

Sentencing to the Starting Point: The Alberta Debate

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Case Commented On: *R v Ford*, [2019 ABCA 87](#)

After *R v Shropshire*, [\[1995\] 4 SCR 22](#), the future of starting points in sentencing seemed questionable but after *R v M (CA)*, [\[1996\] 1 SCR 500](#), the future of the concept seemed downright bleak. Yet, decades later in *R v Lacasse*, [\[2015\] 3 SCR 1089](#), the Supreme Court still wrestled with the applicability of starting points in sentencing. Now, the province which embraced the concept is debating the efficacy of using this sentencing approach. Although the majority of the Alberta Court of Appeal has never wavered on the applicability of sentencing starting points, the meaning of such a tool has changed. In *R v Ford*, [2019 ABCA 87](#), the most recent pronouncement on the issue, the Court seems prepared to shed the past and move beyond this point of contention.

The *Ford* decision is brief and needs context. This requires a review of the principles surrounding starting points including a look back to the source of the principle. This review, however, and here is the spoiler alert, will not just engage a linear analysis of the law. It is not enough that we understand the divergent issues arising from applying starting points in sentencing to arrive at the final sentence determination in an individual case. We must also situate that starting point in the grander scheme of legal principle by asking the reason for using such a point in the first place. This exploration of the “why” requires us to understand what the attraction to a starting point in anything is anyway and whether, for this reason, we simply cannot shed the basic need to start from somewhere. For this part of the discussion, I will not start with the expected but with the unexpected.

A “starting point,” according to the online Cambridge Dictionary, is “[a place or position where something begins](#).” This is a linear concept, reminiscent of elementary mathematical vectoring, where motion is conceived as implying a direction from A to B. We move through space and time from one point to another. A starting point anchors us in that space and carves out a place, a pinpoint, at which we can orientate ourselves. Without such concreteness of place and time, we would experience vertigo. We would be horribly out of place. A recent book by the theoretical physicist, [Carlo Rovelli](#), explains this human need to belong to somewhere both literally and physically. In “[The Order of Time](#),” Rovelli describes our entire world view as a human construct. “Entire” includes our conception of time. In fact, Rovelli persuasively argues, time is entirely a human construction which has little scientific basis. We created time to help us explain the world better and to better control it. Time, in other words, is humanity’s starting point. Time helps us understand events. If we can’t start with ‘In the beginning’ or the ‘Big Bang’ then we can’t completely appreciate the import and impact of those events.

This brings us to Rovelli's further contention that points in time are imbued with perspective. Perspective requires a particular point of view connected to the time event. According to Rovelli, "point of view is an ingredient in every description of the observable world we make" (at 153). This requires us to look at the world from within because that's where we are located – within the world. Just as we cannot use a map to take us from point A to B without knowing where we are in relation to those points, we feel a need to make sense of the world through the eyes of the insider.

You may now ask how this travel through the space-time continuum relates to starting points in sentencing. It has everything to do with them. This seemingly side bar peregrination lends context to the debate on the space occupied by starting points in our sentencing nomenclature. Without considering the human desire to start from somewhere, we will not have the entire perspective before us. Without injecting the human perspective into an event, we are losing meaningful engagement with it and within it.

To gain this meaning, we need to take a deep look at the source. Although Alberta did not create the concept of starting points in sentencing, it did perfect it in the 1984 decision, *R v Sandercock*, [1985 ABCA 218](#). There, in the context of sentencing for a major sexual assault offence, Justice Roger Kerans, speaking for the panel which included the then Chief Justice James Laycraft, affirmed the Court's "commitment to the 'starting-point approach' to sentencing" (at para 2). When I say, 'the Court,' I mean the entire Court. Justice Kerans, in paragraph 2, makes this unusual position clear. He states confidently that "All members of the Court were consulted ... and we are authorized to say that the conclusions in these Reasons were approved by a majority of all of the judges of the Court, as well as this panel, and are to be considered as a guideline." With this sweeping statement, starting-points in sentencing in Alberta were swept in.

