THE LAW OF SENTENCING

TABLE OF CONTENTS

"In our system of justice, the ultimate protection against excessive criminal punishment lies within a sentencing judge's overriding duty to fashion a 'just and appropriate' punishment which is proportional to the overall culpability of the offender." To achieve this objective, "the quantum of sentence imposed should be broadly commensurate with the gravity of the offence committed and the moral blameworthiness of the offender: *R v Moreira,* 2021 ONCA 507, at para 43, citing Lamer C.J. at *R v M(CA),* [1996] 1 SCR 500, at para 73

AVAILABLE SENTENCES

By virtue of s. 731 of the *Criminal Code*, a sentencing judge may impose only two of the following three sentencing options: a period of custody, probation, and a fine. Under that section, a period of probation may be added to either a fine or a period of custody but not both: *R v Berhe,* 2018 ONCA 930, at para 1

AGGRAVATING FACTORS

A. GENERAL PRINCIPLES

It is an error of law to rely on an aggravating fact on sentencing that has not been proven beyond a reasonable doubt by the Crown, contrary to s.718: *R v McIntyre*, 2016 ONCA 843 at para 18.

In *LeBreton*, 2018 NBCA 27, the New Brunswick Court of Appeal held that a sentencing judge can infer that the accused had an aggravating state of mind from undisputed facts at a guilty plea, even without a *Gardiner* hearing.

Characterizing an element of the offence as an aggravating factor is a reviewable error: *R v Bagheri,* 2022 ONCA 357, at paras 2, 17. Nevertheless, numerous cases have found no such error where a sentencing judge has taken into account statutory aggravating factors that are themselves elements of the offence: *R v Sears,* 2021 ONCA 522, at para 41

B. OUTSTANDING CHARGES

It is an error of law to rely on outstanding charges as an aggravating factor on sentencing, unless proven beyond a reasonable doubt (*R v Klammer*, 2017 ONCA 416 at para 3), or unless there is a nexus between the outstanding charges and the offences for which the accused is being sentenced: *R v Banovac,* 2018 ONCA 737 at para 4

C. UNCHARGED OFFENCES

The accused must be sentenced only on the basis of the offence for which s/he was convicted. It is an error of law to effectively sentence the accused for an uncharged offence: *R v Suter,* 2018 SCC 34

However, uncharged offences can be aggravating on sentence so long as the accused is not punished twice for the same offence. Specifically, under s. 725(1)(*c*), a sentencing judge "may consider any facts forming part of the circumstances of the offence that could constitute the basis for a separate charge". When the accused does not consent to the application of that provision, the Crown must, pursuant to s. 724(3)(*e*) of the *Criminal Code*, establish, by proof beyond a reasonable doubt, the existence of any aggravating fact.

Unrelated offences are excluded. The provision must be construed as encompassing not only the facts of a single transaction, but also the broader category of related facts that inform the court about the "circumstances" of the offence more generally.

Judges can also exercise their discretion to decline to consider uncharged offences if this would result in unfairness to the accused or to the Crown.: *R. v. Larche,* 2006 SCC 56; see also. S.725; *R v Luu,* 2021 ONCA 311, at para 30

The sentencing judge may rely upon the accused's voluntary admissions of prior discreditable conduct as informing his background and character, which is relevant to the objectives of sentencing, particularly rehabilitation: *R v Deiaco,* 2019 ONCA 12, at para 5; see also *R v Luu,* s. 725(1)(c): 2021 ONCA 311, at para 31

D. BREACH OF TRUST

Breach of trust by a police officer is a significant aggravating factor on sentencing: *R v Hansen,* 2018 ONCA 46 at paras 56-57

In respect of sexual offences against a child, the fact that a child consents or even initiates the activity does not remove the trust relationship or the obligation of the adult to decline the invitation. Notwithstanding the consent, desire or wishes of the young person, it is the adult in the position of trust who has the responsibility to decline having any sexual contact whatsoever with that young person: *R v BJT,* 2019 ONCA 694, at para 87

E. FREQUENCY OF OFFENCE IN REGION

The frequency of the commission of an offence in a particular region can operate as a relevant factor for a sentencing judge. It is not an aggravating factor. However, a judge may consider the fact that a type of crime occurs frequently in a particular region when balancing the various sentencing objectives, although the consideration of this factor must not lead to a sentence that is demonstrably unfit: *R v Altiman,* 2019 ONCA 511, at paras 66-67

F. INCOMPLETE CONSPIRACIES

Where the conspiracy did not come to fruition due to the arrest of the accused, it is open to the trial judge to give weight to the magnitude of the crime contemplated by the conspirators' agreement: *R v Luu,* 2021 ONCA 311, at para 32

G. LACK OF REMORSE/INSIGHT

A lack of remorse is not an aggravating factor. Nor is the decision by an accused to put the state to the proof of its case and go to trial: *R v Mohenu,* 2019 ONCA 291, at para 15; *R v Beer,* 2019 ONCA 763, at para 8

To use lack of insight as an aggravating factor is, absent unusual circumstances, an error of law: *R v Siddiqi*, 2015 ONCA 548 at para 21

While not in itself an aggravating factor, it may become one when it is considered because of its impact on the accused's potential danger to the community: *R v Hawley*, 2016 ONCA 143 at para 5; *R v JS,* 2018 ONCA 675 at para 83; *R v Shah,* 2017 ONCA 872 at paras 8-9; *R v Saliba,* 2019 ONCA 22, at para 27; *R v Reeve,* 2020 ONCA 381, at paras 13-14; *R v Walker,* 2021 ONCA 863, at para 4

H. LACK OF PRO-SOCIAL FACTORS

The absence of a pro-social life network might more appropriately be treated as relevant to the likelihood that the appellant could rehabilitate himself rather than being treated as an aggravating factor: *R v Banovac,* 2018 ONCA 737, at para 4

I. FAILURE TO PAY RESTITUTION IN ADVANCE

The failure to pay restitution in advance of a guilty plea is not an aggravating factor, but only the absence of a mitigating factor: *R v Henn,* 2022 ONCA 768, at para 13

J. WEAPONS

The use of a firearm by itself cannot be an aggravating consideration in sentencing under s. 236(a) [use of a firearm during manslaughter], because this provision already takes into account that a firearm was used in the commission of a manslaughter: *R v Araya*, 2015 ONCA 854 at paras 24-25. However, the circumstances surrounding the use of the firearm can constitute an aggravating factor: *Araya* at para 26

The serious concern of growing gun violence in Toronto is a legitimate consideration on sentencing for an offence involving gun violence: *R v Deeb,* 2019 ONCA 875, at para 17

A sentence of three years for a youthful first offender convicted of possession of a loaded firearm is well within the appropriate range, although sentences may be higher or lower: *R v Mohiadin,* 2021 ONCA 122, at paras 12-15

In appropriate cases, a conditional sentence of imprisonment may be imposed for firearm offences: *R v Morris,* 2021 ONCA 681; *R v Desmond-Robinsoon,* 2022 ONCA 369, at paras 13-18

ALLOCUTION: RIGHT OF

The failure to grant a right of allocution, pursuant to s.726, does not render the sentence unfit without any evidence that anything the appellant would have said would be different than what was already before the trial judge and considered by him/her in making the sentence: *R v. Silva*, 2015 ONCA 301; see also *R v BS*, 2019 ONCA 72, at para 15; see also *R v GB,* 2018 ONCA 740

For a good example of the mitigating effect of a right of allocution on sentencing, see *R v Al Saedi,* 2017 ONCJ 204, in which the Court imposed a conditional discharge for the offence of impersonating an officer. The accused gave a powerful statement on sentencing in a courtroom full of grade 12 students, in which he delibered a heartfelt message of his remorse and efforts to make amends, sharing the lessons he learned with the students.

ANCILLARY ORDERS

A. GENERAL PRINCIPLES

Section 6(1) of the Criminal Code provides that, where an enactment creates an offence and authorizes a punishment to be imposed in respect of that offence", a person convicted of that offence "is not liable to any punishment in respect thereof other than the punishment prescribed by this Act."

B. DRIVING PROHIBITION

Driving prohibitions constitute part of the punishment imposed during a sentencing proceeding: *R v Boily,* 2022 ONCA 611, at para 59

A driving prohibition imposed under s. 259(2)(b) commences at the end of the period of imprisonment, not on the date of sentencing: *R v Markos,* 2019 ONCA 80, at para 28; *R v Gauthier-Carriere,* 2019 ONCA 790, at paras 6-7

A driving prohibition under s. 320.24(5.1) commences on the day it is made: *R v Boily,* 2022 ONCA 611, at para 26

Ana accused is entitled to credit against his driving prohibition for the time he was subject to a driving prohibition while on bail. However, any such credit may be reduced or even denied if the accused breached his bail: *R v Gauthier-Carriere,* 2019 ONCA 790, at paras 15-20; *R v R v Markos,* 2019 ONCA 80, at para 28

In considering the fitness of the driving prohibition, the court must look at the entirety of the sentence imposed, including both the period of imprisonment and the period of the driving prohibition: *R v Mitchell,* 2019 ONCA 284, at para 7

A prohibition order under s. 161(1)(a.1) should be restricted to the victim of the offence to which the order attaches: *R v TS,* 2020 ONCA 594, at para 3

A driving prohibition is available for dangerous driving causing death, but not for the more serious offence of criminal negligence causing death – an absurdity that appears to be a result of a drafting error: *R v Boily,* 2022 ONCA 611

C. SECTION 161 ORDERS

Related convictions are not prerequisites to an order under s. 161(1). Nor must the offender have committed the offence in the circumstances contemplated by the order. A finding of pedophilia is not necessary either. A sentencing judge need only have an evidentiary basis upon which to conclude that the particular offender poses a serious risk to young children and be satisfied that the terms of the order are reasonable attempt to minimize it: *R v JB,* 2022 ONCA 214, at para 56

i. (A) PARK, SWIMMING AREA PROHIBITION

The retroactive application of ss.161(a) violates s.11(i) of the *Charter*: *R v JD,* 2021 ONCA 376, at paras 86-98

In *RLS,* the Court of Appeal set aside an order prohibiting him from attending a park, agreeing that "the appellant's past conduct does not suggest that he constitutes a risk to persons present in parks: *R v RLS,* 2020 ONCA 338, at para 14

ii. (B)

The retroactive application of ss.161(b) violates s.11(i) of the *Charter*: *R v JD,* 2021 ONCA 376, at paras 86-98

iii. (C)

The retroactive application of ss.161(c) violates s.11(i) of the *Charter*: *R v KRJ,* 2016 SCC 31

iv. (D) INTERNET PROHIBITION ORDERS

The retroactive application of ss.161(c) violates s.11(i) of the *Charter*: *R v KRJ,* 2016 SCC 31

The overarching protective function of s. 161 of the *Criminal Code* is to shield children from sexual violence. An order under s. 161 constitutes punishment and is not available as a matter of course: there must be an evidentiary basis upon which to conclude that the particular offender poses a risk to children; the specific terms of the order must constitute a reasonable attempt to minimize the risk; and, the content of the order must respond carefully to an offender's specific circumstances: *R v Schulz,* 2018 ONCA 598 at para 41

Section 161(1)(d) permits the courts to prohibit Internet use but does not provide the court with the power to restrict ownership of such Internet capable devices. Nor should such a power be inferred.

In cases involving first time offenders, the court must remain cognizant of the need to avoid an order under s. 161(1)(d) that might unduly prevent a first time offender from making serious rehabilitative efforts in light of his particular circumstances:

Because these orders can have a significant impact on the liberty and security of offenders and can attract a considerable degree of stigma, they will be justified where the court is satisfied that the specific terms of the order are a reasonable attempt to minimize the risk the offender poses to children. The terms of such orders must, therefore, carefully respond to an offender's specific circumstances: *R v Brar,* 2016 ONCA 724, see paras 17-28

In imposing a section 161 order, the Court must have regard to not only the circumstances of the offence and the offender, but also to whether the offender poses a continuing risk to children upon his release into the community. If so, the

Court may impose reasonable terms in an attempt to minimize that risk: *R v LC,* 2018 ONCA 311 at paras 5-8

See also *R v KRJ*, 2016 SCC 31

Given the discretionary nature of an order made under s. 161(1), an appellate court should not interfere absent an error in principle or the imposition of a prohibition that is demonstrably unfit and unreasonable in the circumstances: *Schulz,* at para 43; *R v MC,* 2020 ONCA 510, at para 41

In *Schulz,* the Court of Appeal upheld an internet access restriction, notwithstanding that the accused was a first offender, there was no evidence he contacted or attempted to contact children, and he presented a psychologicl report indicating he was at low risk to reoffend.

