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An Examination of the Need for Enhanced Structure in
The Canadian Sentencing System

by

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ABSTRACT

This thesis reviews the significance of public respect for the administration of justice to the fundamental purpose of imposing punishment in Canada. It is revealed that there are low levels of public respect for the criminal justice system generally, and sentencing in particular. Although there is evidence that some public perception is unfounded, the perception of unwarranted disparity is a valid concern. It is argued that a uniform approach must be adopted in order to minimize unwarranted disparity without sacrificing the Canadian commitment to individualized sentencing. The starting point approach promoted by the Alberta Court of Appeal is advanced as the appropriate solution. This thesis concludes that the adoption of starting point sentencing in all Canadian jurisdictions will increase the consistency and transparency of sentencing and enhance public confidence in the administration of justice.

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I. Introduction

The sentencing system in Canada has always been dependent on judicial discretion, and this was unequivocally reinforced by the 1996 amendments to the *Criminal Code*.[1] With the enactment of Bill C-41, Parliament codified a variety of substantive and procedural aspects of sentencing, many of which had existed for decades in the common law, while others were novel.[2] With respect to discretion, section 718.3 affords sentencing judges the power to exercise discretion in sentencing as long as the punishment imposed lies within the legislated boundaries outlined for particular offences.

While entrenching discretion, Parliament neglected to provide judges with practical guidance on how to approach individual cases. Most notably, at the outset of sentencing the *Code* requires judges to determine what the objective, or objectives, are for imposing sentence in a given case pursuant to the following section of the *Code*:

> 718. The fundamental purpose of sentencing is 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;
>
> (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;

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[1] R.S.C. 1985, c. C-46 [hereinafter *Code*].

[2] The most notable and innovative addition was the conditional sentence of imprisonment found in section 742 of the *Criminal Code*. This sentencing option is discussed further below.

> (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 and the community.[3]

The selection of the objective, or objectives, for imposing sentence is a threshold decision with weighty implications. The objective drives the remainder of the decision-making process, namely, the type and quantum of sentence ultimately selected. Research has demonstrated there to be a correlation between the objective of sentencing emphasized by the judge and the severity of the sentence ultimately selected.[4] However, Parliament has failed to offer a hierarchy among the enumerated objectives, nor has it required judges to limit selection to a single aim. The absence of a uniform approach to the selection of sentencing objective leads to abundant possibilities for sentence in a given case, which some have posited as contributing to the considerable variation in sentencing practices across the country.[5]

Parliament has also not provided any assistance to judges with respect to the type and quantum of sentence appropriate in a given case, notwithstanding these are obvious and essential decisions in arriving at a just sentence.[6] With respect to selecting the appropriate type of sentence, consider the conditional sentence of imprisonment that was introduced by Bill C-41. Stated simply, this is a sentence of imprisonment to be served in the community. Parliament specified that this sentence is available for offences where there is no minimum term of imprisonment, with the exception of serious personal injury

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[3] *Supra* note 1 at s. 718.
[4] Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach,* (Ottawa: Canadian Government Publications Centre, 1987) at 75 (Chair: J.R. Omer Archambault).
[5] Julian Roberts & Andrew Von Hirsh, "Legislating the Purpose and Principles of Sentencing" in J. Roberts & D. Cole (eds.) *Making Sense of Sentencing* (Toronto: University of Toronto Press Incorporated, 1999) at 49.
[6] *Supra* note 4 at 78.

offences, terrorism offences or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more.[7] Furthermore, the court must impose a sentence of less than two years and be satisfied that serving the sentence in the community would not endanger the safety of the community. Finally, a conditional sentence must be consistent with the purpose and principles of sentencing specified in sections 718 to 718.2 of the *Code*. Given that there remain many offences that are statutorily eligible, there is no practical guidance as to when a conditional sentence should be imposed. The same is true with respect to other types of punishment including probation, fines and incarceration.

The task of measuring the quantum of punishment has also not been guided by Parliament. For the most part, the range of sentence specified in the *Code* is vast; most offences have no minimum and a maximum that is "rarely imposed and does not reflect the comparative gravity of the offence."[8] Parliament has provided a list of aggravating factors and it has indicated that a sentence should be increased or reduced to account for relevant aggravating or mitigating circumstances relating to the offence or the offender.[9] However, with respect to the critical determination of the extent of impact that an aggravating or mitigating factor should have on the sentence imposed, Parliament is mute.

Even a cursory examination of the statutory sentencing scheme leads to the conclusion that Parliament has not devised a uniform approach to sentencing. As a result, courts are left to rely on counsel to persuade them of the appropriate sentence through

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[7] *Supra* note 1 at s. 742.1.
[8] Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) at 58. Manson states that the "rarity of maximum sentences is obvious when one compares the maxima with actual sentencing patterns." *Ibid.* at 60.
[9] *Supra* note 1 at s. 718.2(a).

argument and reference to decisions in similar cases. However, as counsel are advocating on behalf of their clients' interests, invariably a sentencing judge will be left with a significant divide between the authorities advanced by the Crown and those advanced by the defence. Furthermore, examining the reasons for sentence rarely provides any hint as to how particular factors translate into adjustments to sentence beyond simply being aggravating or mitigating.[10] In fact, Roberts et al. recognized that "the judgment is not usually comprehensive enough to explain all the reasons giving rise to the sanction. Trial judges rarely have the time to write judgments that explain all of the relevant factors considered at the time of sentencing."[11] The lack of precision and completeness in articulating reasons for sentence has thwarted the development of a concise body of jurisprudence dealing with the thorniest of tasks, measuring punishment. In many cases, the precise myriad of unique factors will not be mirrored in prior decisions, rendering little practical guidance to courts seeking direction.

A judge's task in sentencing is not easy, notwithstanding that they have historically enjoyed a wide discretion with few constraints in this area of the law.

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[10] This is true for all aggravating and mitigating factors, the only factor that is routinely quantified by sentencing judges is credit for pre-sentence custody, or "dead time". Courts routinely award enhanced credit for "dead time" because it is deemed more onerous than post-sentencing custody. This is partially due to the fact that statutory provisions for parole eligibility and statutory release do not include time spent in pre-sentence custody. In addition, remand facilities generally do not provide educational, retraining or rehabilitation programs to those awaiting sentence. See *Regina v. Wust* (2000), 143 C.C.C. (3d) 129 at paras. 28, 29, 41, 44, 45 (S.C.C.). See also *Regina v. Rezaie* (1996), 112 C.C.C. (3d) 97 at paras. 25, 26 (Ont. C.A.). The Supreme Court did not adopt a mechanical formula for calculating pre-sentence custody credit, which effectively conferred a wide discretion on sentencing judges. However, it held that 2-for-1 credit, which had become a frequently endorsed ratio, was appropriate. Since this decision, judges have routinely exercised their discretion in this area by applying various ratios such as 1.33-to-1 or 3-to-1 for pre-sentence custody credit. For example see *Regina v. Francis* (2006), 207 C.C.C. (3d) 536 (Ont. C.A.), *Regina v. Jabbour,* [2001] O.J. No. 3820 (Sup. Ct.), and *Regina v. Kravchov,* [2002] O.J. No. 2172 (C.J.). Both *Jabbour* and *Kravchov* are decisions where enhanced credit was awarded due to the extreme overcrowding at the Don Jail in Toronto.

[11] Roberts, Julian V., Doob, Anthony N. & Marinos, Voula, *Judicial Attitudes to Conditional Terms of Imprisonment: Results of a National Survey* by (Department of Justice Canada, Research and Statistics Division, Policy Sector, 2000) at 1.

Magistrate Maris H. Garton captured this challenge in a speech he delivered in the late 1950s:

> The imposition of sentence is the most difficult of the duties placed upon a judge or magistrate as an administrator of the Criminal Law. In arriving at a verdict when he sits without a jury, as magistrates always do, he has the well-tried and approved Rules of Procedure and the whole body of "Adjective law", which includes the Law of Evidence, to guide him. This "Adjective Law" is pretty rigid and if the judge or magistrate keeps within its bounds, as he must, he will rarely go very far astray.
>
> The matter of sentence, however, is on an entirely different basis. There are no rigid rules. There are only general principles which may be used as a guide. If the object of sentence is to be achieved these principles must remain flexible.
>
> Sentence thus becomes, within very wide limits, a matter of discretion to be exercised by the judge or magistrate after conviction.[12]

The codification of the purpose and principles of sentence have not made Garton's comments any less true today than they were in the 1950s. Identical sentiments continue to be expressed by judges across the country.[13]

Notwithstanding that Parliament has offered no practical guidance to judges as to how to approach sentencing on a case-by-case basis, it has clearly set out an overarching purpose for the sentencing system in Canada generally by enacting section 718 of the *Code*. Section 718's statement of overarching sentencing purpose is distinct from the objectives of sentencing discussed in the previous section. The aims previously discussed relate to justification for punishment in individual sentencing decisions, whereas the fundamental purpose of sentencing is a justification for why Canada employs a system of punishment for crime. The importance of the distinction between the justification for punishment generally and the aims which justify imposing sentencing in

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[12] Maris H. Garton, "Problems of Sentence" (1958-59) 1 C.L.Q. 469 at 470.

[13] For example see *Regina v. Charters,* [2004] A.J. No. 868 (Q.B.) at paras. 11-19, 48 [hereinafter *Charters*].

a given case was first noted by H.L.A. Hart and continues to be promoted in modern sentencing discourse.[14]

Many have written about the meaning of the fundamental purpose as articulated in section 718 of the *Code*. Roberts and Von Hirsh noted its confused nature as follows:

> When determining the nature and severity of the sanction, are judges supposed to be assisting in crime prevention or imposing proportionate punishments? The difference is important. Should sentences be looking ahead, to crimes that might be prevented, or should they be looking backward at the seriousness of the crimes already committed? ...
>
> The language of the fundamental purpose reflects the dual nature of the whole statement, which incorporates elements of both utilitarian and retributivist traditions.[15]

In effect, Roberts and Von Hirsh point to the reference to "crime prevention initiatives" as indicative of a commitment to the utilitarian perspective,[16] while the reference to "just sanctions" as reflective of a commitment to the retributive perspective.[17] Clayton Ruby arrives at the same conclusion that Parliament has clearly combined elements of both retribution and utilitarianism.[18]

By concluding that the existence of both utilitarian and retributive components in Parliament's statement is problematic and confusing, Roberts and Von Hirsh fail to acknowledge the distinction that Parliament has made between the justification for punishment generally, and the justification for punishment in a given case. In contrast, although he also does not specifically acknowledge the distinction between justifications,

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[14] H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (London: Oxford University Press, 1968) at 3, cited in A. Manson, *The Law of Sentencing*, *supra* note 8 at 83. See also J. Roberts & A. Von Hirsh, *supra* note 5 at 48-49.

[15] *Supra* note 5 at 52-53.

[16] The utilitarian perspective views punishment as justifiable to the extent that it "promotes favourable consequences" such as the reduction of crime. See A. Manson, P. Healy & G. Trotter, *Sentencing and Penal Policy in Canada,* (Toronto: Emond Montgomery Publications Limited, 2000) at 1.

[17] The retributive perspective views punishment as justifiable "simply because it is deserved by an offender for the commission of an offence." *Ibid.*

[18] C. Ruby et al. *Sentencing* (6th ed.) (Markham: LexisNexis Canada Inc., 2004) at 4.

Ruby does not conclude that retribution and utilitarian aims in section 718 are together problematic. Reconsider the language of section 718:

> The fundamental purpose of sentencing is 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;
>
> (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 and the community.

This section addresses both the justification for punishment generally – "to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society" - and the justification for sentencing individual cases – "by imposing just sanctions that have one or more of the following objectives." Undoubtedly, Parliament could have minimized confusion by separating these distinct purposes into different provisions of the *Code.*

Although the justifications for punishment generally and for the imposition of sentence in a given case are distinct concepts, they are interdependent. In order to ensure that the overarching purpose of punishment is met, sentencing judges are directed by Parliament to impose just sanctions. If one questions whether the overarching purpose is being met, one must examine whether just sanctions are being imposed. The converse is also true. If just sanctions are not being imposed, it follows that our sentencing system is

not contributing to respect for the law and the maintenance of a just, peaceful and safe society.

A central aspect to achieving respect for the law is attaining public confidence in the sentencing system and the administration of justice more generally. The importance of public confidence in sentencing was recognized long before the sentencing amendments to the *Criminal Code.* The 1977 British Columbia Court of Appeal decision in *Regina v. Oliver* advanced the following assertion:

> Courts do not impose sentences in response to public clamour, nor in a spirit of revenge. On the other hand justice is not administered in a vacuum. Sentences imposed by courts for criminal conduct by and large must have the support of concerned and thinking citizens. If they do not have such support, they will fail.[19]

This view continues to be expressed in modern jurisprudence, albeit with reference to the language found in section 718 of the *Code.* In *Regina v. R.P.*, the New Brunswick Court of Appeal overturned a sentence holding that it "undermine[d] public confidence in the administration of justice." The Court further noted that "[a]s a consequence, this sentence negatively impacts on the preservation of the respect for the law, one of the fundamental purposes of sentencing."[20] Similarly, in *Regina v. Smith,* the Alberta Court of Queen's Bench held that it was "expected that, if properly explained by the judge, a sentence will be understood and will foster respect for the administration of justice, and not cost public confidence."[21] Finally, in *Regina v. Lea,* the Prince Edward Island Supreme Court stated the following:

> When someone violates the sanctity of another's dwelling house by committing an offence contrary to s. 348(1)(a) of the Criminal Code, the task facing a sentencing judge is to balance society's interest in maintaining a dwelling house as a safe place, with the need to fix a sentence which addresses all the objectives

[19] [1977] B.C.J. No. 932 at para. 5 (C.A.).
[20] (2001), 245 N.B.R. (2d) 179 at para. 18 (C.A.).
[21] (2002), 288 A.R. 175 at para. 13 (Q.B.).

> and principles of sentencing. This balancing must be conducted while keeping in mind the basic purpose of sentencing which is to engender public confidence in the administration of justice and to protect members of society. A sentence that is disproportionate to the seriousness of the crime, either because it is too severe or too lenient, does not engender confidence in the administration of justice.[22] [Emphasis added]

It has been demonstrated that public confidence in the administration of justice is a central component to the justification for punishment in Canada. It follows that the views of the public are integral to any critical analysis of the current sentencing system. Part II of this thesis reveals that the majority of the Canadian public does not maintain high regard for sentencing in Canada. However, it will be shown that many public criticisms are misconceptions and do not reflect an inherent flaw in the system itself, but rather reflect the system's inability to convey sufficient and accurate information. In contrast, the public perception of unwarranted disparity is real and requires substantial reform to the current system as a remedy.

Enhancing public opinion should not be the sole focus in developing a plan for reform; the criticisms advanced by stakeholders in the criminal justice system are valuable as they are informed and empirically based. However, to limit the analysis to the views held by those with direct experience in the system would render it impossible to assess whether, and to what extent, our system of punishment achieves what Parliament intended. The examination of the weaknesses of the current system in part II is focused on public opinion, yet it is supplemented with the criticisms of various stakeholders. It is demonstrated that the public's perception of unwarranted disparity is shared by those with first hand experience in the system. The exercise of striking a balance between minimizing disparity and promoting individualization, the latter being a

[22] (2005), 197 C.C.C. (3d) 97 at para. 32 (P.E.I. S.C.). For similar judicial commentary see *Regina v. Keller* (1997), 158 Sask. R. 181 at paras. 22, 23 (C.A.) and *Regina. v. Reid*, [2003] Y.J. No. 101 at para. 31 (T.C.).

historically valued characteristic of sentencing in Canada, is then discussed. Part II concludes with a discussion of the necessity of advancing a uniform approach to the task of sentencing. In essence, part III explores the role of appellate courts in structuring discretion and proposes the starting point approach as an appropriate regime to reduce unwarranted disparity while ensuring that individualized factors are properly accounted for.

II. Deficiency in the Canadian Sentencing System - A Lack of Public Confidence

The credibility of the sentencing system in Canada is wavering, as evident by the persistent battery of criticism from the media, victims of crime, politicians, laypeople, lawyers and even judges. Public understanding and acceptance of the Canadian sentencing system was noted as a priority by the Canadian Sentencing Commission ("Commission") in 1987:

> The adage "justice must not only be done but must be seen to be done" reminds us that belief in the ultimate fairness of the justice system is central to the legitimacy of a government. The appearance of "justice" in a justice system is not a peripheral nicety – it is central to its existence.[23]

Remodeling the sentencing system to be more realistic and comprehensible was the Commission's proposed course towards gaining public acceptance and understanding.[24] Yet despite two decades of opportunity, including codifying the justification for our system of punishment, the public is no more informed or accepting than before the Commission was handed its mandate. This is confirmed by the abundant literature that has emerged in the last two decades dealing with public opinion on criminal justice issues.