Yet, the Court of Appeal was no stranger to that concept even then. The starting-point approach was first articulated as a guiding principle in the *R v Johnas* decision, [1982 ABCA 331](#). In *Johnas*, the Court considered the appropriateness of a starting-point for robbery in light of the sentencing of several offenders for factually similar circumstances but with differing personal backgrounds. Some of the offenders had criminal records, while others were youthful offenders (at para 2). All of the cases involved the late-night robbery of small retail venues, such as convenience stores and gas bars (at para 3). Although violence was threatened, no victims were harmed (at para 4). At the time, these types of robberies were of great community concern. In terms of general sentencing principles, due to the gravity of the robberies, the principles of deterrence and denunciation were of paramount concern rather than rehabilitation. On this basis, the Court found that "we must record a term of three years imprisonment as a starting point in the seeking of an appropriate sentence" (at para 19). The word "record" is underlined for emphasis. Remember that word.

In any event, the Court does recognize the individuality that is sentencing. The general principles in determining a fit sentence required the Court to "speak of generalities" but through the perspective of the individual and the circumstances of the offence to arrive at a fit sentence (at para 16). It is important to note the duality of this sentiment and the juxtaposition of terms. The specific becomes the general as the individual is sentenced to a term of imprisonment which fits the type. Yet, the Court does this as an imperative – "we must" – and "[records](#)" or keeps the

information by storing it in the precedential archive for future use. The individual may still be present, at the point of the imposition of sentence but is the individual really present at that pre-recorded starting point?

The Alberta Court of Appeal was not breaking new ground in *Johnas* but was, through clear court-driven consensus, normalizing starting-points and, in so doing, embedding the approach into well-established sentencing principles. Other provincial appellate courts were using a similar approach, but labelling is everything. In the Nova Scotia Court of Appeal, for example, the Court referenced a “minimum” term of imprisonment for the *Johnas*-type of robbery (see *R v Hingley* (1977), 19 NSR (2d) 541 at 544). This was not consistent with the Alberta branding of starting-points (*Johnas* at para 22). It was too literal and restrictive, permitting discretionary decreases from that term only in “exceptional mitigating circumstances” (see *R v Owen* (1982) 50 NSR (2d) 696). This seems to suggest that the *Johnas* Court still recognized that sentencing was an exercise in discretion.

Yet, the Court does not use the word “discretion” in the decision but does use the phrase “judicial reasoning” (at para 31). Judicial reasoning is a process, or a form of analysis, employed by a judge in arriving at a decision. It involves how the sentence is determined not the mechanisms used. Starting points are therefore about the consistent application of sentencing principles based on a “norm for the type of offence involved” (para 31). This norm is developed “by comparisons to other cases, by experience, by the seriousness of the offence and by its prevalence” (para 31). It is only after the norm is determined that the Court then looks at the aggravating and mitigating factors involved in the specific case (para 31). Sentences, in other words, are objectively determined but through the unique perspective of the offender and the specific circumstances of the case. No two sentences will ever be precisely the same. In support of this position, the Court quoted Lord Justice Lane said in *R v Bibi*, (1980) 71 Cr App R 360, who stated that:

“We are not aiming at uniformity of sentence; that would be impossible. We are aiming at uniformity of approach.” (at 361)

Nevertheless, the distinction between uniformity of sentence and uniformity of approach is subtle. For instance, in the UK, Lord Justice Lane’s jurisdiction, uniformity seems to be the key word for both approach and sentence. A sentencing council, comprised of legal and non-legal members, create sentencing guidelines mandated for use in determining sentence in court (<https://www.sentencingcouncil.org.uk>). This council strives for “greater consistency in sentencing, whilst maintaining the independence of the judiciary.” These guidelines go further than a matter of judicial reasoning by setting a sentencing point based not only on legal principle and case authority but also on public consultation. This approach widens the field of perspective. Having pursued the starting point to its starting point, we can fast forward to the Supreme Court’s most recent treatment of the approach in the *Lacasse* decision. This decision sets the standard for sentencing across Canada by not setting a standard. In that decision, the majority of the Court reiterated sentencing principles found in the common law and as reflected in [s 718 of the Criminal Code](#) but at the same time confirmed the essence of sentencing as a discretionary process. The sentencing judge, as the eyes and ears of the Rule of Law, is in the best position to fashion a fit and appropriate sentence. In this way, sentencing is a true partnership between the

principles, which guide the judge, and the judge’s own sense of justice as seen through the factual, legal and societal lens.