In SC, the Ontario Court of Appeal held that a lifetime blanket prohibition order on using the internet was overbroad. The order was narrowed to prohibit the accused from using a computer to communicate with minors or to access illegal content and social media: 2019 ONCA 953, at para 9

D. SEX OFFENDER REGISTRY ORDERS (SOIRA)

Section 490.013(2) of the *Code* deals with the duration of SOIRA orders:

An order made under subsection 490.012(1) or (2)

(a) ends 10 years after it was made if the offence in connection with which it was made was prosecuted summarily or if the maximum term of imprisonment for the offence is two to five years;

(b) ends 20 years after it was made if the maximum term of imprisonment for the offence is 10 or 14 years;

(c) applies for life if the maximum term of imprisonment for the offence is life.

There is no right to appeal a SOIRA order imposed pursuant to s. 490.012(1) of the *Code*. However, a trial judge has an inherent jurisdiction to correct an erroneous SOIRA order, and is not *functus* after the imposition of such an order. On appeal, an appellate court may issue a writ of mandamus, compelling the trial judge to correct an erroneous order: *R v RP,* 2018 ONCA 473 at paras 16-22

E. NON-COMMUNICATION ORDER: SECTION 743.21

A trial judge is not obliged to make his/her order under s. 743.21 conditional on an order made by the family court or any CAS proceedings: *R v Hoare,* 2018 ONCA 991, at para 5

In *R v McNeil,* 2016 ONCA 384, the Court varied a non-communication order to allow the appellant to communicate with his co-accused and partner following the expiration of her custodial sentence - given that his custodial sentence would expire several years after hers.

F. RESTITUTION ORDERS: SECTIONS 738 AND 739

A restitution order forms part of a sentence. It is entitled to deference and an appellate court will interfere with the sentencing judge's exercise of discretion only if there is an error in principle, or if the order is excessive or inadequate.

An order for compensation should be made with restraint and caution. While the offender's ability to make restitution is not a precondition to the making of a restitution order, it is an important factor that must be considered before a restitution order is imposed. A restitution order made by a sentencing judge survives any bankruptcy of the offender. This means it is there for life. A

restitution order is not intended to undermine the offender's prospects for rehabilitation. This is why courts must consider ability to pay before imposing such an order. It is not enough for the sentencing judge to merely refer to or be aware of an offender's inability to pay. The sentencing judge must weigh and consider this: *R v Robertson,* 2020 ONCA 367, at paras 6-8

An accused's status as the residual beneficiary under a will does not preclude the making of a restitution order in favour of the estate bequethed in that will: *R v Hooyer,* 2016 ONCA 44 at para 31

Large institutions may be less vulnerable than others, and that this can affect whether to make a restitution order. There is no requirement, however, that restitution orders must be lower for institutional victims: *R v Lawrence,* 2018 ONCA 676 at para 11

Where a breach of trust is particularly egregious, a restitution order may be imposed even where repayment does not appear to be likely: *R. v. Wa*, 2015 ONCA 117, at para. 12; *Lawrence* at para 13; *R v Wagar,* 2018 ONCA 931, at para 19

Restitution orders give effect to several sentencing principles, including denunciation and specific and general deterrence: *R v Henn,* 2022 ONCA 768, at para 30

G. WEAPONS PROHIBITION ORDER: SECTION 109

Implied or perceived threats of violence will satisfy the criteria of mposing a weapons prohibition order under s.109(1)(a): *R v Mills,* 2016 ONCA 391 at para 14

Despite a weapons prohibition order being mandatory under s.109(1)(c), if no judicial order is made, no order shall issue: *R v. Shia,* 2015 ONCA 190 at paras 34-38

There is no deference owed to a trial judge's imposition of a lifetime weapons prohibition order where no reasons were provided for the imposition of that order: *R v Dow,* 2017 ONCA 233 at para 3

The offence of child luring satisfies the requirement of attempted violence in s.109(1)(a): *R v Harris,* 2019 ONCA 193, at para 19

i. Section 113 Applications

Pursuant to s.113, a person who is or will be subject to a prohibition order may apply to the Superior Court of Justice to issue an authorization or licence or a registration certificate for a firearm if it is established that it is necessary for the person or their family's sustenance, or the prohibition would impose a virtual prohibition against employment in the only vocation open to the person: *R v Hawrlyuk,* 2022 ONCA 36, at paras 8-9

APPELLATE REVIEW

For a review of the jurisprudence relating to Sentence Appeals, see Appeals: Sentence Appeals

COLLATERAL CONSEQUENCES

Collateral consequences are not necessarily 'aggravating' or 'mitigating' factors under s. 718.2(a) of the *Criminal Code*, nor is their relevance tied to their impact on the offender's moral blameworthiness or the seriousness of the offence. They are relevant, if at all, in determining how the individual circumstances of the offence and the offender affect the appropriate "individualized" sentence. The question is… whether the effect of those consequences means that a particular sentence would have a more significant effect on the offender because of his or

her circumstances. Like offenders should be treated alike, and collateral consequences may mean that the offender is no longer "like" the others, rendering a given sentence unfit: *R v Suter,* 2018 SCC 34, at paras 46-48

The sentencing judge should take into account the collateral immigration consequences flowing from a sentence when determining a fit sentence.

Trial and appellate courts may (modestly) reduce an otherwise fit sentence in order to avoid collateral immigration consequences. However, in doing so the court cannot 1) impose an unfit sentence and 2) an artificial sentence that circumvents the scheme of the *Immigration and Refugee Protection Act.*

See, for example: *R v Edwards*, 2015 ONCA 537; *R v Ansari*, 2015 ONCA 891; *R v Frater,* 2016 ONCA 386; *R v Zagrodskyi,* 2018 ONCA 34 at paras 12-17; *R v Martinez-Rodriguez,* 2018 ONCA 178; *R v Al-Masajidi,* 2018 ONCA 305; *R v Chang,* 2019 ONCA 924 (where immigration consequences mentioned but never pursued)

A conditional sentence of imprisonment does not constitute a term of imprisonment for the purpose of the inadmissibility provisions of the *Immigration and Refugee Protection Act.* Further, the phrase "punishable by a maximum term of imprisonment of at least 10 years" refers to the maximum sentence an accused person could have received at the time of the commission of the offence: *Tran v Canada,* 2017 SCC 50

Vigilante violence against an offender for his or her role in the commission of an offence is a collateral consequence that should be considered — to a limited extent: *R v Suter,* 2018 SCC 34

Although the vigilante justice in *Suter* did not flow directly from the commission of the or from the length of the sentence or the conviction itself, it was nevertheless said to be a collateral consequence as it was inextricably linked to the circumstances of the offence.

The SCC held that there is no requirement that collateral consequences emanate from state misconduct in order to be considered as a factor at sentencing. That said, vigilante justice should only be considered to a limited extent. Giving too much weight to vigilante violence at sentencing allows this kind of criminal conduct to gain undue legitimacy in the judicial process. This should be avoided.

In *Fiddes,* the Court of Appeal recognized that the experience of suffering a serious, life threatening beating in custody warranted a reduction in sentence: *R v Fiddes,* 2019 ONCA 27, at para 8

The collateral consequences of the pandemic could not be used to reduce a sentence to the point where it becomes disproportionate to the gravity of the offence or the moral blameworthiness of the offender: *R v Morgan*, 2020 ONCA 279

A sentencing judge's decision regarding the pandemic's impact in a particular case is a matter of discretion and is entitled to deference: *R v Walker,* 2021 ONCA 863, at para 6

Family separation may be a relevant collateral consequence. It is open to a sentencing judge to consider both collateral family consequences of family separation on the offender, as well as on the children themselves. However, the sentence imposed must always remain proportionate to the gravity of the offence and the responsibility of the offender: *R v LC,* 2022 ONCA 863, at paras 23-24

CONDITIONAL SENTENCES

A conditional sentence is generally more effective than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and community, and the promotion of a sense of a responsibility in the offender. Further, a conditional sentence is itself a punitive sanction capable of achieving the objectives of denunciation and deterrence. However, a focus on denunciation and deterrence in sentencing does not necessarily foreclose a conditional sentencing order in the circumstances: *R v Macintyre-Syrette,* 2018 ONCA 706 at para 16

The stigma associated with a conditional sentence that includes punitive provisions such as house arrest should not be underestimated. A conditional sentence can provide a significant amount of denunciation and significant deterrence: *R v Ali,* 2022 ONCA 736, at para 30

A conditional sentence can be appropriate even where deterrence and denunciation are the paramount considerations. This is particularly so "in circumstances where the offender is forced to take responsibility for his or her actions and make reparations to both the victim and the community, all the while living in the community under tight controls: *R v Henn,* 2022 ONCA 768, at para 27

The scope of s. 718.2(e) restricts the adoption of alternatives to incarceration to those sanctions that are "reasonable in the circumstances." In keeping with this principle, there are circumstances in which the need for denunciation and deterrence is such that incarceration is the *only* suitable way to express society's condemnation of the offender's conduct: A conditional sentence does not, generally speaking, have the same denunciatory effect as a period of imprisonment. Incarceration remains the most formidable denunciatory weapon in the sentencing arsenal: *Macintyre-Syrette* at para 19

An otherwise fit incarceral sentence will not be reduced to a conditional sentence for an individual who suffers from a variety of physical diseases absent evidence that accommodations cannot be made for him in accordance with the statutory obligations imposed upon provincial correctional authorities. *R v. R.C.,* 2015 ONCA 313

Where a conditional sentence is replaced with a custodial sentence on appeal, the accused is entitled to one-to-one credit for time served on his conditional sentence to the date of release of the appellate court's reasons: *R v. Rafiq,* 2015 ONCA 768

To impose a conditional sentence, the statutory requirements under 742.1 of the *Criminal Code* must be met. Many offences do not qualify for a conditional sentence, for example, any offence prosecuted by way of indictment for which an offender may be punished by a maximum term of imprisonment of 14 years or life. It is, however, possible to impose probation alone as a sentence for these offences. The provisions which can be inserted into a probation order are very extensive and wide and can include virtual house arrest scenarios which bear a striking resemblance to a conditional sentence. However, probation conveys less denunciation and deterrence, and has fewer enforcement powers: *R v Veljanovski,* 2017 ONCJ 150

The Court is not entitled to circumvent the limitations on the availability of a conditional sentence in s.742.1 by imposing a suspended sentence on the ineligible count and a conditional sentence on the eligible count. To do so would

amount to a disguised conditional sentence: *R v Mohenu,* 2019 ONCA 291, at paras 6-7

The Court is not entitled to circumvent the limitations on the availability of a conditional sentence in s.742.1 by blending a custodial on one count, and a conditional sentence on another count, that jointly exceed two years: *R v Nolan,* 2019 ONCA 969, at paras 62, 64

A conditional sentence can provide deterrence and denunciation, and thus may be appropriate for a crime involving violence, such as aggravated assault, even when deterrence and denunciation are paramount considerations. A sentencing judge should determine whether a CSO is appropriate by considering, and weighing, the ability of a conditional sentence to meet the deterrence and denunciation objectives and other relevant sentencing objectives, including restraint and rehabilitation: *R v Ali*, 2022 ONCA 736, at paras 27-29, 33, 35-38

Even when concluding that the level of violence requires a sentence that stresses general deterrence, a sentencing judge will erred in principle by failing to weigh other relevant sentencing factors on the question of whether a conditional or custodial sentence should be imposed: *R v Ali*, 2022 ONCA 736, at para 39

A trial judge's decision regarding the appropriateness of a conditional sentence is entitled to considerable deference: *R v Rage,* 2018 ONCA 211 at para 10

The fact that a conditional sentence is available on appeal when it was not at trial does not mean that one will necessarily be imposed. The issue is whether the sentencing judge's decision remains sound, given the newfound availability of a conditional sentence, after considering the sentencing judge's reasons, the applicable principles, and any fresh evidence: *R v Romano,* 2021 ONCA 211, at para 70

In *Veljanovski,* the court held that the unavailability of a conditional sentence for the offence of fraud over $5,000 would not be grossly disproportionate either for the accused or in the case of reasonable hypotheticals, and thus did not violate s.12 of the *Charter* (cruel and unusual punishment). Nor did the statutory bar violate s.7 for overbreadth or arbitrariness.

CONCURRENT V CONSECUTIVE

Generally, sentences for offences arising out of the same transaction or incident should be concurrent:. In reaching that determination, the court must determine if the acts constituting the offence were part of a linked series of acts within a single endeavour. If so, concurrent sentences are appropriate. There is an exception to that normal rule, however, which applies where the offences constitute invasions of different legally protected interests.