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[23] *Supra* note 4 at 54.
[24] *Ibid.* at 94.

Public opinion data on the criminal justice system, not limited to the sentencing phase, is critical and relevant to a critique of sentencing in Canada. Recent Canadian statistics reveal that only 7% of the public are very confident in the courts, while 79% of the public rate the justice system as "poor" or "fair".[25] These are important statistics because "[t]he issue of sentencing is clearly related to perceptions of the justice system in general."[26] More importantly, these statistics must figure prominently as the overarching purpose of sentencing is to promote respect for the law. Therefore, it would be an unduly circumscribed analysis to merely focus on public opinion of sentencing, while ignoring public opinion of the criminal justice system more generally.

There are a variety of sources for the public's lack of confidence in the criminal justice system. Many of the criticisms outlined are merely misconceptions about sentencing. In other words, many impressions held by the public lack empirical support. However, the mere existence of misconceptions about sentencing is a problematic phenomenon in itself, and the causes are explored below. This is followed by a discussion of the predominant criticism that there is disparity in Canadian sentencing – a belief that unfortunately, is not a misconception.

A) Public Misconceptions and the Role of the Media

A significant contributor to the widespread public dissatisfaction in the criminal justice system is the public perception of judicial leniency in sentencing.[27] The proportion of the Canadian public that considers sentencing to be lenient has varied,

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[25] Julian Roberts and Mike Hough, *Understanding Public Attitudes to Criminal Justice* (Berkshire: Open University Press, 2005) at 44.
[26] Julian Roberts, Nicole Crutcher & Paul Verbrugge, "Public Attitudes to Sentencing in Canada: Exploring Recent Findings" (2007) Can. J. Crim. & Crim. Jus. 75 at 84.
[27] *Ibid.* at 84.

although it has always constituted a majority. At the turn of the 20th century, over two thirds of the public felt that sentences handed down by the courts were too lenient.[28] The proportion swelled to 80% in 1983, however it returned to the two thirds mark in the mid 1980s.[29] Recent data has shown that approximately 74% of the public are of the view that sentencing is unduly lenient.[30] These results are staggering in light of the research that those with a perception of judicial leniency are likely to express less confidence in the courts. An opinion poll taken in 2003 revealed that when people were asked why they had a low confidence in courts, the most frequent justification was lenient sentencing.[31]

An even higher proportion of the Canadian public support increased harshness in sentencing when confronted with the youth criminal justice system.[32] In fact, the sentencing provisions of the *Young Offenders Act,* prior to it being replaced by the *Youth Criminal Justice Act*, were toughened in response to public demand.[33] The amendments included increasing the maximum youth court sentence available for first degree murder from five to ten years and altering the transfer provisions to adult court. However, the legislative intervention did little to satisfy the public as post-amendment statistics

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[28] Trevor Sanders & Julian V. Roberts, "Public attitudes toward conditional sentencing: Results of a national survey" (2000) 32 Can. J. Beh. Sci. 199 at 199.

[29] Julian Roberts, *Public Opinion and Sentencing: The Surveys of the Canadian Sentencing Commission* (Ottawa: Department of Justice Canada, Research and Development Directorate, Policy, Programs and Research Branch, 1988) at 30, 44. This trend was unlike that in Britain which has remained constant for the past 30 years, see J. Roberts and T. Gabor, "Living in the Shadow of Prison: Lessons from the Canadian Experience in Decarceration" in (2004) 44 Brit. J. Criminol. 92 at 96. See also J. Roberts, *Virtual Prison*, *infra* note 35 at 133.

[30] *Supra* note 26 at 83.

[31] *Ibid.* at 97-98.

[32] *Infra* note 36 at 48. See also Katherine Covell & R. Brian Howe, *infra* note 34 at 346.

[33] This is consistent with the history of adult sentencing where public opinion has successful prompted reform. See Julian Roberts, Virtual Prison, *infra* note 35 at 131-132. Public opinion was a factor with respect to the introduction of mandatory minimum sentences, the abolition of parole, and the establishment of sex offender registries.

revealed that approximately 90% were in favour of increasing the harshness of youth sentencing.[34]

The public underestimates the frequency with which sentences of incarceration are imposed, and the length of those sentences.[35] Few Canadian studies have compared public attitudes to the actual practice of sentencing courts,[36] however, research relating to the sentencing of youth has demonstrated that on the scale of harshness, the public and the courts are not that far apart.[37] For many scenarios, the public's preference for a custodial sentence only marginally exceeded the actual rate in which a jail sentence was imposed. The only significant variance between public opinion and reality emerged with a scenario involving a recidivist facing sentence for assault.[38] This research suggests that increasing public awareness and understanding of sentencing patterns would likely reduce the perception of leniency.

There was a recent study conducted in Australia where sentences imposed by courts were compared with sentences that would have been imposed by members of the public.[39] Public participants were provided with four cases that involved serious offences committed by offenders with potentially strong mitigating factors. They received an academic lecture about sentencing theory and principles, a judicial lecture and were

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[34] Katherine Covell & R. Brian Howe, "Public Attitudes and Juvenile Justice in Canada" (1996) 4 Int'l J. Child. Rts. 345 at 346-347.
[35] Julian Roberts, *Virtual Prison* (Cambridge: University Press, 2004) at 93.
[36] Jennifer Tufts and Julian V. Roberts, "Sentencing Juvenile Offenders: Comparing Public Preferences and Judicial Practice" (2000) 13 Crim. J. Pol. Rev. 46 at 47.
[37] *Ibid.* at 53.
[38] The public's preference for incarceration for an assault by a recidivist was 54% while the actual rate at which incarceration was imposed by the courts was 32%. Overall, 37% of the public preferred incarceration in the four juvenile offender scenarios, only somewhat higher than the actual custody rate derived from the youth court sentencing statistics, which was 28%. Conversely, this research found that the public and the courts differed in the degree to which a criminal record aggravated sentence. In cases where there was a prior, related conviction, the courts were more than twice as likely as the public to impose a custodial sentence. *Ibid.* at 53, 56.
[39] Austin Lovegrove, "Public Opinion, Sentencing and Lenience: An Empirical Study Involving Judges Consulting the Community" (2007) Crim. L.R. 769.

afforded the opportunity to pose questions to the judge. The judge then presented his sentencing judgment, omitting all references to the sentence imposed or appropriate range of sentence, but including information about the circumstances of the offence and the offender. Participants were then asked to anonymously submit the appropriate sentence. After the judge revealed what sentence had been imposed, participants were required to rate the adequacy of the actual sentence.[40] The results revealed that judges were not more lenient than the public "in terms of the types and levels of sentence for relatively serious offences and where there was ... significant offender mitigation."[41]

In addition to the view of sentencing as unduly lenient, there are a variety of public misconceptions about the criminal justice system. The belief held by the public that the crime rate is increasing and recidivism is prevalent is a fallacy,[42] particularly given that the majority of offenders on parole complete their periods of parole successfully without any recidivism.[43] Furthermore, the public has a tendency to under-estimate the severity of the maximum sentences available to sentencing judges,[44] and the severity of the sentence actually experienced by the offender.[45] For example, the image held by the public of the conditional sentence is that of leniency, while offenders serving

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[40] *Ibid.* at 776-777.
[41] *Ibid.* at 777.
[42] *Supra* note 25 at 47.
[43] Micheline Reed & Julian Roberts, "Adult Correctional Services in Canada, 1997-98" in *The Juristat Reader: A Statistical Overview of the Canadian Justice System* (Toronto: Thompson Educational Publishing Inc., 1999) at 12. In fact, only 10% of offenders reoffended while on parole, and when recidivism occurred, the offences tended to be non-violent. The percentage of parolees that commit violent offences while on parole is only 1%. Nine out of ten members of the public surveyed over-estimated the rate of recidivism, and more than one half estimated the recidivism rate of parolees to be between 50% and 100%. *Ibid.*
[44] J. Roberts, *supra* note 29 at 45.
[45] *Supra* note 35 at 96.

the sentence often regard the conditions to be very restrictive.[46] Finally, the public tends to be misinformed with respect to the presence and impact of mitigating circumstances.[47]

When examining public opinion, the source of the information provided to the public, as well as the reliability of that information must be considered in order to understand how the opinion was generated. It is not surprising that approximately 95% of the public reported that their source of information about sentencing was the media.[48] In fact, five out of six people report that they closely follow crime related stories in the media.[49] As the dominant conveyor of information, exploration into the reliability of the media's coverage of sentencing matters is warranted.

The public itself has doubted the reliability of the sentencing information provided by the media.[50] There are two main public criticisms regarding reliability of information; the first relates to the types of cases selected by the media to broadcast or publish. The types of cases covered by the media are not exhaustive, there is a disproportionate emphasis on cases involving violence. Furthermore, the media are more inclined to cover cases where an excessively lenient sentence, rather than an excessively harsh sentence, is imposed.[51] This has a distorting effect by depriving the public of a full sentencing "database" from which a more informed opinion can be drawn.[52]

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[46] *Ibid.* at 101, 114.
[47] *Supra* note 25 at 78.
[48] J. Roberts, *supra* note 29 at 44.
[49] B. Bradford, *Criminal Justice Survey 1995: A Prince Edward Island Study of Public Opinion Related to Criminal Justice* (Prince Edward Island: author, 1995) at 21, cited in Jennifer Tufts, "Public Attitudes Toward the Criminal Justice System" in *Juristat* (Ottawa: Canadian Centre for Justice Statistics, Department of Justice Canada, 2000) at 3.
[50] *Supra* note 4 at 98. Of those with an opinion on this issue, 61% were of the view that the media did not provide them with adequate information about sentencing.
[51] *Ibid.* at 98.
[52] *Ibid.* at 95-96. For further discussion see J. Roberts, *infra* note 60 at 137. Roberts identifies the lack of a full sentencing database as a contributor to public dissatisfaction with the sentencing system.

The second public criticism regarding the reliability of the information conveyed by the media is the type of information deemed newsworthy in a given case. In 70% of its coverage, the media did not include the reasons for a particular sentence being imposed. Although 30% of media coverage referenced some reasoning, two-thirds of this latter proportion only provided a single reason rather than a comprehensive summary of the entirety of the sentencing judge's reasoning.[53] Instead, the media tends to focus on the selected sentence and the aggravating features of the offence. Other relevant information such as the submissions advanced by counsel or the content of a pre-sentence report are rarely deemed newsworthy.[54] Therefore, the public are deprived of important context that forms the basis for a judge's arrival at a particular disposition, and are denied a general educational base for sentencing.

The public's level of understanding and knowledge about sentencing is deficient. For example, when the public was canvassed regarding the definition of a conditional sentence, the results were dismal. Less than one half of the respondents chose the correct definition among the three offered, while the remainder chose definitions for bail or parole.[55] Researchers concluded that even with a sanction that had received intense media coverage since its inception in 1996, the result has not been increased public awareness.[56] Enhancing public understanding and acceptance of the Canadian sentencing system will be reliant on ensuring that public information sources, which are largely

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[53] *Supra* note 4 at 96-97.
[54] Julian Roberts and David Cole, "Introduction to Sentencing and Parole" in *Making Sense of Sentencing,* Julian V. Roberts and David P. Cole (eds.) (Toronto: University of Toronto Press Inc., 1999) at 22.
[55] *Supra* note 35 at 139.
[56] *Supra* note 28 at 202.

media, convey accurate and complete information.[57] Evidently, this has been deficient to date.

The amount of information conveyed to the public has impact on their perception of sentencing. Increasing the amount of information provided to the public regarding a sentencing matter increases the likelihood that they will not arrive at a harsher recommended sentence than that imposed by a judge.[58] More specifically, individuals who received additional background information pertaining to an offender were more likely to rank treatment as the most important goal of sentencing, while those provided with less information were more likely to rank punishment as the most important goal.[59] Given the media is the primary vehicle for public education of the criminal justice system, it may positively influence public opinion by augmenting the amount of information conveyed, such as where a sentence fits relative to the average sentence imposed for the particular crime.[60]

Analyzing the content of the story is an important and obvious exercise in any investigation into the reliability of the media, however, the headline of the story must attract particular scrutiny. It is undeniable that a percentage of the public only read the headline of a story, and even if the story itself is read in whole or part, the headline is designed to have a lasting impact on the reader. Consider the following headlines for coverage of cases where a conditional sentence was imposed:[61]

Law on Sentencing Far Too Lenient (*Globe and Mail*)

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[57] Canadian Bar Association, *Submission on Directions for Reform: The Green Paper on Sentencing, Corrections and Conditional Release* (Ottawa: Legal and Governmental Affairs, The Canadian Bar Association, 1991) at 2.
[58] Tufts, *supra* note 49 at 7.
[59] *Supra* note 34 at 352.
[60] J. Roberts, "Sentencing Trends and Sentencing Disparity" in *Making Sense of Sentencing,* Julian V. Roberts and David P. Cole (eds.) (Toronto: University of Toronto Press Inc., 1999) 137 at 157-158.
[61] *Supra* note 35 at 137.

Molester Shows Law's Weakness (*Edmonton Sun*)
Sentence Sparks Outrage (*Calgary Herald*)
Sex Offender Walks Free (*Ottawa Citizen*)
Fake Doctor Dodges Jail (*Toronto Star*)
No Justice in House Arrest for Child Molester (*Toronto Star*)
House Arrest for Rapist Upsets Victim Counselors (*Toronto Star*)
Man Confined to Home for Sex Assaults on Boy (*Toronto Star*)
Paralyzed Teen Lashes Out as Free-Ride Sentence (*Toronto Star*)
House Arrest in Fatal Hit and Run (*Toronto Star*)
No Jail for Sex With Student (*Ottawa Citizen*)
Hockey Duties Score Lighter Sentence (*National Post*)
We Bring 'Em in, Judges Send them Back Out (*Edmonton Sun*)
Rioter Dodges Jail (*Edmonton Sun*)
Cushy Sentence a Miscarriage (*Toronto Sun*)
Pimp Given 2 Years House Arrest: 3 Sold as Sex Slaves (*Toronto Star*)

It is apparent from these headlines that the media emphasize the most lenient aspect of the conditional sentence: that the offender remains in his or her home.[62] More importantly, each of the headlines conveys a negative image of the conditional sentencing regime, and the courts for employing it. The media must bear substantial responsibility for why public support for this disposition is low.[63]

An individual's view of a particular sentence in a given case is subjective. Not every individual or victim will view a particular sentence in the same light, or have comparable levels of satisfaction. However, a factor that is common to most, if not all, people and/or victims is that expectations largely govern reaction.[64] Therefore, in order

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[62] *Ibid.* at 137.

[63] Although the media bears significant responsibility for an uninformed and misguided public, it cannot bare sole blame. Research has demonstrated that even those who come into direct contact with the criminal justice system, including sentencing, report confusion. For example, in cases where a conditional sentence and/or probation are imposed, the majority of victims are confused by the meaning of the court order. In many cases, there is insufficient information contained in the court order, which leads to confusion. See Julian V. Roberts & Kent Roach, *Community-Based Sentencing: Perspectives of Crime Victims An Exploratory Study,* (Policy Centre for Victim Issues Research and Statistics Division Department of Justice Canada, 2004) at 1, 26-27. Similar confusion arises with respect to the purpose of a victim impact statement. Approximately one quarter of victims surveyed did not understand what the purpose of their victim impact statement was on sentencing. See Julian Roberts, "Victim Impact Statements and the Sentencing Process: Recent Developments and Research Findings" (2003) 47 C.L.Q. 365 at 387. These examples are evidence that the criminal justice system itself contributes to public confusion.

[64] J. Roberts and K. Roach, *supra* note 63 at 17.

to gain acceptance and public support, a sentencing system must be clear and comprehensive, and the vehicles for public education must endeavour to transmit complete and accurate information. The misperception of leniency is evidence that public confidence in sentencing is needlessly diminished.[65] In other words, if the public were furnished with accurate and complete information about the actual practice of criminal courts, levels of confidence would increase. Unfortunately, the same is not true with respect to the public perception of unwarranted disparity.

