [1994] O.J. No. 2357 (Gen. Div.).

- isolated incarceration of a woman in a facility that houses primarily men: see *R.* v. *Bennett*, [1993] O.J. No. 892 (C.J.).

- significant pre-trial custody where accused never incarcerated before: see *R.* v. *Bell*, [1995] O.J. No. 4533 (Gen. Div.) and *R.* v. *Bennett*, {1993] O.J. No. 892 (C.J.).

As these cases demonstrate, it is not an error to give credit that is greater than "two for one".[32] Indeed, provincial courts have properly given "enhanced credit" in excess of "two for one".

The Ontario Court of Appeal has also held that it is not an error to give "reduced credit" for pre-trial custody. In *R. v. Francis*, the trial judge refused to give 2-for-1 credit for pre-trial custody but gave the defendant 7 years credit for the 5 years and 3 months spent in pre-trial detention. The Court of Appeal upheld the sentence. The Court outlined a number of relevant and irrelevant factors in determining whether to depart from the practice of giving 2-for-1 credit. First, the Court held that the conduct of counsel during the trial is an irrelevant factor in assessing the appropriate credit for pre-

[32] *R.* v. *Morrisey* (1999), 148 C.C.C. (3d) 1 (S.C.C.); *R.* v. *MacDonald*, [2001] O.J. No. 4926 (C.A.)

trial detention. Second, the Court held that the amount of time a defendant spends in Court attending proceedings (as opposed to at the jail) is not a relevant consideration in assessing credit. Finally, the Court accepted the following factors as relevant to the calculation of credit for pre-trial detention:

> (1) whether the incarceration history of the accused indicates that the accused is unlikely to obtain early parole; and
>
> (2) whether the accused is seen to pose a serious danger to society.[33]

In *R. v. Thornton*, the Court of Appeal also endorsed "reduced credit" for pre-trial custody.[34] Mr. Thornton was detained on April 29, 2005. On November 22, 2005 he waived his preliminary inquiry. On his first appearance in the Superior Court, Mr. Thornton indicated his intention to plead guilty. Mr. Thornton did not actually plead guilty to "over .80", drive disqualified and mischief until 10 months later. Mr. Thornton was a chronic alcoholic and had a long record with 36 prior convictions, may of which involved drinking and driving. He received only 1-for-1 credit for pre-trial custody. The Court justified this on the basis that the lack of programming in the remand facility was not "truly a deprivation" because there was good reason to think that Mr. Thornton would not have benefited from it in any event. The Court of Appeal also considered the delay between when Mr. Thornton announced his intention to plead guilty and his actual plea:

> we see no reason (and none was offered) why it took the appellant an additional ten months to plead guilty. Indeed, given the appellant's apparent wish to obtain treatment, there was no logic, that we can see, in his postponing the sentence hearing and spending an extra ten months at EMDC. If it was his expectation (as would appear to be the case from our review of the record) that he would rack up more "dead time" on a 2:1 basis so that he could eventually ask the trial judge to give him time served for the charge of "over .80" (thirty-six months) and a conditional sentence for the remaining crimes, his plan was ill-conceived. To give effect to it would be to turn the sentencing process on its head. It would allow accused persons to tie the hands of the trial judge and fashion their own sentences,

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[33] *R. v. Francis, supra* at paras. 20 – 23; *R. v. Kozy* (1990), 58 C.C.C. (3d) 500 (Ont. C.A.), *R. v. Sawchyn* (1981), 60 C.C.C. (2d) 200 (Alta. C.A.); *R. v. Mills* (1999), 133 C.C.C. (3d) 451 (B.C.C.A.); *R. v. Young* (2004), 186 C.C.C. (3d) 219 (Man. C.A.).; *R. v. J.E.D.*, [2007] O.J. No. 2022 (C.A.)

[34] *R. v. Thornton*, [2007] O.J. No. 1865 (C.A.); this decision has been used to see also *R. v. Fries*, [2008] O.J. No. 923, *R. v. Kozovski*, [2007] O.J. No. 3610; *R. v. Sandranathan*, [2007] O.J. No. 2326

> as it were, rather than leaving it to the trial judge to craft the appropriate sentence in accordance with the principles of sentencing set forth in the *Criminal Code*. In the end, just as the trial judge was not required to automatically give extra credit for a loss of programming, so too, he did not automatically have to give extra credit for parole considerations.[35]

In *R. v. Roulette*, the Manitoba Court of Appeal considered the burden of proof in respect of enhanced or reduced credit:

