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Binding The Courts: The Use of Precedent in Sentencing Starting Points

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Cases Commented On: *R v Felix*, 2019 ABCA 458; *R v Parranto*, 2019 ABCA 457

The Alberta Court of Appeal recently released two companion decisions on sentencing starting points in *R v Felix*, 2019 ABCA 458, and *R v Parranto*, 2019 ABCA 457. In *Felix* and *Parranto*, the Alberta Court of Appeal considers the appropriate sentencing starting point for an offender involved in the wholesale trafficking of fentanyl, an insidious and dangerous drug responsible for the deaths of many Albertans. These decisions are prime examples of how an appellate court grapples with precedential authority in arriving at the final outcome. In this post, I will discuss these cases as exemplars of this precedential process, which lies at the heart of the rule of law under our common law system. These decisions give us a glimpse of the complexities of precedent, in cases where there is no issue of whether precedent should be followed but rather on the issue of how best to follow it.

In the *Felix/Parranto* decisions, the court, by setting a nine-year starting point for trafficking in fentanyl on a wholesale level, relies on both their own precedential history and the Supreme Court's binding law. This, on the face, is not exceptional. Provincial appellate courts, although the highest level of authority in their home province, are bound by the law given from the apex court. Nevertheless, this imperative to follow also grants the provincial appellate court the right to lead. In other words, the supreme law binds the lower appellate court, but that lower court must then apply that law through the lens of interpretation, which reflects the appellate court's own unique voice and perspective.

I have written extensively on the Alberta Court of Appeal's penchant for setting sentencing starting points in a previous ABlawg post - "Sentencing to the Starting Point: The Alberta Debate." The use of starting points in sentencing is controversial, both within Alberta and across Canada. The use of precedent is an important step in solidifying a unified view from the court. But to create precedent, the court often must use precedent.

It behoves the court in such situations to show the gravitas of precedential authority by empanelling a larger than usual panel of judges to propound on the issue. Instead of the usual 3-judge panel, in *Felix/Parranto* the decisions are rendered by a 5-judge panel. This is needed in various circumstances; where the issue requires horizontal clarity, such as when the appellate court itself renders unclear or inconsistent decisions regarding an issue; where the issue requires vertical clarity, such as when the appellate court clarifies divergent decisions from the lower court or sets new binding law; and where lower court precedent is clear, but in the opinion of the appellate court is in error. Of the many Alberta Court of Appeal decisions remarking on

sentencing starting points (there are approximately 295 cases), the court has utilized 5-judge panels seven times.

The first such 5-judge panel decision is the 'starting point' of all starting point sentencing decisions, *R v Johnas*, 1982 ABCA 331. *Johnas* is an example of the appellate court setting down general binding sentencing starting point principles for the lower courts to follow. The citation name of the decision is a misnomer as the decision relates to a number of sentencing appeals involving similar fact situations (the robbery of small late-night commercial establishments staffed by one person) and all of the accused share similar antecedents (youthfulness). Significantly, the decision is rendered by the Court and liberally uses the pronoun "we." For example, at paragraph 33, the court uses the inclusive pronoun when setting precedent by stating "we are of the view that the starting point in Alberta for the type of robbery under consideration should be three years."

Four years later, another 5-judge panel was struck to consider the use of sentencing starting points for young offenders in *R v CWW*, 1986 ABCA 47. There, the Court decided it was inappropriate to do so considering the special place individualization has in sentencing a young person and the diminished importance of general deterrence. Interestingly, the Supreme Court of Canada in *R v JJM*, [1993] 2 SCR 421, in discussing the *CWW* decision, made particular reference to the precedential weight of *JJM* in remarking that this position was "adopted by a special five member panel" (Cory J. at 433). Note the description of the position as an 'adoption,' which by definition suggests the implementation of a formal acceptance.

The third 5-member panel to consider starting points is in *R v Rahime*, 2001 ABCA 203, where the binding effect of the pronouncement is softened somewhat by the Court's characterization of the decision as "guidance" from which sentencing judge's "may depart" (at para 19). Of course, creating precedent is not always a numbers game. In *R v Fleury*, 1990 ABCA 362, the 3-member panel set a sentencing starting point for minor property crimes. Even so, according to the CanLII database, the case has been cited by no other courts.

