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Placing Parity in Perspective

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Case commented on: *R v Germain*, [2022 ABCA 257 \(CanLII\)](#)

The recent Alberta Court of Appeal decision of *R v Germain*, [2022 ABCA 257 \(CanLII\)](#), reads like a judge’s “how to” manual for applying the sentencing principle of parity. Here, the Court not only discusses the role of parity in making a sentencing determination but also provides a step-by-step approach to applying the principle in practice. To do this, the Court relies on precedent and deference, the cornerstones of appellate review of sentencing. Significantly, the decision attempts to reconcile a long line of Court of Appeal decisions on starting points, with recent direction by the Supreme Court of Canada in *R v Parranto*, [2021 SCC 46 \(CanLII\)](#), *R v Friesen*, [2020 SCC 9 \(CanLII\)](#), and *R v Lacasse*, [2015 SCC 64 \(CanLII\)](#), that sentencing is not a “mindless numbers game” involving a strict adherence to a minimum sentencing regime (see *R v Ostertag*, [2000 ABCA 232 \(CanLII\)](#) at para 21). Rather, sentencing strives for individualization in the context of general principles. This seemingly incongruous task creates uncertainty in those very principles the sentencing court is bound to apply. Although the *Germain* decision clarifies the practicalities of sentencing, there remains considerable room in future decisions for further delineation of the framework of sentencing and the proper placement of the parity principle within it.

Douglas Germain entered a plea of guilty to voyeurism under [s 162\(1\)\(a\)](#) of the *Criminal Code*, involving over one hundred recordings taken over six years of women either going to the washroom or changing their clothing (at para 4). Mr. Germain captured these recordings in the course of his employment, working as a plumber (at para 5). At least two of the women were under eighteen years of age (at para 6). According to defence submissions, the offences were out of character. Mr. Germain attended psychological counselling prior to sentencing. The Crown requested a one-year jail term, while the defence submitted that a conditional sentence order was appropriate (at para 7). In support of the sentencing submissions, both counsel relied upon several sentencing decisions. The sentencing judge (Judge G.B. Lepp) imposed a 15-month conditional sentence order with conditions (at para 1).

In imposing sentence, the judge listed several aggravating and mitigating circumstances (at paras 20 –21). For example, the fact that Mr. Germain committed the offences in the course of his employment was an aggravating feature. The judge also relied on the sentencing objectives of denunciation, general deterrence, and rehabilitation (at para 23). The judge found Mr. Germain was not at a significant risk of reoffending (at para 23). The sentencing judge considered both similarities and differences in previous sentencing decisions in an effort to apply the principle of parity – that like offenders receive like sentences (at para 24).

In this search for parity, the sentencing judge considered, among other cases, the decision in *R v Weinheimer*, [2007 ABPC 349 \(CanLII\)](#), where the offender received a suspended sentence for taking photographs of men using the urinals on 15 occasions over 2 years (at para 25). The judge found the offences in *Weinheimer* caused less harm than the case at hand and the offender was less culpable than Germain (at para 25). Another decision considered was *R v Dekker*, [2014 ABPC 61 \(CanLII\)](#), where the offender received nine months conditional sentence after recording 77 videos of people, some of whom were minors, in washrooms over a lengthy period (at para 25). The sentencing judge found this case to be similar in facts and culpability to Germain’s case but there was no breach of trust (at para 25). Still another decision relied upon was *R v Jarvis*, [2019 ONSC 4938 \(CanLII\)](#). This case involved a schoolteacher who made multiple videos of young people with a pen camera in a common area of a high school (at para 25). The sentencing judge found Jarvis to be “significantly” more culpable based on the age of the victims but found Germain caused more harm due to the number of victims and the substantial breach in privacy (at para 25).

In using these previous sentencing decisions, the sentencing judge “calibrated” Germain’s sentence “up or down” to reflect the specific circumstances of the case (at para 24). Ultimately the sentencing judge found Germain’s culpability and the seriousness of the offence “high” (at para 27). The sentencing judge then took into account the principles surrounding the imposition of a conditional sentence order, as well as whether such a sentence would fulfill the primary sentencing objective of proportionality (at paras 28 – 31). The fundamental sentencing principle of proportionality, as found under [s 718.1](#) of the *Criminal Code*, requires a sentence to be “proportionate to the gravity of the offence and the degree of responsibility of the offender.”

