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Sentencing in Sexual Assault Cases – Whither Appellate Guidance?

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Cases Considered:
R. v. Jefferson, 2008 ABCA 365; *R. v. C.H.L.*, 2008 ABCA 366.

In two decisions released on back to back days in early November, the Alberta Court of Appeal grappled with the issue of sentencing in serious sexual assault cases. Both judgments were released as Memoranda of Decision, and neither is very helpful in providing guidance to lower court judges for sentencing in this area. The cases call into question the legitimacy of a Practice Note issued by the Court of Appeal to the effect that Memoranda of Decision have less weight than Reasons for Judgment Reserved in sentencing cases. Indeed, in one of the cases the judges themselves question this practice, yet effectively perpetuate it at the same time.

R. v. C.H.L. concerned historical abuse by a father upon his daughter 30 years ago during a period when she was 6 to 9 years old. The father, C.H.L., pleaded guilty to 3 crimes covering 5 different incidents of rape, incest, and gross indecency. At the time of sentencing he was 64 years old, had no criminal record, and a steady work history interrupted for a period of time because of depression. C.H.L.'s psychiatrist was of the opinion that "jail would be very bad" for C.H.L. and his wife (at para. 3), but no reasons were given for this assessment. In contrast, the author of the pre-sentence report recommended that C.H.L. "is not a suitable candidate for community supervision", and expressed concern "about his attitude towards the offence" (at para. 4). There is not much detail provided about the victim, save that she attempted suicide twice after the sexual assaults were revealed.

Section 742.1 of the *Criminal Code*, R.S.C. 1985, c.C-46, permits conditional sentences for certain offences, allowing convicted offenders to serve their time in the community where their sentence does not exceed 2 years less a day and where the sentencing court is satisfied that such a sentence "would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing." C.H.L. was granted a conditional sentence of 2 years less a day by Judge D. Brand of the Alberta Provincial Court, which included house arrest but permitted C.H.L. to go to work. The Crown appealed the sentence as unfit.

In its Memorandum of Decision, the Court of Appeal (per Justices Jean Côté, Colleen Kenny and Elizabeth Hughes) noted that Judge Brand's "brief oral reasons … covered less than we would have hoped. They said little about statute law and nothing at all about case law" (at para. 7). However, the Court of Appeal's reasons fall prey to the same criticism. Despite the fact that counsel on the appeal are said to have presented arguments on starting points for sexual assault sentencing and the question of which Court of Appeal decisions should be seen as precedential, the Court of Appeal did not "find it necessary to rely upon or decide any of those principles or disputes here." Rather, it was seen as "sufficient to invoke a few well-known and much more

basic principles, and then to look at the facts here, to decide what range of sentences the crime and the personal circumstances of the respondent would permit" (at para. 10).

The Court began by assessing the seriousness of the offences, which they found to be "extremely bad" (at para. 14) based on the repeated nature of the sexual assaults over a lengthy period of time, the daughter's young age, the egregious breach of trust, and the impact on the victim. According to the Court,

> If there were no mitigating circumstances, all the circumstances of these crimes could not possibly attract a sentence of less than four years. More could be justified, but four is the lowest one could legitimately go on these particular facts. That is true even without looking at any mandated starting points from Court of Appeal precedents (at para. 16).

Not one case is cited, so it is very difficult for the average reader to know where the 4 years which seems so obvious to the Court comes from.

In *R. v. Sandercock* (1985), 62 A.R. 382; 1985 CanLII 104, the Alberta Court of Appeal established a 3 year starting point for major sexual assault cases, thereby attempting to balance the "twin difficulties" of sentencing, 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 a 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 guideline, 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 certain key elements required for guilt. … 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 of terms of possible sentences (at paras. 3 - 4).

