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July 19, 2018

A Fine Balance: Sentencing *Suter* in the Supreme Court of Canada

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Case Commented On: *R v Suter*, 2018 SCC 34

Sentencing, Chief Justice Lamer tells us in *R v M (CA)*, 1996 CanLII 230, [1996] 1 SCR 500, at paragraph 91, 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." This sentiment neatly encapsulates all that is sentencing: an ephemeral yet earthy task in which the sentencing judge envelopes themself in a venture engaging both heart and mind. It is a "delicate" process, not heavy-handed, which requires a deft understanding of the human condition within the clarity of legal rules and principles. It is an art, not a science, meaning it is not a base computation or a tallying up of factors given pre-determined weight. Art also suggests artistic freedom and the discretionary nature we nurture in the sentencing process. But it is a determination statutorily mandated with well-defined rules and principles. There is wriggle room but just as we must stay within our lanes while driving, the sentencing judge must not over-correct or act erratically in imposing sentence. There are parameters. Some are, as indicated, statutory, as the "sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender" (s. 718.1 of the *Criminal Code*). Other parameters arise from the profound sense of community that envelopes us when a fellow member breaks our laws – the laws that reflect our fundamental values. We feel the impact of rule-breakers, but we also feel their angst. We all know, to some degree, we too could be similarly situated, both as victim or offender. It is at this tipping point where the sentencing judge's task becomes even more delicate as it searches for the fair and just balancing of all which is required to impose a fit and appropriate sentence tailored to the circumstances of the offence and the background of the offender. It is this delicate or fine balancing which is at the core of the myriad of issues arising in the newest Supreme Court sentencing decision in *R v Suter*, 2018 SCC 34.

True to Justice Moldaver's view, writing on behalf of the majority in *Suter*, that sentencing is a "highly individualized process" (para 4), the facts in *Suter* are highly unusual and particularly tragic. Mr. Suter entered a plea of guilty to a charge of failing or refusing to comply with a demand to provide a breath sample pursuant to s. 254(5) of the *Criminal Code*. A young child was killed when the vehicle Mr. Suter was operating crashed into a restaurant's outdoor patio where the child and his family were enjoying a family meal. As a death occurred, the maximum punishment for the refusal to provide a breath sample was increased to life imprisonment under s. 255(3.2). However, the sentencing judge accepted Mr. Suter was not impaired by alcohol at the time of the incident. Indeed, the events leading to the incident involved a highly charged emotional event in which Mr. Suter and his spouse were arguing in the vehicle. Moreover, Mr. Suter's refusal to provide a breath sample occurred after he received, incorrectly, legal advice to

refuse. The fatality was widely publicized and Mr. Suter was a victim of a disturbing and brutal form of vigilante justice (paras 1-3).

With this unique and troubling fact situation, the sentencing judge crafted a sentence seemingly far below the norm for the offence by imposing a term of four months incarceration with a 30-month driving prohibition. The Crown appealed the sentence to the Alberta Court of Appeal resulting in a substantial increase to the sentence to 26 months incarceration. Leave to appeal to the Supreme Court was granted. Unusually, the majority of the Supreme Court found both the sentencing judge and the court of appeal were in error (paras 5-6), resulting in the Supreme Court re-sentencing Suter (para 5). In the majority's view, a term of 15 to 18 months incarceration was appropriate (para 103). However, as re-incarceration would cause undue hardship, it was "in the interests of justice" to impose a sentence of time served, amounting to 10 and a half months incarceration (para 103). The sole dissent of Mr. Justice Gascon found the sentencing judge imposed a fit and appropriate sentence and committed no error in law (para 109). He too allowed the appeal in part but restored the original sentence. Both the majority and the dissent upheld the sentencing judge's imposition of a 30-month driving prohibition (paras 24, 104 & 202).