B) Disparity – A Sentencing Reality

Unwarranted disparity has been referred to as "warrantless or irrational variations in sentences for the same or similar crime committed in the same or similar circumstances."[66] Concern about excessive disparity was not ignored by Parliament when it codified the purpose and principles of sentencing in 1996. Section 718.2(b) purports to combat unwarranted disparity by stating that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances." As previously discussed, the principle of parity is included among the numerous codified principles with no guidance or hierarchy among them.

The issue of unwarranted disparity has also been addressed in prominent Canadian legal research. In the mid-1980s, the Canadian Sentencing Commission embarked upon research that targeted most, if not all, of the interest groups in the criminal justice system. In addition, it considered various statistically based research

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[65] *Supra* note 26. Research has shown that those with a perception of judicial leniency are likely to express less confidence in the courts. In particular, a 2003 poll revealed that when people were asked why they had a low confidence in courts, the most frequent justification was lenient sentencing. Moreover, some have argued that the media treatment of sentencing stories has created the perception of leniency. *Ibid.* at 97.

[66] *Regina v. McGinn* (1989), 49 C.C.C. (3d) 137 at para. 11 (Sask. C.A.); *Regina v. English* (1994), 31 C.R. (4th) 303 at para. 27 (Nfld. C.A.).

studies. The Commission ultimately concluded that there was unwarranted disparity in sentencing.[67] Almost two decades later, this conclusion has been maintained.[68]

Among the interest groups consulted, the public's view of sentencing was investigated by the Sentencing Commission. Approximately 75% of the public surveyed believed there to be unwarranted disparity in sentencing.[69] This figure is comparable to the recent statistics cited above, that 74% of the public consider sentencing to be unduly lenient.[70] The important distinction remains that the perception of excessive disparity held by the public is shared by other stakeholders in the criminal justice system, unlike the public perception of leniency. Interestingly, recent Australian research found that the public itself is not unified in its view of what is an appropriate sentence. In other words, there is substantial disparity between what members of the public deem to be an appropriate sentence in a given case.[71]

Police, criminal lawyers, offenders and even the judiciary also maintain the view that unwarranted disparity exists in Canadian sentencing. Commission research revealed that "there have been too many cases in which the police, and others, have felt that the sentence did not 'fit' the crime, whether the 'unwarranted disparity' took the form of an unduly lenient or harsh sentence."[72] Furthermore, over 80% of lawyers involved in criminal law practice, either as Crown Attorneys or defence counsel, were of the view

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[67] *Supra* note 4 at 77.
[68] *Supra* note 60 at 156. Roberts concluded that recent Statistics Canada data revealed there to be unwarranted disparity in sentencing.
[69] *Supra* note 29 at 32.
[70] *Supra* note 26 at 83.
[71] *Supra* note 39 at 777.
[72] *Supra* note 4 at 56-57.

that there was unwarranted disparity in their own jurisdiction.[73] This figure swelled to over 90% when asked whether there was unwarranted disparity across Canada.[74]

Offenders have also noted excessive disparity as problematic in sentencing and target their blame towards the judiciary. Almost the entirety of the sample of offenders surveyed by the Commission believed that some judges favour prison more than other judges, and that a single judge may be tough on some crimes and not others.[75] The overwhelming majority of offenders noted that there was geographical, racial and gender disparity in sentencing.[76] Support for the perception of unjustifiable geographical disparity is garnered from a study on long term imprisonment in Canada. Results demonstrated that the parole eligibility period for second degree murder was higher in Quebec than in other Canadian provinces.[77] Finally, offenders identified the existence of inexcusable socio-economic disparity with more than 75% believing that wealthy offenders received differential treatment for the same crime as non-wealthy offenders.[78]

Notwithstanding that judges are the frontline targets for blame, they have conceded that there is unwarranted disparity in sentencing. In research conducted for the Commission, 74% of the more than 400 judges surveyed stated that there was at least a

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[73] *Ibid.* at 56, 74. The John Howard and Elizabeth Fry Societies share the view that there is unwarranted disparity in sentencing. *Ibid.* at 58-59.
[74] *Ibid.* at 55, 71-74. The Canadian Bar Association was of the view that "examples of unwarranted disparity are too common to ignore." *Supra* note 57 at 29.
[75] John Ekstedt and Margaret Jackson, *Justice in Sentencing: Offender Perceptions: Research Reports of the Canadian Sentencing Commission* (Ottawa: Department of Justice Canada: Research and Development Directorate, Policy, Programs and Research Branch, 1988) at 21, 43.
[76] *Ibid.* at 20, 43. For a discussion of the existence of unwarranted geographic disparity see J. Roberts, *supra* note 60 at 151-154.
[77] *Supra* note 4 at 76. See Canada, Solicitor General, *Long Term Imprisonment in Canada.* Working Paper no. 1. (Ottawa: Ministry Secretariat, 1984) at 16-17. It would be absurd to conclude that the most serious cases of any particular offence gravitate to one province warranting higher sentences, instead disparity in sentencing is a more plausible explanation. *Supra* note 60 at 154.
[78] *Supra* note 75 at 19-20.

"fair amount of variation from judge to judge" in sentencing,[79] and 50% believed there to be unwarranted variation as between provinces.[80] These results are confirmed by the Palys and Divorski study published in 1986, that provided 200 provincial court judges with hypothetical scenarios to determine what sentence they would impose.[81] The results yielded variation in the sentences recommended for each hypothetical case, and for some cases, the range was dramatic. For example, there was a range from a suspended sentence to a 13-year custodial sentence for an armed robbery scenario.

The superficial explanation that emerges in much of the research and literature as to why excessive sentencing disparity exists, rests with the judiciary: judges possess different attitudes and approaches to sentencing.[82] Offenders share this conclusion as they do not view judges as "neutral, objective arbiter[s], but instead they ascribe to [them] idiosyncratic decision-making and sentence formation."[83] The Palys and Divorski study supports this view, as it found that the purpose selected by the judge for sentencing was related to the severity of the selected sentence.[84] Similarly, John Hogarth's early research concluded that the perception and philosophy of the judge accounted for approximately 50% of the variation in sentence length between judges.[85] More recently, when asked to sentence from a deterrence perspective, judges were shown to have selected very different sentences from those asked to apply a rehabilitative perspective.[86] However, blaming judges for unwarranted disparity in sentencing does not sufficiently

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[79] *Supra* note 4 at 73.
[80] Jean-Paul Brodeur, Renate Mohr, Julian Roberts & Karen Markham, *Views of Sentencing: A Survey of Judges in Canada – Research Reports of the Canadian Sentencing Commission* (Ottawa: Department of Justice, Research and Development Directorate, Policy, Programs and Research Branch, 1988) at 2.
[81] *Supra* note 4 at 75.
[82] *Supra* note 80.
[83] *Supra* note 60 at 150.
[84] *Supra* note 4 at 75.
[85] *Supra* note 60 at 155.
[86] *Supra* note 54 at 12.

penetrate the problem. The focus must be directed to our system which demands that judges make unilateral choices with little guidance. As the Commission concluded, the system does not merely tolerate excessive disparity, the system causes it.[87]

The depth of the problem of unwarranted disparity in sentencing was recognized in *Charters*.[88] The Court expressed frustration with the state of sentencing in Canada, and ultimately stated that there was a "crisis" that required immediate attention. The identified crisis was that sentencing law had been unsettled since the Supreme Court of Canada extended a very high level of deference to sentencing judges and correspondingly reduced the role of the appellate courts. The effect has been wide disparity "with apparently nothing other than the individual views of the sentencing judge to explain the difference."[89] What emerges from the obiter commentary in this decision is that there is a tremendous pressure on judges to impose an appropriate sentence, but there exists little, if any, support or guidance in the system. Recent research conducted by Roberts, Doob and Marinos has revealed concurring results, that judges have identified a need for more guidance from appellate courts.[90]

C) Positive Interpretation on the Existence of Disparity in Canada – Evidence of Canada's Commitment to Individualized Sentencing

The existence of disparity in sentencing is not entirely negative as it reflects the criminal justice system's commitment to an individualized approach. Parliament's intent in this regard is apparent upon consideration of the sentencing provisions in the *Code*. One of these provisions provides for pre-sentence reports. These reports are prepared by

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[87] *Supra* note 4 at 73.
[88] *Supra* note 13 at para. 14.
[89] *Ibid.* at para. 14.
[90] *Supra* note 11 at 7, 8.

probation services and provide detailed information regarding the particular offender being sentenced. A further example of Parliament's dedication to an individualized approach is the requirement in the *Code* that judges take into consideration aggravating and mitigating factors.[91] Both of these examples demonstrate that Canada's sentencing regime was intended to be adaptive to the unique circumstances of each offence and offender.

The importance of individualization of sentencing has been reinforced by the Supreme Court of Canada in several landmark sentencing decisions. In *Regina v. M.(C.A.),* the Court stated the following:

> It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime... Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction.[92]

Furthermore, in *Regina v. Proulx,*[93] the Court noted that the rationale behind the individualized process stemmed from the fundamental principle of proportionality. In particular, the Court held that "[p]roportionality require[d] an examination of the specific circumstances of both the offender and the offence so that the 'punishment fits the crime'."[94]

An individualized approach to sentencing is essential to ensuring equality, which is a constitutionally guaranteed right afforded to every Canadian citizen.[95] The Supreme Court has held that to treat all citizens identically without regard for individual

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[91] *Supra* note 1 at s. 718.2(a). There is a non-exhaustive list of aggravating factors provided in section 718.2(a) of the *Code.* The common law also provides for other factors, both aggravating and mitigating.
[92] (1996), 105 C.C.C. (3d) 327 at para. 92 (S.C.C.) [hereinafter *M.(C.A.)*].
[93] (2000), 140 C.C.C. (3d) 449 (S.C.C.) [hereinafter *Proulx*].
[94] *Ibid.* at para. 82.
[95] Section 15 of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

circumstances does not achieve equality.[96] As noted by Tim Quigley, the legal concepts arising out of equality jurisprudence are equally applicable to the criminal justice context.[97] Indeed, to achieve fairness and equality, a sentencing system must permit variations in sentence on account of differing circumstances.

A sentencing regime that is responsive to the unique facets of different cases also serves to enhance public confidence in the administration of justice. Recent research pertaining to mandatory minimum sentencing has revealed the following:

> Perhaps the most interesting finding to emerge from this research is the strong public support for individualized sentencing ... There is a clear understanding by the public that a mandatory penalty that imposes the same sentence on all offenders, regardless of variation in the seriousness of the offence or levels of culpability, will inevitably create injustice. As legislators trip over themselves in their haste to increase the number and severity of mandatory sentences of imprisonment in order to promote public confidence in the courts, they would do well to consider the views of the public as they emerge from systematic research such as we have reported in this article.[98]

Although mandatory minimum sentences are among the more rigid of examples, it is the general principle of inflexibility that gains disfavour with the public. Therefore, the preservation of a measure of individualism in the reform to the current system would assist in promoting public respect for sentencing, which as discussed in detail above, must be a reform priority.

Determining the appropriate balance between extending some deference to sentencing judges while increasing the structure of the sentencing system to reduce unwarranted disparity is arguably an imperfect exercise which has been referred to as a

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[96] *Andrews* v. *Law Society (British Columbia),* [1989] 1 S.C.R. 143 at paras. 26, 27.
[97] Tim Quigley, "New Horizons in Sentencing?" (1996) 1 Can. Crim. L. Rev. 277 at 291.
[98] *Supra* note 26 at 99.

tension between flexibility and the rule of law.[99] The importance of this delicate balancing process towards attaining equality is captured below:

> [Individualization] is a process which has been going on for a very long time, although it has only recently acquired a distinctive name. It has been the cause of most of the criticism of the lack of uniformity in sentences; but I submit that only through its application can true equality of sentences be attained and I think this fact is becoming generally accepted. In the past judges and magistrates have perforce applied this principle very imperfectly because they were rarely supplied with, and had no means of acquiring, the necessary facts concerning the individuals they had to sentence.[100]

Harmonizing an individualistic approach with the reduction of unwarranted disparity requires not only that judges be afforded sufficient information about the case and be mandated to provide comprehensive reasons for sentence,[101] but importantly, it requires that judicial discretion be preserved. There is a subjective component to assessing the unique circumstances in a given case which often involves an element of moral judgment.[102] As observed by Lord Justice Laws, without sufficient discretion, judges would have no means to react to the unique circumstances in a given case, and unfairness would result:

> [T]he closer Parliament comes to legislating for specific cases, the closer we are to rule-book justice. Rule-book justice is barbarous. It treats the criminal not as an individual, but merely as a member of a class, to be dealt with according to the rules set to govern the class. If the State systematically looks at its citizens, even the most flawed among them, in that grim light, it looks at them as things not people.[103]

The need for a flexible sentencing system that provides the appropriate balance between judicial discretion and individualism can be illustrated by reference to some practical examples. Consider a scenario where a group of individuals all charged with

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[99] Andrew Ashworth, *Sentencing and Criminal Justice* (4th ed.) (London: Butterworths, 2005) at 49.
[100] *Supra* note 12 at 473.
[101] *Supra* note 18 at 32.
[102] Ralph Henham, *Criminal Justice and Sentencing Policy* (Aldershot, England: Dartmouth, 1996) at 138.
[103] Lord Justice Laws, "The Future of Sentencing: A Perspective from the Judiciary" in P.H. Sedgwick, ed., *Rethinking Sentencing: A Contribution to the Debate* (London: Church House Publishing, 2004) at 67.

one count of theft under $5000 enter pleas of guilty. In practice, the matter proceeds to 'plea court' where the presiding justice will encounter many other sentencing matters on that same occasion. Heavy dockets leave little time to devote to each matter; as a result the amount of background information provided to the court regarding the offenders is minimal. Therefore, the distinctions as between offenders will not be presented to the court. Assuming the admitted facts reveal that all accused assumed a similar role in the commission of the offence, all offenders will be treated in the same manner by the sentencing judge. In effect, there will be little, if any, disparity between the sentences imposed on each of the accused.

In contrast, some cases receive a substantial amount of time and attention from the court on sentencing. For example, consider a case of a man charged with defrauding his employer for several hundred thousand dollars to support his family after incurring a substantial gambling debt. In light of the seriousness of the offence, namely the monetary value of the fraud and that it was a breach of trust, this offence would attract a custodial sentence. However, the context of the offence and the circumstances of the offender may render a conditional sentence of imprisonment appropriate. The sentencing judge may well require that a presentence report be prepared and that a psychiatric assessment be conducted. Undoubtedly, this example requires a flexible approach to sentencing that allows the sentencing judge to permeate the unique myriad of circumstances.

In the current system, however, the sentence imposed for the previous example would vary depending on which judge imposed it. Unwarranted disparity exists because different judges, armed with the same information about the offence and the offender,

approach cases from different starting points. In other words, judges are not united in their views of what the going rate is for a particular offence. Furthermore, the starting points of individual judges are not articulated, and are therefore virtually impossible to scrutinize on appeal. In effect, the reality of unwarranted disparity is that the sentence an accused would receive in one courtroom is likely to differ from that received in another courtroom.

Lawyers practicing in the criminal justice system have adapted to the existence of unwarranted disparity by embarking on judge shopping. This practice is aptly described as procedural maneuvering in order to either avoid or secure certain judges on account of perceived partiality.[104] Although there is no empirical evidence as to whether or not the public are aware of this practice, courts have held that it discredits the reputation of the justice system.[105] Therefore, in order to minimize unwarranted disparity and the practice of judge shopping, reform to the current system must include a uniform approach to sentencing where all judges notionally begin from the same starting point. In addition, sufficient discretion must remain so as to enable courts to appropriately respond to the myriad of circumstances with which they are confronted. A measure of individualism not only heightens public respect for the administration of justice, but it also extends loyalty to equality rights and the fundamental principle of proportionality, all of which are priorities in the vision of sentencing reform in Canada.

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[104] In *Regina v. Ng,* [2003] A.J. No. 489 at paras. 123-124, 148 (C.A.), Chief Justice Fraser referred to judge shopping as "a growth industry". Moreover, she stated that this practice has had a negative impact on public confidence in the criminal justice system. This case addressed the issue of judge shopping in the context of re-election from a judge and jury trial to one of judge alone upon learning of the identity of the presiding judge. However, the practice and concerns are equally prevalent with respect to guilty pleas and sentencing.

[105] *Ibid.* Regardless of the extent to which the public are informed about the practice of judge shopping, stakeholders within the system are aware of this practice. See also *Regina v. Regan* (2002), 161 C.C.C. (3d) 97 at paras. 59-61 (S.C.C.). This case also addressed the issue of judge shopping in the context of re-election.