The establishment of sentencing starting points for particular categories of offences was accepted by the Supreme Court of Canada in *R. v. McDonnell*, [1997] 1 S.C.R. 948 and *R. v. Stone*, [1999] 2 S.C.R. 290 as one way for appellate courts to provide guidance in sentencing. *Sandercock* itself was recently reaffirmed by the Court of Appeal in *R. v. Law*, 2007 ABCA 203. According to the Court in that case,

> All trial judges have to start their sentencing reasoning somewhere. If there were no notional tariffs, ranges or starting points - in other words, if there were no rationally designed judicial approaches to reflect common perspectives on values

> and to serve recognized penological purposes - then there would be no rational manner for the Courts to effectuate the will of Parliament.
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> Courts are to impose sentences that are fit to the offender and the offence within the meaning of s. 718.1 of the *Criminal Code*. To get to a "fit" sentence, a judge does not throw a dart at a board setting out a space between the statutory minimum and maximum. Penological objectives and social values could not be consistently or predictably served or asserted by a forensic lottery associated with idiosyncratic impulses of specific courts. Such a standardless system would not encourage consistency of approach by courts or even by individual judges. Justice may be, as Benjamin Cardozo has said, a work in progress, but it should not be constantly re-invented.
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> This is not to suggest that the conscientious trial judges in this province would be unable to impose fit sentences without guidance. Rather, it means that consistency and predictability require something more than confidence in the people making the decisions (at paras. 56 - 58).

Returning to *C.H.L.*, and to adopt the metaphor used in *R. v. Law*, the Court is clearly aiming its dart at a particular target, but the basis for the point value of the target is obvious only to the Court. Perhaps the Court is relying upon *R. v. W.B.S.*, (1992), 73 C.C.C. (3d) 530; 1992 CanLII 2761, where the Court of Appeal established a starting point sentence of 4 years for cases of major sexual assault of children by a parent or other person in a position of control and trust. W.B.S. has been explicitly followed in a number of Alberta Court of Appeal decisions, most recently in *R. v. S.P.C.*, 2008 ABCA 280. If this is indeed the basis for the 4 year baseline relied upon by the Court in *C.H.L.*, why could it not have made that explicit?

After noting the 4 year baseline, the Court goes on to look at mitigating factors, noting C.H.L's guilty plea, his lack of a criminal record, his age, the long gap since the crimes were committed, and the unlikelihood of him re-offending based on unspecified health issues. Other factors were said to be neutral, such as the fact that C.H.L. claimed to have been abused as a child. Oddly, no aggravating factors are mentioned at this stage. The repeated nature of the assaults was referenced earlier to establish this as a serious sexual assault, notwithstanding the fact that in *W.B.S.* the 4 year starting point was for a *single* incident of serious sexual assault. One might have thought that the long history of the assaults would have been seen as a significant aggravating factor tending to move the sentence up from 4 years. Overall, the Court concludes that "one could not properly give [the mitigating factors] more weight than 25%, which would leave a sentence of at least three years in jail" (at para. 21). The Court notes that "all the case law" specifies that general deterrence and denunciation are the primary sentencing considerations in a case of this kind, but which cases are significant we are not told. In the end, the 2 year conditional sentence was found to be "plainly unfit" and outside the proper range (at para. 23). The Court of Appeal substituted a sentence of 3 years actual jail time, less the amount of time served under the conditional sentence order (131 days).

Importantly, in determining the fitness of the conditional sentence the Court stated that just because "a conditional sentence is not barred by a specific statutory provision does not mean that it is fit" (at para. 23). This is one of the few legal principles articulated in the case. Section 742.1 of the *Criminal Code* excludes conditional sentences for certain offences, including "serious personal injury offences." Section 752 of the *Criminal Code* defines serious personal injury offences to include sexual assault (section 271), sexual assault with a weapon (section 272), and

aggravated sexual assault (section 273), as well as indictable offences involving "the use or attempted use of violence against another person" 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. The specific offences for which C.H.L. was convicted do not fall within this definition, although the spirit of the section 752 certainly seems to cover such offences.

During the recent federal election, the Conservatives promised to resurrect the issue of judicial discretion in sentencing, including the exclusion of "serious crimes" from the possibility of conditional sentences. In its election platform, The True North Strong and Free: Stephen Harper's plan for Canadians, at 37, serious crimes are said to include robbery, arson and home invasion. It remains to be seen whether offences such as those at issue in *C.H.L.* will be included (if in fact the Conservatives continue to govern when Parliament resumes in late January).