With these facts firmly in mind, the issues arising in the case are as unique as the facts and the ultimate outcome. The issues do not arise from the facts but flow from them. There is a difference. In appellate advocacy, the appellate lawyer combs through the reasons, issue spotting and identifying arguable points based on knowledge of the types of appellate issues, which regularly arise in an appeal. For instance, are there grounds for an unreasonable verdict? Did the trial judge reverse the burden of proof in convicting the offender? These are just a couple examples of the specific appellate issues arising from a case. This is not to say that there may not be identifiable non-appellate type issues, such as errors involving substantive elements of an offence, but again those too would be easily spotted and seen to be arising from the facts. In a parallel manner, the appellate decisions based on these grounds swing from one issue to the next. Uniquely, in *Suter*, the issues flow and are not uniquely identifiable. There is no issue spotting as the legal issues move steadily and continuously resulting in the sensation that the Supreme Court's treatment of this appeal flow.

On this basis, setting out the myriad swirling of issues flowing from this decision is no easy task. Identification is also encumbered by the presence of a vocal dissent. In any event, on a meta-view of the decision, the first bundle of issues directly flow from the sentencing of Mr. Suter. One such point of discussion is on the use of vigilante justice, also characterized as a collateral consequence, as a mitigating factor in the sentencing balancing exercise. In *Suter*, the sentencing judge relied upon the incident in mitigation of sentence while the Court of Appeal found the judge erred in doing so. Both the majority and dissent in *Suter* agree that vigilante justice, as a non-state collateral consequence, was a mitigating factor to be balanced with all other considerations in arriving at a fit sentence. Justice Moldaver, however, restricted the use of such a collateral consequence to prevent "legitimizing" such illegal behaviour by accepting it as part of a legitimate legal process (para 58). Justice Gascon found the sentencing judge properly balanced the incident in arriving at a fit and appropriate sentence (paras 105, 109, 113-114 & 150).

The issue of the effect of Suter's quasi-mistake of law can also be identified in this first sequence. I use the descriptor 'quasi,' meaning in this context, "apparently but not really" not for pejorative reasons but to emphasize what is at the root of the different world views between the majority and the dissent on this point of law. Neither Justice Moldaver nor Justice Gascon clearly and cogently describe what mistake of law truly is in legal terms. To be sure they discuss around the concept and drop hints, some large hints, of what their working definitions are but the reader is never entirely certain from where each position is starting. Without knowing the legal principles around this legal construct, it is the justification for the ultimate conclusion that becomes the legal construction of mistake of law. This serves to reinforce the feeling that this decision flows in a non-traditional legal judgment manner. Instead of starting with what mistake of law is in legal terms, involving academic scholarship (Glanville Williams comes to mind) and case law (mistake of law versus mistake of fact, colour of right and officially induced error have a large body of case law discussing the substantive issues) including a statutory analysis (s. 19, albeit there is a sparse discussion of this in the dissent), the Court presumes the principles and relies on the justification or their interpretation of whatever legal status they have given the term. Justice Gascon does come closer by challenging Justice Moldaver for this lack of a principled approach (para 125) but does nothing concrete to reverse the time machine and go back to the essentials of what mistake of law is in light of legal principles (paras 125 to 128). Instead, Justice Gascon fashions a template of his own in paragraph 128, in which he creates a sliding scale of blameworthiness based on a range of knowledge that could be attributed to Suter. Thus, the case authority discussion is derailed by the Court not focussing on the issues and instead allowing their decision to be pulled by the current of reasoning, justification, and the issue-spotting of errors found in one another's reasons.

Context is one reason why neither the majority nor the dissent gives clear direction on the mistake of law. This mistake of law, based in Suter's reliance on bad legal advice to not provide a breath sample, is only notionally acting as a defence in order to provide mitigation of sentence. It is not acting as a defence per se. The slurring of the legal meaning of mistake of law is understandable considering the focus is not on the mistake, as operating as a defence impacting guilt or innocence, but as a mitigating factor on sentence to be balanced with all of the other sentencing considerations. Unfortunately, by not approaching the issue in a principled fashion, by allowing the reasoning to be the de facto substitute for those principles, we are never clear as to when and how mistake of law can be used on sentencing generally. The Supreme Court, as the final arbiter of all that is law in Canada, has not given us rules to live by or even rules to apply.