D) Adopting a Uniform Approach to Sentencing to Minimize Disparity and Promote Individualized Sentencing

The notion of a continuum is a useful concept to demonstrate the balance between structure and discretion in sentencing. A model that promotes individualized sentencing by providing judges with unconstrained discretion would be located at one end of the continuum, while mandatory sentences are at the other end. As previously discussed, the current system has fostered an unacceptable level of disparity which has depleted public respect for the sentencing system. The current system can therefore be oriented along the continuum favouring individualization over uniformity in sentence. It will be demonstrated in part III, that this imbalance has been enabled by the high degree of discretion that has been afforded to sentencing judges by Parliament and the Supreme Court of Canada.

In order to shift the balance between these two poles of the continuum, the current system requires that judicial discretion be structured. In order to inject structure without removing discretion altogether, a uniform approach to sentencing must be adopted. There are two options to achieve a uniform approach to sentencing: increase the power of the appellate courts to promote guideline jurisprudence, or enact legislative guidelines. In part III of this thesis it will be demonstrated that Canadian appellate courts have momentum to assume the role of guiding sentencing judges towards a uniform approach to sentencing. By tracing appellate review of sentencing in Canada from the Supreme Court of Canada's deference trilogy in the 1990s through to its current state, it will be shown that appellate courts are currently well situated to increasingly structure judicial discretion. In contrast, it is argued that Parliament's action in the area of sentencing reform has not demonstrated that legislative guidelines are a realistic option.

It is conceded that Parliament has substantially revised some aspects of sentencing legislation in the last few years. For example, in 2007 Parliament restricted the availability of the conditional sentence of imprisonment. The *Code* was amended to state that serious personal injury, terrorism or criminal organization offences are all ineligible for the conditional sentencing regime.[106] Similarly, Parliament has excluded a variety of other offences from the conditional sentencing regime by adding mandatory minimum penalties of imprisonment, regardless of whether they are prosecuted by way of indictment or summary conviction. These include sexual interference, invitation to sexual touching, sexual exploitation, making, distributing, possessing or accessing child pornography, as well as a variety of firearms related offences.[107] Notwithstanding Parliament's willingness to make significant amendments to some sentencing provisions, these legislative initiatives do not remotely resemble the reform that would be required to enact a legislative guidelines model.

Legislating sentencing guidelines as a means of constraining judicial discretion has been employed in the United States and Britain. Typically, the guidelines take the form of a numerical grid which is based on quantifications of the seriousness of the offence and the criminal history of the offender.[108] The range of sentence that is available to the sentencing judge after applying the facts of the particular case to the grid

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[106] Bill C-9, *An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment)*, S.C. 2007, c. 12, s. 1. Section 752 now defines serious personal injury offence as (a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving (i) the use or attempted use of violence against another person, or (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person, and for which the offender may be sentenced to imprisonment for ten years or more, or (b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).

[107] *Supra* note 1 at ss. 85(3), 151(a), 152(a), 153(1.1)(a).

[108] For example see Nicholas N. Kittrie et al., *Sentencing, Sanctions and Corrections: Federal and State Law, Policy and Practice,* 2nd ed., (New York: Foundation Press, 2002) at 220.

system is extremely narrow in comparison to the range of sentence available to Canadian judges pursuant to the *Criminal Code.* Sentencing guidelines systems apply to all criminal offences and are either presumptive or voluntary. Presumptive guidelines are binding on sentencing judges, such that any deviations from the recommended sentence must be accompanied by sufficient reasons. Moreover, there is a right enjoyed by both the defence and prosecution to have the reasons for departure from a presumptive sentence reviewed by an appellate court.[109] In contrast, voluntary guidelines are merely advisory and have no right of appeal upon a departure by the sentencing judge.[110] In practice, not all judges utilize advisory guidelines, and even fewer provide reasons for departing from the recommended sentence.[111]

There are a variety of different models of guidelines in force across the United States.[112] Many of these models have endorsed non-custodial sentencing options in order to minimize incarceration rates, [113] while others employ a more harsh approach, such as the federal model, which was regarded as the most severe in that country.[114] In 1984, Congress passed the *Sentencing Reform Act*[115] which created the United States

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[109] *Ibid.* at 220-221.
[110] *Ibid.*
[111] *Ibid.*
[112] By 1996, all states had some version of mandatory minimum sentencing laws, 16 states and the federal system had implemented, or were about to implement, presumptive or advisory sentencing guidelines and five states had adopted determinate sentencing systems. *Supra* note 108 at 214. Determinate sentencing has been referred to as "truth in sentencing" as its purpose is to make offenders aware of what sentences they can expect to serve for committing specific crimes. Furthermore, offenders are advised at the time of sentencing or shortly thereafter what the length of the prison sentence would be, and parole is abolished. See Michael Tonry & Kathleen Hatlestad, *Sentencing in Overcrowded Times* (New York: Oxford University Press, 1997) at 110. See also Pamela L. Griset, *Determinate Sentencing: The Promise and the Reality of Retributive Justice* (Albany: State University of New York Press, 1991) at 2.
[113] In particular, Minnesota has demonstrated leadership in this regard by adopting a goal of not exceeding 95% capacity in their penal institutions. *Supra* note 108 at 224.
[114] John Gibeault, "While the Feeney Amendment's Tightening of Federal Guidelines Has Judges Steaming, States are Moving to Loosen Up Strict Regimens" (2004) 90 A.B.A. J. 55 at 56. The federal guidelines system was ruled unconstitutional and is now merely advisory in nature, *infra* note 119.
[115] Now codified at 18 U.S.C.A. §§ 3551-3586, 28 U.S.C.A. §§ 991-998.

Sentencing Commission and mandated it to develop sentencing guidelines for federal crimes, to be enacted by the legislature.[116] Although the federal guidelines were narrow and initially mandatory, departures were permissible with appropriate reasons from the sentencing judge, such as the existence of an aggravating or mitigating circumstance that was not adequately accounted for in the guidelines.[117] The federal guidelines were toughened by amendments in 2003, which reduced the grounds for which downward adjustments to the presumptive sentences could be made and removed all deference to sentencing judges when they departed from the guidelines.[118] The latter change effectively granted appellate courts the authority to conduct a *de novo* review of sentence. However, the United States Supreme Court recently held the federal guidelines to be unconstitutional,[119] rendering them advisory and restoring a reasonableness standard of deference to sentencing judges.[120] The Court's remedy was propelled by its view that latitude was essential to minimizing disparity, which was Congress' main goal behind the Guidelines.

The British experience, until relatively recently, was similar to that which currently exists in Canada: sentencing judges were afforded significant freedom to fulfill their discretionary assignment. However, the English Court of Appeal has historically been more active than its Canadian counterparts, as its mission since the 1960s was to achieve uniformity and consistency in sentencing. Some of the contributing factors for

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[116] Many states have also set up commissions to undertake this role. For example, see Minnesota Sentencing Commission at www.msgc.state.mn.us.
[117] See *United States v. Aguilar-Pena,* 887 F.2d 347 at 349 (1st Cir. 1989).
[118] *Supra* note 114. The grounds which were deemed no longer permissible for downward adjustments include: a defendant's acceptance of responsibility, a guilty plea or acceptance of plea bargain, and a payment of restitution to the extent ordered by the court. There were additional areas subject to limitations which include: family support obligations, coercion and duress and a defendant's diminished capacity. *Ibid* at 59.
[119] *United States v. Booker* and *United States v. Fanfan,* 125 S.Ct. 738 (U.S. 2005).
[120] *Ibid.* at 791.

this mandate included: increased academic interest in criminal law generally, the emergence of publications containing sentencing decisions and related commentary, heightened crime rates, increases in prison population, public discontent with perceived sentencing disparity and frequent introductions of sentencing related legislation.[121] The Court of Appeal's role was not limited to developing and articulating sentencing principles, but included the delivery of guideline judgments.[122] Guideline judgments provide an appropriate starting point sentence for particular offences and convey how to adjust the sentence to account for aggravating and mitigating factors.[123] The exercise of formulating sentencing policy was one which Parliament had historically been content to delegate to the courts.[124]

Beginning in the late 1990s, British Parliament began to shift the balance toward increased structure in sentencing. For example, the *Crime (Sentences) Act 1997*,[125] removed discretion from the judiciary by implementing mandatory "two strikes" and "three strikes" provisions.[126] Furthermore, Parliament created the Sentencing Advisory Panel ("Panel") through the enactment of the *Crime and Disorder Act 1998*.[127] The Panel

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[121] D.A. Thomas, "The Role of the Court of Appeal in the English Sentencing System" (1998) 10 Fed. Sen. Rep. 259. See also Ian Dunbar & Anthony Langdon, *Tough Justice: Sentencing and Penal Policies in the 1990s* (London: Blackstone Press Ltd., 1998) at 66-69.

[122] *Ibid.* See also Martin Wasik, *Emmins on Sentencing,* 4th ed. (London: Blackstone Press, 2001) at 365.

[123] Gavin Dingwall, "The Court of Appeal and 'Guideline' Judgments" (1997) 48 N. Ir. Legal Q. 143 at 144. Guideline judgments enable the Court of Appeal to confront the "interrelationships of sentences for different forms of an offence" and provide sentencing judges with a framework for sentencing contained within one judgment rather than leaving them to reconcile a variety of appellate judgments. See Andrew Ashworth, "Techniques of Guidance on Sentencing" (1984) Crim. L. Rev. 519 at 521.

[124] *Supra* note 121 at 259.

[125] (U.K.), 1997, c. 43.

[126] Andrew Ashworth, "Legislature vs. Judiciary: The Struggle for Supremacy in English Sentencing" (1998) 10 Fed. Sen. Rev. 275 at 276-277. Section 2 of the *Crime (Sentences) Act 1997,* set out a mandatory life sentence for a person convicted of a second serious offence ("two strikes") unless there existed "exceptional circumstances." Examples of serious offences included attempted murder, attempted rape and robbery with a firearm. Sections 3 and 4 of the *Crime (Sentences) Act 1997,* provided for a mandatory minimum sentence of incarceration of seven and three years, for a third ("three strikes") "class A drug trafficking offence" and a third "domestic burglary" respectively.

[127] (U.K.), 1998, c. 37.

was given a mandate to serve as an independent advisory body to assist the Court of Appeal in revising and creating presumptive guidelines.[128] Eventually, Parliament's asserted its supremacy over the judiciary with the enactment of the *Criminal Justice Act 2003.*[129] This statute outlined minimum or presumptive sentences for serious offences and created the Sentencing Guidelines Council ("Council"), which was to be supported by the Sentencing Advisory Panel. This effectively removed the Court of Appeal from any involvement in the development of sentencing guidelines, as this role is now assigned to the partnership of the Panel and Council. The British sentencing guidelines came into force on January 10, 2005, marking the beginning of a new sentencing era in Britain.[130]

Recommendations for structuring judicial discretion in Canadian sentencing have surfaced at various times including in 1964 by former Supreme Court of Canada Justice Cartwright,[131] and in 1988 by the Sentencing Commission.[132] By the mid 1980s, concerns pertaining to unwarranted disparity prompted appellate courts to articulate guidelines and principles to encourage lower courts to adopt a more uniform practice of sentencing. These articulations included, identifying relevant factors, determining the appropriate weight to be ascribed to certain aggravating and mitigating facts and recommending an appropriate sentence for a given offence. The leader in this regard has been the Alberta Court of Appeal and its use of "starting points". This approach provides sentencing judges with a presumptive sentence for a typical case, from which upward or

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[128] *Ibid.* at section 81. The Panel came into existence in 1999, and by early 2001 it had begun to advise the Court of Appeal. See Wasik, *supra* note 122 at 373. The Court of Appeal was required to consult with the Panel each time it frames or revises guidelines. *Crime and Disorder Act 1998,* s. 80. See also Ashworth, *supra* note 99 at 54.

[129] (U.K.), 2003, c. 44.

[130] For information on the Panel and Council, see http://www.sentencing-guidelines.gov.uk/index.html.

[131] In his opening address to a sentencing conference held at the Centre of Criminology, University of Toronto. Cartwright, J. *Proceedings of the National Conference of Judges on Sentencing* (Toronto: Centre of Criminology, University of Toronto, 1964) at 1.

[132] *Supra* note 4 at 81-85.

downward adjustments are then made in response to applicable aggravating and mitigating factors.[133] In part III, the starting point approach is analyzed and it is concluded that guideline judgments from appellate courts offer the most practical and realistic means of attaining a uniform approach to sentencing in Canada.

III. Enhancing the Role of Appellate Courts Towards a Uniform Approach to Sentencing

A) The Supreme Court of Canada, Jurisdiction and Sentence Review

Because appeals serve to constrain judicial power and provide confirmation that a case was properly decided, it is somewhat surprising that the legal right to appeal criminal matters is relatively recent in Canada. Appellate review began with the enactment of the *Criminal Code* in 1892.[134] Initially, the avenue to appeal conviction[135] was significantly more expansive than that pertaining to sentence,[136] as the latter was limited to an assessment of legality. This changed in 1921, when a private member's bill passed rapidly through Parliament allowing for sentences to be reviewed on the basis of their fitness.[137] The relevant sections of the *Code* underwent minor amendments in 1923,[138] and 1955,[139] and the current provision is found in section 687(1) of the *Code*:

> 687. (1) Where an appeal is taken against sentence the court of appeal shall, unless the sentences is one fixed by law, consider the fitness of the sentence

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[133] See *Regina v. Sandercock* (1985), 22 C.C.C. (3d) 79 (Alta. C.A.) [hereinafter *Sandercock*]. The Court articulated the starting point methodology and then applied it to the offence of sexual assault.
[134] *Criminal Code, 1892* (U.K.), 55 & 56 Vict., c. 29.
[135] *Ibid.* at s. 742.
[136] *Ibid.* at s. 744(4).
[137] *An Act to Amend the Criminal Code,* S.C. 1921, c. 25, s. 22, amending R.S.C. 1906, c. 146. The bill passed through the Senate in three successive years prior to being heard by the House of Commons in 1921. *House of Commons Debates,* Vol. II (March 9, 1921) at 1857 (Thomas Mitchell Tweedie). Prior to second reading, the Minister of Justice insisted that judges and provincial attorneys general be consulted. The feedback provided by them was almost entirely positive. *House of Commons Debates,* Vol. V (April 11, 1921) at 4343 (Hon. C.J. Doherty).
[138] *An Act to Amend the Criminal Code,* S.C. 1923, c. 41, s. 9.
[139] *An Act Respecting the Criminal Law,* S.C. 1953-1954, c. 51, s. 593.

appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,

(a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or

(b) dismiss the appeal.

(2) A judgment of the court of appeal that varies the sentence of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court.[140]

The standard of review was immediately regarded as malleable by appellate courts across Canada, which led to many decades of diverse approaches to sentence appeals.[141] By the early 1970s there remained at least two distinct approaches as recognized by the Saskatchewan Court of Appeal in *Regina v. Morrissette.*[142] The Court referred to the "laissez-faire" approach, where intervention was only justified if the sentence "shocked the conscience of the court" as being clearly inadequate or excessive, or if the trial judge committed an error of law or principle. The second approach noted in *Morrissette* involved a comprehensive consideration of the fitness of the sentence, in which a broader discretion was exercised. It was not until the mid 1990s that the Supreme Court of Canada pronounced a unified approach to reviewing sentence.

The *Criminal Code* does not provide an avenue for sentence appeals to the Supreme Court of Canada, instead jurisdiction is found in section 40 of the *Supreme Court Act* as follows:

40. (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of

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[140] *Supra* note 1. Equivalent rights are extended to summary conviction offences, see sections 813 and 822(6). Unlike sentence appeals for indictable offences which are heard by the court of appeal, summary conviction sentence appeals are decided by a single judge of the superior court.

[141] The various and differing articulations of the standard of review for sentence appeals continued to be recognized as problematic to those attempting to reconcile them into the 1950s. See A.E. Popple, "Practice Note – 'Appeals Against Sentence'" (1951) 11 C.R. 208 at 208. This was acknowledged by the Quebec Court of King's Bench (Appeal Side) in *Cooper v. The King* (1951), 100 C.C.C. 242 at 243.

[142] (1970), 1 C.C.C. (2d) 307 at 312 [hereinafter *Morrissette*].