This human touch to sentencing is therefore, according to *Lacasse*, connected to the standard of appellate review. Deference to the sentencing judge serves to contain appellate review to demonstrably unfit sentences resulting from an error in principle and law. The principle of deference, in this way, illuminates the process of sentencing by recognizing responsibility lies on that judge to craft a just and fair sentence. It is a deep responsibility indeed. A responsibility that despite the comments in *Lacasse* has resulted in division in the Alberta Court of Appeal on the parameters in which that deference must be wielded. Yet, the recent decisions rendered by the Alberta Court on the issue suggest the softening of the starting point from a hard start to a soft reference point. Such approach, is more consistent with the Supreme Court’s views of the issue.

There have, of course, been critics of the more flexible approach to starting points. One matter of contention in the Alberta Court of Appeal started before *Lacasse* but continued in earnest even after the release of the decision. In a series of dissenting opinions (*R v Murphy*, [2014 ABCA 409](#) (Wakeling JA is not in dissent but renders a concurring judgment) *R v KSH*, [2015 ABCA 370](#), *R v Rossi*, [2016 ABCA 43](#), *R v Vignon*, [2016 ABCA 75](#), *R v Yellowknee*, [2017 ABCA 60](#)), and *R v SLW*, [2018 ABCA 235](#), Justice Thomas Wakeling believes appellate courts “must provide an analytical framework for the assistance of sentencing courts” (*KSH* at para 60, *Rossi* at para 56, *Vignon* at para 45, and *Yellowknee* at para 52). In each decision, Wakeling JA creates sentencing protocols for sentencing judges, akin to the computer coding language of “if, then.” These “subsets” or “bands of offences” (see e.g. *SLW* at paras 97–98) reflect categories of sentences in which gravity of the offence is the variable measurement. If an offence falls within a band, then the sentence to be imposed is easily ascertained and articulated.

Although Wakeling JA perceived this framework as providing articulable sentencing structure within a discretionary decision, other appellate courts disagreed. As later commented on by the Manitoba Court of Appeal in *R v PES*, [2018 MBCA 124](#), Justice Wakeling’s effort created “rigid analytical categories,” which “unnecessarily limit the discretion of the sentencing judge.” The Manitoba Court emphatically rejected this unifying approach (at para 77). The Alberta Court of Appeal too rejected this model in *R v Gauvreau*, [2017 ABCA 74](#) and *R v RGB*, [2017 ABCA 359](#). In *RGB*, the Court made it “absolutely clear, it is not the law in Alberta that a sentencing judge must apply the three-subset model in imposing sentence for these types of offences” as mandated by Justice Wakeling. The Court went further by categorically rejecting the Wakeling Model and “sentencing grids in general” (at para 18). In the Court’s view, the approach “fetters the proportionality analysis” (at para 18).

Notably, Justice Wakeling continued to recommend “an analytical sentencing framework” even after the rejection of it. In the 2018 *SLW* decision, Justice Wakeling makes the case for his approach by referencing other jurisdictions such as the UK, which favours such a framework. As mentioned, the UK experience involves community input through a sentencing council, which does provide detailed and refined sentencing guidelines for certain offences, albeit not all. In Justice Wakeling’s last effort on the issue, he pointedly remarks in *SLW* at paragraph 100 that “because Parliament has not established a sentencing commission with a mandate to prepare

sentencing guidelines, it falls to appeal courts to do so.” Wakeling JA’s comments did not attract any further attention from the courts.