The analysis of the mistake of law issue is an important one as it provides the dominant mitigating factor on sentence. Without a clear indication of the basis of this mitigation, the balancing is tainted, and the sentence imposed is rendered unfit. Using incomplete defences, which would not amount to a full defence to the charge, in mitigation of sentence is appropriate. This was not disputed in *Suter* (para 64 of majority judgment and para 125 of dissent and see dissent of Justice Gonthier in *R v Pontes*, 1995 CanLII 61 (SCC), [1995] 3 S.C.R. 44 at paras 75 and 87 and the Court in *R v Stone*, 1999 CanLII 688, [1999] 2 SCR 290). The twist in *Suter* is the general unavailability of mistake of law as a defence unless it falls, as discussed below, within an exception such as mistake of mixed law and fact, colour of right and officially induced error. Again, without knowing the premise of the mistake, in law, we are unsure if the mistake is being

used at sentencing as a defence that could not be proven at trial or as a defence unavailable at trial.

There is glancing discussion by Justice Gascon on s.19 of the *Code* which sets out the admonition that ignorance of the law is no excuse (para 127). There is, however, no discussion of when a mistake of law can be a defence such as when it is a matter of mixed fact and law (see *R v Manuel*, 2008 BCCA 143 at paras 16 and 17), a colour of right (see Justice Moldaver's decision in *R v Simpson*, 2015 SCC 40, [2015] 2 SCR 827), or officially induced error such as in *Lévis (City) v. Tétreault*, 2006 SCC 12 , [2006] 1 SCR 420. Not referencing the *Lévis* decision is a surprise as it is that decision in which the Supreme Court outlines the very strict requirements for the defence of officially induced error, a defence traditionally only applicable in regulatory matters. A reliance on another person for knowledge of the law seems to fit squarely within the *Suter* form of mistake of law. Yet, there is no discussion in *Suter* of this point. We do not know under what form of mistake of law the Court is considering. Is it officially induced error as Justice Gascon seems to be suggesting or is it an honest but mistaken belief in law? Is the issue a mixed law and fact, permitting a defence? Or is it a question of scope and interpretation of the law, which is a feature of mistake of law? Does it even matter if the defence is available in law or not or what it may consist of if we are in the sentencing hearing stage where the procedural and evidential standards are relaxed? These and many questions are simply left out of this decision to be filled in by speculation. Again, there are hints to their approach as the issue of the lawyer's incorrect advice and the reliance on it is a point of discussion and disagreement.

To be sure, duty counsel or *Brydges* lawyer (referring to *R v Brydges*, 1990 CanLII 123, [1990] 1 SCR 190, in which the Supreme Court found the state must provide an accused access to a lawyer upon arrest to comply with s.10(b) right to counsel under the *Charter*) does not, according to case law, fulfil the *Lévis* requirement that the official who gives the legal advice be a government official authorized to speak on the issue. In *R v Pea,* 2008 CanLII 89824 (ON CA) and *R v Beierl*, 2010 ONCA 697 duty counsel was not considered an official for purposes of the defence. This point, seemingly at issue in an officially induced error scenario, was not discussed in *Suter* just as the defence itself was not directly raised.

Also, not fully discussed is the *Pontes* decision, referenced earlier in this post, in which Justice Gonthier, for the dissent, enters into a principled discussion of the operation of s. 19 of the *Code* and thoroughly discusses instances where a mistake of law may be a defence to a strict liability offence (paras 71 to 80). Although *Pontes* is decided in the context of regulatory offences, Justice Gonthier considers an earlier Supreme Court decision in *R v Docherty,* 1989 CanLII 45 (SCC), [1989] 2 S.C.R. 941, on the required elements of the then *Criminal Code* offence of wilfully failing or refusing to comply with a probation order. In his analysis in paragraph 75 of *Pontes*, Justice Gonthier relies on *Docherty* for the contention that ignorance of the law may provide an excuse where knowledge of the law is part of the *mens rea* of the offence. The evidence of an accused's lack of knowledge of the legality of the breach would negate a "wilful" failure or refusal to comply. There is no discussion in *Suter* on the *mens rea* required for the offence for which Suter entered a plea and subsequently this aspect was not raised.