The decision to impose consecutive as opposed to concurrent sentences is a matter of discretion for the sentencing judge. An appellate court ought not to interfere with that decision unless it reflects an error in principle; *R v Sadikyov,* 2018 ONCA 609 at paras 13, 16; see also *R V JH,* 2018 ONCA 245 at para 50; *R v JS,* 2018 ONCA 675 at para 87

Totality considerations can provide a cogent reason for imposing a concurrent sentence or adjusting the length of consecutive sentences: *R v Claros*, 2019 ONCA 626, at para 53

The rule that sentences for offences arising out of the same transaction or incident should normally be concurrent does not necessarily apply where the offences constitute invasions of different legally-protected interests, although the principle of totality must be kept in mind: *R v Gummer* (1983), 1 OAC 141, [1983] OJ No 181 (CA) at para 13

Whether the nexus between offences is sufficiently or insufficiently close to merit either consecutive or concurrent sentences is a fact-specific inquiry: *R v Sears,* 2021 ONCA 522, at para 48

There is no absolute rule that drugs and weapons convictions must attract consecutive sentences in all cases: *Sadikyov* at paras 14, 15, 17

A trial judge does not have jurisdiction to bifurcate a sentence, such that one part of the sentences runs concurrent to another sentence and the reaminder of the sentence runs consecutively to that sentence. Section 719(1) stipulates that a sentence commences when it is imposed, and section 718.3(4) grants the trial judge discretion to order that the sentence run consecutively. There is no statutory jurisdiction to order part of the sentence to run consecutively and part to run concurrently: *R v Sadykov,* 2018 ONCA 296 at paras 8-15

There is no jurisdiction to postpone the beginning of a sentence: *R v Cameron,* 2022 ONCA 710, at para 38

Breach of prohibition orders warrants a sentence that runs concurrently to any other sentence imposed. The fact that two offences relating to the breach of a prohibition order occur in close succession, or even at the same time, is not a basis for imposing concurrent sentences.

Similarly, two or more separate violations of prohibition orders generally require their own distinct sentences, unless there is cogent reason to do otherwise given the principles and objectives of sentencing: *R v Claros,* 2019 ONCA 626, at paras 51-52

It is not an error in principle for a sentencing judge to determine a global sentence first and then to impose concurrent sentences of equal length because concurrent sentences can reflect a trial judge's view that the offences were "sufficiently interrelated to merit concurrent dispositions: *R v Wilson,* 2022 ONCA 857, at para 57

A. EXAMPLES

In *Leite,* the Court of Appeal found that the trial judge erred by imposing consecutive sentences for two counts of possession of fentanyl found in separate places in the same residence on the same day: 2019 ONCA 121

In respect of a conviction for a substantive offence combined with a conviction for breach of recognizance, the court should avoid double punishment by considering the fact that the offender was on a bail at the time he committed the offence ass aggravating, and then imposing a consecutive sentence for the breach itself. The proper approach to this issue depends on the factual foundation for the breach of recognizance charge. Where the facts underlying that charge are separate and distinct from the related charges, the sentences may be consecutive. Where, however, the factual basis for the breach of recognizance conviction was also the factual basis for the drug convictions, in order to avoid double punishment when considering the breach as aggravating on the substantive charges, the breach of recognizance sentence should be concurrent to the substantive offence: *R v Lin,* 2020 ONCA 768, at paras 28-30

The appropriateness of sentencing consecutively for offences related to flight from police is supported by the authorities that stress the need for deterrence of highly dangerous behaviour in flight from police. If sentences for such offences are not consecutive, flight from police might seem well worth the risk: *R v Jarvis,* 2022 ONCA 7, at para 5

In *Masci,* 2022 ONCA 294, the Court of Appeal found that the trial judge did not err in making a sentence for point firearm consecutive to possession of a firearm where the firearm was found in the accused's possession 12 days later as he was arrested by police while walking on a residential street in Toronto.

DANGEROUS OFFENDER APPLICATIONS

A. GENERAL PRINCIPLES

For a thorough review of the principles governing the designation of dangerous offenders under s.753(1) of the *Criminal Code* and the imposition of indeterminate sentences under s.753(4.1) of the *Criminal Code,* see *R v Boutilier,* 2017 SCC 64; see also *R v Sawyer*, 2015 ONCA 602

The onus is on the Crown to establish that the dangerous offender designation is made out beyond a reasonable doubt: *R v Brown,* 2021 ONCA 320, at para 28

The dangerous offender provisions form part of the sentencing process, and their interpretation must be guided by the fundamental purposes and principles of sentencing, including proportionality: *R v. Sawyer*, 2015 ONCA 602

B. SELECTING AN ASSESSOR

S. 752.1 provides for the trial judge to designate the assessor. In so doing, the trial judge should not to start with a presumption in favour of the Crown's proposed assessor.

s. 752.1 does not specify any particular procedure for a trial judge to follow in hearing from the parties and designating the assessor. It is within the trial management power of a judge to determine the procedure to be used to hear

from the parties on the issue of designating the assessor. In exercising the trial management power in the context of designating an assessor under s. 752.1, trial judges should bear in mind that the selection of an assessor is a preliminary step in the dangerous offender proceeding, and should be conducted in a relatively summary fashion: *R v KC,* 2022 ONCA 738, at paras 75-77, 114-116

At a minimum, if the parties are unable to agree to an assessor, the trial judge must provide an opportunity for both sides to make a proposal of one or more people to conduct the assessment, and submissions as to who should be designate. At a minimum, the capacity to perform an assessment would include consideration of the expert qualifications and experience of the person or persons proposed to conduct the type of assessment required, and the ability to conduct the assessment and prepare the report within the timelines set out in s. 752.1. Where there is an evidentiary basis for concerns about bias, that would be a relevant factor to consider: *R v KC,* 2022 ONCA 738, at para 118

Having one neutral assessor appointed by the court enhances the appearance of justice because it removes any perception that the appointment has been made to secure a litigation advantage. Further, if the person designated to perform the assessment is perceived to be neutral, it increases the likelihood that only one expert witness will ultimately be required at the hearing: *R v KC,* 2022 ONCA 738, at para 100

C. SERIOUS PERSONAL INJURY OFFICE

In assessing whether the offender has committed a serious personal injury offence, s. 752(a)(ii) does not suggest that the judge is required to undertake an objective assessment of the conduct of the offender. Parliament appears to have limited the conduct captured by this section by reference to the impact, or potential impact, of an offender's conduct on the victim: *R v Cook,* 2020 ONCA 809, at para 19

To qualify as a serious personal injury offence under s. 752(a)(ii), the conduct of the offender must be such that it was "inflicting or likely to inflict severe psychological damage upon another person". However, trivial conduct or conduct *de minimis* would not meet the severity requirement. For example, the offence of criminal harassment does not necessarily constitute a serious personal injury offence. Severe psychological damage" acts as a threshold and must be something more than "serious psychological harm" and requires at a

minimum substantial interference with the victim's physical or psychological integrity, health or well-being: *R v Cook,* 2020 ONCA 809, at para 20

D. PERRSISTENT BEHAVIOUR UNDER S.753(1)(I)

Unlike the "pattern of repetitive behaviour" in s.753(1)(a)(i), the jurisprudence has not interpreted this subsection to require similarities between the predicate offence and past offences. Instead, the past behavior must be "persistent" and coupled with indifference and intractability: *R v Tynes,* 2022 ONCA 866, at para 70

E. PATTERN OF BEHAVIOUR UNDER S.753(1)(A)(I)(II)

Two incidents may constitute a pattern, provided they disclose a sufficient degree of similarity.

The pattern requirement in ss. 753(1)(a)(i) and (b) is not based exclusively on the number of offences. It is also rooted in the elements of similarity in the offender's behaviour.

The statutory requirements demand proof of a pattern of behaviour, not a pattern of offences or convictions. As used in s. 753(1), a pattern refers to actions, not thoughts. The required pattern is based not solely on the number of offences, but also on the elements of similarity in the offender's behaviour.

Two strikingly similar incidents, or series of incidents, can sustain a finding of a pattern of behaviour for the purposes of s. 753(1)(a).

The behaviour involved in the predicate offences cannot be the exclusive source to furnish the pattern requirement in s. 753(1)(a) because of the reference to "of which the offence for which he or she has been convicted forms a part": *R v Gibson,* 2021 ONCA 530, at paras 223, 224, 228, 230, 231

F. BRUTALITY: S.753(1)(A)(III)

Brutality may be defined as conduct which is coarse, savage and cruel and which is capable of inflicting severe psychological damage, merciless, unfeeling, ruthless violence, vicious and inhumane conduct: see citations at *R v Blake,* 2022 ONCA 336, at para 26

Conduct which is coarse, savage and cruel and which is capable of inflicting severe psychological damage on the victim is sufficiently 'brutal' to meet the test": *R v Arnaout,* 2023 ONCA 751, at para 8

The less a pattern is required, the more shocking the behaviour must be. The focus of s. 753(1)(a)(iii) is on the brutality of the behaviour associated with the predicate offences, and from that, the risk of future dangerousness is assessed.

Ultimately, it is for the sentencing judge to determine whether the Crown has proven both the brutality of the offender's behaviour associated with the predicate offence, and whether based on that behaviour, the offender's future behaviour is unlikely to be inhibited by normal standards of behavioural restraint. The determination is for the court but is one that can be, and often is, informed by psychiatric evidence: *R v Blake,* 2022 ONCA 336, at paras 38-39

G. LACK OF SEXUAL IMPULSE CONTROL: S.753(1)(B)

A single incident can meet the requirements of s. 753(1)(b). Further, the inclusive language in s. 753(1)(b) makes it clear that the behaviour revealed in the predicate offences can sustain the burden. *R v Gibson,* 2021 ONCA 530, at paras 230-231

H. INTRACTABILITY AND TREATMENT PROSPECTS

See *R v Boutilier,* 2017 SCC 64

The sentencing judge must consider the issue of intractability and treatment prospects at the designation stage of the dangerous offender hearing. Intractability is relevant to both stages of a dangerous offender hearing: in the first with respect to whether the offender's risk of offending is amenable to treatment, and in the second with respect to what sentence is appropriate to

address the degree of intractability. Note, however, that the sentencing judge's finding that there was no reasonable prospect of control of the appellant in the community at the penalty stage can be relied on at the designation stage: *R v Simpson,* 2020 ONCA 765, at paras 32 and 33

Evidence about treatability, that is not sufficiently cogent as to affect a trial judge's conclusion on dangerousness, may still be relevant in deciding on the sentence that is required to adequately protect the public: *R v Brown,* 2021 ONCA 320, at para 28

In Brown, the trial judge's failure to consider intractability at the designation stage warranted appellate intervention. The trial judge considered the appellant's risk management/treatability at the sentencing stage, and found that there was a possibility of treatment, and that an LTSO would be sufficient. The Court of Appeal held that, had the trial judge properly considered the appellant's treatment prospects at the designation stage, he would not have designated the offender as dangerous. The Court vacated the designation and substituted an LTSO: *R v Brown,* 2021 ONCA 320, at paras 23-35

To determine whether a lesser measure will adequately protect the public, there must be actual evidence before the sentencing judge that the dangerous offender can be safely released into the community. Mere hope, even a judicial assumption about the existence of community programs or other necessary resources, is inadequate to the task of addressing the reasonable expectation of protection of the public: *R v Radcliffe,* 2017 ONCA 176 at para 58; *R v Hess,* 2017 ONCA 220 at paras 29-45

The court may consider that prior incarceration and court orders had not been successful in restraining the appellant's behavior: *R v Cook,* 2020 ONCA 809, at para 24

I. SENTENCE TO BE IMPOSED UNDER S.753(4.1)

The focus of the inquiry mandated by s. 753(4.1) is the nature and quality of the offender's propensity for committing violent crimes in the future, not the proportionality of the sentence to the relative severity of violent crimes committed in the past: *R v. H.A.K,* 2015 ONCA 905

On whether to impose an long term supervision order as a lesser alternative, see Long Term Supervision Orders

Once a DO designation has been made, in determining the length of the fixed-term custodial component of a composite sentence under s. 753(4)(b), the hearing judge is not restricted to imposing a term of imprisonment that would be appropriate on conviction of the predicate offence but in the absence of a dangerous offender designation. The hearing judge must take into account the statutory limits of the offence for which sentence is being imposed, the paramount purpose of public protection under Part XXIV, and other applicable sentencing principles under ss. 718-718.2. This analysis may justify fixed term sentences lengthier than those appropriate outside the dangerous offender context: *R v Stillman,* 2018 ONCA 551 at para 32

While outside the dangerous offender environment, sentencing judges are disentitled to determine the length of a sentence of imprisonment solely by reference to the period of time necessary to complete essential or recommended rehabilitative program, in deciding the length of the custodial component of a composite sentence under s. 753(4)(b), a hearing judge is entitled to take into account access to rehabilitative programming in a penitentiary. In other words, a hearing judge may impose a fixed-term sentence that exceeds the appropriate range in the non-dangerous offender context, to ensure the offender has access to treatment programs in a penitentiary. The length of the sentence imposed, however, should be subject to three constraints.

First, any custodial sentence imposed as a component of a composite sentence under ss. 753(4)(b) or as a standalone disposition under s. 753(4)(c), cannot exceed the maximum term of imprisonment for the predicate offence.