In *R v Suter*, [2018 SCC 34](#), a decision of the Supreme Court of Canada rendered on June 29, 2018, the same day as the *SLW* decision, the Supreme Court considers a sentencing appeal from the Alberta Court of Appeal. Notably, Justice Clement Gascon, albeit in dissent, imagines an “analytical sentencing framework” already available in the *Criminal Code* sentencing provisions. At paragraph 153, Justice Gascon describes the statutory scheme as “carefully drafted” and as provisions which were “enacted as ‘a step towards more standardized sentencing, ensuring uniformity of approach’ (C. C. Ruby, G. J. Chan and N. R. Hasan, *Sentencing* (8th ed. 2012), at 1.59).” Justice Michael Moldaver for the majority in *Suter*, reiterates sentencing ranges “as merely guidelines” (at para 24). He too confirms the paramountcy of the statutory framework in the *Code* by suggesting that “as long as the sentence meets the sentencing principles and objectives codified in ss 718 to 718.2 of the *Criminal Code*, and is proportionate to the gravity of the offence and the level of moral blameworthiness of the offender, it will be a fit sentence.” It seems the Supreme Court views the statutory authority as sufficient sentencing guidance.

Another, earlier riff, on an analytical framework for sentencing can be found in *R v Hamilton*, [2004 CanLII 5549](#) (ONCA). There, Justice David Doherty envisions sentencing as “a very human process” (at para 87). In his view, “most attempts to describe the proper judicial approach to sentencing are as close to the actual process as a paint-by-numbers landscape is to the real thing” (at para 87). In discussing the appropriate range of sentencing for cocaine importation, Justice Doherty, after running through the various sentencing objectives, principles and sentencing precedents touches upon the meaning of a sentencing “range” for an offence. At paragraph 111, he explains how a range for a specific offence “does not determine the sentence to be imposed on a particular offender as the range is “in large measure a reflection of the ‘objective seriousness’ of the crime.” In other words, the range of sentence is a short hand for a constellation of objective criteria arising from a factual matrix including, in the example of cocaine importation, the amount of the drug imported and the commercial aspect of the incident. That range is then tailored to the specific instance by consideration of aggravating and mitigating factors resulting in a sentence which may be at any point throughout the appropriate range. Perhaps, even, Justice Doherty explains, the sentence imposed could be “well below” that range should the circumstances of the offence and the offender require it. Sentencing is thus humanized through the filling in of the objective criteria with real, tangible circumstances.

Applying this sentiment, starting points may provide the objective point needed to focus or pin down the point of reference for a sentencing judge. But this point cannot be further objectified through a rigid container approach. Rather, the sentencing judge breathes life into the reference point through the just application of principles and objectives, which are responsive to and reflective of the narrative before them. In appellate review, this should mean deference to the sentencing judge who considered and understands the complexities of the case before them. It should not mean a recalibration of a sentence back to the starting point without a clear error as described in *Lacasse*. Using a renaissance art analogy, starting points should be the fresco cartoon, which roughly sketches and maps out the image, not the finished fresco imbued with colour and movement. That final piece is wholly created through the discretion of the sentencing judge.

Although the Wakeling experiment ended after *SLW* in 2018, this foray into a more structured approach to sentencing was not so off the mark of the original starting point concept. Wakeling JA's use of "subsets" or "different categories of offence classified by their degrees of seriousness or blameworthiness" (*Yellowknee* at para 70), is essentially the same as the Court's penchant for categorization through characterization of offences to assist in determining a starting point sentence. For instance, in *R v Pazder*, [2016 ABCA 209](#), the court in an attempt to create a uniform approach to sentencing and uniformity of sentence, delineated distinctions between first level and second level offenders for commercial drug trafficking sentencing (at paras 13–14). The difference between the three-year starting point for level one, a more minor form of trafficking, and the four and a half year starting point for level two, involving the wholesale dealing of drugs, was found in the moral culpability or personal responsibility of the offender (at paras 15–17). The degree of responsibility could increase or decrease the sentence from the starting point (at para 18). Similarly, the *LaBerge* categories of culpability ([1995 ABCA 196](#) at paras 8–12) have resulted in highly regimented sentencing guidelines for manslaughter as sentencing submissions involve fitting the case into the desired sentencing category. Categories as a signature of blameworthiness was further approved in the five-panel decision in *R v Arcand*, [2010 ABCA 363](#), the pre-*Lacasse* decision upholding the Court's approach to starting points and then again later in *R v Hajar*, [2016 ABCA 222](#), rendered after *Lacasse*.