The primary ground of appeal urged by the Crown was the sentencing judge’s misapplication of the parity principle (at para 32). In seven carefully written paragraphs (at paras 39 – 45), the Court (Justices Jo’Anne Strekaf, Ritu Khullar, and Kevin Feehan) defined the parity principle, starting with its statutory expression found under [s 718.2\(b\)](#) of the *Criminal Code*. Under that section, the sentencing judge “shall” consider the parity principle by imposing a sentence that “should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.” It is important to pause and examine the language used in this section. First, by using the word “shall,” the sentencing judge must consider parity, but in applying the principle, the judge “should”, not “must”, impose a similar sentence for like offenders and offences. This is a concession to the need for individualization in sentencing, allowing the judge to exercise their discretion by deviating from the principle. This “shall” versus “should” dichotomy leaves room for a debate on the centrality of parity as a principle and the proper emphasis and placement of that principle in the sentencing matrix.

Perhaps recognizing this tension inherent in the consideration and then application of the principle, the Court in *Germain* noted parity can be viewed as both a “discrete sentencing requirement” and as a “necessary means” to achieving a proportionate sentence (at para 39). This duality puts parity in perspective as a stand-alone principle to be applied in the name of sentencing ranges or guidelines, and as a tool of individualization used in fulfilling the fundamental and overarching principle of proportionality. Parity thus becomes a secondary principle of sentencing, which must give way to proportionality when appropriate (see *Lacasse* at para 54 and *Friesen* at para 10).

The *Germain* Court then provides helpful “how-to” instructions in applying parity as a principle and in using it to achieve proportionality. First, the sentencing judge must construct an accurate picture of the offender and the offence, with particular attention to those facts or factors which relate to proportionality, namely the gravity of the offence and the culpability of the offender (at para 40). Although the Court suggests other facts not “directly” connected to proportionality may be relevant, other facts would be important to fulfill the individualization inherent in a fit and proper sentence such as the offender’s background, rehabilitative prospects, and community support.

Once the factual basis is determined, the judge then turns to the case law “to comply with the parity principle” (at para 41). Here is where the decision becomes interesting. This case law review could be viewed as a compendium of relevant cases that speak to parity as a principle. The compendium could also be viewed as the “historical portraits”, subject to judicial discretion, as described by Chief Justice Richard Wagner, as he is now, in *Lacasse* when describing sentencing guidelines or sentencing starting points (*Lacasse* at para 54). But the Court in *Germain* views this differently, suggesting that such a review of past cases may be redundant or “unnecessary” where there is an established starting point or sentencing range (at para 41). This comment seems counter-intuitive, suggesting that the parity process is frozen in time when a sentencing starting point is enunciated.

The suggestion that a case law review is unnecessary by-passes the need for individualization. Parity does rest on comparison; however, comparison requires some modicum of detail by looking for the specific similarities and peculiar differences arising in the offender’s case. Sentencing starting points are more general, using a broad-brush approach to generalize the “portrait” cases. In these ranges and starting points we see patterns but not the details. Although ranges may be extremely useful in calibrating the sentencing approach, it must be filled in and supported by the sentencing judge to fulfill pertinent sentencing objectives and proportionality requirements. The *Germain* Court does acknowledge, as per Supreme Court of Canada authorities, that starting points and ranges are “not legally binding in theory or in practice” (at para 41). If this is so, instead of an either-or proposition, parity as a principle and as a tool of proportionality would be better fulfilled if sentencing starting points were a tool, and not an endpoint, to assist in the search for those similar cases.

Notably, the Court of Appeal acknowledges the difficulty parity presents. No two cases will ever be the same. How similar or different they will be is “a matter of degree” (at para 43). There will always be “similarities *and* differences”, according to the Court, making the parity exercise an exercise in futility should the judge be searching for perfect parity (see also *R v MacKinnon*, [2022 NSPC 12 \(CanLII\)](#) at para 44). Rather the judge should put parity in perspective by recognizing parity rests on individualization (*Germain* at para 44). It is the synergy between parity and individualization that promotes proportionality and ensures the sentence is a fit one.

The Court did not discuss the role of discretion in the parity process, yet discretion and deference is the stuff of which parity is made. Parity requires discernment and the judicial lens of experience, as well as common-sense (see *Friesen* at para 33). Above all, parity requires a strong understanding of the human condition. The parity principle “preserves fairness in sentencing” (*R v Pearce*, [2021 ONCA 239 \(CanLII\)](#) at para 17) and strengthens public confidence in the justice system. It guides

and restrains discretion in arriving at a proportionate sentence (see *Lacasse* at para 2, and *R v Nasogaluak*, [2010 SCC 6 \(CanLII\)](#), [2010] 1 SCR 206 at para 44).