There is another telling dimension to the mistake of law approach. Throughout the dissent, Justice Gascon calls the offence "administrative" (paras 107, 172, 181, 183, and 201) signalling

his belief the offence is more akin to a regulatory matter. This characterization renders the mistake of law defence even more applicable based on its broader usage in the prosecution of regulatory matters where knowledge of a large body of regulation is difficult. Yet, the *Suter* offence is in the criminal code and is not regulatory. To characterize this offence as administrative in nature deflects the issue away from the reason behind the offence not just as an incentive to assist police in the investigation of impaired driving crimes but to provide a disincentive to refuse to do so in order to escape criminal or civil liability. Courts have characterized this offence in a similar way (see *R v Seip*, 2017 BCCA 54 at para 36).

This result-oriented perspective occurs to such an extent in *Suter* that we are not even sure to what standard of proof the mistake of law must be proven for the mistake to be considered in sentencing. This missing piece acts to magnify the differences between the majority and dissent. Justice Moldaver enters into a discussion of Suter's sincere and honest belief in the mistake (paras 62-70) akin to a mistaken but honest belief assessment needed for the defence of mistake of fact. Conversely, Justice Gonthier focuses on the bad legal advice, without which, Suter would not be in court, making Suter's "moral blameworthiness ... infinitesimal" (para 174). No one meaningfully articulates the commonalties, other than mistake can be considered on sentence. It is as if the Court is working backward from the sentence to the mistake itself. This backward glance is the source of friction between the two decisions and is most readily apparent in their perception of the importance of the legal advice on the mistake.

This framing of the so-called mistake of law scenario leads into the very different perspective on the bad legal advice given to Mr. Suter. Justice Moldaver pins the mistake of law on Suter in terms of his belief of what the law required. In the majority's construction of legal rights and responsibilities, it is the individual and their personal choices that control the effect of the law. Justice Moldaver takes a hard-line in finding a paucity of evidence on the true substance of the legal advice given and counters that absence of evidence with the presence of the police officer, who fulfills his *Charter* duty by cautioning Suter to provide a sample or face the consequences of a criminal charge. To take this position in the context of a sentencing hearing, where evidential and procedural rules are relaxed (see *R v Lévesque*, 2000 SCC 47, [2000] 2 SCR 487) shows a clear desire to minimize the impact of the mistake, in whatever form it is in.

Justice Gascon pins the mistake on the duty counsel lawyer and then frames Suter's duties within a *Charter* framework. The dissent leans on the *Charter* as an explanation for why Suter was acting under a mistake of law relying on *Charter* protections not as stand-alone arguments where rights are breached but to provide the basis for inferences as to why people choose to do what they do. Thus, Suter's failure to blow, despite the police officer's dire warning that a failure will result in a criminal charge, is waved away by Justice Gascon as a reasonable response of an accused to information from an agent of the state – the very agent who is attempting to build evidence against him. This emphasis on the state as the bad actor so to speak builds a much different narrative than the majority. It also fails to acknowledge some case authorities that have tackled the issue of officially induced error where the police caution to provide a sample is confusing (see R. v. Humble, 2010 ONSC 2995). Again, we are on uncertain ground by not knowing what the mistake of law is predicated on and who the "authorized" officials are in the scenario. The *Suter* decision is directionless on this and yet the appeal provided a perfect opportunity to provide clarity on these issues, despite the uniqueness of the fact situation.