The *Hajar* decision reaffirmed the starting point mentality in the context of the starting point for a major sexual interference against a child. A five-panel court was assembled, producing a majority decision of three justices, a concurring judgment from one justice and a sole dissent. Even so, according to *R v DSC*, [2018 ABCA 335](#) at paragraph 40, "*Hajar* is binding on all trial judges in the province. Until it is overruled by the Supreme Court of Canada, or reconsidered by another five panel of this Court, it is binding on all appellate judges." This statement directly responded to an earlier 2017 decision, *R v Gashkanyi*, [2017 ABCA 194](#), in which the majority essentially disagreed with *Hajar*. The majority in that case included Justice Ronald Berger, known for his dissenting positions. To be even more clear on the Court's disapproval of *Gashkanyi*, in *R v Reddekopp*, [2018 ABCA 399](#), the Court unanimously reiterated that *Gashkanyi* "did not change" the three-year starting point for major sexual interferences cases (at para 5). The Court went further by clarifying that a starting point is "not a mandatory minimum sentence" (at para 10) but is only a point of reference. Interestingly, Justice Wakeling is a member of the *Reddekopp* panel, which decision was rendered nearly six months after Justice Wakeling's last foray into an appellate-driven sentencing framework.

Yet *Reddekopp* was but one of fifteen Court of Appeal decisions from 2018 discussing starting points in sentencing. For the most part, these 2018 decisions continue using the starting point as the focal point of the analysis. An exception is the decision in *R v Gandour*, [2018 ABCA 238](#). The Court, in allowing a Crown appeal against sentence, at paragraph 55, found the sentencing judge misconceived the scope of the starting point for a home invasion offence. According to the Court, the judge viewed the starting point as a "cap, not notional places to start the analysis." This perspective suggests the starting point is a place to anchor the sentencing analysis and not mechanically binding number.

However, a few months later in *R v Godfrey*, [2018 ABCA 369](#), the majority decision spends much of its time discussing the precedential effect of starting points. The majority admits that as per *Lacasse* and *Suter* “it is not *per se* an error in principle for a judge to sentence outside a sentencing guideline” (at para 4). However, in their view, starting points are “part of the law of the province” and are not “established in the abstract” (at para 5). In short, starting points are there to be recognized and considered as part of the sentencing process. Indeed, according to *R v Arcand*, [2010 ABCA 363](#), there is a three-step process in applying the starting point – akin to an analytical test (*Godfrey* at para 5 and 8). The *Godfrey* majority describes starting point sentences as “an assimilation and amalgam of all of the relevant sentencing considerations. They are not just ‘one more source of guidance’ among ‘competing imperatives’. They promote parity in sentencing, and consistency in weighing the gravity of the offence and the responsibility of the offender” (at para 6). In doing so, the majority in *Godfrey* cautions “local judges” to follow the starting point analysis and as they “are not entitled to invent their own standards in criminal sentencing isolated from national or provincial/territorial standards” (at para 7). Justice Brian O’Ferrall in dissent does not take exception with the concept of starting points as persuasive authority but contextualizes the starting point analysis as one of many “guides” to sentencing (at para 26). As Justice Gascon did in *Suter*, Justice O’Ferrall looks to statutory authority and codified sentencing principles as providing guidance as well (at paras 27–28). Appellate courts do also provide guidance but only to the extent that they review and analyze “hundreds of sentencing decisions” to arrive at the starting point (at para 29). In this way, starting point sentences are a grass roots venture, informed by the organic process of individual cases reviewed in reference to other cases. As Justice O’Ferrall aptly puts it “guidance is a two-way street” (at para 29). The concept of binding authority gives way to a communal perspective.