> final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.[143]

The Court dealt squarely with this jurisdiction in *Regina v. Gardiner*[144] as the law had previously been unsettled. Writing for the majority, Dickson J.A. (as he then was) held as follows:

> If policy considerations are to enter the picture, as they often do, there would appear to me to be every reason why this Court should remain available to adjudicate upon difficult and important questions of law in the sentencing process, in particular where there are, as here, conflicting opinions expressed in the provinces. Indeed we are asked, in effect, in this appeal to decide between two opinions of the Ontario Court of Appeal which are in direct conflict. I can see no advantage to litigants or to the orderly administration of justice in closing doors which do not have to be closed.
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> ...
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> Although I am of the view that the Court has jurisdiction to assess the fitness, i.e. the quantum of a sentence, I am equally of the view that as a matter of policy we should not do so. It is a rule of our own making and a good rule. But it does not go to limit the general appellate jurisdiction of this Court to determine questions of criminal law of national importance. The sentence here is questioned on a point of law. The appeal is against the principle, not the fitness, of a sentence. The legality of the sentence is at issue.[145]

B) The "Narrowing Trilogy" from the Supreme Court of Canada

In a trilogy of decisions released in three sequential years, the Supreme Court of Canada attempted to end the uncertainty surrounding the appropriate standard of review for sentence appeals. It began with the unanimous ruling in 1995 in *Regina v.*

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[143] R.S.C. 1985, c. S-26, s. 40.

[144] (1982), 68 C.C.C. (2d) 477 (S.C.C.). The primary issue before the Court was to determine the appropriate standard of proof for evidence advanced in a sentencing hearing.

[145] *Ibid.* at 506.

Shropshire.[146] The main issue in *Shropshire* was parole eligibility for an offender convicted of second-degree murder, yet the Supreme Court opted to confront the overarching issue of the appropriate standard for appellate review. It was held that the Court of Appeal erred in its conclusion that appellate intervention was justified unless specific reasoning was provided by the sentencing judge to explain why the parole eligibility date was set beyond the statutory minimum. The Court ruled that the method applied by the sentencing judge and the accompanying reasons constituted a proper exercise of discretion, and it therefore restored the sentence imposed at first instance.

In *Shropshire,* the Supreme Court found that the Court of Appeal's approach was interventionist and inappropriate as it employed an overly broad standard of review.[147] Instead, the Court held that:

> An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial 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. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable. [148]

The Court adopted the reasoning of the Nova Scotia Court of Appeal in *Regina v. Pepin*[149] that appellate courts must not consider whether they would have imposed a different sentence, but rather determine if the wrong principles were applied, or if the sentence was "clearly or manifestly excessive" or inadequate.[150] Furthermore, the

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[146] (1995), 102 C.C.C. (3d) 193 (S.C.C.) [hereinafter *Shropshire*].
[147] *Ibid.* at para. 44. In concluding remarks, the Supreme Court stated that the Court of Appeal had virtually substituted its opinion for that of the sentencing judge. *Ibid.* at para. 54.
[148] *Ibid.* at para. 46.
[149] (1990), 98 N.S.R. (2d) 238 at 251 (C.A.). See also *Regina v. Muise* (1994), 94 C.C.C. (3d) 119 at para. 83 (C.A.) [hereinafter *Muise*].
[150] *Supra* note 146 at para. 47. The Supreme Court also adopted the following passage from *Regina v. Gourgon* (1981), 58 C.C.C. (2d) 193 at 197 (B.C.C.A.): "[T]he matter is clearly one of discretion and unless patently wrong, or wrong principles applied, or correct principles applied erroneously, or proper

Supreme Court agreed that sentencing was "not an exact science," and that sentencing judges should only be expected to "arrive at a sentence that is within an acceptable range."[151] Consequently, an unreasonable sentence was held to be one that falls outside of the acceptable range.

One year after the release of *Shropshire,* the Supreme Court of Canada rendered its ruling in *Regina v. M.(C.A.).*[152] *M.(C.A.)* involved a variety of charges which the sentencing judge found to be "egregious".[153] Consequently, he imposed a cumulative sentence of 25 years imprisonment. Citing the principle of totality, the British Columbia Court of Appeal intervened and stated that in cases where life imprisonment was not an available sanction for any single offence, the cumulative sentence must be limited to 20 years unless otherwise warranted by special circumstances. The Supreme Court of Canada was satisfied that special circumstances existed so as to justify the original sentence, and noted that Parliament did not intend any upper limit on fixed term sentences.[154] The Court concluded that the Court of Appeal had been "overly interventionist,"[155] and that the sentence imposed at first instance was "just" and "not demonstrably unfit."[156]

In *M.(C.A.),* the Court furthered its support for the deferential standard that it had articulated in *Shropshire*. Specifically, the Court stated:

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factors ignored or overstressed, an appellate Court should be careful not to interfere with the exercise of that discretion of a trial Judge." *Ibid.* at para. 52.

[151] *Ibid.* at para. 48, citing *Muise, supra* note 149 at para. 83.

[152] *Supra* note 92.

[153] *Ibid.* at para. 20. The charges included sexual assault, incest, and assault with a weapon that were perpetrated against the children of the accused and spanned many years.

[154] *Supra* note 92 at paras. 20, 56, 94-96. The Supreme Court noted that the sentencing judge had deemed the offences to "transcend" the "parameters of the worst case."

[155] *Ibid.* at para. 94.

[156] *Ibid.* at paras. 94, 96.

> [A]bsent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the Criminal Code.[157]

Bolstering the justifications previously offered for this deferential standard, the Court added that sentencing judges maintain an advantageous position over appellate court judges even in cases where a guilty plea is entered. The benefit of having the direct assessment of counsel's submissions was cited as a justification by the Court, as was the following:

> A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community.[158]

Although the Supreme Court acknowledged the utility of appellate courts serving to minimize the disparity of sentences for similar offenders and similar offences, it added that deference must be exercised due to the discretion afforded to sentencing judges by Parliament. The Court stated that some disparity in sentences would be expected "across various communities and regions in this country, as the 'just and appropriate' mix of accepted sentencing goals [would] depend on the needs and current conditions of and in the particular community where the crime occurred."[159] It was therefore held that appellate courts should only intervene to minimize disparity "where the sentence imposed

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[157] *Ibid.* at para. 90.
[158] *Ibid.* at para. 91.
[159] *Ibid.* at para. 92.

by the trial judge is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes."[160]

The final decision in the 'narrowing trilogy' was *Regina v. McDonnell,*[161] in which the Supreme Court of Canada considered an intervention by the Alberta Court of Appeal to sentences imposed for sexual assault. The main issue arising on the appeal pertained to the sentencing judge's decision not to classify one of the offences as a "major sexual assault," thereby avoiding Alberta's starting point sentence for such an offence.[162] Although nothing was added by the Court to its articulation of the appropriate standard of review in *Shropshire* and *M.(C.A.),* the Court referred extensively to these authorities in arriving at the conclusion that the Court of Appeal had improperly intervened. The Court ruled that failing to place a particular offence within a judicially created category of assault for the purposes of sentencing could not be considered an error in principle that would warrant appellant intervention.[163] Furthermore, the Court stated that to decide otherwise would circumvent deference by allowing appellate courts to create categories of offences and intervene upon any deviation.[164]

In *McDonnell,* the Supreme Court held that the sentence was not demonstrably unfit even though it was at the "bottom of the scale."[165] The Court stated that a sentence will not be deemed demonstrably unfit where a court of appeal considers all of the relevant mitigating and aggravating circumstances and merely arrives at a different

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[160] *Ibid.*
[161] (1997), 114 C.C.C. (3d) 436 (S.C.C.) [hereinafter *McDonnell*]. Unlike in *Shropshire,* this was not a unanimous decision; rather, it was a 5-4 majority.
[162] The starting point approach adopted by the Alberta Court of Appeal is discussed in detail below.
[163] *Supra* note 161 at para. 32.
[164] *Ibid.*
[165] *Ibid.* at para. 25.

sentence than that imposed by the sentencing judge.[166] Furthermore, the Supreme Court dismissed the argument that the sentencing judge had failed to consider relevant factors, as all of those noted by the Court of Appeal had been explicitly dealt with in the reasons of the sentencing judge. In fact, the Court indicated that the Court of Appeal had mischaracterized the views of the sentencing judge in its ruling overturning sentence.[167] The practice of starting point sentencing is advanced as the most appropriate solution to address the problem of unwarranted disparity in Canadian sentencing. The starting point approach, and the Supreme Court of Canada's treatment of it, is discussed in detail below.

C) The Non-Judicial Response to the Trilogy

The Supreme Court of Canada's articulation of a narrow standard of appellate review of sentence in *Shropshire, M.(C.A.)* and *McDonnell* provoked significant criticism from both practicing and academic lawyers. The collective sentiment was that the Court had circumscribed the role of appellate courts beyond what Parliament defined in the *Code.* Some asserted that the Supreme Court's declaration was generally "unfaithful to the plain language of section 687, which merely requires that courts of appeal calibrate sentencing decisions for 'fitness,' not some more exacting standard."[168] Others voiced a more specific concern, for example, that an offender's right to have the fitness of the

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[166] *Ibid.* at para. 24.
[167] *Ibid.* at para. 22.
[168] Gary T. Trotter, "Appellate Review of Sentencing Decisions" in J. Roberts & D. Cole (eds.) *Making Sense of Sentencing* (Toronto: University of Toronto Press Incorporated, 1999) at 237. See also Gary T. Trotter, "*R. v. Shropshire:* Murder, Sentencing and the Supreme Court of Canada" (1996) 43 C.R. (4th) 288 at 297. Trotter argued that the Supreme Court stressed the need to be faithful to the statutory language dealing with second-degree murder in *Shropshire,* yet proceeded to "read in" a higher standard of review than that contained in the *Code.* See also Allan Manson, Patrick Healy & Gary Trotter, *supra* note 16 at 126-127, and Norris, *infra* note 169 at 218. Norris advanced further evidence that the narrowing is inconsistent with s. 687, as the latter permits appellate courts to receive evidence, if it so chooses, to assist in the consideration of fitness.

parole eligibility order for second degree murder considered by an appellate court was virtually "eviscerated," and that a finding that an order was "clearly or manifestly" inadequate or excessive would be scarce given that the available range is limited to 15 years.[169]

The thrust behind much of the criticism of the trilogy was directed at the Court's rationale for maintaining a high standard of deference to sentencing judges. The Court's emphasis on the advantage of assessing witnesses at trial was noted by several critics to be immaterial in many instances as the proportion of cases that proceed directly to sentencing following a guilty plea was high.[170] The Supreme Court maintained that advantage still existed in cases of a guilty plea because the sentencing judge was afforded the opportunity to assess counsel's submissions. However, an appellate court is furnished with a complete record of the proceedings, and in some cases profited from information that was unavailable at the initial sentencing hearing.[171] Similarly, critics challenged the Court's assertion that sentencing judges possessed "unique qualifications of experience and judgment from having served on the front lines of our criminal justice system."[172] Arguably, appellate court judges enjoy a more expansive view of the jurisdiction, and are often more experienced, with the benefit of "front-line" exposure as many had been appointed from the trial courts.[173] Finally, some questioned the Supreme Court's view that a sentencing judge's proximity to the community in which the offence was committed was an advantage warranting deference. Instead, it has been argued that

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[169] John Norris, "Sentencing for Second-Degree Murder: *R. v. Shropshire*" (1996) 1 Can. Crim. L.R. 199 at 216. Norris argued that it would be difficult to establish errors in principle because judges were not required to give reasons for these orders.
[170] See Ruby, *supra* note 18 at 118. See also Norris, *supra* note 169 at 217.
[171] Ruby, *ibid.*.
[172] *Supra* note 92 at para. 91.
[173] See Ruby, *supra* note 18 at 118. See also Manson, *infra* note 177 at 289, and Norris, *supra* note 169 at 218.

protection for the community may lead to judges being widely over reactive, and that a more balanced view may better serve the interests of justice and ensure that sentencing precedents are not limited to particular locales.[174]

It was forecasted that the Supreme Court's limitation on appellate intervention in sentencing would likely reduce the number of appeals being advanced and their success rate.[175] However, it was also acknowledged that this would be dependent on the manner in which appellate courts received the direction of the Supreme Court.[176] Furthermore, the particular timing of the trilogy was of significance, given that Bill C-41 was enacted in its midst. It was anticipated that lower courts would require guidance from appellate courts as to how to operate within the new sentencing framework as Parliament had provided the courts with no keys to resolve conflicts between the various sentencing objectives.[177] Moreover, some commentators concluded that Parliament intended for the appellate courts to assist in this function as they refrained from altering the legislated standard of review.[178] Unfortunately, there are no meaningful statistics that address the impact of the trilogy on the number and success rate of sentence appeals.[179]

The narrowing of appellate review was feared to increase unwarranted disparity of sentences. Trotter explained that "[s]trengthening the 'bottom-up' current in sentencing (in direct proportion to the weakening of the 'top-down' influence of the

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[174] *Supra* note 169 at 218.
[175] Trotter (1999), *supra* note 168 at 239-240. See also Quigley, *supra* note 97 at 282.
[176] Trotter, *ibid.* See also Manson, *infra* note 177. Manson asserted that *McDonnell* should be viewed as a response to the starting point regime and"recognition of the different sphere of institutional competence as between the appellate courts and Parliament." He stated that it should not discourage appellate courts from varying unfit sentences as they have done since 1921. *Ibid.*
[177] Allan Manson, "*McDonnell* and the Methodology of Sentencing" (1997) 6 C.R. (5th) 277 at 291.
[178] Trotter (1999), *supra* note 168 at 240.
[179] For discussion pertaining to the limited sentencing statistics, see Peter McCormick, *infra* note 281.

appellate courts) [could] only realistically result in more disparity in the lower courts."[180] Manson asserted that appellate courts must contribute to structuring discretion towards the reduction of unwarranted disparity. He opined that:

> Courts of appeal are expected to play a leading role in developing sentencing patterns within their jurisdictions and to endeavour to induce a level of consistency. Especially now with the new statements of purpose, objectives and principles in ss. 718 to 718.2 of the Code, appellate courts must be encouraged to consider the sentences with a view to building a jurisprudence of sentencing. Both the majority and minority decisions in *McDonnell* accept the utility of guidance from appellate courts.[181]

The reaction to the narrowing trilogy was not entirely negative. Undoubtedly, it was essential for the Supreme Court to rule on the proper role for appellate courts in reviewing the fitness of a sentence, as there had been divergent methods of review in place since 1921. The fact that some courts understood Parliament to have extended a *de novo* right of review, while others interpreted an extra-deferential standard, reflects the ambiguous language in the *Code*. Further, optimism was advanced that limiting the opportunity for appellate courts to intervene would create an atmosphere conductive to an increase in alternatives to incarceration.[182] Quigley opined that "[i]f initiatives at the community level are to be given a fair opportunity to succeed, the courts, particularly courts of appeal, must be prepared to defer to the collective judgment exercised by community members. The more limited scope of appellate review dictated by these two cases may well aid in this venture."[183]

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[180] Trotter (1999), *supra* note 168 at 240.
[181] *Supra* note 177 at 290.
[182] *Supra* note 97 at 282.
[183] *Ibid.* at 291.

D) An Examination of the Appellate Interpretations of the Trilogy

It is not a simple undertaking to assess the appellate jurisprudence that followed the Supreme Court of Canada's trilogy and ascertain whether, and to what extent, the approach to sentence review was altered. A significant and complicating factor to obtaining an accurate assessment is the fact that Bill C-41 was enacted in the midst of the trilogy, installing what has been referred to as a "cafeteria"[184] style sentencing framework. For example, the creation of the conditional sentence of imprisonment combined with the codification of restraint and restorative justice signalled a Parliamentary desire to decrease reliance on incarceration as a response to criminal behaviour.[185] Indeed, in *Regina v. Pierce*[186] the Ontario Court of Appeal accepted that with Bill C-41, Parliament clearly intended to encourage courts to be "more imaginative in structuring sentences that are less restrictive of the liberty of the person sentenced." However, alongside these reformist provisions are the more traditional aims of sentencing such as denunciation and deterrence. Therefore, beginning in the late 1990s, appellate courts were confronted with requests to reconcile seemingly competing sentencing aims and new sanctions, while simultaneously digesting the Supreme Court of Canada's pronunciation of the standard of review.

The message of heightened deference to sentencing judges was understood and accepted without any apparent difficulty by appellate courts across the country. Instead, as will be demonstrated, it was the process of defining the parameters for their new role that received particular focus in post-trilogy appellate jurisprudence. Fortunately, in

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[184] Andrew Ashworth, *Sentencing and Criminal Justice* (3rd ed.) (London: Butterworths, 2000) at 84.
[185] Allan Manson, "The Appeal of Conditional Sentences of Imprisonment" (1997) 5 C.R. (5th) 279 at 279.
[186] (1997), 114 C.C.C. (3d) 23 at para. 38 (Ont. C.A.).