In contrast, the next 5-member decision, *R v Arcand*, 2010 ABCA 363, released nine years after *Rahime*, is a capstone pronouncement on sentencing starting points. The Court signals the intent of this decision in the opening paragraph by reminding us "without public confidence in the criminal justice system respect for the rule of law is imperilled." By this point, the concept of sentencing starting points was questioned and tested by a series of lower court decisions debating the validity of starting points in major sexual assaults as earlier set by the 3-judge panel decision in *R v Sandercock*, 1985 ABCA 218. Like *Johnas*, the *Arcand* decision considers a series of lower court "Reconsideration Cases" (at para 6) but unlike *Johnas*, it does so in a big way. *Arcand* is almost canonical in its breadth and depth. The Court spends 230 paragraphs worth of pre-discussion, before finally discussing these Reconsideration Cases and the cases at hand. This pre-talk takes the reader on a sentencing journey, starting with an historical approach to sentencing, drilling down into sentencing reforms and then drilling back up to discuss the objectives of sentencing starting points and the objections to it.

Paragraphs 182 to 230 in *Arcand* are devoted to *stare decisis* with a virtual textbook commentary on the binding effect and force of the appellate courts and the need for *stare decisis* in the orderly

space we call the Rule of Law. With a riff on Alfred Einstein's belief that the supreme being "does not play dice" with the Universe, the Court vividly depicts the *stare decisis* role within its own Court by warning that without such principle "An appeal would be scarcely better than putting the dice back in the cup and shaking them again" (at para 185). Concomitantly, this section of the judgment touches on the duty of the lower courts to accept the binding effect of the intermediate courts even if the lower court views the precedent as wrong (at para 184). Using the now familiar gaming metaphor, the Court compares a legal landscape without *stare decisis* as a 'roll of the dice,' in which anything and everything goes resulting in trials that are no better than a horse race. In this precedent-less scenario, luck, rather than the law, rules (at para 183).

Over the years, *Arcand* has been cited 501 times but the road to binding authority has not always been smooth. In *R v Lee*, 2012 ABCA 17, a decision rendered two years after *Arcand*, the 3-judge panel was not totally *ad idem* with the *Arcand* court; one member of the panel dissented on the issue. In that same year, the Court constituted another 5-judge panel in *R v Nickel*, 2012 ABCA 158. Here, the focus was on correcting a "flaw" in a lower court decision (*R v Evans* (1996), 182 AR 21 (Alta PC)*)* which was favourably cited in other sentencing decisions (at para 3). The majority in *Nickel*, did not mince words as they found the questionable decision, as well as the "reconsideration cases" that relied on it, lacking in authority and having little, if any, residual precedential value (at para 21).

The sixth 5-panel court to opine on sentencing starting points is *R v Hajar*, 2016 ABCA 222. This is another lengthy decision, mostly focussed on the specific sentencing scenario before it, with brief commentary on the role of the intermediate appellate court in reviewing sentencing decisions (at paras 45 to 50). At paragraphs 46 to 47, the court describes the role of the court as an appellate authority assisting the trial courts in the face of pressing societal issues. Thus, the appellate court "does more than act as a buffer against outliers of sentencing outcomes. It also has a duty to provide transparent and manageable methods of reasoning to assist front-line courts in their important function of imposing just sanctions" (at para 46). This mandates the appellate court to provide "real assistance" to the trial courts that is not a matter of merely giving "thumbs up or down on an impressionistic basis as to the fitness of sentence in a given case" (at para 47). Rather, it is the duty of the appellate court to provide guidance through the adoption of "starting point sentencing for certain crimes where typical cases can be discerned and a relatively wide disparity in sentencing exists amongst judges" (at para 47). This then is the meaning of starting points as guidance as articulated in *Rahime*.