> It would seem almost invariable that it will be the Crown rather than the accused seeking a departure from the two-to-one norm. It should therefore be the Crown's responsibility to establish facts which would support a lesser credit than two-to-one, either by agreement or by tendering evidence. It would be open to defence counsel to tender evidence in response. (Obviously, if defence counsel seeks a larger credit than two-for-one, the onus will fall on the defence to establish that case.)[36]

More recently, Canadian courts have been called upon to consider the impact of stringent pre-trial bail conditions, particularly "house arrest", on the sentence calculation process.[37] In *R. v. Downes*, the Court of Appeal for Ontario held that time spent under strict bail conditions, especially house arrest, must be taken into account as a mitigating factor on sentence. Justice Rosenberg provided the following summarized approach to credit for pre-trial bail as follows:

- Time spent on stringent pre-sentence bail conditions, especially house arrest, is a relevant mitigating factor.
- As such, the trial judge must consider the time spent on bail under house arrest in determining the length of sentence.
- The failure of the trial judge to explain why time spent on bail under house arrest has not been taken into account is an error in principle.

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[35] *R. v. Thornton, supra* at para. 32; see *R. v. Savoie* [2007] B.C.J. No. 2344 (C.A.) at paras. 12 – 16 for a contrary approach to delay in resolving the case.
[36] *R. v. Roulette*, [2005] M.J. No. 459 (C.A.) at para. 25
[37] *R. v. Downes*, [2006] O.J. No. 555 (C.A.); *R. v. Spencer* (2004), 186 C.C.C. (3d) 181 (Ont. C.A.); *R. v. Hilderman*, [2005] A.J. No. 977 (C.A.); *R. v. Lau* (2004), 193 C.C.C. (3d) 51 (Alta. C.A.) and *R. v. Perrault* (2005), 197 C.C.C. (3d) 183 (B.C.C.A.)

- The amount of credit to be given for time spent on bail under house arrest is within the discretion of the trial judge and there is no formula that the judge is required to apply.
- The amount of credit will depend upon a number of factors including, the length of time spent on bail under house arrest; the stringency of the conditions; the impact on the offender's liberty; the ability of the offender to carry on normal relationships, employment and activity.
- Where the offender asks the trial judge to take pre-sentence bail conditions into account, the offender should supply the judge with information as to the impact of the conditions. If there is a dispute as to the impact of the conditions, the onus is on the offender to establish those facts on a balance of probabilities in accordance with s. 724(3) of the Criminal Code.[38]

In *Downes*, the Court of Appeal gave the defendant 5 months credit for 18 months spent on house arrest bail (or a ration of 1 to 3.6). In other cases, the credit for pre-trial bail awarded ranges from approximately 1-to-9 on the low end to 1-to-2 on the high end.[39] It is important to note that in *R. v. Panday*, the Court of Appeal for Ontario held that credit for restrictive pre-trial bail conditions cannot be used to reduce the sentence below any mandatory minimum term of imprisonment.[40]

### 2. Delay in prosecution

By itself, delay in a prosecution will not usually result in the mitigation of sentencing. The first question must be "why did so much time pass between the time of the offence and the date of the conviction?" If the delay has been due to the victim's reluctance to report the crime to the authorities, the delay itself will not mitigate the sentence. On the other hand, that period of delay may give rise to others factors which do mitigate the sentence. For example, if during that long period of delay, the offender has not reoffended and has managed to become a productive member of the community, those factors will be taken into account in mitigation of sentence. In addition, delay may result in the offender being an elderly offender by the time of

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[38] *R. v. Downes*, [2006] O.J. No. 555 (C.A.) at para. 37

[39] *R. v. Phronimadis*, [[2006] O.J. No. 3992 (C.A.); *R. v. Lai*, [2008] O.J. No. 1342; *R. v. Dass*, [2008] O.J. No. 1161; *R. v. Marini*, [2006] O.J. No. 4072, *R. v. Galley*, [2006] O.J. No. 1845; *R. v. Marks*, [2007] O.J. No. 1550; *R. v. Howell*, [2007] O.J. No. 4585; *R. v. V.C.*, [2006] O.J. No. 3268

[40] *R. v. Panday*, [2007] O.J. No. 3377 (C.A.); see also *R. v. Ijam*, [2007] O.J. No. 3395

sentencing and, thus, entitled to the mitigating force of "old age" (*e.g.*, ill health or infirmity).