Nestled within these correlated issues and directly arising from the sentencing hearing, flows the discussion on the application of the 2015 Supreme Court decision on sentencing principles, *R v Lacasse*, 2015 SCC 64, [2015] 3 SCR 1089. Where *Suter* is set in a unique factual circumstance, *Lacasse* involves the all too often scenario of impaired driving causing death. There is, sadly, nothing unique about the facts there. Indeed, the *Lacasse* decision is broadly based and serves to clarify general sentencing principles and the role of the appellate courts in considering a sentence appeal. *Suter*, while applying *Lacasse*, resurrects some of those self-same issues. Notably, Justice Gascon dissented with the then Chief Justice McLachlin, giving *Suter* a *déjà vu* flavour. Some might even say based on Justice Gascon's dissent, that far from applying *Lacasse*, the Court in *Suter* is doing just what *Lacasse* attempted to avoid – the "tinkering" of the quantum of sentences at the appellate level. In *Suter*, as in *Lacasse*, moral culpability, proportionality and gravity of the offence drive the foundational underpinnings of the decision.

The next issue, flowing from the first two, involves the larger discussion on the role of the Supreme Court in sentencing appeals – not just appellate courts – but as the court of final appeal. This is not just a purely jurisdictional discussion as found in *R v Gardiner*, 1982 CanLII 30 (SCC), [1982] 2 SCR 368, and as distilled by Chief Justice Lamer in paragraph 33 of the *M(CA)* decision. This is a complex interplay between the roles of trial courts versus appellate courts in determining fitness of sentence that flows beyond jurisdiction. Appellate intervention is hierarchical yet infused with deference. Deference to the trial judge is a continual appellate theme, as it symbolizes the core of our common law justice system. This is a system where judicial parameters are laid down in principle but not rigidly adhered to. There is, as mentioned at the start of this post, wriggle room for the judges to apply their own common sense and discretion, based naturally in law so as not to be unreasonable or erratic. It flows from judicial independence and from a desire to inject into the process a good dose of humanity in the form of equity.

Deference to the trial judge in *Suter* becomes not just an issue arising from the appeal but becomes a tool used by the dissent of Justice Gascon (paras 161 – 178). For Justice Gascon, the majority becomes a court of first instance as they exercise their own discretion, wielded through their own judicial lens by sentencing the accused *ab initio*. All of this, to Justice Gascon's chagrin, to 'tinker' with the sentencing judge's perfectly principled original sentence. Justice Gascon goes so far as to 'call out' Justice Moldaver for obfuscating the real reason for the increased sentence imposed by the majority as a pandering to the public/government's tough on crime agenda, particularly in the area of impaired driving (para 159). This deference is hard won as Justice Gascon himself admits that he would have "personally ... weighed the gravity of the offence more heavily than the sentencing judge" (para 170). His challenge to the majority is a clear indication that the court is divided philosophically, politically and legally. Deference in *Suter* becomes not just trial judge deference but deference to the Rule of Law, to the independence of the courts and to each other.

Indeed, Justice Moldaver commences his reasons by applying an earlier Supreme Court case, *R v Mian*, 2014 SCC 54, [2014] 2 SCR 689, on the scope of appellate review (see my earlier blog posting on the issue on my ideablawg website). *Mian* raises the spectre of a reasonable apprehension of bias at the appellate level when the appellate court raises issues not identified by

appellate counsel. In *Mian*, it is not so much the raising of the new issue which is problematic but raising the issue without giving counsel the ability to respond. In Justice Moldaver's view this opportunity was given in *Suter*.