Second, the sentencing objectives, principles and factors in ss. 718-718.2 cannot be entirely ignored – although the significance of factors such as the degree of responsibility of the offender and the gravity of the offence play a lesser role in determining a sentence under Part XXIV.

Third, the length of sentence imposed must be responsive to evidence adduced at the hearing. The evidence about treatment programs should be specific, preferably indicating an approximate length or range of time within which the offender may be expected to complete the programming said to be necessary to protect the public. There must be a clear nexus between that programming and

future public safety, sufficient to support a "reasonable expectation" that the overall sentence will "adequately protect the public against the commission by the offender of murder or a serious personal injury offence": s. 753(4.1). And the evidence must account for the offender's "amenability to treatment and the prospects for the success of treatment in reducing or containing the offender's risk of reoffending": *Stillman* at paras 39, 51-54

Enhanced credit may be denied if it would unduly interfere with the length of custodial sentence deemed necessary by the trial judge to adequately protect the public from the risk of the appellant's recidivism: *Stillman* at para 59

J. RISK ASSESSMENT 60-DAY LIMIT

In *A.H.*, 2018 NSCA 47, the Nova Scotia Court of Appeal upheld the decision of an application judge declining to extend the statutory 60-day limit for the Crown to obtain an expert assessment report in support of a dangerous or long-term offender application. The court held there was no reason to interfere with the application judge's discretionary decision not to extend the assessment period.

K. EVIDENCE IN DO PROCEEDINGS

A dangerous offender proceeding is part of the sentencing process and is governed by the same sentencing principles, objectives and evidentiary rules. the importance of the sentencing judge having access to the fullest possible information about the offender is heightened in the context of a dangerous offender application. As a result, the court must take a generous approach to admissibility in a dangerous offender proceeding: *R v Williams,* 2018 ONCA 437 at paras 42, 48; *R v Walker,* 2020 ONCA 765, at para 86

During a dangerous offender application under s. 753, access to the widest possible information is important. A sentencing judge is required to examine not only the conduct of the offender and impact that it had on the victim during the time period of the offence itself, but also the surrounding circumstances, which can include their entire relationship: *R v Cook,* 2020 ONCA 809, at para 15

As with any sentencing hearing, hearsay evidence is admissible so long as it is found to be "credible and trustworthy." This common law principle is codified in s. 723(5) of the *Criminal Code*. Character evidence is also specifically admissible in a dangerous offender proceeding pursuant to s. 757 of the *Criminal Code*: *Williams* at para 49

Despite the broad approach to admissibility at the sentencing stage, it is not the case that the offender is deprived of all protections:. The Crown must prove disputed aggravating facts beyond a reasonable doubt. The corollary to this principle in a dangerous offender proceeding is that the Crown must prove the statutory elements of dangerousness beyond a reasonable doubt: *Williams* at para 53

Crown and police synopsis are admissible at DO hearings. However, once the evidence has been admitted, the court must then grapple with the appropriate weight to be accorded to the information contained within the synopses.

Police synopses are often prepared at the time of arrest, or in the early stages of a criminal prosecution. A fuller appreciation of the facts often emerges later, such that the facts set out in the synopses will often diverge from the facts proven at trial or admitted on a guilty plea:

It is difficult to conclude that a Crown synopsis, standing alone, is an accurate reflection of events. The court noted that the sources of information contained in the synopsis may not be specified and an assessment of the reliability and trustworthiness of the information contained within may be difficult or impossible: *Williams* at paras 42-45, 52

Some basic facts set out in the synopses can be used for the purposes of establishing details such as dates and ages. Other facts, where support can be found in other parts of the record, can likewise be relied upon. This does not, however, lead to the conclusion that the entire contents of the document can be taken as proven beyond a reasonable doubt: *Williams,* at para 54

Due to the evidentiary frailties inherent in the nature of a police synopsis, caution is required when the sentencing judge is considering whether the contents of those records can, along with the rest of the record, provide the basis for a finding that the statutory elements of dangerousness have been proven beyond a reasonable doubt. The incidents set out in the synopses must be considered in light of all of the evidence led at the hearing. Certain parts of a synopsis may find support and confirmation, either directly or by reasonable inference, in other

parts of the record. If so, it is open to the sentencing judge to rely on those incidents as evidence in support of a finding that the statutory elements of dangerousness, such as the requisite pattern of behaviour, are made out: *Williams* at para 55

IRCA reports can provide important social context evidence that bears on the moral culpability of an offender facing a dangerous offender proceeding: *R v* 2022 ONCA 866, at para 95

L. FUTURE RISK OF REOFFENCE

If the expert focuses on whether the offender is treatable only at the time he writes the report, this may be insufficient evidence to base a finding regarding the offender's risk of reoffending in the future: *R v. Sawyer*, 2015 ONCA 602 – see para 58

M. PROCEDURAL FAIRNESS

The indeterminate sentence allows for control of offenders found to be dangerous for the rest of their lives. This is a significant deprivation of liberty. As such, procedural fairness must be jealously guarded and strictly enforced in this context. Subject to the right of the parties to agree otherwise, the closing arguments must therefore include oral submissions, held in open court, in the presence of the accused, counsel, the trial judge and the court reporter: *R v McDonald,* 2018 ONCA 369 at para 41

Section 650 of the *Criminal Code* gives the appellant the right to be present in court during the whole of his trial subject to exceptions that do not apply in this case. Closing arguments are part of an accused's trial, and thus are subject to the requirement that the accused be present. This right gives effect to the principle of fairness and openness that are fundamental values in our criminal justice system. Presence gives the offender the opportunity of acquiring first-

hand knowledge of the proceedings leading to the eventual result. The denial of that opportunity may well leave the offender with a justifiable sense of injustice, which is the "implicit and overriding principle underlying" the right to be present: *McDonald* at para 42

Pursuant to s.758(2), the accused may be removed from the DO proceedings if necessary to continue the proceedings. In these circumstances, while a video link may not be the only way that procedural fairness can be achieved, at a minimum, fairness requires that this option be carefully explored: *R v Walker,* 2019 ONCA 765, at para 104

A sentencing judge is required to provide sufficient reasons for imposing a dangerous offender designation, even in cases where the accused consents to the designation: *R v Suganaqueb,* 2022 ONCA 193

N. APPEAL

Appellate review of a dangerous offender designation "is concerned with legal errors and whether the dangerous offender designation was reasonable." While deference is owed to the factual and credibility findings of the sentencing judge, appellate review of a dangerous offender designation is more robust than on a "regular" sentence appeal. Courts can review the imposition of an indeterminate sentence for legal error and reasonableness, but should defer to the factual and credibility findings of the trier of fact: *R v Sawyer,* 2015 ONCA 602

Deference is accorded to a sentencing judge on issues of fact-finding, including on the question of whether there is a reasonable possibility of eventual control of an offender in the community: *R v Hess,* 2017 ONCA 220 at para 26

The court may admit fresh evidence on an appeal from a dangerous offender designation when it is in the interests of justice to do so: ss. 759(7) and 683(1). The well-known *Palmer* test governs the admissibility of fresh evidence in this context: R v. Sawyer, 2015 ONCA 602

i. Fresh Evidence

Fresh evidence must be sufficiently cogent that it could reasonably be expected to have affected the result of the dangerous offender proceedings had it been adduced there along with the other evidence. An appellate court is not concerned with what the outcome might be were the proceedings held in the present - when the fresh evidence is adduced. For the most part, evidence of institutional progress since sentence, including participation in and completion of various programs, exerts no meaningful influence on the trial judge's sentencing determination: *Radcliffe* at para 59; see also *R v Williams,* 2018 ONCA 437

DISCHARGES

The imposition of a discharge does not require exceptional circumstances. The criterion under s.730 require only that the discharge be in the best interests of the accused and not contrary to the public interest: *R v Mills,* 2022 ONCA 404, at para 10

A conditional discharge is inappropriate for violent offences. Even if it is in the interests of the accused, it may not be in the interests of the public: *R v Huh,* 2015 ONCA 356

A person who receives a condition discharge is deemed, pursuant to s.730(3) of the *Criminal Code,* not to have been convicted of an offence. For the purpose of sentencing such a peson for a further offence, they are still deemed to be a first-time offender.

The Crown may, however, apply to revoke the discharge pursuant to s.730(4) if the offender is convicted of an offence while bound by the conditions of his probation order. If revocation occurs and a conviction is entered, the offender can then be treated as having a record: *R v Barclay,* 2018 ONCA 114 at para 44

Section 6.1(1)(a) of the CRA precludes the disclosure not only of the record, but also of the existence and fact of an absolute discharge beyond one year following its imposition, unless the prior approval of the Minister of Public Safety and Emergency Preparedness is obtained. The prohibition on disclosure of discharges is complete. Section 6.1(1)(a) of the CRA precludes disclosure not to selected persons but to any person. It is of no moment whether the record remains in provincial record bases; it cannot be disclosed without the Minister's prior approval. However, the Crown would be entitled to put before the court the factual reality that the incident underlying the discharge occurred: *R v Montesano,* 2019 ONCA 194, at paras 9, 11

DENUNCIATION AND DETERRENCE

Specific deterrence has little relevance in the context of suicide. Similarly, An act of attempted suicide is the ultimate plea for help, and does not cry out for a denunciatory sentence: *R v Dedeckere*, 2017 ONCA 799 at para. 14; see also *R v Fabro,* 2021 ONCA 494, at paras 21-23

General deterrence is a factor of decreased significance when sentencing those whose behaviour is driven by mental illness: *R v Dedeckere*, 2017 ONCA 799 at para. 14; see also *R v Fabro,* 2021 ONCA 494, at paras 21-23

The societal perception of the seriousness or harmfulness of the offender's conduct has a role to play in considering factors such as denunciation and deterrence: *R v Strong,* 2019 ONCA 15, at para 3

An argument can be made that specific deterrence has been accomplished where an offender has, since commission of the offence, been sentenced separately for a similar offence: *R v Claros,* 2019 ONCA 626, at para 45

DOWNES CREDIT

Unlike predisposition custody, which is governed by s. 719(3) of the *Criminal Code*, no statutory provision explicitly authorizes or requires consideration of time spent subject to stringent predisposition bail conditions as a relevant mitigating factor on sentence. That said, it is beyond controversy that prior decisions of this court authorize a sentencing judge to take into account, as a relevant mitigating circumstance on sentence, time spent under stringent bail conditions, especially house arrest.

A sentencing judge should explain why she or he has decided not to take predisposition house arrest into account in determining the sentence that she or he will impose. The amount of credit to be given, if any, lies within the discretion of the trial judge. Unlike s. 719(3) in relation to predisposition custody, there is no formula the sentencing judge must employ. The amount of credit is variable, a function of several factors, including but not limited to:

i. the period of time spent under house arrest;

ii. the stringency of the conditions;

iii. the impact on the offender's liberty; and

iv. the ability of the offender to carry on normal relationships, employment and activity.

The failure to consider or give effect to an offender's predisposition bail conditions as a mitigating factor on sentence warrants appellate intervention only where it appears from the trial judge's decision that such an error had an impact on the sentence imposed: *R v Adamson,* 2018 ONCA 678 at paras 106-108; *R v Joseph,* 2021 ONCA 733, at para 107

Mitigation for bail conditions is to be based on how punitive those conditions were, not how necessary they were: *R v Joseph,* 2021 ONCA 733, at para 107

Credit may be given for stringent bail conditions other than house arrest, but house arrest is the most material condition. Further, the case law does not support credit at a rate of 1:1 for house arrest bail. “Bail is not Jail”: *R v Joseph,* 2021 ONCA 733, at para. 112

A sentencing judge is not required to apply a precise mathematical calculation for presentence bail (see *R. v. Dragos*, [2012] O.J. No. 3790), and to precisely identify the credit given: *R v Persaud*, 2015 ONCA 343

It is not appropriate to deny enhanced credit for delay caused by the accused in the proceedings where that delay did not constitute wrongful or bad conduct on the part of the accused. Such wrongful conduct includes, for example, bringing many frivolous motions in advance of the trial. It os an error in principle for a sentencing judge to rely on the accued’s legitimate exercise of his rights to deny him enhanced credit on sentencing: *R v Schlaepfer,* 2022 ONCA 566, at para 18

The focus of the *Downes* credit inquiry is the impact of the conditions on the appellant. The reasonableness of the conditions is not the issue. Nor does *Downes* credit depend upon whether the accused sought to review onerous conditions that were imposed by a court at the request of the Crown. Put simply, it is unfair when considering *Downes* credit to hold accused persons solely responsible for the punitive impact of onerous conditions that a court has imposed at the request of the Crown: *R v Schlaepfer,* 2022 ONCA 566, at para 22

The decision on whether to grant credit for curfew conditions on bail is entitled to deference on appeal: *R v Wawrykiewicz,* 2019 ONCA 21, at para 17

Where the sentencing judge does not articulate the credit that was given to bail conditions, the decision is not entitled to deference: *R v. HE,* 2015 ONCA 531, at para 55