Perhaps the lack of reference to specific guiding legal principles in *C.H.L.* is a question of judicial resources, and the Court of Appeal is faced with so many sentence appeals that it cannot provide detailed written reasons for decision with appropriate references to case law in each one. It is still hard to understand why a leading case such as *R. v. W.B.S.* was not cited, however.

Turning to the other case that is the subject of this post, Andrew Aurie Jefferson pleaded guilty to charges of sexual assault, threat to cause death/bodily harm, unlawful confinement, sexual assault with a weapon and common assault in relation to 3 separate incidents involving 3 victims. Unlike C.H.L., Jefferson did not know his victims - these were random attacks of women walking down the street over a period of 2 months in the spring of 2006. The events became increasingly serious over time, culminating in the 3rd victim's abduction and serious sexual assault with a knife lasting over an hour. At the time of sentencing, Jefferson was 21 years old. Justice A.G. Park of the Alberta Court of Queen's Bench sentenced Jefferson to 6.5 years imprisonment, less the 2.5 years he had already spent in custody.

In response to a Crown appeal, 2 sets of reasons were released by the Court of Appeal in a Memorandum of Judgment. Writing for himself and Justice Carolyn Phillips, Justice Ronald Berger indicated that the Crown was seeking the establishment of a starting point for the offence of sexual assault with a weapon. The Crown's submission was based on the fact that in *Sandercock*, the Court of Appeal explicitly excluded planned and deliberate attacks from the 3 year starting point for major sexual assaults, "whether the offender has stalked his victim or chosen her at random. …" (*Sandercock* at para. 17). The Crown contended that 10 years was an appropriate starting point for sexual offences of this kind, and relied on a number of cases to support this proposition.

Several of the cases relied upon by the Crown were Memoranda of Judgment, leading Berger J.A. to point to the Court's Practice Note A4, which provides as follows:

> 4. Precedent
> Previous memoranda of the Court in sentencing cases have little weight as precedent: see ***R. v. Johnas*** (CA 1982) 41 AR 183, 196, and ***R. v. Beaver*** (CA 1984) 51 AR 159, 160 (see http://www.albertacourts.ab.ca/ca/practicenotes/a.pdf).

This Practice Note was recently affirmed by some members of the Court in *R. v. D.S.*, 2008 ABCA 117, where the panel began its judgment by noting: "This memorandum (like any sentencing memorandum) will not be appropriate to cite as authority" (at para. 1). Interestingly, this panel included Justice Jean Côté, who also sat in *C.H.L.*

According to Justice Berger, however, the basis for Practice Note A4 - that only "Reasons for Judgment Reserved" are circulated amongst members of the Court of Appeal - is flawed, because "judges off the panel may or may not comment on a circulated draft; they may or may not agree with the reasoning; their views, whatever they may be, may not find expression in the judgment that is finally issued; indeed, "Reasons for Judgment Reserved" may not enjoy the support of the majority of the members of the Court" (at para. 10).

Further,

> It is not at all surprising that neither the Crown nor the defence bar in this jurisdiction adheres to the Practice Note. For that matter, nor does the Supreme Court of Canada (see *R. v. McDonnell*, [1997] 1 S.C.R. 948) where the Court looked to memoranda of judgment and judgments delivered from the bench to properly assess the range of sentencing for sexual assault in Alberta (at para. 11).

Justice Berger expressed support for the judgment in *R. v. Beaudry*, 2000 ABCA 243 at paras. 34 to 40, which are in fact his own reasons for judgment in that case. In *Beaudry*, after a lengthy analysis of the principles of *stare decisis*, Berger J.A. noted that even judges of the Court of Appeal often ignore Practice Note A4 and rely upon previous Memoranda of Judgment. Justice Berger criticized the "hierarchy of precedential value based on label", and opined that

> Memoranda of Judgment and judgments labelled "Reasons for Judgment Reserved" must be accorded equal precedential value. Jurisprudential value should depend on the manner in which reasons are cast and the context in which they are delivered, and not on the label affixed. It is the decision of the Court that is binding, not the weighted value of it (*Beaudry* at para. 37).