Starting points as binding authority or one of many guides to sentencing is another aspect of the concern with starting points as effective minimum sentences. Although in *R v Arcand*, [2010 ABCA 363](#) (at para 131), the Court of Appeal emphatically found that “starting points do not amount to minimum sentences,” there was a notion earlier in the Supreme Court of Canada that “there is a risk that these starting points will evolve into de facto minimum sentences” (see Lamer CJC’s remark in *R v Proulx*, [2000 SCC 5](#) (CanLII) at para 88). With the advent of an increasing number of minimum sentences in the *Code*, the Alberta Court has continually reiterated the distinctiveness of starting points. The most recent decision commenting on this, *R v Ford*, [2019 ABCA 87](#), is both a decision on starting points and on the constitutionality of minimum sentences for sexual interference. In that decision both concepts are overlaid upon each other resulting in, as discussed further below, in a softer approach to starting points.

This softer view seems to come “top up” as per Justice O’Ferrall’s comments in *Godfrey* through the application of starting points in the lower courts. The Honourable Judge J. Maher explores the meaning of starting points in *R v BCP*, [2019 ABPC 2](#). In this decision, Judge Maher compares starting points with sentencing ranges and discusses the preference, as a sentencing judge, for the starting point approach (at paras 11–14). In his view, starting points are more flexible and less confining than a sentencing range which involves “floors” and “ceilings” creating a rigid field of sentences absent exceptional circumstances (at para 12). Conversely, a starting point has no end or beginning and therefore releases the sentencing judge from the blinders created by a rigid range. Although this reasoning is attractive, it seems at odds with Justice Doherty in *Hamilton* and with the Supreme Court in *Lacasse*. Ranges may in fact provide

more options as guidelines not requirements. Additionally, “exceptional” circumstances provide a generalized label that only garners meaning from the facts of each individual case. Still, as recognized in *R v Alcantara*, [2017 ABCA 56](#) at paragraph 45, the starting point also provides “guidance” but does not “fix a mandatory number.”

As later restated in *Ford*, in the Court’s view, there is a clear dividing line between mandatory minimums and starting points (at para 32). In *Ford*, the sentencing judge imposed 6 months imprisonment for sexual interference of a child, far below the *Hajar* starting point of 3 years. Although, *Ford* is notable for striking down the mandatory minimum of 12 months required for the offence under s 151, the Court, through the decision of Justice Martin, suggests Judge Maher’s view of starting points may in fact be correct. While still approving of *Hajar*, the *Ford* court upholds the 6-month sentence imposed on the basis that the accused suffered from mental challenges and was therefore less morally culpable. The starting point may be present in *Ford* but as a background reference, a reference point from which the sentencing could be viewed through the factual perspectives. This blurring of the starting point into a contextual guideline is evident in other 2019 Court of Appeal decisions such as in *R v Paulson*, [2019 ABCA 147](#) and *R v Costello*, [2019 ABCA 104](#).

Starting points are needed but they must not be applied in the vacuum devoid of individuality. In deep space and time without a reference point we are lost. So too in sentencing as defined in *Reddekopp*, a starting point is “as the term suggests, it is that point at which the applicable principles and objectives of sentencing are applied to the relevant circumstances of the case to arrive at a fit sentence” (at para 10). Points of light can guide us, but we must do so with the perspective of the within. Justice Martin reminds us in *R v Boudreault*, [2018 SCC 58](#), that “sentencing is first and foremost an individualized exercise, which balances the various goals of sentencing” (at para 58). The *Ford* decision suggests the Alberta Court of Appeal may finally be in sync with the “highly individualized” and “delicate balancing” of sentencing (see para 4 of *R v Suter*). Starting points or not, sentencing Courts must approach this exercise with the individual at the centre of that point – not alone – but in the contextual mix of legal principle and circumstances of the case to arrive at a fit, just, fair and proportionate sentence. This is the perspective which must lie at the core of the point from which sentencing is imposed.

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