Appellate courts may interfere with the discretionary determination of *Downes* credit if the sentencing judge placed undue emphasis on the bail conditions as a mitigating factor or if there is a lack of evidentiary foundation to support the sentencing judge’s findings: *R. v. Dodman*, 2021 ONCA 543, at para. 10; *R v Schlaepfer,* 2022 ONCA 566, at para 14

It is an error to deny *Downes* credit simply on the basis that concurrent sentences are being imposed. However, a sentencing judge may refuse to grant *Downes* credit where to do so would otherwise result in an unfit sentence: *R v CC,* 2021 ONCA 600, at para 5

FINES

A. ABILITY TO PAY:

See section 734(2) of the Criminal Code

ii. STANDARD OF PROOF

In determining whether the record contains sufficient evidence to "satisfy" the court that the offender can afford to pay the contemplated fine, the trial judge must be satisfied, on a balance of probabilities, of the offender's ability to pay: *R v Mahmood,* 2016 ONCA 75 at para 22

iii. ABILITY TO PAY VERSUS TIME TO PAY

An offender's ability to pay is inextricably linked with the time an offender has to pay the fine. If an offender shows on a balance of probabilities that s/he does not have the ability to pay immediately, s/he must be given sufficient time to pay that is reasonable in all the circumstances: *R v Mahmood,* 2016 ONCA 75 at para 23

B. FINES IN LIEU OF FORFEITURE

A fine in lieu of forfeiture may be imposed where the property:

- cannot, on the exercise of due diligence, be located;
- has been transferred to a third party; or
- has been commingled with other property that cannot be divided without difficulty: *R v Schoer,* 2019 ONCA 105, at para 92

The use of the discretionary "may" connotes a discretion to impose a fine instead of forfeiture, a discretion that is only available where making an order of forfeiture is impractical or impossible. The exercise of discretion arising from the word "may" in s. 462.37(3) is restricted by the objective of the provision, the nature of the order and the circumstances in which the order is made: *R v Schoer,* 2019 ONCA 105, at para 90

The discretion is restricted to the decision whether or not to impose a fine and to the determination of the value of the property: *R v Vallieres,* 2022 SCC 10;

For example, in Henn, the Court of Appeal exercised its discretion not to impose a fine in lieu of forfeiture in circumstances where the offender was also ordered to pay restitution for the money in question: *R v Henn,* 2022 ONCA 768

Where funds are no longer available, s. 462.37(3) of the *Criminal Code* provides that the court may order the offender to pay a fine "equal to the value of the property" that ought to have been forfeited. The amount of the fine is required to be equal to the value of the property which was possessed or controlled by the appellant, not the value of the benefit or profit received by the appellant: *R v Way,* 2017 ONCA 745 at para 7; *R v Schoer,* 2019 ONCA 105, at paras 95, 105; *R v Vallieres,* 2022 SCC 10

This amount is warranted in light of the scheme for the forfeiture of proceeds of crime, under which a fine must, in principle, be equal to the value of the property of which an offender had possession or control at some point in time. The purpose of a fine in lieu is to replace the proceeds of crime rather than to punish the offender. It is therefore in the nature of a forfeiture order. The imposition of a

fine in lieu may be considered where forfeiture of the property that is proceeds of crime has become impracticable: *R v Vallieres,* 2022 SCC 10

The definition of the term "property" in s. 2 captures gross income derived from the sale of property obtained by crime. At the step of determining the value of the property, the Crown's burden is only to show that the offender had possession or control of property that is proceeds of crime and to establish the value of that property. The determination of the property's value must be based on the evidence and not on a purely hypothetical calculation. In a situation involving the resale of property obtained by crime, the proceeds of crime are, in principle, the sum obtained in exchange for the property originally in the offender's possession or under their control: *R v Vallieres,* 2022 SCC 10

An offender's ability to pay must not be considered in determining the amount of a fine in lieu, any more than in deciding whether or not to impose such a fine: *R v Vallieres,* 2022 SCC 10

In situations involving co-accused who had possession or control of the same property that constitutes proceeds of crime, courts may divide the value of the property between the co-accused if there is a risk of double recovery, if apportionment is requested by the offender and if the evidence allows this determination to be made. The onus is on the offender to make the request and to satisfy the court that it is appropriate to apportion the value of the property between co-accused. The exercise of the court's discretion to apportion will depend on the circumstances of each case: *R v Vallieres,* 2022 SCC 10

Where the conditions giving rise to a possibility of double recovery are met, the court must apportion the value of the property between the co-accused in order to reflect the nature of a fine in lieu, which replaces the property that cannot be forfeited, nothing more and nothing less. However, given the approximate nature of the exercise, the court retains some flexibility in deciding how the value of the property will be apportioned between the co-accused: *R v Vallieres,* 2022 SCC 10

Where there are multiple offenders before the court, and the property passed through the hands of one offender to another without the first offender retaining the benefit of the full value of the property, the sentencing judge may allocate a portion of the fine less than the full value of the property that had been under the offender's possession and control, so long as the balance of the total value of the proceeds of crime are distributed to the other offenders before the court: *R v Chung,* 2021 ONCA 188, at para 101

While the offender bears the burden of raising apportionment and establishing its appropriateness, the Crown should, to the extent possible and where the available evidence allows, mitigate the risk of double recovery by apportioning, on its own initiative, the value of the property that is proceeds of crime between the co-accused. The Crown should discharge this duty in every case, but especially where the co-accused are tried separately: *R v Vallieres,* 2022 SCC 10

There may be circumstances where the objectives of the provision do not call for a fine to be imposed, for example if the offender acted alone and did not benefit from the crime: *R v Chung,* 2021 ONCA 188, at para 100

The purpose of a fine in lieu of forfeiture is to deprive an offender of the proceeds of crime. *Criminal Code*, s. 462.37(1) provides for the forfeiture of property that is the proceeds of crime. Pursuant to *Criminal Code*, s. 462.37(3), the fine in lieu of forfeiture is to be the value of the proceeds of crime. The value of the proceeds of crime is not necessarily the value of the property: *R v Lawrence,* 2018 ONCA 676 at para 14

The term “proceeds of crime” is granted an expansive definition in s. 462.3(1):

“proceeds of crime” means any property, benefit or advantage, within or outside of Canada, obtained or derived directly or indirectly as a result of

(a) the commission in Canada of a designated offence ….

For the property to be the proceeds of crime for purposes of forfeiture, “the offender must have had possession or control of the property in question at some point”: *R v Schoer,* 2019 ONCA 105, at para 87

Trial judges may structure a fine in lieu of forfeiture and restitution order so that the restitution order takes priority over payment of the fine in lieu of forfeture, which can be reduced by any amount paid toward the restitution order: *R v Dhanaswar,* 2016 ONCA 229 at paras 2-3

For a comprehensive review of the governing principles on fines in lieu of forfeiture, including the standard of review, the statutory scheme, the test for imposing a fine in lieu of forfeiture, the relevance of rehabilitation, ability to pay,

and the availability of civil remedies for a victim, as well as the relevance of general sentencing objectives, see *R v Angelis,* 2016 ONCA 675.

For a review of the governing principles on a trial judge's discretion to refuse to order a fine in lieu of forfeiture, see also *R v Rafilovich,* 2017 ONCA 634

The fine is dealt with separately from, and in addition to, the punishment for committing a crime. The imposition of a fine in lieu of forfeiture is not punishment imposed upon an offender. It is also not part of the global sentence imposed upon an offender and accordingly it is not to be consolidated with sentencing on a totality approach: *R v Saikaley,* 2017 ONCA 374 at para 181; *R v Lawrence,* 2018 ONCA 676 at para 14; *R v Schoer,* 2019 ONCA 105, at paras 93-94

It is inappropriate to deduct the income tax paid on the income derived from the proceeds of crime subject to forfeiture: *R v Way,* 2017 ONCA 745 at paras 7-8

i. Imprisonment in Default of Fine

As a means of enforcing the fine, s. 462.37(4) requires the judge who imposes the fine to also impose a term of imprisonment in the event that the offender does not pay the fine. Although the sentencing judge has some discretion in the length of the term of imprisonment to be set, that discretion is bounded by mandatory minimum and maximum terms of imprisonment that correspond to the quantum of the fine. For example, default of a fine of more than $1 million requires a mandatory minimum sentence of five years and a maximum of ten years. The sentencing judge must provide the offender with reasonable time to pay:

Section 462.37(4) provides a graduated approach to setting the term of imprisonment consequent to default. The larger the amount of unrestored proceeds of crime that the offender is found to have possessed or controlled, the longer the minimum term of incarceration:

The mechanism for imprisoning a defaulting offender is set out in s. 734.7 of the *Criminal Code*. The court cannot issue a warrant of committal until the time allowed for payment has expired, the mechanisms provided by ss. 734.5 and 734.6 are not considered to be appropriate, or the offender has, without reasonable excuse, refused to pay the fine. Although ability to pay a fine is not a consideration at the sentencing stage (except in terms of the time to be given to pay), it is a consideration at the committal stage both with respect to determining if time should be given to pay and with respect to determining whether there has been a reasonable excuse for not paying. No one is to be committed unless

judged not to have had a reasonable excuse for nonpayment. Poverty is a reasonable excuse. The section targets *refusals* – in other words, wilful nonpayment.

The rationale for imprisonment in default of payment is to give serious encouragement to those with the means to pay a fine to make payment.. Imprisonment on default of payment is thus not additional punishment for the underlying offence, but a means of coercing payment from those offenders who have the means to pay: *R v Chung,* 2021 ONCA 188, at paras 102-105

The term of imprisonment in default of payment of a fine is reduced commensurate to the payment of the fine: see ss. 734.8

Any time served in prison is served after taking into account the offender's financial circumstances and willingness to comply: ss. 734.7(b); see also *R v Khatchatourov*, 2014 ONCA 464, at paras 60-61

FORFEITURE

A. FORFEITURE OF PROCEEDS OF CRIME

Criminal Code, s. 462.37(1) provides for the forfeiture of property that is the proceeds of crime.

The term "proceeds of crime" is granted an expansive definition in s. 462.3(1):

"proceeds of crime" means any property, benefit or advantage, within or outside of Canada, obtained or derived directly or indirectly as a result of

(a) the commission in Canada of a designated offence ….

For the property to be the proceeds of crime for purposes of forfeiture, "the offender must have had possession or control of the property in question at some point".

Where the sentencing judge is satisfied on a balance of probabilities that the property is the proceeds of crime, that the offender had possession or control of it at some point, and the designated offence was committed in relation to that property, a forfeiture order must be made: *R v Schoer,* 2019 ONCA 105, at paras 87-88

B. OFFENCE RELATED PROPERTY UNDER THE CDSA

"Offence related property" is defined in s. 2(1) of the CDSA as any property

(a) by means of or in respect of which a designated substance offence is committed
(b) that is used in any manner in connection with the commission of a designated substance offence, or
(c) that is intended for use for the purpose of committing a designated substance offence

Section 16(1) of the CDSA provides that where a person is convicted of a designated offence, and the court is satisfied that any property is offence-related property, and that the offence was committed in relation to that property, the court shall order that the property be forfeited.

Section 19.1(3) of the CDSA provides that, if a court is satisfied that the impact of an order of forfeiture would be disproportionate to the nature and gravity of the offence, the circumstances surrounding the commission of the offence and the criminal record, if any, of the person convicted, a court may decide not to order forfeiture of the property or part of the property.

It is an error of law for a judge to refuse to consider proportionality in making a determination under s.19.1(3): *R v 2095540,* 2019 ONCA 296

Section 19(3) of the CDSA provides for forfeiture of property following conviction. An order for forfeiture of property implies the loss of property and sale by the Crown to realize the value of the property. Section 16(1)(b) specifically provides that the property is to be disposed of by a province or Canada.

Quantifying the amount to be forefeited is not an exact science. A sentencing judge must calculate an amount that is proportionate to the nature and gravity of the offence, the circumstances surrounding the commission of the offence and the criminal record, if any, of the accused, and all non-financial considerations. A sentencing judge is not to be expected to embark on a detailed accounting of income and expenses related to the property or fluctuations in the property value, especially where no sufficient evidence is presented to the sentencing judge for consideration: *R v Rafilovich,* 2017 ONCA 634 *at para 37*

GAP PRINCIPLE

The gap principle is said to be a foundational consideration in sentencing. Where the principle is relevant, it is an error for the sentencing court to fail to apply it": The rationales behind the principle include:

1. a gap in an offender's criminal record is relevant to future risk and to rehabilitative potential;

2. a person who has rectified past behaviour for a substantial period of time should be considered as having better prospects for individual deterrence and rehabilitation;

3. if someone with a criminal record has not had any convictions for several years, they are to be treated if not as a first offender, then almost as a first offender; and,

4. ordinarily, the gap should reflect a sufficient passage of time to be relevant.