But flowing from the *Mian* concern is the additional problem or error of the court of appeal in sentencing Suter for offences of which he was not charged (paras 35 to 44). The procedural concept of an appellate court raising new issues on its own motion becomes an error in law as the court of appeal created a "novel and confusing" form of impairment "by distraction" akin to a careless driving or dangerous driving delict (para 38). According to Justice Moldaver, by doing so, the court of appeal was "circumventing the sentencing judge's finding that this accident was simply the result of "non-impaired driving error" (para 38). Again, deference to the trial judge re-appears, as finding of facts is the province of the trial judge, who lived and breathed the evidence, not the appellate court, who merely reads it. This is particularly important in sentencing as a sentencing judge can sentence an accused on uncharged offences arising from the facts, but those aggravating features must be proven beyond a reasonable doubt (see *R v Angelillo*, 2006 SCC 55, [2006] 2 SCR 728). There is a further concern with this position as it reflects on Justice Gascon's concern with the majority's decision to re-sentence Suter. Sentencing as an art is a collage of facts and principle where the emotional content of the accused's background and the gravity of the offence colour the decision-making. Who better to do this than the original sentencing judge.

Indeed, who better? Briefly looking at previous sentence appeals decided at the Supreme Court level, the re-sentencing of Suter is unique. The Court may remit the matter back to the trial judge for imposition of sentence where the Court enters a conviction overturning an acquittal (see for example *R v Bradshaw*, [1976] 1 SCR 162, 1975 CanLII 19 (SCC); *R v Audet*, [1996] 2 SCR 171, 1996 CanLII 198 (SCC), and *R v Ewanchuk*, [1999] 1 SCR 330, 1999 CanLII 711 (SCC)). The Court may also remit the matter to the lower appellate court for re-consideration pursuant to that court's power under s. 687 of the *Criminal Code* to vary the sentence imposed (see for example *Lowry et al v R*, [1974] SCR 195, 1972 CanLII 171 (SCC) and *R v Loyer et al*, [1978] 2 SCR 631, 1978 CanLII 194 (SCC) where the Supreme Court ordered the matter back to the court of appeal to pass a new sentence upon hearing of sentencing submissions by counsel at page 204). Rarely does the Supreme Court re-sentence an Appellant but never before has the Court found both the trial judge and the court of appeal to be in error in the fitness of sentence imposed (according to my Canlii database search). The Supreme Court has no direct statutory authority to impose sentence as in the case of a provincial court of appeal.

Although re-sentencing *in toto* has not happened previously, the Supreme Court has adjusted a sentence. For instance, in *R v Morrisey*, [2000] 2 SCR 90, the Court varied the sentence to properly account for pretrial custody. Also, the Court has adjusted a sentence to bring it into conformity with a joint submission on sentence such as in *R v Anthony-Cook*, 2016 SCC 43, [2016] 2 S.C.R. 204. Prior to *Suter*, the closest the Court came to imposing a sentence is in *R v Middleton*, 2009 SCC 21, [2009] 1 SCR 674, where Justice Cromwell, dissenting in part, found the sentence to be illegal but refrained from deciding what sentence he would impose considering the outcome of the appeal per the majority's decision (see paras 112 -113).

Justice Gascon, to put it mildly, did not approve of this re-sentencing. As mentioned earlier, he found the new sentence imposed by the majority to be effectively a non-sentence as it amounted to time served. Consistent with this view, Justice Gascon labelled the majority's decision as a "stay" of the sentence (para 158). The Supreme Court has stayed the passing of sentence in previous appeals but not in conjunction with re-sentencing, such as in *Suter*, where the Court actually applies sentencing principles and balances the required considerations to arrive at an actual sentence quantum. In *R v LFW*, 2000 SCC 6, [2000] 1 SCR 132 for example, the Court found the conditional sentence was inappropriate and a term of incarceration was required. The then Chief Justice Lamer stayed the passing of that imprisonment as the offender had completed the conditional sentence and it would be "very difficult" for the sentencing judge to re-sentence (para 32). In another decision, the Court restored but stayed a conditional sentence order where the offender had already served the period of incarceration ordered by the court of appeal (see *R v RNS*, 2000 SCC 7, [2000] 1 SCR 149). *Suter* also differs from *R v Fice*, [2005] 1 SCR 742, 2005 SCC 32 (CanLII), where the Supreme Court found the court of appeal erred in upholding an illegal conditional sentence order but stayed what would otherwise be a penitentiary sentence. The Court in *Fice* did not enter into a sentencing assessment and the stay appeared to be with consent of all parties (para 46).