Regina v. Stone,[187] the Supreme Court of Canada offered further assistance to appellate courts with this task. The Court reinforced its earlier statements in *M.(C.A.)* and *McDonnell* that appellate courts must minimize the disparity of sentences by fixing the appropriate range of sentence for particular types of offences.[188] The Court further held that these guideline judgments must clearly define the category of offence and the "logic behind the starting point [or range] appropriate to it" in order to effectively assist lower courts.[189] Mindful of the obligation of sentencing judges to assess the unique circumstances of each case, the Court maintained that the principle of uniformity must be balanced with the other sentencing principles and the circumstances of the case. With its judgment in *Stone,* it was unequivocal that the Supreme Court had not abolished a central role for appellate courts in sentencing.

As the task of maintaining the boundaries of sentence ranges was delegated to the appellate courts, many addressed the manner in which this would be achieved. However, it is apparent from the discussion below that this was regarded as an imprecise process. In *Regina v. Mafi,*[190] the British Columbia Court of Appeal stated that in many instances, the boundaries would be controlled by simply confirming a range that existed within appellate and lower court jurisprudence. However, the Court also accepted that there would be situations where appellate courts would alter a pre-existing range.[191] Although the Court held that appellate courts should not tinker with a sentence, it also stated that they should vary sentences that fall outside of the range, even if the sentence is only

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[187] (1999), 134 C.C.C. (3d) 353 (S.C.C.) [hereinafter *Stone*].
[188] *Ibid.* at paras. 244-245.
[189] *Ibid.* at para. 245. This point was not expressly stated by the majority in *McDonnell,* however in *Stone,* the Court adopted these dissenting comments of Justice McLachlin in *McDonnell.*
[190] (2000), 142 C.C.C. (3d) 449 (B.C.C.A.)[hereinafter *Mafi*].
[191] *Ibid.* at para. 12.

slightly outside. The justification for such intervention was that it would ensure that the sentencing range remained meaningful.[192] For example, if a sentence is slightly outside of the acceptable range for a particular category of offence and the appellate court extends deference to the sentencing judge, the decision to uphold the first instance sentence will simultaneously broaden the acceptable range.[193] Furthermore, regardless of whether a sentence is varied, or a range is altered, an appellate court's decision will have a precedential effect.[194]

Connected to the notion of controlling the boundaries of sentence ranges is the determination of how wide a particular range should be. In *Regina v. White,*[195] the British Columbia Court of Appeal held that the range must "incorporate the concepts inherent in the phrases used by the Supreme Court of Canada to describe an unfit sentence, namely, one which is 'clearly unreasonable', 'demonstrably unfit' and a 'substantial and marked departure' from the middle of the range."[196] The range should be narrow enough to be of assistance to trial judges in the exercise of their discretion and remain loyal to the principle of parity.[197] In *Mafi,* the Court stated that a range must be wide enough to allow sentencing judges ample freedom to exercise their discretion, yet sufficiently narrow that any variance by an appellate court within the range would amount to tinkering.[198] More recently, in *Regina v. Bernier,*[199] the Court held that the width of the appropriate range in a case would depend on how counsel defined the salient

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[192] *Ibid.* at para. 14.
[193] *Ibid.*
[194] *Ibid.* at para. 18. See also *Regina v. Pankewich,*(2002), 161 C.C.C. (3d) 534 at para. 19 (Sask. C.A.).
[195] [1998] B.C.J. No. 838 (C.A.).
[196] *Ibid.* at para. 19. See also *Mafi, supra* note 190 at paras. 14-15, where the Court states that in assessing whether there was a marked departure, regard must be had for the centre point of the range rather than the outside.
[197] *Ibid.*
[198] *Supra* note 190 at para. 15.
[199] (2003), 177 C.C.C. (3d) 137 (B.C.C.A.) [hereinafter *Bernier*].

facts, and that differences in proposed ranges should not be viewed as conflicting.[200] This commentary on the width of a given range demonstrates the lack of precision involved in developing and maintaining appropriate sentencing ranges.

In *Bernier,* the British Columbia Court of Appeal elaborated on its earlier comments with respect to the defective process of setting ranges.[201] The Court sat with five judges in order to resolve a perceived conflict between two of its prior decisions relating to home invasion sentencing and to address the appellate role with respect to setting ranges. The Court held that the system of setting ranges was flawed, as counsel "may not provide the Court with all relevant authorities; some of the authorities provided may reflect offences or offenders that are not truly similar; the authorities may be dated, or from jurisdictions where the particular crime is a greater or lesser problem; the authorities may define the relevant crime too broadly, or too narrowly; [or] the authority may simply be anomalous."[202] The Court emphasized the subjective and individualistic nature of sentencing and concluded that the articulation of ranges is to offer guidance to sentencing judges rather than serve as "rules."[203] It was therefore noted as preferable for courts to focus on the purposes and principles of sentencing and how they apply to a given case, rather than on ranges.[204]

Following the trilogy, appellate courts were also confronted with whether a sentence could be found to be demonstrably unfit although not outside of the appropriate range. This was more frequently encountered by appellate courts following the creation

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[200] *Ibid.* at para. 105.
[201] *Ibid.* at paras. 40-42, 74.
[202] *Ibid.* at para. 74.
[203] *Ibid.* The Court further stated that the ranges "are not, nor could they be, mandatory minimum and maximum sentences which demand compliance by trial judges." *Ibid.*
[204] *Ibid.* at paras. 75, 96.

of the conditional sentence of imprisonment, as the issue pertained to whether a traditional incarceration setting was appropriate rather than one based in the community. In addition to the elaboration provided by the Supreme Court in *Shropshire* which equated the demonstrably unfit standard with an unreasonableness standard, appellate courts were assisted in this challenge by the use of a dictionary. Among the dictionary definitions for "demonstrably" were "apparent," "palpable," "to manifest clearly," "certainly" and "unmistakably".[205] The Saskatchewan Court of Appeal referred to these dictionary definitions in *Stroshein*, and examined similar cases to determine if conditional sentences had been imposed. The Court ultimately found no comparable cases within the jurisdiction involving the imposition of a conditional sentence, and that appellate courts in other jurisdictions were overturning conditional sentences imposed in similar cases.[206] It was therefore determined that a sentence could be demonstrably unfit notwithstanding it fell within the acceptable range.[207]

Analysis of post-trilogy appellate decisions with a dissent furthers the conclusion that the Supreme Court of Canada pronounced a standard of review that is subject to interpretation. This analysis reveals that a lack of cohesiveness as between jurists has emerged within some appellate courts. For example, in *Regina v. Shahnawaz*,[208] there were widely divergent views on the purpose of appellate review. This case involved a Crown appeal of a conditional sentence in a heroine trafficking case, in which the accused had tendered evidence of post traumatic stress disorder, including severe cognitive impairment, as a result of years of torture. The majority found that the

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[205] *Regina v. Stroshein* (2001), 153 C.C.C. (3d) 155 at para. 7 (Sask. C.A.) [hereinafter *Stroshein*]. See also *Pankewich, supra* note 194 at para. 32.
[206] *Ibid.* at paras. 14-15.
[207] The acceptable range being a custodial sentence that is two years less a day or shorter.
[208] (2000), 149 C.C.C. (3d) 97 (Ont. C.A.).

sentencing judge over-emphasized the personal circumstances of the offender. Further, it found the sentence to be manifestly unfit as the correct range was 9 to 12 years imprisonment. As a result, the majority increased the offender's sentence to six years in custody.

In contrast, in his dissent, Justice Laskin was of the view that intervention was not justified as there was no error in principle and the sentence was not unreasonable.[209] Citing *McDonnell* and *Stone,* Laskin J.A. stated that there were cases in which a sentencing judge will depart from a "customary range" and that this decision is entitled to deference. He found the sentencing judge's emphasis on the accused's personal circumstances to have been "within the realm of reasonableness"[210] and upheld the sentence as follows:

> An appellate court is not justified in interfering with a sentencing judge's discretion merely because it would have given different weight or emphasis to a relevant factor. The weighing of relevant factors, the balancing process, is what the exercise of discretion is all about. Only if the sentencing judge exercises that discretion unreasonably – by, for example, overemphasizing one factor or not giving enough weight to another – should an appellate court interfere. In this exceptional case, the trial judge did not exercise her discretion unreasonably. See *R. v. McKnight* (1999), 135 C.C.C. (3d) 41 at 53-54 (Ont. C.A.).[211]

Thus, although the majority and the dissent agree that overemphasizing a factor in sentencing warrants appellate intervention, they differ on how much overemphasis warrants appellate review. The majority endorses a *de novo* approach, while the dissent suggests that the decision of the sentencing judge warrants considerable deference. In addition, the majority regards sentence deviation outside of the prescribed range as a strong indicator of demonstrable unfitness, while the dissent does not.

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[209] Laskin J.A. also noted that the Crown's position was one of leniency and that "[n]othing justifies this court increasing the length of the sentence asked for by the Crown, let alone tripling it as my colleague proposes. *Ibid.* at para. 38.
[210] *Ibid.* at para. 66.
[211] *Ibid.* at para. 74.

For some appellate courts, the trilogy marked a departure from past practice. The Saskatchewan Court of Appeal has repeatedly and expressly stated that the trilogy dramatically altered the manner in which it has approached sentence review historically. In *Regina v. Laliberte,*[212] the Court stated that prior to the trilogy it had not applied a "strong deferential approach" to sentence review. The Court also acknowledged its new narrow role and noted that the combination of the deferential standard with the Canadian commitment to individualized sentencing led to "considerable latitude for disparity of sentences and for the application of the appropriate sentencing factors."[213] The Court cautioned appellate courts against varying a sentence on the basis of disparity as "[t]o do so runs contrary to the role of appellate courts."[214] Instead, the Court stated that disparity must only be considered after all other purposes and principles of sentencing have been considered:

> It is only after giving full effect to the principles of sentencing within the current constraints governing appellate review that if a reviewing court is unable to rationalize the sentence with sentences for similar offences committed in similar circumstances, it must either increase or decrease the sentence. The court intervenes at this stage to achieve a rational relationship with other sentences imposed in similar circumstances for similarly situated offenders.[215]

The comments of the Saskatchewan Court of Appeal regarding its narrowed function in *Laliberte* were re-iterated in many post-trilogy decisions.[216] Notwithstanding its dramatic shift to a deferential approach, the Court observed its responsibility to ensure "broad

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[212] (2000), 143 C.C.C. (3d) 503 (Sask. C.A.).
[213] *Ibid.* at paras. 13-14, 72.
[214] *Ibid.* at para. 73.
[215] *Ibid.* at para. 75. See also *Regina v. Fraser* (2007), 302 Sask. R. 210 at para. 48 (C.A.) where the Court states that appellate courts must be particularly cautious when addressing disparity.
[216] See also *Stroshein, supra* note 205 at para. 38.

parity of sentencing and [the maintenance of] public respect for the administration of justice."[217]

It has been demonstrated that despite the concerns and criticisms of the trilogy, the Supreme Court of Canada left appellate courts with ample liberty to issue guideline judgments. Moreover, it has been shown that the practice adopted by appellate courts across Canada is not uniform, nor is that adopted by individual sentencing judges in individual cases. Unfortunately, there is little empirical data available to analyze the impact that the trilogy had on appellate courts with any precision.

The only sentence appeal statistics that offer any assistance are those gathered by Peter McCormick, which were entirely based on panel sittings of the Manitoba Court of Appeal. There was a decrease in the number of sentence appeals as between the three year period from 1989 to 1991, when the Court heard 354 sentence appeals,[218] and the three year period from 2001 to 2004, during which time the Court heard only 80 sentences appeals.[219] It would be exceedingly simplistic to conclude that this massive drop was entirely due to a chilling effect following the trilogy as predicted by some critics. Data from the years 1992 through to 2000 is unavailable, yet it would be of assistance to examine these figures to determine if any pattern of decline exists. Interestingly, the reverse trend emerged when the success rates of sentence appeals heard by the Manitoba Court of Appeal are compared as between the pre-trilogy and post-trilogy period. For the three year period from 1989 to 1991, approximately 38% of

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[217] *Ibid.* at para. 5.
[218] Peter McCormick, "Caseload and Output of the Manitoba Court of Appeal 1991" (1993) 22 Man. L.J. 263 at 267, Peter McCormick, "Caseload and Output of the Manitoba Court of Appeal 1990" (1992) 22 Man. L.J. 24 at 29, Peter McCormick, "Caseload and Output of the Manitoba Court of Appeal 1989" (1990) 19 Man. L.J. 334 at 341.
[219] Peter McCormick, "The Manitoba Court of Appeal, 2000-2004: Caseload, Output and Citations" (2005) 31 Man. L.J. 1 at 6.

sentence appeals were allowed; this figure soared to almost 71% in the three year period from 2001 to 2003. It is possible that this inverse trend (i.e. fewer appeals being heard yet the success rate increased) was substantially influenced by a need for appellate guidance following the enactment of Bill C-41.

Additional information is required to distil more definitive conclusions from these statistics. Determining the total number of sentences that were imposed at first instance relative to the two sample periods would be helpful. This would allow the pre-trilogy and post-trilogy calculation of the proportion of sentences appealed to be compared. Furthermore, comparing the types of issues arising on appeal in both of these periods may yield more meaningful conclusions. For instance, assume that 20% of the sentence appeals in the pre-trilogy period were based solely on the issue of ascribing appropriate credit for pre-sentence custody. If the post-trilogy period revealed that this figure dropped to 3%, it would be reasonable to conclude that this issue was settled based on an accumulation of available jurisprudence, and thus, appellate review was necessary in fewer cases. Although it is impossible to isolate a relationship between the trilogy and this empirical evidence, the conclusion remains that in approximately 71% of recent cases, the Manitoba Court of Appeal exercised its power to intervene in sentence appeals. Therefore, although these statistics do not offer strong proof that this Court was unconstrained by the trilogy, there exists some evidence that this may be true.

E) The Alberta Court of Appeal's Starting Point Approach

The Alberta Court of Appeal did not regard the trilogy as restricting its role in sentence review, unlike the understanding maintained by its Saskatchewan counterpart.

This is demonstrated in *Regina v. Point*[220] where the Alberta Court of Appeal held that *Shropshire* should not be construed as endorsing a completely subjective approach to sentencing. The Court adopted the following passage from the Court of Queen's Bench in *Regina v. McLaughlin*:

> In the course of argument, counsel submitted numerous cases which decided the parole ineligibility of similarly situated accuseds. Those decisions are remarkable for their widely disparate results that may be explained in part by the fact that some have taken statements from the Supreme Court of Canada, to the effect that sentences are to be reviewed with deference by and interfered with only if demonstrably unfit, (see *R. v. Shropshire* (1995), 43 C.R. (4th) 269; *R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327; and *R. v. McDonnell* (1997), 114 C.C.C. (3d) 436), as encouragement to engage in a very subjective approach to sentencing which allows for greater reliance on the personal views of the sentencing judge than established principles of sentencing. In my view, this approach had led to significant and unjustified disparity in sentencing generally and in determinations of parole ineligibility. That result could not have been intended by Supreme Court of Canada when it enunciated this principle. Rather, I think that statement was predicated on the premise that sentences which follow established principles of sentencing and legal precedents are to be shown appellate deference. Put another way, sentences can only be fit if they reflect the principles of sentencing and fall within the range established by relevant case law.[221]

Alberta has been a national leader in terms of delivering appellate guideline sentencing judgments through the starting point approach.[222] This approach involves an appellate court defining typical categories of an offence with precision, while "acknowledg[ing] at the same time that each actual case presents differences from the archetypical case."[223] In other words, the court takes an offence which typically encompasses conduct of various degrees of seriousness, and segregates different types of

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[220] [2003] A.J. No. 1307 at para. 17 (C.A.).
[221] [2003] A.J. No. 473 at para. 21 (Q.B.).
[222] Starting points were ultimately approved of by the Supreme Court of Canada in *McDonnell,* and subsequent cases. See *McDonnell, supra* note 161, *Stone, supra* note 187 at para. 245, and *Proulx, supra* note 93 at para. 86. However, the Court has clearly stated that starting points were not binding on lower courts and therefore were merely "guides". See *Regina v. Ostertag, infra* note 247 at paras. 13, 23, *Regina v. Beaudry* (2000), 271 A.R. 219 at para. 147 (C.A.) and A. Manson, *supra* note 177 at 277.
[223] *Supra* note 133 at para. 6.

conduct into "meaningful categories."[224] The appellate court then assigns a precise starting point sentence for a particular category. Thereafter, a sentencing judge determines whether the case at issue fits within any of the categories for which a starting point exists. If so, the sentencing judge commences the analysis from the starting point sentence and makes adjustments on account of the aggravating and mitigating factors of the offence and the offender.[225] The maximum and minimum sentences in the *Code,* if the latter exist, remain possibilities in any given case, however, the less serious categories are unlikely to attract a sentence proximate to the maximum, while the more serious offences are unlikely to attract a sentence proximate to the minimum.[226]

The starting point approach is rooted in the historical practice of courts approaching a case by considering the range of sentence that has previously been imposed for similar criminal acts.[227] It was developed to ensure that the seriousness of the offence and the individual circumstances of the offender were injected into the calculation of sentence.[228] Importantly, the starting point approach does not involve the creation of new criminal acts, instead it reflects the recognition that crimes defined by Parliament cover a broad range of conduct of varying degrees of seriousness.[229] This was aptly captured by McLachlin J. in her dissenting reasons in *McDonnell:*

> The starting-point approach, as indicated earlier, is merely a variation on the traditional concept of ranges of sentence for particular types of criminal acts. To recognize a certain type of act as being serious or major, and hence, in the typical case, attracting a sentence in a particular range, is not to create a new crime. It is only to recognize what no one would deny – that a given category of crime as

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[224] *Ibid.* at para. 5. Examples of archetypical cases include robbery in the nature of a bank "hold-up", trafficking in small amounts of a particular narcotic, and home invasion robbery.
[225] *Ibid.* at paras. 6-7.
[226] *Ibid.* at para. 5.
[227] *Supra* note 161 at para. 62.
[228] *Ibid.* at para. 62.
[229] *Ibid.* at para. 85.