R v Singh, 2012 ONSC 30, cited in dissenting reasons of Nordheimer J.A. in *R v Milani,* 2021 ONCA 567, at para 68

GARDINER HEARING

In a jury trial, the factual findings required to identify a proportional sentence may not be evident, as jurors give general verdicts without elaborating on the precise findings they have made. To assist in overcoming this challenge, s. 724(2) of the Criminal Code applies to fact-finding for the purposes of sentencing in a jury trial, once the jury has rendered its general verdict. Section 724(2) provides as follows:

Where the court is composed of a judge and jury, the court

(a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and

(b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.

The sentencing judge is bound by the express and implied factual implications of the jury's verdict. The sentencing judge must not accept as fact any evidence consistent only with a verdict rejected by the jury. When the factual implications of the jury's verdict are ambiguous, the sentencing judge should not attempt to follow the logical process of the jury, but should come to his or her own independent determination of the relevant facts. To rely upon an aggravating fact or previous conviction, the sentencing judge must be convinced of the existence of that fact or conviction beyond a reasonable doubt; to rely upon any other relevant fact, the sentencing judge must be persuaded on a balance of probabilities.

Offenders should be sentenced based on factual determinations, not contingencies. It is an error to sentence an offender based on what he could have been found to have done, rather than on what he has been found to have done: *R v Moreira,* 2021 ONCA 507, at paras 45-47, 50; *R v Aragon,* 2022 ONCA 244, at paras 105-106

It is an error for a sentencing judge to rely on facts in sentencing that are not expressed or implicit in the jury's verdict, but that are based on the sentencing judge's belief as to what the jury must have decided. To rely on aggravating facts that are not necessarily expressed or implicit in the jury verdict, the sentencing judge must come to their own independent determination that those aggravating facts have been proved, beyond a reasonable doubt: *R v Aragon,* 2022 ONCA 244, at para 107

GLADUE PRINCIPLES

A. GENERAL PRINCIPLES

The *Gladue* factors are highly particular to the individual offender, and so require that the sentencing judge be given adequate resources to understand the life of the particular offender.

i. THE ABORIGINAL FACTOR MUST BE TAKEN INTO ACCOUNT AT SENTENCING

Absent express informed waiver, counsel has a duty to present the unique circumstances of an aboriginal offender on sentencing: *R v Radcliffe,* 2017 ONCA 176 at paras 54

A sentencing judge is obliged, under s. 718.2(e) of the Criminal Code, to consider the unique circumstances of Aboriginal offenders, and it is an error for a sentencing judge to fail to factor into a sentencing decision the accused's Aboriginal status: *R v Van Every,* 2016 ONCA 87 at para 87; *Radcliffe* at para 56; *R v Kreko* 2016 ONCA 367 at para 27; *R v Martin,* 2018 ONCA 1029, at para 13

Judges are under an affirmative obligation to inquire into the offender's experiences as an Indigenous person. The failure to seek and/or consider such information is a legal error: *R v CK,* 2021 ONCA 826, at paras 48-50

Section 718.2(e) of the *Criminal Code* provides that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered by a sentencing judge, with particular attention to the circumstances of Aboriginal offenders. The court is to give "serious consideration to a conditional sentence in these circumstances; a conditional sentence is generally more effective than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and community, and the promotion of a sense of a responsibility in the offender. Further, a conditional sentence is itself a punitive sanction capable of achieving the objectives of denunciation and deterrence. That being said, a focus on denunciation and deterrence in sentencing does not necessarily foreclose a conditional sentencing order in the circumstances: *R v Macintyre-Syrette,* 2018 ONCA 706, at paras 15-16

There is no general rule that in sentencing an Aboriginal offender the court must give the *most* weight to the principle of restorative justice, as compared to other legitimate principles of sentencing. The relative weight to be assigned to the goals of restorative justice as against the principles of denunciation or deterrence will be connected to the severity of the offence. The principles of denunciation and deterrence may predominate where the offence is sufficiently serious: *Macintyre-Syrette* at para 18

That being said, trying to carve out an exception from *Gladue* for serious offences would inevitably lead to inconsistency in the jurisprudence due to the relative ease with which a sentencing judge could deem any number of offences to be 'serious': *R v Martin,* 2018 ONCA 1029, at para 18

The *Gladue* factors must be considered no matter how serious the offences. An Aboriginal offender is not to be treated as though they were non-Aboriginal for some category of "serious" offences: *R v McNeil,* 2020 ONCA 595, at para 34

The application of *Gladue* factors is not a matter of weight, and the duty to apply *Gladue* factors does not vary with the offender. However, a sentencing judge can find that the circumstances of a particular accused do not diminish the

moral culpability of his actions: *R v MacIntyre-Syrette,* 2018 ONCA 259 at para 18

When sentencing an Aboriginal offender, courts must consider:

(1) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts;

(2) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection: *R v FHL,* 2018 ONCA 83 at para 31

However, it is an error of law to require a causal connection between aboriginal status and the offences committed. Such a requirement "displays an inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples" and "imposes an evidentiary burden on offenders that was not intended by *Gladue:*" *R v Kreko,* 2016 ONCA 367 at paras 20-23; *FHL,* at para 32.

Instead, aboriginal factors must be tied to the particular offender and offence(s) in that they must 1) bear on his or her culpability or 2) indicate which types of sanctions may be appropriate in order to effectively achieve the objectives of sentencing. Merely asserting one's aboriginal heritage or pointing to the systemic factor affecting aboriginals in Canada generally is inappropriate: *Kreko; FHL* at paras 38-42.

Systemic and background factors may bear on the culpability of the offender, to the extent they illuminate the offender's level of moral blameworthiness: *Radcliffe* at paras 52-53

From a sentencing judge's perspective, adhering to this approach requires attention to two factors. First, a sentencing judge must take judicial notice of the systemic and background factors affecting Aboriginal peoples in Canadian society.

In conducting this inquiry, however, courts must display sensitivity to the "devastating intergenerational effects of the collective experiences of Aboriginal peoples", which are often difficult to quantify.

Systemic and background factors, however, do not operate as an excuse or justification for an offence. They are only relevant to assessing the "degree of responsibility of the offender", and to considering whether non-retributive sentencing objectives should be prioritized. They do not detract from the "fundamental principle" that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. What Gladue and Ipeelee recognize is that evaluating the degree of responsibility of an Aboriginal offender requires a "different method of analysis." A different method of analysis does not necessarily mandate a different result: *FHL* at paras 43-47

Generally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing. However, even for the more violent and serious offenders, sentencing judges nonetheless have a *duty* to apply s.718.2(2). There is no discretion. Failure to apply *Gladue* in any case involving an Aboriginal offender runs afoul of this statutory obligation: *R v Altiman,* 2019 ONCA 511, at paras 82-83

ii. GLADUE REPORTS

The following is the type of information a sentencing judge needs from a *Gladue* report:

1) Whether the offender is aboriginal

2) What band or community or reserve the offender comes from and whether the offender lives on or off the reserve or in an urban or rural setting. This information should also include particulars of the treatment facilities, the

existence of a justice committee, and any alternative measures or community-based programs.

3) Whether imprisonment would effectively deter or denounce crime in the subject community. Within this heading it would be useful for the Court to determine whether or not crime prevention can be better served by principles of restorative justice or by imprisonment.

4) What sentencing options exist in the community at large and in the offender's community. For example, does an alternative measures program exist in the offender's community if he lives on a reserve?"

See *R v MacIntyre-Syrette*, *2018 ONCA 259* at para 15, quoting from *R v Laliberte*, 2000 SKCA 27

It is an error for the sentencing judge to proceed with sentencing where the Gladue report gives insufficient assistance to determine the types of sentencing procedures and sanctions that would be appropriate given the offender's connection to his specific Aboriginal community. In such circumstances, it is an error for a sentencing judge to not identify these shortcomings and either order a supplementary report or summon the author or other witnesses from the community to address these questions. Without this information, the sentencing judge is not in a position to meaningfully assess the appropriateness of a non-custodial sentence: MacIntyre-Syrette at paras 19, 24

iii. CRAFTING A FIT SENTENCE

Judges must craft sentences that are meaningful to Aboriginal people by emphasizing the use of principles of restorative justice and restraint: *Van Every* at para 88; *Radcliffe* at para 52

The sentencing judge must assess available sentencing procedures and sanctions. This requires an understanding of available alternatives to ordinary sentencing procedures and sanctions. If, for example, offender lives as a

member of a discrete Indigenous community, the sentencing judge needs to be told what institutions exist within that community and whether there are specific proposals from community leadership or organizations for alternative sentencing to promote the reconciliation of the offender to his or her community. The ordinary source of this information is the *Gladue* report: *R v Macintyre-Syrette*, 2018 ONCA 259 at para 14

The trial judge need not particularize how the information of disadvantage was precisely factored into his analysis. The trial judge has no obligation to quantify the effect of each factor: *Van Every* at para 99

The "aboriginal factor" does not necessarily justify a different sentence for Aboriginal offenders. It provides the necessary context for understanding and evaluating the offender and the circumstances of the case. It is only where the unique circumstances of an offender bear on culpability, or indicate which sentencing objective can and should be actualized, that they will influence the ultimate sentence: *Radcliffe* at para 54-55

While the Gladue factors apply to all offences, even the gravest of offences, the more violent and serious the offence the more likely it is that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same: *Van Every* at para 88

B. DANGEROUS OFFENDERS

In the context of dangerous offender applications, aboriginal characteristics that make an offender "less blameworthy" generally have little impact.

However, where Gladue factors serve to establish the existence and availability of alternative Aboriginal-focused means aimed at addressing the environmental, psychological or other circumstances which aggravate the risk of re-offence posed by the Aboriginal offender, a sentencing judge must make reference to them. That being said, the failure to consider Aboriginal circumstances may be overcome by evidence regarding risk of re-offence and the absence of any reasonable possibility of eventually controlling that risk in the community: *Radcliffe,* at paras 57, 59.

Sometimes, the long-standing problems of a person declared a dangerous offender simply cannot be adequately ameliorated, the risk of re-offence reduced to an acceptable level, by Aboriginal programs or facilities alone.

C. PAROLE ELIGIBILITY

Section 718.2(e) and the principles enunciated in *R. v. Gladue,* [1999] 1 S.C.R. 688, apply to decisions on parole eligibility: *Van Every* at para 87

INCHOATE OFFENCE

The absence of a completed crime is a relevant consideration in assessing the gravity of an offence, and thus a component of the fundamental principle of proportionality. This is so because offenders are punished for their wrongdoing in proportion to the culpability and harmfulness of their conduct. Stated in the form of an equation:

Culpability x Harm = Punishment

The gravity of the harm associated with an immature attempt is arguably less than with a mature completed offence. On the other hand, moral culpability is often measured by an actor's state of mind, which does not differ, in most cases at least, between the preliminary and the completed offence. Often, the fact that the crime is incomplete is not due to any want of effort on the part of the accused, nor any lesser degree of responsibility.

It is reasonable to conclude that Parliament had in mind this distinction between inchoate and completed crimes when it enacted the punishment provisions for attempts in s. 463(b). There, it set the maximum for attempts at "one-half of the longest term" to which a person who is guilty of the completed offence is liable: *R v Marshall,* 2021 ONCA 28, at paras 51-61

IMPACT OF INCARCERATION

In fashioning an appropriate sentence, a trial judge should consider exceptional difficulties that an offender will encounter while incarcerated, relating to physical injuries that cannot be easily accommodated by an institution and that, accordingly will mean that incarceration has a disproportionate impact on him: *R v Allen,* 2017 ONCA 170 at para 16

INTERMITTENT SENTENCE

A. THE STATUTORY SCHEME

Section 732(1) of the Criminal Code describes the circumstances in which a sentence of imprisonment may be served intermittently.

Section 719(1) of the Criminal Code provides that a sentence commences when it is imposed, except where a relevant statute provides otherwise.

B. CHAINING INTERMITTENT SENTENCES TOGETHER

Chaining intermittent sentences (i.e., imposing multiple sentences together) beyond the 90-day limit established by s. 732(1) is illegal as it defeats the object

of the subsection and the correctional principles it was meant to serve: *R v Clouthier,* 2016 ONCA 197 at para 31 (citation ommitted)

Example: where an accused is convicted of several counts in the same information, and the trial judge imposes intermittent sentences at different times for those counts, together amounting to more than 90 days. This result is an effective sentence that defeats the object of s. 732(1): *Clouthier* at paras 38-40

However, since a conditional sentence imposed at the same time is not "a sentence of imprisonment" within the meaning of s. 732(3), it does not extend the intermittent sentence beyond the 90-day limit in s. 732(1) and is therefore lawful: *Clouthier* at para 31

Example: imposing a 90-day sentence of imprisonment to be served intermittently and concurrent sentences of 18 months to be served conditionally.