If the delay in gaining the conviction has been attributable to the prosecution, even where the delay did not warrant a stay of proceedings under s. 24(1) of the *Charter*, that delay may be taken into account in mitigation of the sentence. More than 30 years ago, in *R.* v. *Cooper*[41], the Court of Appeal for Ontario held that "excessive delay which causes prolonged uncertainty for the appellant but does not reach constitutional limits can be taken into account as a factor in mitigation of sentence." Since the advent of the *Charter*, the Ontario Court of Appeal[42] and the Supreme Court of Canada[43] have recognized that delay which does not necessarily justify a stay of the proceedings may be taken into account as a mitigating factor on sentence. This reasoning has been applied by courts in Ontario and other provinces in the following circumstances:

- 12 year delay from the commencement of proceedings to the end of the criminal prosecution due to successive appeals to the Supreme Court of Canada: see *R.* v. *Keegstra*, [1996] A.J. No. 833 (C.A.)

- pre-charge delay of four years insufficient to grant stay but mitigating factor in imposing conditional sentence of two years less a day for theft over and fraud over: see *R.* v. *Cleary*, [2002] N.W.T.J. No. 44 (S.C.)

- pre-charge delay of three years a mitigating factor in sentences of three months imprisonment to be served concurrently for six charges of forging and uttering forged documents, notwithstanding that the delay also inured to the benefit of the accused (due to the delay, amendments to the *Criminal Code* allowed the offences to be prosecuted by summary conviction with a maximum period of imprisonment of six months, whereas formerly the offences could only be prosecuted by way of

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[41] *R.* v. *Cooper (No.2)* (1977), 35 C.C.C. (2d) 35 (Ont.C.A.)
[42] *R.* v. *Bosley*, [1992] O.J. No. 2656 (C.A.); *R.* v. *W.L.*, [1996] O.J. No. 3931 (C.A.)
[43] *R.* v. *MacDougall* (1998), 128 C.C.C. (3d) 283 (S.C.C.)

indictment with a maximum penalty of 14 years imprisonment) see: *R.* v. *Zinkhofer*, [2000] A.J. No. 109 (Prov. Ct.)

- six months discount given as a result of five year delay which may have caused "prolonged uncertainty" for the accused: see *R.* v. *G.W.R.*, [1998] O.J. No. 6281 (Gen Div.).

### 3. Immigration Consequences

Many sentencing decisions make mention of the immigration consequences associated with conviction; however, the significance attributed to this factor is difficult to discern. Consideration of immigration consequences in the sentencing process often occurs in cases where some form of discharge is sought in order to avoid any adverse immigration consequences. However, it will also be considered in more serious cases where the conviction will result in the deportation of an offender who had developed roots in Canada. For example, in *R.* v. *Zhang*[44], with respect to the appeal from sentence, the Ontario Court of Appeal recognized that the offender would be deported and hoped to make a new life for himself upon completion of his sentence. The appellant's sentence for assault causing bodily harm and aggravated assault was reduced from 12 years to 9 years, having regard to "all circumstances".

In *R.* v. *Melo*[45], the Ontario Court of Appeal heard an appeal from conviction on shoplifting charges. The appellant argued that, because a *Criminal Code* conviction could result in her being deported, it was entirely disproportionate to the seriousness of the offence charged. She submitted that a conditional or absolute discharge ought to have been imposed instead of a conviction and fine. The Court declined to interfere with the conviction imposed by the trial judge. The Court made the following statement with respect to the relevance of the immigration consequences:

> [T]he fact that a convicted shoplifter may be in jeopardy under the *Immigration Act* is not, in itself and in isolation, a sufficient ground for the granting of a conditional or absolute discharge. It is one of the

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[44] *R.* v. *Zhang*, [2000] O.J. No. 1617 (C.A.)
[45] *R.* v. *Melo*, [1975] O.J. No. 723 (C.A.)

> factors which is to be taken into consideration by the trial court, in conjunction with all of the circumstances of the case. In a case where clearly on the facts disclosed a discharge would be granted, the fact that the convicted person may be subject to deportation is not sufficient to "tip the scales" the other way and lead to the granting of a discharge. If the deportation will cause undue hardship to the convicted person in all of the circumstances of the case, appropriate powers are available in the Immigration Appeal Board to alleviate the condition thus created.