The Crown also argued that in the *Germain* case, the principle of parity conflicted with the overarching need for proportionality with the judge focusing too much on parity to the detriment of proportionality (at para 54). In the Crown's view, proportionality rules and, in the end, if after reaching a sentence consistent with parity, a higher sentence is needed to comply with proportionality, then a higher sentence should be imposed. The Court disagreed with this position as a "general proposition" (at para 57). It is useful on this point to look at the Supreme Court's discussion of the relationship between parity and proportionality in *Friesen* and *Parranto*. Notably, Justices Russell Brown and Sheilah Martin, in *Parranto*, call proportionality an "organizing" principle (*Parranto* at para 10) that "all sentencing starts with" (see also *Friesen* at para 30). It is difficult to see conflict between proportionality and parity when proportionality is the one principle that binds all sentencing principles and objectives and acts as the container in which these objectives and principles reside. But as we have gleaned, parity is not static. If proportionality is ever present in the sentencing determination, then conflict is impossible; proportionality begets parity as parity is an "expression" of proportionality (see *Parranto* at para 11 and *Friesen* at para 32). Chief Justice Wagner in *Friesen* succinctly puts parity in perspective by explaining how "parity gives meaning to proportionality" and is the proverbial glue, promoting consistency in sentencing (*Friesen* at para 33). This dynamic duo of proportionality and parity imparts relevancy to sentencing guidelines, ensuring sentencing decisions, as historical portraits and as present-day decisions, are part of the same fabric that is resilient, flexible, and wise enough to sustain future sentencing decisions. The Court in *Germain* views parity as an anchoring device, which frees the judge from an intuitive approach to sentencing in favour of a reasoned, sensitive, and equitable one (at paras 57 – 58).

There are two caveats to all of the above. First, the Court of Appeal reminds us of the concern raised in *Friesen* that parity is only workable when the sentencing guidelines are themselves responsive "to society's current understanding and awareness" of what proportionality requires or "to the legislative initiatives of Parliament" (at paras 61 and 62, and see *Friesen* at para 35). To ensure this responsiveness, judges may deviate from the past.

Second, as mentioned earlier in this post, parity is not perfect in the sense that the compendium of case law representing parity is often not complete. In *Germain*, the Court explains how past case law may be imperfectly inscribed, resulting in written decisions that are too brief and may miss or leave out essential details (at para 64). This methodological deficiency, coupled with a reliance on counsel's curation of the case law, which may itself be incomplete, calls for "a degree of caution and the exercise of judgment" in using past decisions as a measure of parity (at para 65). Although the compendium offered to the sentencing judge may be incomplete, surely the sentencing judge has the tools to counterbalance these potential deficiencies, either through their own lens of judicial experience or through the ability to do further legal research prior to imposing sentence. A sentencing judge is not a silent partner in the sentencing process, but an active participant, who, with counsel's input, has the responsibility to craft a fit and just sentence. In any event, the point should be well-taken as an admonition to counsel to be duly diligent in presenting accurate and detailed case authority.

In the end, the Court of Appeal applied their reasoning together with an application of deference to find the sentencing judge had properly and reasonably arrived at an appropriate sentence (at para 53).

The *Germain* decision is a useful depiction of parity in practice. It helps us understand how parity and proportionality both strive together to produce a just sentencing outcome. Even so, the decision leaves us wanting more on the subject. The relationship between parity and proportionality still feels sketched out, needing more details to be truly understood and applied. Also, what is parity's status constitutionally? Although proportionality is not a principle of fundamental justice enshrined in the constitution, a grossly disproportionate sentence does attract *Charter* treatment (see *R v Safarzadeh-Markhali*, [2016 SCC 14 \(CanLII\)](#) at para 70). Does this mean a grossly disparate sentence in terms of parity must be a grossly disproportionate one for *Charter* purposes? If so, is parity always a matter of perspective, and therefore magnified by other sentences, or is there an inherent aspect of parity that can be objectively assessed and measured? Can parity be completely equated with sentencing starting points and guidelines or is there more? Moreover, the concept that deviations from parity can occur and may actually be needed to ensure the past is relevant to the present and future is an area requiring further study. Finally, the professionalism aspect of parity – that parity is a sentencing presentation by counsel that requires due care and attention, is a particularly important concept needing a second look. All of these questions and more help put parity, and perhaps other sentencing concepts, into a larger perspective than we anticipated.

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