JOINT SUBMISSIONS

A. JUDGES SHOULD GIVE CAREFUL CONSIDERATION TO JOINT SUBMISSIONS

Joint submissions must be carefully considered and should be followed absent an articulable basis upon which the trial judge concludes that the proposed sentence would bring the administration of justice into disrepute or that it is otherwise contrary to the public interest: *R v Anthony-Cook,* 2016 SCC 43 at para 32; *R v McLellan,* 2016 ONCA 215 at para 2

A joint submission will bring the administration of justice into disrepute or be contrary to the public interest if, despite the public interest considerations that support imposing it, it is so "markedly out of line with the expectations of

reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system". And trial judges should "avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts": *Anthony-Cook* at paras 33-34

Trial judges should approach the joint submission on an "as-is" basis. That is to say, the public interest test applies whether the judge is considering varying the proposed sentence or adding something to it that the parties have not mentioned, for example, a probation order. However, if counsel have neglected to include a mandatory order, the judge should not hesitate to inform counsel: *Anthony-Cook* at para 51

Trial judges should apply the public interest test whether they are considering "jumping" or "undercutting" a joint submission. The public interest criteria involved in considering whether to undercut a sentence are different, however.

From the accused's perspective, "undercutting" does not engage concerns about fair trial rights or undermine confidence in the certainty of plea negotiations. In addition, in assessing whether the severity of a joint submission would offend the public interest, trial judges should be mindful of the power imbalance that may exist between the Crown and defence, particularly where the accused is self-represented or in custody at the time of sentencing. These factors may temper the public interest in certainty and justify "undercutting" in limited circumstances.

At the same time, where the trial judge is considering "undercutting", he or she should bear in mind that the community's confidence in the administration of justice may suffer if an accused enjoys the benefits of a joint submission without having to serve the agreed-upon sentence: *Anthony Cook* at para 52

In *Staley,* 2018 ONSC 5240, the Court allowed a sentence appeal on the basis that the trial judge erred in jumping a joint submission which did not bring the administration of justice into disrepute, contrary to the test in *Anthony* Cook.

In *Espinoza-Ortego,* 2019 ONCA 545, the Court of Appeal allowed a sentence appeal in part on the basis that the trial judge erred in refusing to allow counsel to withdraw a guilty plea when Crown counsel could no longer support a joint submission previously agreed upon.

i. THE PARAMETERS OF A JOINT SUBMISSIONS

In *MC,* the Ontario Court of Appeal highlighted that the precepts in *Anthony-Cook* relating to joint submissions dealt with the length and nature of a custodial sentence and probationary period, and said nothing of sentencing flowing from plea agreements in which the parties are not in *full* agreement about the appropriate sentence. Thus, the fact that the parties may be in full agreement about ancillary orders, but far apart on the principal component of the sentence – the length of the term of imprisonment – distinguishes such a sentencing scenario from true joint submissions. Finally, any joint submission respecting ancillary orders cannot be characterized as the product of resolution discussions when some of those ancillary orders (e.g., a DNA order) are mandatory: *R v MC,* 2020 ONCA 510, at paras 31-34

B. COUNSEL'S OBLIGATIONS IN PRESENTING A JOINT SUBMISSION

When faced with a contentious joint submission, trial judges will want to know about the circumstances leading to the joint submission — and in particular, any benefits obtained by the Crown or concessions made by the accused. The greater the benefits obtained by the Crown, and the more concessions made by the accused, the more likely it is that the trial judge should accept the joint submission: *Anthony-Cook* at para 53

Counsel should provide the court with a full account of the circumstances of the offender, the offence, and the joint submission without waiting for a specific request from the trial judge. Counsel are obliged to ensure that they justify their position on the facts of the case and be able to inform the trial judge why the proposed sentence would not bring the administration of justice into disrepute or otherwise be contrary to the public interest. If they do not, they run the risk that the trial judge will reject the joint submission: *Anthony-Cook* at paras 54-55

C. WHEN A TRIAL JUDGE PROPOSES TO DEPART FORM A JOINT SUBMISSION

If the trial judge is not satisfied with the sentence proposed by counsel, the judge should notify counsel that he or she has concerns, and invite further submissions on those concerns, including the possibility of allowing the accused to withdraw his or her guilty plea, as the trial judge did in this case: *Anthony-Cook* at para 58

If the trial judge's concerns about the joint submission are not alleviated, the judge may allow the accused to apply to withdraw his or her guilty plea: *Anthony-Cook* at para 59

Trial judges who remain unsatisfied by counsel's submissions should provide clear and cogent reasons for departing from the joint submission: *Anthony-Cook* at para 60

Not only should the trial judge give the parties an opportunity to be heard when intended to depart from a joint submission on the *length* of the sentence, but also on the allocation of time served: *R v GE*, 2018 ONCA 740 at para 9

JUMPING A SENTENCE

For the law on a judge's proposal to jump a joint sentence, see Joint Submissions

It is an error of law for a judge to exceed the Crown's position on sentence without giving the defence an opportunity to make further submissions on the issue: *R v Ipeelee,* 2018 ONCA 13 at para 1; see also *R v Grant,* 2016 ONCA 639 at paras 164-166; *R v Bulland,* 2020 ONCA 318, at para 7; *R v Renaud,* 2020 ONCA 302, at para 4: *R v Blake-Samuels,* 2021 ONCA 77, at paras 30-33, 36-38; *R v Mohiadin,* 2021 ONCA 122, at para 9; *R v Nahanee,* 2022 SCC 37

A sentencing judge should let the parties know as soon as possible if they are concerned that the Crown's proposed sentence is, or may be, too lenient and they are contemplating exceeding it. Whenever possible, the judge should set out in detail what it is that they find troublesome with the Crown's proposed sentence. It is enough for a judge to advise the parties that, in their view, the sentence proposed by the Crown appears too lenient, having regard to the seriousness of the offence and/or the degree of responsibility of the accused. Additional they should respond to the concerns raised by the sentencing judge, including matters that the parties considered irrelevant or simply overlooked in their initial submissions.

Further, the sentencing judge must provide clear and cogent reasons for imposing a sentence which exceeds the Crown's position. Fundamental fairness requires that the parties be permitted to make additional submissions and that the sentencing judge make the appellant aware of their increased penal jeopardy: *R v Bagheri,* 2022 ONCA 357, at para 16

A. CONSIDERATION ON APPEAL

The sentencing judge's failure to provide notice and the opportunity for further submissions is an error in principle that will only justify appellate intervention where it appears from the judge's decision that such an error had an impact on the sentence. In these circumstances, the appellant must demonstrate that there was information that they could have provided, if given the opportunity to do so, and it must appear to the appellate court that this information would have impacted the sentence. In assessing impact, the focus should be on whether the missing information is material to the sentence at issue.

Appellate intervention is also warranted where the sentencing judge failed to provide reasons, or provided unclear or insufficient reasons, for imposing the harsher sentence.

Lastly, an appellate court may intervene if the sentencing judge relied on flawed or unsupportable reasoning for imposing the harsher sentence, such as the erroneous consideration of an aggravating factor or misapprehension of relevant authorities: *R v Nahanee,* 2022 SCC 37

JURISDICTION TO AMEND SENTENCE

A sentencing judge may amend a sentence after it has been imposed only where the amendment does not amount to a reconsideration of her original decision. The two step tests involves the following questions:

(1) Is the proposed amendment consistent with the judge's manifest intentions at the time the sentence was imposed?

(2) Does permitting the amendment give rise to a reasonable apprehension of taint and/or cause unfairness to the offender?

R. v. Krouglov, 2017 ONCA 197 (CanLII); see also *R v Hasiu*, 2018 ONCA 24 at paras 30-58; *R v DA,* 2019 ONCA 310

KIENAPPLE

The *Kienapple* principle provides that where the same transaction gives rise to two or more convictions on offences with substantially the same elements, the accused should be convicted only of the most serious offence. There must be both a factual and legal nexus between the offences. The requisite factual nexus is established if the charges arise out of the same transaction; the legal nexus is established if the offences constitute a single criminal wrong or delict:

The crucial question is whether the offences represent different criminal wrongs or the same wrong committed in different ways. A sufficient legal nexus is not established where the offences target different societal interests, different victims, or prohibit different consequences: *R v KM,* 2020 ONCA 231, at paras 47-49

It applies where there is both a factual and a legal nexus between the offences. The requisite factual nexus is established if the charges arise out of the same transaction. The legal nexus is established if the offences constitute a single criminal wrong: *R v Bienvenue,* 2016 ONCA 865 at para 9

In *Boily,* the Court of Appeal suggested strongly that an individual cannot be punished for an offence that is stayed due to kienapple, or for an uncharged offence that is otherwise an included offence of an offence the accused has been convicted of: *R v Boily,* 2022 ONCA 611, at para 59

A. EXAMPLES

There is no legal nexus between the offences of possession of child pornography and making child pornography available. The former involves possession, the latter involves distribution: *R v Aalami,* 2017 ONCA 624 at para 44

In *Brownlee,* the Court of Appeal stayed a conviction for theft in light of a conviction for break and enter, and stayed a conviction for possession of property obtained by crime in light of a conviction for trafficking in property obtained by crime : *R v Brownlee,* 2018 ONCA 99 at paras 48-50

In *Sadykov,* the Court of Appeal stayed a conviction for assault with a weapon and possession of a weapon for a dangerous purpose in light of a conviction for aggravated assault: *R v Sadykov,* 2018 ONCA 296 at para 5

In *MJ,* the Court of Appeal stayed a conviction for failing to provide the necessaries of life in light of a conviction for criminal negligence causing bodily harm: *R v MJ,* 2018 ONCA 708, at para 8

In *PB,* the Crown conceded on appeal that the appellant should not have been convicted of both sexual assault and sexual interference. The Court of Appeal stayed the sexual assault conviction: *R v PB,* 2019 ONCA 13, at para 12

In *Palmer-Coke,* the Court of Appeal held that the conviction for unlawful confinement ought to be stayed because it was an integral part of the continuing sexual assault: 2019 ONCA 106, at paras 32-33

In *Hartling*, the Court of Appeal held that the conviction for breach of a probation condition to keep the peace and be of good behaviour by drinking alcohol should have been kienappled, in light of a second conviction for breach of a probation condition to abstain from drinking alcohol: *R v Hartling,* 2020 ONCA 243, at paras 68-70

In *Cudmore,* the Court of Appeal held that a conviction for use firearm in the commission of an indictable offence, pursuant to s. 85(1)(a) should be kienappled where the accused is also convicted of robbery with a firearm under s.344, as the use of the firearm is an essential element of the s.344 offence: *R v Cudmore,* 2020 ONCA 389

There is a sufficient factual nexus between the offence child luring under 16 communicating to obtain sexual services from a minor to satisfy the *Kienapple* principle. However, there is an insufficient legal nexus between child luring and communicating to obtain sexual services from a minor to engage *kienapple*. The luring offence is directed towards the use of telecommunication which enables adults to engage in anonymous, low visibility contact with vulnerable children. The latter offence is aimed at commercialized prostitution involving persons under 18 years of age: *R v Hanifa,* 2021 ONCA 326, at paras 21-30

Kienapple does not apply as between the offences of breach of trust and obstruction of justice, as the latter does not require that the accused be a public official, and the former does not require an intent to obstruct, pervert, or defeat the course of justice: *R v Petrolo,* 2021 ONCA 498, at para 42

LONG TERM SUPERVISION ORDERS

A. STATUTORY REQUIREMENTS

Under s.753.1(2)(b)(i), the "pattern of repetitive behaviour" has to "contain enough of the same elements of unrestrained dangerous conduct to be able to predict that the offender will likely offend in the same way in the future": see *R v AT,* 2022 ONCA 650, at paras 10, 13

B. IMPOSITION OF LTSO INSTEAD OF DO DESIGNATION

In order to impose an LTSO, there must be evidence of the availability in the community of the resources necessary to supervise the accused. The court can look to, and rely upon, the resources of the Parole Board of Canada, Correctional Services Canada, and the mental health care system, to make this finding: *R v Hess,* 2017 ONCA 224 at paras 58-64

C. LENGTH OF AN LTSO

The period for which an LTSO is in force should not be longer than necessary to obviate the risk of re-offence and to protect the public.

Any period of long-term supervision established by the sentencing court may be reduced or terminated on an application to the superior court of criminal jurisdiction by the offender, a member of the Parole Board of Canada, or, with Board approval, by the offender's parole supervisor. The grounds for the reduction or termination are that the LTO no longer presents a substantial risk of re-offending and thereby being a danger to the community. The onus is on the applicant: *Criminal Code*, s. 753.2(3): *R v Marshall,* 2021 ONCA 28, at para 95

D. COMMENCEMENT OF LTSO

Where an offender is already serving a sentence, a long-term supervision order does not start until the offender's sentence is completed. Even if the offender is released from custody, his sentence continues until warrant expiry. On that date, the long-term supervision order takes effect: *R v MO,* 2016 ONCA 236 at para 32

E. STATUTORY CONDITIONS ON AN LTSO OFFENDER

Section 753.2(1) of the *Criminal Code* says that an offender who is subject to an LTSO shall be supervised in the community in accordance with the *Corrections and Conditional Release Act* [*CCRA*] when the offender has finished serving his

sentence. Section 134.1 of the CCRA sets out the approach to conditions for individuals on LTSOs. The Parole Board may establish conditions it considers reasonable and necessary, including conditions to protect victims of crime.