It should also be noted that the concept of imposing time served on a sentence appeal even if a longer sentence was appropriate is not unusual. Provincial appellate courts of appeal regularly take into account whether it would be in the interests of justice to re-incarcerate the Appellant when a sentence appeal is allowed (see *R v Reddick*, 1977 ALTASCAD 199 (CanLII) at para 4; *R v Mann*, 1995 CanLII 321 (ON CA) and *R v Maxwell-Smith*, 2013 YKCA 12 (CanLII) at para 21). What is unusual is the fact that it is the Supreme Court doing it. Justice Moldaver, who sat as a trial judge and as a court of appeal justice, is very familiar with sentence appeals and the pragmatic outcomes needed. We see in *Suter* a clear division along the lines of practical realism on one hand and principled rule-based approaches.

The last set of issues flow from the previous ones as we read between the lines of this judgment. Such a close reading reveals both this Court's approach to criminal law and the sense of discordant approaches within the Court itself. Examples of this can be seen in the majority and dissent positioning around mistake of law and deference. It is also viscerally read in the tone and approach of Justice Gascon's dissent with a specific part dedicated to pulling apart the majority's position to the point of parsing in all of its minutiae the majority's reasoning (paras 156 – 159). This dissection reminds me of the Supreme Court's own caution not to cherry-pick or parse a trial judge's reasons but to view the whole of the reasons in determining whether an error was occasioned and if there is an error, the significance of it (I discuss this more thoroughly in a soon to be published paper in the Manitoba Law Journal entitled *The W(D) Revolution*). Justice Gascon's dissent shows this is easier said than done.

This extensive point by point response to the majority and even the majority's anticipatory responses to the dissent belie a tension hitherto not seen to such a degree in the Supreme Court. Even in the heady days of the Nineteen- Nineties when the court was fractured, there was a sense the Court was still attempting to talk to us, the legal community, albeit disparately, about the legal principles. *Suter* feels different. In *Suter* the judges are airing their laundry so to speak and speaking as they probably do behind closed doors where they engage in no doubt vigorous debate about the issues. Is this the transparency Chief Justice Wagner is encouraging from the

Court? Or, as parts of this judgment feel, is this exclusionary as the legal community becomes the child in the room who can sense the tension from the parental tone of voice but cannot understand the meaning of the words? In some ways we are not privy to the deeper discordance that may lay behind this judgment – perhaps the differences between principal and pragmatism, which seems to permeate this judgment.

This leads us finally to a discussion of not what lies between the lines but how those lines are written and the judgment as a unique literary device that may challenge our idea of how the law is not only decided but also represented in Canadian case law. I mentioned this earlier, but the judgment reads as a discourse in which the majority and dissent write for themselves and between themselves. This may suggest an American approach where the SCOTUS render opinions, not judgments, and as such tend to be opinionated in their approach by consistently responding to one another either directly in the opinions or through footnotes. Whether *Suter* signals a change in writing style and approach will be a matter of record as this newly minted Wagner court renders decisions on decisive issues.

This decision is important. It discusses novel issues in a novel way. It exhibits an approach from the Supreme Court which we have not seen before. It impacts an area of criminal law in much need of legal discussion considering much of what a trial judge does in criminal law focuses on the criminal sanction. But the *Suter* decision is wanting as it leaves us wanting more. Sentencing is a delicate art and requires a fine balance between oft opposing principles. So too, a Supreme Court judgment requires that self-same balance to help us navigate our clients through the legal maze. Although *Suter* fails to achieve this balance, it does leave a legacy of the further work which needs to be done by the legal community in clarifying and pushing the limits of sentencing principles.

This post may be cited as: Lisa Ann Silver, "A Fine Balance: Sentencing Suter in the Supreme Court of Canada" (July 19, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/07/Blog_LAS_Suter_July2018.pdf

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