Eight years later in *Jefferson*, Justice Berger continues to be troubled by the implications of Practice Note A4. This time, Justice Phillips and Justice Sullivan both concur with him on this point (although Justice Sullivan writes his own reasons). Interestingly, both are Justices of the Court of Queen's Bench sitting *ex officio* on this appeal. As Queen's Bench justices one would expect that they have a particular interest in clarifying the weight of Memoranda of Judgment and their precedential value for lower courts. As stated by Justice Sullivan,

> Defence counsel and the Crown should have the benefit of any and all reasons of the Appellate Court in building their cases; trial judges should have the benefit of the same in establishing fair sentences. The idea that all of the Court's reasoning is legally relevant stands for the principle of equality and the rule of law … (*Jefferson* at para. 37).

C.H.L. is a case where the problems with Memoranda of Judgment ring loud and clear, as they seem to give the Court licence to avoid citing any case law. The Court should not forget that the audience for its judgments is not only legal professionals working in the area who will be familiar with the relevant case law, but the general public, who will rightly want to understand the basis for a particular sentence. To return to the passage quoted above from *R. v. Law*, "consistency and predictability require something more than confidence in the people making the decisions" (at para. 58).

The issue of the weight to be accorded to Memoranda of Judgment also applies outside the sentencing context, and ABlawg is following this issue for a future post.

Although *Jefferson* is encouraging to the extent that it calls into question Practice Note A4, the Court of Appeal declines to provide the guidance being sought by the Crown by way of a starting point sentence for cases of sexual assault with a weapon. Here too Justice Berger seems willing to question Court of Appeal orthodoxy. He finds that the proper approach for providing guidance to lower court judges in sentencing matters is to "carefully delineate the range of sentences typically imposed for certain crimes" rather than to establish a starting point (at para. 12, relying on the Supreme Court's decision in *Stone, supra*). The range approach is said to properly recognize that parity in sentencing between cases is a less important consideration than fitness of a sentence in a particular case, as well as to accord appropriate deference to sentencing judges. In contrast, the starting point approach "sacrifices deference on the altar of parity [and] … pays lip service to the individualized process of sentencing … while severely constraining the exercise of sound discretion by sentencing judges…" (at para. 17).

After declining to implement the starting point approach, however, neither Justice Berger nor Justice Sullivan went on to "carefully delineate the range of sentences typically imposed" for the kinds of sexual offences at issue in *Jefferson.* The Crown was taken to task for not citing sufficient case law to assist the Court in setting the range. In the absence of more than a few cases "arbitrarily selected" (at para. 19), Justice Berger turned to the facts of the case and assessed the fitness of the sentence in that context, ultimately upholding the sentence as fit. Much deference is paid to the sentencing judge at this stage - he "properly characterized the assault as "serious attacks""; he "made specific reference to the traumatic effect upon the victims and appreciated full well that the most important concerns are denunciation and deterrence"; he understood that "[w]omen in our community should not have to worry about walking the street to be attacked from behind by a person with a knife"; he took into account a Forensic Assessment Outpatient Service (FAOS) report, a risk assessment and a "very thorough pre-sentence report"; he found that Jefferson was "truly remorseful" and had spared the victims from testifying at trial by pleading guilty (at paras. 20 - 24).

The Crown's failure to cite sufficient case law is unfortunate, and *Jefferson* thus may not have been an appropriate case to establish a range that was guiding for future cases. However, as in *C.H.L.*, readers are left without more specific guidance as to the legal basis for considering the fitness of the sentence in the case itself. We are not supposed to take Memoranda of Judgment as less weighty, but in failing to cite relevant case law in support of upholding the sentence of 6.5 years, the Court of Appeal effectively makes it so. It is fit to conclude with a quote from Justice Sullivan's concurring reasons:

> When consideration of context in sentencing eclipses the principle of parity, judicial discretion appears to the public as judicial inclination. This can only hamper public respect and public confidence, necessary conditions for maintaining the rule of law (at para. 33).