We have come full circle back to *Felix* and *Parranto*, which to be fair, are two different, albeit consistent, decisions written by two different members of the panel. As earlier mentioned, the decisions set down a nine-year starting point for wholesale trafficking of the killer drug, fentanyl. Each decision comes at the binding principle in different ways. In *Felix*, Justice Antonio walks us through the underlying facts including the circumstances of the offender (at paras 4 to 10, 18 to 23), the dangerousness of the drug and the many deaths attributed to it (at paras 11 to 17), counsel's position at sentencing (Crown asks for global sentence of ten years incarceration and defence for two years plus three years probation, at paras 24 to 26), and the sentencing decision (sentencing judge imposes a global sentence of seven years incarceration, at paras 27 to 36). In fixing the nine-year starting point, Justice Antonio echoes the opening sentiment in *Arcand* that the act of sentencing engages public confidence in the justice system. Antonio J. finds it is the

duty of all courts, lower and intermediate, "to protect the public by imposing sentences that will alter the cost-benefit math performed by high level fentanyl traffickers" (at para 40).

To support this notion, Antonio J. leans on Supreme Court approval by quoting both *R v Lacasse*, 2015 SCC 64, one of the most recent discussions of sentencing principles, and the earlier decision in *R v Proulx*, 2005 SCC 5. Accordingly, the Supreme Court in *Lacasse* "confirms the usefulness of ranges and starting points in reflecting the principles and objectives of sentencing" (at para 41). Similarly, the passages relied upon by Antonio J. from *Proulx* comment on the usefulness of starting points and how the approach promotes transparency in sentencing (at para 41). She then moves seamlessly from vertical authority to horizontal as she connects transparency with the public confidence needed in sentencing according to *Hajar* (at para 41). From there, Antonio J. recognizes that "springing from the starting point, sentencing judges must tailor sentences to suit individual offences and offenders" (at para 41) reiterating, as I discuss in my previous blog on the issue, the importance of starting points as a methodology or uniform approach as opposed to the creation of uniform sentences for all offenders committing the same offence (at para 41). In paragraphs 42 to 43, Antonio J. continues her march through starting point and sentencing authority as found by her own court. Finally, at paragraph 44, she uses the weight of the authority outlined to provide "a clear statement" for the lower courts. Thus, *stare decisis* is used to create new precedent.

The difficulty is that the *Lacasse* discussion on sentencing ranges, and specifically on starting point approaches, is not wholly supportive of the starting point approach. At paragraph 57 of *Lacasse*, as quoted by Justice Antonio, the *Lacasse* court, through Justice Wagner writing for the majority, views such approaches, as the Alberta Court of Appeal did in the 2001 *Rahime* decision, as

> "nothing more than summaries of the minimum and maximum sentences imposed in the past, which serve in any given case as guides for the application of all the relevant principles and objectives. However, they should not be considered "averages", let alone straitjackets, but should instead be seen as historical portraits for the use of sentencing judges, who must still exercise their discretion in each case". (*Lacasse* at para 57)

This vision conceptualizes starting points as a short-hand or abbreviation of an entire body of case authority and not as a hard start. It leaves room for sentencing judge discretion, which may arise from a thorough analysis of those historical portraits. Starting points can form the foundation of a just and appropriate sentence but it cannot be a substitute for the sentencing exercise. Such a sentencing exercise is conducted by the fully informed and knowledgeable sentencing judge, who applies the law to the specific case at hand.

Justice Wagner continues in paragraph 58 of *Lacasse* to describe sentencing as "highly individualized exercise that goes beyond a purely mathematical calculation." This position at first seems at odds with Justice Antonio's reference to math, which I mentioned earlier in this post (*Felix* at para 40). These mathematical references, however, are coming from differing perspectives. Justice Antonio is referencing the deterrent effect of a sentencing starting point on the offender and on those considering committing the offence in the future. For many offenders, particularly those who benefit financially from their criminal enterprise, the length of the

potential sentence is part of the cost-benefit analysis of doing business. On the other hand, Justice Wagner's reference serves as a warning to both the lower and intermediate courts that the sentencing exercise itself is not merely the imposition of a precedential number. Rather, it is an exercise in discretion. In other words, a sentencing judge does not start with the starting point number but arrives at the appropriate sentence through a just consideration of the starting point sentence as a guide.

Still, deterrence is a nuanced and subtle behavioural form of correction that is difficult to distill into a numeric count, even at the level of wholesale traffickers. In the end, Justice Wagner in *Lacasse* reminds the lower courts that "sentencing ranges are primarily guidelines, and not hard and fast rules" (at para 60). As a result, "a deviation from a sentencing range is not synonymous with an error of law or an error in principle" (at para 60). Otherwise, as the Supreme Court found in *R v MacDonnell*, appellate courts would be judicially creating categories of offences for purpose of sentencing to circumvent principles of deference (*Lacasse* at para 61).