The following cases have also accepted that, while a relevant mitigating factor, the immigration consequences of the criminal conviction will not in and of themselves determine the appropriate sentence:

- *R.* v. *Kerr* (1982), 43 A.R. 254 (C.A.);
- *R.* v. *Lie*, [1996] O.J. No. 2908 (Prov. Div.): Sexual assault was a minor one, but serious enough to require consideration of general deterrence. The fact that the accused would be deported if convicted was only one factor to be considered, even though in his circumstances, there was very little chance of relief at the Immigration Appeal Board. A discharge was contrary to the public interest.
- *R.* v. *R.F.*, [1994] B.C.J. No. 2501 (C.A.): Mitigation on the grounds of deportation not considered where appellant has already exposed himself to threat of deportation by three prior convictions.
- *R.* v. *Tan*, [1996] B.C.J. No. 767 (C.A.): Assuming, without deciding, that it was appropriate to consider the impact of immigration consequences, the impact of those consequences is not enough to make unfit the otherwise fit sentence of life imprisonment without eligibility for parole for thirteen years for the offence of second degree murder.
- *R.* v. *Mendoza*, [1993] A.J. No. 194 (C.A.): Appeal from conviction for assault with a weapon dismissed. Potential adverse effect on immigration status did not in and of itself justify a discharge, though Court commented favourably on the character of the appellant and recommended sympathetic treatment from the immigration authorities.

- *R.* v. *Braithewaite*, [1996] O.J. No. 1650 (C.A.): Trial judge erred in treating deportation as a mitigating factor.

On the other hand, there have been a number of cases where the immigration consequences of the sentence imposed were considered to be sufficient to "tip the scales" in favour of a sentence which might not otherwise have been appropriate:

- *R.* v. *Shokohi-Manesh* (1991), 69, C.C.C. (3d) 286, Alta. C.A.): Having regard to his age, his steady employment at all times while in Canada, his having satisfied the parole authorities that the adverse impression created at his trial was not warranted, the fact that his crime did not cause loss to anyone, and to his apology and rescission.
- *R.* v. *Abrahams*, [2000] O.J. No. 1853 (Sup. Ct.): An outstanding deportation was among the factors that allowed the sentence to be reduced to a conditional sentence for possession for the purpose and escape lawful custody.
- *R.* v. *Chiu* (1984), 31 Man.R. (2d) 15 (C.A.): Crown appeal from conditional discharge for theft under dismissed. Having regard to all the circumstances, the trial judge did not place undue emphasis on the consequences that could result under the *Immigration Act*.
- *R.* v. *Arias*, [1987] A.J. No. 64 (C.A.).

As a general rule, it appears that immigration consequences are a factor, but only a factor, to be considered in imposing sentence.

While the immigration consequences are a relevant factor, the possibility of an offender being punished again for the same crime in the country to which he is deported, is not a relevant consideration.[46]

**Conclusion**

[46] *R.* v. *Arellano and Sanchez* (1975) 30 C.R.N.S. 367 (Que.S.C.)

As this paper demonstrates, there is much more to sentencing than giving the judge a short "bio" of your client and asking for leniency. It is crucial to understand the relevant mitigating and aggravating factors unique to each case and to marshal evidence to assist in asking for the most favourable sentence possible.

If your client happens to be a young person, a whole different set of considerations apply. Part IV of the *Youth Criminal Justice Act* provides much more specific and direct guidance to courts faced with the prospect of sentencing a young person. For example, s. 38(2) provides that a youth court judge shall determine the sentence in accordance with the following principles:

> (a) the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances;
> (b) the sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances;
> (c) the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence;
> (d) all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons; and
> (e) subject to paragraph (c), the sentence must
>
> > (i) be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1),
> > (ii) be the one that is most likely to rehabilitate the young person and reintegrate him or her into society, and
> > (iii) promote a sense of responsibility in the young person, and an acknowledgement of the harm done to victims and the community.

General deterrence is not a relevant consideration when sentencing young people and, pursuant to s. 39(1) of the *YCJA*, terms of imprisonment are available in very limited circumstances.[47] Again, this is not a complete catalogue of the differences between youth sentencing and adult sentencing. It is simply a reminder that youth sentencing are more regulated, can be more creative and are more focused on the individual rather

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[47] *R. v. B.W.P; R. v. B.V.N.*, [2006] S.C.J. No. 27 at paras. 37 – 38, per Charron J.; in this case, the Supreme Court held that s. 63(1) of the *YCJA* which places the onus on the young person to overcome the presumption that an adult sentence will be imposed for "presumptive offences" violates s. 7 and is not saved under s. 1 of the *Charter*.

than the offence. This is because, as the Supreme Court recognized, young people have "heightened vulnerability, less maturity and a reduced capacity for moral judgment."[48]

[48] *R. v. D.B.*, 2008 S.C.C. 25 (May 16, 2008)