> defined by the Criminal Code is capable of embracing a wide variety of conduct, some more heinous and hence deserving of harsher punishment than others.[230]

Although the starting point approach is an example of an appellate court setting appropriate ranges for sentence in order to reduce unwarranted disparity, it existed long before the Supreme Court of Canada delivered the deference trilogy. It was the 1982 decision of a five-member panel of the Alberta Court of Appeal in *Regina v. Johnas*[231] in which the starting point approach was first adopted in Alberta. In *Johnas*, the Court was confronted with nine sentence appeals for the offence of robbery, all of which involved the "hold-up" of small commercial establishments, had no violence or physical harm, and resulted in little or no financial success. The Court held that due to the prevalence of this type of robbery, protection of the public and deterrence must be of paramount importance in arriving at a fit sentence. The Court stated that for this type of offence, the starting point must be three years from which the aggravating and mitigating factors of the offence and offender are to be applied.[232] In adopting this approach, the Court adopted the words of Lord Justice Lane in *Regina v. Bibi,*[233] that its aim must not be for uniformity of sentence, but rather for uniformity of approach.[234] Notably, the Court rejected the more rigid approach followed by the Nova Scotia Court of Appeal that three years imprisonment should be a minimum sentence for this type of offence.[235]

Although *Johnas* marked the beginning of starting point sentencing in Alberta, it is the Court of Appeal's 1985 ruling in *Sandercock* that continues to be cited by courts across the country. In *Sandercock,* the Court of Appeal reconsidered and upheld the

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[230] *Ibid.*
[231] (1982), 2 C.C.C. (3d) 490 (Alta. C.A.) [hereinafter *Johnas*].
[232] *Ibid.* at para. 33.
[233] *Regina v. Bibi* (1980), 71 Crim. App. R. 360 at 361 (C.A.).
[234] *Supra* note 231 at para. 31.
[235] *Ibid.* at para. 22. See *Regina v. Hingley* (1977), 19 N.S.R. (2d) 541 (C.A.) and *Regina v. Owen* (1982), 50 N.S.R. (2d) 696 (C.A.).

general idea of the starting point approach to sentencing.[236] The Court recognized the balance that must be struck between the issues of disparity and inflexibility as follows:

> On the one hand, appellate guidance offered cannot be so vague as to permit unjustified disparity of sentences. The discretion of sentencing judges is wide, but is not unfettered. Each sentence, must, in the words of the Criminal Code, be "fit", and a significantly disparate sentence is not a fit sentence unless there is reason for the disparity. Justice requires that two offenders in identical life circumstances who commit identical crimes should receive identical sentences. Such a twinning is rare, but the sentence process must be such that the reason for any apparent disparity is clear.
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> On the other hand, the guidance offered should not be too rigid. A fixed guide-line, or tariff (or, indeed, even an "approved range"), fails to take into account the immense variety of circumstances which can be found in different cases involving a conviction for the same offence. Even putting aside the offender's circumstances, those who advocate some form of fixed sentences fail to appreciate that the definitions of the crimes in the Criminal Code contain only key elements required for guilt. For example, the definition of robbery requires only the taking of the property of another accompanied by an act of violence. The elements for guilt are the same whether the offence involves an elaborate bank hold-up or, literally, taking candy from a baby. The category of "robbery" is simply too broad for any meaningful sentence regime. The manifest object of the Criminal Code is that the sentencing process will adjust for the other important factors, whether aggravating or mitigating. This is why the sentencing judge is given a wide scope in terms of possible sentences.[237]

The Supreme Court of Canada confronted the propriety of the starting point approach in *McDonnell.* On behalf of the 5 - 4 majority, Sopinka J. unequivocally upheld the development and promotion of starting points by appellate courts to guide lower courts. Furthermore, Sopinka J. held that the starting point may be a factor to consider in determining whether a sentence is demonstrably unfit.[238] Notwithstanding that these comments reveal an express endorsement of this approach, aspects of Sopinka's judgment are irreconcilable with this conclusion. In particular, Sopinka J. held that failing to characterize an offence into a judicially created category of assault was not an

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[236] *Supra* note 133 at paras. 1-2.
[237] *Ibid.* at paras. 3-4.
[238] *Supra* note 161 at para. 43.

error in principle that warranted appellant intervention.[239] As noted by Sanjeev Anand, this finding significantly reduced any precential value to be attached to the starting point approach.[240] The majority position is further confused by Sopinka's statement that "[u]nless there otherwise is a reason under Shropshire or M.(C.A.) to interfere with the sentence, a sentence cannot be altered on appeal, notwithstanding deviation from a starting point."[241] This statement is additional evidence that Sopinka J. intended to remove all authority from the starting point approach and render it merely a tool to confirm that intervention is justified when other grounds to intervene already exist. Therefore, although he expressly endorsed the use of starting points to assist sentencing judges with the exercise of their discretion, Sopinka appeared to have stripped the starting point approach of any meaningful position in Canadian sentencing.

After *McDonnell,* the propriety of the starting point approach appeared uncertain. Some viewed Sopinka J.'s reasons in *McDonnell* as a rejection of the starting point approach.[242] Other commentators considered that Sopinka's rejection of the starting point could be limited to categories of offences that are captured within *simpliciter* offences and assume bodily harm.[243] However, as Anand noted, Sopinka's commentary that there is no legal basis for judicially created categories of offences within a statutory

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[239] *Ibid.* at para. 32.
[240] Sanjeev Anand, "Sentencing, Judicial Discretion and Juvenile Justice, Part II" (1999) 4 C.L.Q. 485 at 492.
[241] *Supra* note 161 at para. 43.
[242] A. Manson, *supra* note 177 at 277.
[243] S. Anand, *supra* note 240 at 491. Both the majority and minority reasons in *McDonnell* address whether the starting point approach for sexual assault involves a presumption of harm. McLachlin J. described that in determining whether or not a case should be categorized as a major sexual assault, "the judge must consider whether the violation of the victim's integrity was 'such that a reasonable person would know beforehand that the victim likely would suffer lasting emotional or psychological injury, whether or not physical injury occurs.'" She highlighted the fact that actual harm suffered is not in issue in determining whether or not the case is a major sexual assault for the purpose of sentencing. Rather, she noted that if actual harm was alleged by the Crown as an aggravating fact, that its existence would have to be proven as there is no presumption. *Supra* note 161 at para. 95.

offence for sentencing purposes "goes to the very heart of the propriety of using starting point sentences."[244] It therefore appeared as though little support existed for this approach as a mechanism for appellate courts to minimize disparity.

The Supreme Court of Canada returned to the topic of starting point sentencing in *Stone* notwithstanding that a starting point approach had not been applied in that case. In particular, the Court endorsed the dissenting view of McLachlin J. that appellate courts must ensure that the categories of offences for which starting points have been assigned are clearly defined.[245] The Court's express endorsement of this approach is evident in the following excerpt:

> Although the majority, *per* Sopinka J., did not expressly identify this need for clarity in the classification of offences, it did agree that appellate courts may set starting points as guides for lower courts. In my opinion, a clarity requirement must be read into this appellate court authority because such guides would not be useful without a clear description of the category created and the logic behind the starting point appropriate to it. The same need for clear direction applies to ranges set by appellate courts.[246]

Reliance on the starting point approach in Alberta was not diminished following *McDonnell.* Instead, in *Regina v. Ostertag,* the Alberta Court of Appeal concluded that by virtue of the Supreme Court of Canada's decisions in *McDonnell* and *Stone,* the starting point approach had been upheld. Furthermore, the Court emphasized this approach's loyalty to equality:

> The principle of equality of treatment before the law, a constitutional imperative in Canada, has application in sentencing. A person convicted of an offence has the right to expect a sanction that will not be more severe than the sanctions imposed on others who are similarly situated; the community has the right to expect that a person convicted of an offence will not receive a more favourable sanction than others who are similarly situated and have committed similar

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[244] *Ibid.* at 491-492.
[245] *Supra* note 187 at para. 245.
[246] *Ibid.*

> offences. Starting-point sentencing guidelines support the principles of equality and uniformity.[247]

In *Regina v. Proulx,* the Supreme Court of Canada revisited starting points by addressing the interplay between them and the conditional sentencing regime. The Court discussed the two-stage process that a judge must embark upon when considering whether a conditional sentence is appropriate, once it has been determined that there is no mandatory minimum term of imprisonment and that the safety of the community would not be endangered by the offender serving the sentence in the community. At the first stage, a sentencing judge must exclude the possibility of probationary measures and a penitentiary term. This determination is made with consideration of the fundamental purpose and principles outlined in sections 718 to 718.2 of the *Code.* At the second stage, the sentencing judge must assess whether serving the sentence in the community would be consistent with the fundamental purpose and principles of sentencing in sections 718 to 718.2 of the *Code*.[248]

In *Proulx,* the Court confirmed its view that starting points may be used as guidance to lower courts in order to minimize unwarranted disparity.[249] Moreover the Court provided as follows:

> Starting points are 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.[250]

However, the Court maintained that the range of sentences that qualify for a conditional sentence is quite narrow such that it was not necessary to have starting points to assist

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[247] (2000), 266 A.R. 57 at para. 11 (C.A.) [hereinafter *Ostertag*].
[248] *Supra* note 93 at paras. 58-60.
[249] *Ibid.* at para. 86.
[250] *Ibid.* at para. 87.

with the second stage determination.[251] The Court expressed concern that injecting starting points into the second stage of the analysis would risk the individualistic approach to determining the appropriateness of a conditional sentence. As Parliament had not presumptively excluded any offences at that time, the Court feared that using starting points as tools at this second stage of the analysis would create offence specific exclusions to conditional sentences and would be inconsistent with what the legislature envisioned.[252]

The Supreme Court of Canada was silent in *Proulx* with respect to the role of starting points in the first stage of analysis as to whether a conditional sentence was appropriate, including the determination of whether probationary measures or a penitentiary term was required. This silence was noted by the Alberta Court of Appeal in *Regina v. Rahime.*[253] The Court held that the commentary of the Supreme Court of Canada in *Proulx,* did not restrict the application of starting point sentences at the first stage of the conditional sentence analysis:

> At stage one, the sentencing judge must consider the sentencing purpose and principles to the extent necessary to narrow the range of sentence for the offender and to determine whether a penitentiary term can be rejected. Starting point sentences, in the context of aggravating and mitigating circumstances, offer guidance in making that stage one determination but do not compel a particular conclusion...
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> ...
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> In our view, the law in this area is settled. Starting point sentences continue to provide useful guidance to sentencing judges at the stage where the judge is considering whether a conditional sentence is available or possible. There will be cases in which the sentencing judge decides, from a preliminary review of the fundamental purpose and principles of sentencing, in light of aggravating and mitigating circumstances, that a conditional sentence is available or possible notwithstanding a three year starting point. On the other hand, there will be cases

[251] *Ibid.* at para. 89.
[252] *Ibid.* at para. 88.
[253] (2001), 156 C.C.C. (3d) 349 (Alta. C.A.).

> in which the sentencing judge decides that the sentence must be at or above the starting point.[254]

In Alberta, starting points have been developed for several offences including home invasion robbery,[255] low level heroin trafficking,[256] methamphetamine trafficking at the commercial level[257] and trafficking at the wholesale level.[258] Although the Alberta Court of Appeal continues to be a leader in the use of the starting point approach, many other appellate courts have followed, including Manitoba[259] and Nova Scotia.[260] Notably, the Saskatchewan Court of Appeal, which underwent a dramatic alteration to its practice of reviewing sentence following the trilogy, has welcomed the structure of the starting point approach. In particular, this Court has adopted starting points for categories of offences including home invasions,[261] serious or major sexual assault[262] and manslaughter.[263] Finally, notwithstanding that in its 1988 decision in *Regina v. Glassford,*[264] the Ontario Court of Appeal rejected the starting point approach as stated in *Sandercock,* this province has resorted to the starting point approach in some narcotics

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[254] *Ibid.* at paras. 36, 46.
[255] In *Regina v. Matwiy* (1996), 105 C.C.C. (3d) 251 at paras. 14-31 (Alta. C.A.) the Court adopted an eight year starting point for home invasion robbery.
[256] In *Ostertag, supra* note 247, the Alberta Court of Appeal held that the starting point for low level heroin trafficking is five years.
[257] In *Regina v. Wainwright* (2007), 422 A.R. 25 (C.A.), the Court of Appeal held that cases of methamphetamine trafficking will attract a starting point sentence of three years.
[258] In *Regina v. Johnson,* [2008] A.J. No. 686 (C.A.) the Court discussed the distinction between trafficking at the wholesale and commercial level. The Court held that wholesale trafficking would involve a starting point sentence of 4 ½ years. See also *Regina v. Lau* (2004), 193 C.C.C (3d) 51 at paras. 19-21 (Alta. C.A.).
[259] See *Regina v. Borkowsky,* [2008] M.J. No. 20 (C.A.) and *Regina v. Goulet,* [2008] M.J. No. 42 (Prov. Ct.).
[260] See *Regina v. Johnson* (2007), 258 N.S.R. (2d) 386 (C.A.) where the Court discussed the established starting point of three years for the offence of robbery.
[261] *Regina v. Fraser, supra* note 215 at paras. 27, 55, the Court of Appeal discussed the existence of a starting point of between seven and ten years for home invasion robbery cases.
[262] In the recent decision of *Regina v. Woods,* [2008] S.J. No. 200 at para. 30 (C.A.), the Court discussed the existence of a three year starting point for a serious or major sexual assault.
[263] In *Regina v. F.(R.R.),* [2008] S.J. No. 232 at para. 9 (C.A.), the Court noted held that the sentencing judge's finding of a seven year starting point for manslaughter was a reasonable one and was based on prior decisions of this appellate court.
[264] (1988), 42 C.C.C. (3d) 259 (Ont. C.A.).

cases.[265] Undoubtedly, the value of the uniform approach to sentencing offered by starting points has been appreciated in many Canadian provinces.