The *Parranto* decision presents a different factual background with the accused facing a number of offences including possession of a restricted weapon. There was no sentencing or *Gladue* report, but the sentencing judge considered the fact that the offender was addicted to drugs and of Metis background (at para 5). The sentencing judge imposed a global sentence of 11 years. Justice Watson, speaking for the *Parranto* court, found the judge "made a series of interrelated errors," the primary one being "in his handling of the starting point approach" (at para 24) relating to individualization of sentence. In allowing the sentence appeal, the court increased the global sentence to 14 years incarceration (at para 69).

Justice Watson comes out strongly in favour of the binding authority of the intermediate court on the lower courts in the matter of sentencing starting points (at paras 28 to 38). He reiterates the view that failing to impose the starting point number is not necessarily an error but that "departure from the approach itself" does constitute an error. As Watson J. further explains in paragraph 29, the starting point approach is directive and not permissive; lower courts must consider themselves bound by the approach. The sentencing judge in *Parranto* committed this cardinal error when he rejected the starting point approach as inconsistent with *Lacasse*'s description of sentencing guidelines as "historical portraits" (at para 32). According to Watson J., there is no viable debate on the use of starting points as a sentencing approach in Alberta. The sentencing judge's position "over-simplified and mis-stated the law" and "misconceived the position of the Supreme Court of Canada in relation to starting points" (at para 32). Unlike Justice Antonio, Justice Watson is not just using precedent to support the creation and utilization of sentencing starting points. Rather, he is using precedent in the *Arcand* sense, where the appellate court feels the need to reconsider and correct the lower court's application of binding authority. Justice Watson decision sends a clear message to the lower courts that the starting point approach must be adhered to until and unless an even higher authority says otherwise.

Notably, Justice Watson acknowledges the Supreme Court may yet address the starting point approach in the pending decision in *R v Friesen,* 2019 CanLII 96796. In *Friesen,* the Manitoba Court of Appeal allowed the sentencing appeal and reduced the sentence imposed by the sentencing judge who mis-applied a sentencing starting point. The Supreme Court allowed the appeal and restored the original sentence with reasons to follow (*Friesen,* SCC). This decision, if

it does engage the starting point issue, will indeed be of great interest and precedential value. The Supreme Court, as the apex court, takes a longer view of authority by setting it in light of precedent emanating from across the country. The starting point approach is not wholly embraced throughout the country. For instance, the British Columbia Court of Appeal recently released their own decision on sentencing wholesale traffickers of fentanyl in *R v Leach*, 2019 BCCA 451, in which Justice Fitch, speaking for the court, dismissed a sentence of 16 years incarceration. In the decision, Fitch J. carefully considers the sentence imposed through the lens of deference by finding the decision was based upon an extensive review of the applicable case law (at para 60). In furtherance of this approach, Fitch J. acknowledges the difficult balancing required of the sentencing judge where the "conduct imperilled the lives of many of his fellow citizens" for his own personal financial benefit (at para 112). Then at paragraph 113, the Fitch J. invokes a perspective on sentencing ranges that differs from the Alberta Court of Appeal. Justice Fitch reiterates that sentencing "ranges develop over time, guided by judicial experience and the need for public protection. In my view, it is premature to identify a range applicable to a case of this kind." This view harkens back to *Lacasse* and Justice Wagner's description of sentencing ranges as historical portraits. The Supreme Court in *Friesen* may indeed clarify exactly what those portraits look like when applied by the sentencing judge.

The *Felix* and *Parranto* decisions are truly companion pieces. These cases should be read as one unified commitment by the Alberta Court of Appeal to the starting point approach and as one imperative voice to the lower courts to follow *stare decisis* and apply the law as given by the intermediate level. Precedence has great value in our common law system; it promotes finality and consistency. It ensures the law does not defy prediction. It is, as described in *R v Mankow* (1959), 1959 CanLII 443 (AB CA), a "central pillar of our law" (see *Arcand* at para 183). But how *stare decisis* is used is not inviolable or fixed. As this post suggests, it can be used in different ways to underline the authority of the court using it and to remind those bound by it to take heed.

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