Although some commentators have argued that the starting point approach fetters judicial discretion to impose individualized sentences,[266] in her dissenting judgment in *McDonnell,* McLachlin J.A. noted that the "starting-point approach facilitates, rather than hinders, the proper exercise of judicial discretion and the individualization of sentences."[267] Rather than fetter discretion, McLachlin J.A. held that the starting point approach focuses the sentencing judges on "legitimate considerations"[268] to which appropriate deference is afforded:

> The starting-point approach does not provide a new judge-made legal principle, enabling courts of appeal to interfere with the proper exercise of the trial judge's discretion, as Sopinka J. suggests. The starting point merely indicates the appropriate range of sentence for an offence of a certain degree of seriousness. When a court of appeal interferes on the ground that the judge ignored the correct starting point, it is simply saying that the sentence is demonstrably unfit because it falls outside the acceptable range of sentence for that sort of offence. This Court in Shropshire, supra, at paras. 48 and 50, citing R. v. Muise (1994), 94 C.C.C. (3d) 119 (N.S.C.A.), expressly acknowledged the need for courts of appeal to intervene where the sentence falls outside the appropriate range.[269]

The loyalty of the starting point approach to the principles of equality and fundamental fairness is a significant attribute as all offenders before the courts are entitled to receive the same treatment. Ensuring that a sentencing judge applies the same process of analysis to each case, including the requirement that all relevant mitigating and aggravating factors be considered, reflects a sentencing system that supports

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[265] Unlike Alberta, even when some courts utilize an identified starting point, the result has not been widespread implementation across Ontario. Examples of the starting point approach in narcotics cases see *Regina v. Brown,* [2008] O.J. No. 2825 at paras. 39, 42 (Sup. Ct.) and *Regina v. Cunningham* (1996), 104 C.C.C. (3d) 542 at paras. 23-24 (C.A.).
[266] *Supra* note 161 at para. 79.
[267] *Ibid.* at para. 79.
[268] *Ibid.* at para. 80.
[269] *Ibid.* at para. 101.

individualism.[270] Although judges retain discretion as to the appropriate weight to be assigned to such factors, this uniform approach renders it more likely that a person will not receive a sentence that is more severe than others who are similarly situated.[271] As previously discussed, the individualized approach involves the freedom and ability of a sentencing judge to respond to the unique myriad of factors that are present in a given case. Moreover, the failure to properly account for all relevant factors constitutes an error in law that allows for appellate intervention.[272] Therefore, any argument that the starting point approach is overly mechanical and contrary to the Canadian commitment to individualized sentencing must fail.

Notwithstanding that the Alberta Court of Appeal clearly rejected adopting minimum sentences in favour of starting points, some have opined that there is no distinction between these two approaches. This claim was rejected by the Court in *Sandercock* where it held that unlike minimum sentences, the starting point approach "does not arbitrarily confine the discretion of the sentencing court. Rather, it offers a rational structure for its exercise, and a structure which is just because it guards against both disparity and inflexibility."[273] Similarly, in a ruling approximately 15 years after *Sandercock* was released, the Court responded to this recurring criticism as follows:

> Starting-point sentencing does not create minimum sentences as a by-product of aiming at trying to achieve greater uniformity of treatment of offenders. The language of the decisions is clear: when following such guidelines, the sentencing judge should adjust to sentence both upwards, to account for aggravating factors, and downwards, to account for mitigating factors.
> ...

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[270] *Supra* note 247 at para. 23.
[271] *Ibid.* at paras. 11, 12. Manson expressed optimism for the starting point method as one that will offer a uniform approach to sentencing judges, which "marries individualized discretion with appellate guidance." See Manson, *supra* note 177 at 280, 282.
[272] *Supra* note 161 at para. 99.
[273] *Supra* note 133 at para. 2.

> In upholding the approach of starting point sentencing, the Supreme Court of Canada has clearly recognized that the use of starting point guidelines does not create minimum sentences. It never did, though some advanced that position in the hope of undermining or eliminating starting point sentencing. That court has been quick to strike down minimum sentences, even those created by Parliament, much less those created by the judiciary, where the minimum sentences could not be justified. In that climate, the Supreme Court would have struck down starting point sentencing, had it been satisfied that adherence to such principles would have produced minimum sentences.[274]

Furthermore, the fact that the Supreme Court of Canada has upheld the starting point approach, reflects recognition that it does not create minimum sentences.[275]

The claim that it is difficult to assign the appropriate starting point for specific conduct has also been advanced as a downfall to the starting point approach.[276] It is critical to this approach that appellate courts precisely describe the conduct that falls within each category and that the sentencing judge subsequently place the case in issue within the proper offence category.[277] Logically, should the matter be mis-categorized, it will result in a disproportionately harsh or lenient sentence.[278] Assuming the category is clearly defined by the appellate court, the sentencing judge can avoid any potential downfall by scrutinizing the facts in the following manner:

> Before the sentencing process begins, the Crown must have established that the accused is guilty of the offence charged. The Crown must then go on, if it has not already done so, to establish circumstances of the offence bringing it within the category of offence meriting a particular starting point. This is another way of saying that the Crown must establish that the offence in all the circumstances falls within a particular range. This fixes the starting point. In order to obtain a harsher sentence, the Crown must establish aggravating circumstances. On the other hand, if mitigating factors are revealed, the sentence will be reduced from the starting point.[279]

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[274] *Supra* note 247 at paras. 12, 16. See also Anand, *supra* note 240 at 486.
[275] This was noted by the Alberta Court of Appeal in *Ostertag, supra* note 247 at para. 16.
[276] *Supra* note 161 at para. 98.
[277] *Ibid.* at para. 104.
[278] *Ibid.* at para. 103.
[279] *Ibid.* at para. 82.

Anand addressed the starting point approach in relation to the enormous amount of sentencing discretion that was afforded to youth court judges under the *Young Offenders Act*.[280] He argued that there was empirical evidence to support the conclusion that sentencing judges in Alberta were not following the starting point approach and therefore adopting this approach has not increased uniformity of sentence.[281] Anand relied on statistical research conducted by Peter McCormick with respect to the volume and success rate of sentence appeals in Alberta between 1985 and 1992. In particular, he highlighted McCormick's data that Alberta's Court of Appeal addressed more sentence appeals during this period than any other province, besides Ontario, despite being the fourth largest province,[282] and that 51.4% were successful.[283] McCormick acknowledged that these figures may yield the conclusion that sentencing judges were rejecting the starting point approach, but that it was also possible that appellate courts tended to tinker with sentences. Anand countered the latter conclusion with reference to McCormick's data that the "median reduction in sentence for a successful defence appeal was 50% and the median increase in sentence for a successful Crown appeal was 100.5%."[284]

Even if it is assumed that McCormick's data was sufficient to support Anand's conclusion as it applied to the period between 1985 and 1992,[285] it is unlikely that

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[280] Anand, *supra* note 240 at 492-493. Anand highlighted that the high degree of discretion afforded to sentencing judges has resulted in unwarranted disparity and inconsistent reactions by appellate courts across the country to "key sentencing issues". He noted that either appellate court guidelines or legislative sentencing guidelines were options to structure this discretion, and concluded that the latter was the appropriate option. However, it is significant to note that the Alberta CA held in *Regina v. W.(C.W.)* (1986), 25 C.C.C. (3d) 355 (Alta. C.A.) that the starting point approach was inappropriate for youths. He ultimately concluded that legislative guidelines must be adopted to structure judicial discretion.

[281] Anand, *Ibid.* at 486-487. See also Peter McCormick, "Sentence Appeals to the Alberta Court of Appeal, 1985-1992: A Statistical Analysis of the Laycraft Court" (1993), 31 Alta. L. Rev. 624.

[282] *Ibid.* at 487. See also Peter McCormick, *ibid.* at 627.

[283] *Ibid.* See also McCormick, *ibid.* at 630.

[284] *Ibid.* See also McCormick, *ibid.* at 640.

[285] It could be argued that McCormick's data was limited as there was no information or analysis as to what the grounds of appeal were, or how many sentence appeals involved offences for which a starting point

research would continue to suggest that appellate courts were not following the starting point approach today.[286] This is true notwithstanding Anand's argument that there was little precential value to the starting point approach following the Supreme Court of Canada's deference trilogy in the late 1990s.[287] Ultimately, Anand suggested that there was ambiguity within Sopinka's judgment as to whether the SCC is endorsing or rejecting the starting point approach.[288] It is conceded that the position of the Supreme Court of Canada with respect to starting points was open to an ambiguous interpretation prior to the release of its decisions in *Stone* and *Proulx* where the Court expressly endorsed this approach.[289] However, McCormick's research period, between 1985 and 1992, was relatively soon after the birth of the starting point approach. This period predated important clarification by the Supreme Court of Canada that a departure was a factor to be considered in determination of whether a sentence was demonstrably unfit and warranted appellate intervention.[290] Therefore, with authoritative clarity and the passage of time, it would be expected that sentencing judges would follow the starting point approach. If circumstances existed to justify a departure, the duty to provide reasons enables a reviewing court to ensure that the appropriate approach was followed in each case, and that a fit sentence was imposed.

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existed. These are critical questions, the answers of which will either advance or negate Anand's conclusion. Therefore, it is arguable that there was simply not sufficient information available to render the conclusion that Alberta trial courts were not following the starting point approach between 1985 and 1992.

[286] There is no comparative data available.

[287] *Supra* note 240 at 489-492.

[288] *Ibid.* at 491. For example, Anand argued that the majority rejected starting point categories that are subsumed within *simpliciter* offences and assume bodily harm, and he suggested that other types of categories could be utilized. However, he stated that "the pronouncement by Sopinka J. that there is no legal basis for the judicial creation of a category of offence within a statutory offence for the purposes of sentencing goes to the very heart of the propriety of using starting point sentences at all." *Ibid.* at 492.

[289] *Proulx, supra* note 93 at para. 86. However, the Court stated that starting points should not be used for specific offences to provide guidance as to the proper use of conditional sentences.

[290] *Supra* note 161 at para. 43.

Most importantly, and fundamentally fatal to Anand's analysis of McCormick's data, was his failure to acknowledge that the starting point regime is not applicable in all cases. Starting points have been developed for some offences, including sexual assault, narcotic trafficking and home invasion robbery. However, there remains many offences for which no starting point exists. Therefore, with respect to sentence appeals, the starting point approach also has no application or relevance in many cases. The number of appeals in which the starting point approach was utilized at first instance is an unknown figure within McCormick's research. Therefore, it is impossible to render any conclusion with respect to the practice of the starting point approach on the basis of the available appellate statistics.

F) Institutional Competence of Appellate Courts

The more demanding criticism of the starting point approach to defend is the argument that appellate courts are not institutionally competent to develop and maintain a comprehensive guidelines scheme.[291] Anand advanced this argument and relied on the observations of the Sentencing Commission regarding institutional competence in support.[292] The Commission noted that appellate courts were "more apt to uphold regional and community standards than to develop consistent guidelines for all of Canada."[293] However, the Supreme Court of Canada has jurisdiction to rule on issues of national importance. To date, the Court has not articulated that any sentencing range for any offence is to have application in all Canadian jurisdictions. Instead, as the trilogy demonstrates, it has delegated this authority to the appellate courts in each province or

[291] *Supra* note 240 at 488.
[292] *Ibid.*
[293] *Supra* note 4 at 295.

territory. Therefore, the purpose of the starting point approach in Alberta, for example, is not to render guidance to the entire country, but to guide sentencing judges in Alberta. Should regional differences within the province of Alberta be appropriate factors for consideration, a sentencing judge retains discretion to adjust the starting point accordingly.[294]

The Commission also found appellate courts to be institutionally incompetent to develop and maintain guideline judgments as there is a limited opportunity for appellate courts to deal with a broad range of cases given that relatively few are subject to appeal.[295] It is undeniable that an appellate court will not encounter sentence review for every category of every offence, and therefore, it is impossible to expect a comprehensive judicially-created sentencing scheme as would be produced with a legislative scheme. However, appellate courts retain the competence to develop guidelines for problematic areas as they develop, assuming that unfit sentences, or those suspected to be unfit, are advanced for appellate review. For example, consider the case that first adopted the starting point approach in Alberta, *Regina v. Johnas.*[296] In that case, the Court was confronted with nine sentence appeals for the same type of robbery. Clearly, sentencing judges required guidance as to the appropriate range of sentence for this type of offence, and the Court of Appeal delivered with the pronouncement of the starting point approach.

The Sentencing Commission also concluded that appellate courts were institutionally incompetent to develop and maintain a sentencing guidelines scheme

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[294] For example, the prevalence of a particular type of crime in a community may be appropriately deemed an aggravating factor that warrants an increase to the starting point.
[295] *Supra* note 4 at 295.
[296] *Supra* note 231.

because there were insufficient resources available with respect to sentencing data.[297] Indeed, it continues to be true that there are no comprehensive sentencing statistics that provide sufficient detail to assist sentencing judges or appellate courts to determine what the existing range of sentence is in a particular case.[298] Indisputably, such resources would enhance the institutional competence of appellate courts. However, this resource limitation would also confront a body endeavouring to legislate sentencing guidelines. In reality, the method employed to inform appellate courts and sentencing judges as to the existing range is to rely on counsel to advance relevant jurisprudence. Although imperfect, and a compromise to having a detailed informative sentencing database, this method of receiving sentencing information is efficient and equivalent to what would be available under a legislated guidelines scheme.

The final concern surrounding institutional competence relates to the dual role of policy-making and sentence review engaged in by appellate courts when developing and maintaining guidelines.[299] In particular, it has been argued that appellate courts would "either feel bound by their own rules (and be less sensitive to the justifications for departing from them) or, alternatively, if they upheld frequent departures from their guidelines, it might be construed as indicating that the rule they formulated is inadequate."[300] This concern is based on an inaccurate view of the starting point approach. It suggests that starting points are effectively minimum sentences, which has been demonstrated to be an erroneous conclusion. Instead, it is fundamental to this

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[297] *Supra* note 4 at 295.
[298] Roberts advocated for the development of a computerized comprehensive sentencing statistics database. He opined that this resource could form the basis for an advisory sentencing guidelines system, which would reduce disparity. *Supra* note 60 at 157.
[299] *Supra* note 4 at 295.
[300] *Ibid.*

approach that judges depart from the starting point sentence. The merit to the approach lies in the fact that all judges start from the identical point and exercise their discretion in departing according to the aggravating and mitigating facts of the offence and the offender. Therefore, the starting point regime provides a uniform approach to sentencing, rather than a uniform sentence, as this criticism mistakenly presumes.

IV. Conclusion

The overarching purpose of sentencing in Canada has been declared by Parliament as contributing to respect for the law and the maintenance of a just, peaceful and safe society. It has been argued that this is a virtuous goal for a punitive response to criminal activity, and therefore need not be altered or replaced. However, the lack of uniform approach to sentencing and sentence review is problematic as it has led to the existence of unwarranted disparity. In turn, this has significantly contributed to the erosion of public confidence in the administration of justice. This thesis has ultimately concluded that the sentencing system in Canada fails to achieve its ultimate purpose.

It has been demonstrated that few substantive alterations are required in order to transform the current system into one that promotes a uniform approach to sentencing while maintaining a commitment to individualization. In fact, the Supreme Court of Canada has encouraged appellate courts to develop and maintain sentencing ranges through the adoption of the starting point approach. As illustrated by the judicial reaction to the Supreme Court of Canada deference trilogy, there is momentum for appellate courts to assume a more active guiding role in sentencing, reduce unwarranted disparity, and yet preserve the ability of sentencing judges to be responsive to the unique and individual features of a given case.

Provincial appellate courts that have not adopted the starting point approach should do so, and those courts of appeal that have adopted such an approach should expand the number and type of starting point sentences. Such changes will promote consistency in sentencing and increase the transparency of the sentencing process. The greater use of starting point sentences will enable media to more accurately report sentencing matters, which will contribute to a more informed public and thereby enhance their confidence in the administration of justice.[301] Furthermore, a widespread implementation of the starting point approach will reduce the need for defence counsel to judge shop in order to guard against unwarranted disparity in the form of an unduly harsh sentence.

Sentencing is a central aspect of the criminal justice system, due in part to the level of visibility to the public.[302] Unlike many of the other phases in the criminal justice process, the public can attend and hear the sentencing submissions of the Crown and defence, followed by the public announcement of sentence. It is for this reason that sentencing serves a symbolic function whereby the court responds to the offender and his or her offending behaviour with authority. Attaining public confidence in this particular phase of justice, will colour public perception of the fairness and rationality of the criminal justice system as a whole. This is succinctly captured by the Ontario Court of Appeal as follows:

> Respect for the law is not enhanced when overly harsh sanctions are imposed and a trial court ignores well established sentencing principles. The trial court does not fulfill its duty to fashion a sanction that will contribute to the maintenance of a more just society when it imposes a sentence on the offender that is far beyond the usual penalty imposed for this offence in other parts of the province and the country. The offender and the

[301] *Supra* note 57 at 2.
[302] *Supra* note 54 at 21. Sentencing decisions are far more visible than decisions taken at other stages of the system, by the police or the Crown, for example.

> offender's family would harbour a well-justified sense of grievance over the offender's treatment by the judicial system.[303]

In light of the prominence of sentencing in the Canadian criminal justice system and its failure to adequately contribute to respect for the law, streamlined reform towards a uniform approach to each sentencing case must become a priority.

[303] *Regina v. Priest* (1996), 30 O.R. (3d) 538 at para. 28 (C.A.).

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