Section 134.1(1) says that every offender who is required to be supervised by an LTSO is subject to prescribed conditions under s. 161(1) of the *Corrections and Conditional Release Regulations* ["CCRR"]. Section 161(1)(a) of the CCRR says that when an offender is released on parole or statutory release, the offender must "travel directly to the offender's place of residence, as set out in the release certificate respecting the offender, and report to the offender's parole supervisor immediately and thereafter as instructed by the parole supervisor".

Under s. 161(1)(b) of the CCRR, the parole officer can fix territorial boundaries within which the offender must remain. Other mandatory provisions include a prohibition against possessing weapons, reporting to the police if instructed to do so by a parole supervisor, and a condition to obey the law and keep the peace. Any breach of those provisions could result in a warrant for the offender's arrest.

Pursuant to s. 753.3(1) of the *Criminal Code,* an offender who breaches an LTSO is guilty of an indictable offence and liable to imprisonment for up to ten years: *R v Hoshal,* 2018 ONCA 914, at paras 36-40

The Parole Board's broad discretion to set LTSO conditions under s. 134.1(2) of the *CCRA* is limited only by the requirement that the conditions must aim at protecting society or facilitating the long-term offender's reintegration into society. The Board is authorized to impose residency requirements where it deems fit, including in a community-based residential facility: *R v Bird,* 2019 SCC 7, (Martin J. in dissent, but not on this point)

F. LTSO BREACH HEARINGS

An accused is not entitled to launch a collateral attack to the constitutionality or validity of a condition that he is charged with breaching: *R v Bird,* 2019 SCC 7

MANDATORY MINIMUM SENTENCES

A. CONSTITUTIONAL CHALLENGES

For a review of the jurisprudence on section 12 of the *Charter,* see Charter: Section 12.

For a review of mandatory minimum sentences for specific offences, see Sentencing: Sentences for Specific Offences

A mandatory minimum sentence may be unnecessary where the jurisprudence already emphasizes the importance and primacy of denunciation and deterrence for the specific offence in issue: *R v John,* 2018 ONCA 702 at para 41

B. OTHER REMEDIES

i. FOR CHARTER RELIEF

While state misconduct can mitigate a sentence, the general rule is that a sentence reduction outside statutory limits is not an appropriate remedy under s.24(1) unless the constitutionality of the statutory limit itself is challenged. Such a remedy would only be appropriate in exceptional cases: *R v Gowdy,* 2016 ONCA 989; *R v Donnelly,* 2016 ONCA 998

ii. FOR STRICT BAIL CONDITIONS

Time spent under strict bail conditions is a mitigating factor on sentence, but it cannot be used to reduce a sentence below the statutory minimum: *R v. Shi*, 2015 ONCA 646

MAXIMUM SENTENCES

Maximum sentences determine the objective gravity of an offence by indicating its relative severity. Parliament's decision to increase the maximum sentence for a crime demonstrates its intention that the offence be punished more harshly. This shifts the distribution of proportionate sentences for the offence. To respect Parliament's decision to increase maximum sentences, courts should generally impose higher sentences than those imposed in cases that preceded the increase in the maximum sentence: *R v Lis,* 2020 ONCA 551, at para 49

Maximum sentences are linked to proportionality in that they help determine one of its essential components – the gravity of the offence. The gravity of the offence contains both subjective and objective components. Subjective gravity relates to the circumstances surrounding the commission of the offence. The maximum sentence Parliament designates for an offence determines the objective gravity, that is to say, the relative severity, of that offence. A decision by Parliament to increase the maximum sentence for an offence demonstrates Parliament's desire that an offence be punished more harshly. This shifts the distribution of proportionate sentences for that offence.

The imposition of maximum sentences is not confined to cases involving worst offences committed by worst offenders. A maximum sentence is appropriate, but only appropriate, if the offence is of sufficient gravity and the offender displays sufficient blameworthiness: *R v Lis,* 2020 ONCA 551, at paras 83-84; *R v Buffone,* 2021 ONCA 825, at para 42

The deterrent and denunciatory purposes which animate life sentences remain in force even though the conditions of incarceration are subject to change through a grant of parole, because the offender would remain under the strict control of the parole system and their liberty would be significantly curtailed for the full duration of those sentences: *R v Buffone,* 2021 ONCA 825, at para 55

MITIGATING FACTORS ON SENTENCING

A. FIRST TIME OFFENDERS

A first sentence of imprisonment should be as short as possible and tailored to the individual circumstances of the accused rather than solely for the purpose of general deterrence: *R v. Laine*, 2015 ONCA 519

B. YOUNG OFFENDERS AND YOUNG FIRST TIME OFFENDERS

In the case of a youthful first offender, the paramount sentencing principles are individual deterrence and rehabilitation. The Trial Judge must impose the shortest term of imprisonment that is proportionate to the crime and responsibility of the offender: *R v. Laine,* 2015 ONCA 519; *R v. Sharif*, 2015 ONCA 694; *R v Mohenu,* 2019 ONCA 291, at para 12

Rehabilitation remains an important consideration when sentencing a youthful first offender, even for very serious offences justifying incarceration: *R v Marzouk,* 2021 ONCA 855, at para 23

It is an error, especially when sentencing a first offender, to focus exclusively on general deterrence and to fail to consider individual deterrence and rehabilitation: *R v Ali,* 2022 ONCA 736, at para 40

Individual deterrence and rehabilitation will always be paramount. However, for very serious offences, general deterrence and denunciation will gain prominence: *R v Brown,* 2015 ONCA 361

Sentences other than a custodial one must be considered in sentencing a youthful first-time offender. Rehabilitation must not be considered only when addressing the length of the custodial sentence to be imposed: *R v Randhawa,* 2020 ONCA 668, at para 30

Where a term of incarceration must be imposed because of the nature of the offence, for a young first offender, the term should be as short as possible and tailored to the individual circumstances of the accused. Rehabilitation remains an important factor, when sentencing a young first offender on any offence, including manslaughter.

This is particularly important when sentencing a youthful first offender to a first penitentiary sentence: *R v SK,* 2021 ONCA 619, at paras 11-13

Youthfulness refers not only to chronological aid but includes maturity. A 21 year old, for example, can still be considered youthful, although he may not be a youth legally speaking: *R v. Laine*, 2015 ONCA 529

C. CULTURAL NORMS

Cultural norms that condone or tolerate conduct contrary to Canadian criminal law must not be considered a mitigating factor on sentencing: *R v HE,* 2015 ONCA 531

D. CONTRIBUTORY NEGLIGENCE

A victims' awareness of the danger involved in certain working conditions or the absence of overt coercion would ignore the reality that a worker's acceptance of dangerous working conditions is not always a truly voluntary choice: *R v Kazenelson,* 2018 ONCA 77 at paras 38-39

E. DELAY BETWEEN OFFENCE AND SENTENCING

For a review of post-verdict delay and it's impact on sentencing, see Charter: 11(b); Post verdict delay

The principles that apply when considering the effect of delay between the commission of the offence(s) and sentencing including:

(1) the effect of delay on sentencing is a case-specific inquiry;

(2) deliberate acts to evade detection by the authorities, whether flight or contribution to delayed complaint tend to weigh against assigning mitigating impact to the fact of delay;

(3) reform and rehabilitation during the intervening period tend to eliminate the prospect of recidivism and to nullify the need for specific deterrence to be reflected in the court's disposition;

(4) certain very serious crimes require sentences with measures of general deterrence and denunciation regardless of the offender's lengthy crime-free existence subsequent to the crime(s); and

(5) objectively speaking, taking into account delay, the court's disposition should not be seen as a reward or benefit eliminating or depreciating the concept of proportionate punishment: *R v Critton*, 2002 CanLII 3240 (Ont. S.C.), at para. 76

F. GUILTY PLEAS

The amount of credit a guilty plea will attract on sentencing varies with each case: *R v Carreira*, 2015 ONCA 639

A very early guilty plea which is entitled to a substantial credit in the sentencing process: *R v Graham,* 2017 ONCA 245 at paras 1-4

Mitigation should be afforded to the fact that a guilty plea, even if it is not an early guilty plea: *R v Spagnola,* 2020 ONCA 638, at para 2

A plea of guilt does not entitle an offender to a set standard of mitigation. In some cases, a guilty plea is a demonstration of remorse and a positive first step towards rehabilitation. In other cases, a guilty plea is simply a recognition of the inevitable: *R v FHL,* 2018 ONCA 83 at para 22

The fact that a preliminary hearing had been held before the appellant pleaded guilty should not be treated as an aggravating factor: *R v Simmons,* 2021 ONCA 919, at para 8

G. INJURY

In *Fiddes,* the Court of Appeal recognized that the experience of suffering a serious, life threatening beating in custody warranted a reduction in sentence: *R v Fiddes,* 2019 ONCA 27, at para 8

In *Randhawa,* the Court of Appeal recognized that the appellant's traumatic brain injury, suffered as a result of his impaired driving, was a significant mitigating factor on sentence: 2020 ONCA 38, at para 12

H. MEDICAL ISSUES

In *Fiddes,* the Court of Appeal held that the trial judge erred by failing to consider, as a mitigating factor on sentence, the serious injuries the appellant suffered as a result of being beaten while in pre-sentence custody: *R v Fiddes,* 2019 ONCA 27, at para 8

I. MENTAL LIMITATIONS

i. MENTAL ILLNESS

A causal link between mental illness and the criminal offence can be considered as a mitigating factor in sentencing: *R v Hart*, 2015 ONCA 480; see also *R v Zaher,* 2019 ONCA 59, at para 28;

The illness must exist at the time of the offence and have an impact on the involvement of the offender in the offence: *R v Wager,* 2018 ONCA 931, at para 13; *R v Fabro,* 2021 ONCA 494, at para 25 [note, however, that serious physical or psychiatric issues may be considered under collateral consequences]

There must also be evidence that a lengthy sentence would have a serious negative effect on the offender such that it should be reduced on compassionate grounds: *R v Fabro,* 2021 ONCA 494, at para 25

In *R v Leer,* 2017 BCPC 235, the British Columbia Provincial Court discussed at length the role of the accused's mental health as a factor in sentencing, as well as the impact of his mental health on whether the provincial or federal correctional system would be more appropriate. The Court began its reasons by stating: Name one of the largest providers of mental health in this province; if you guessed the criminal justice system and our jails you guessed right." See paras 1, 65-72

Medical conditions cannot generally be used to avoid what is otherwise a fit and proper sentence: *R v Bulic,* 2020 ONCA 845, at para 13

ii. Addiction

In order for a sentence to be proportionate to the accused's moral blameworthiness, a court must take into account the fact that the accused is driven to crime to feed his addiction: *R v Colasimone,* 2018 ONCA 256 at para 18

iii. Diminished Intelligence

Evidence of diminished intelligence can be important in identifying the moral fault and hence the degree of responsibility that should be ascribed to the offender for his acts: *R v Plein,* 2018 ONCA 748 at para 83

Cognitive impairment can also justify less emphasis on the principles of specific and general deterrence: *R v Ghadghoni,* 2020 ONCA 24, at para 45

iv. Racism

The principles that are generally applicable to all offenders, including African Canadians, are sufficiently broad and flexible to enable a sentencing court in appropriate cases to consider both the systemic and background factors that may have played a role in the commission of the offence and the values of the community from which the offender comes: *R v Rage,* 2018 ONCA 211 at para 13 [quoting *Borde,* (2003), 63 OR (3d) 417 (CA).

J. MISCELLANEOUS

It is improper to cite as mitigating the fact that an offender forwent their right to testify; this sends an inappropriate message. It is also not mitigating that an offender did not mislead the court. This is the law and it so be expected: *R v Claros,* 2019 ONCA 626, at paras 55-58

The absence of a commercial motive in respect of offence of possession for the purpose of trafficking is mitigating: *R v Spagnola,* 2020 ONCA 638, at para 2

K. OLD AGE

In the process of determining a just and appropriate fixed-term sentence of imprisonment, the sentencing judge should be mindful of the age of the offender in applying the relevant principles of sentencing. After a certain point, the utilitarian and normative goals of sentencing will eventually begin to exhaust themselves once a contemplated sentence starts to surpass any reasonable estimation of the offender's remaining natural life span: However, in the process of determining a just and appropriate fixed-term sentence of imprisonment, the

sentencing judge should be mindful of the age of the offender in applying the relevant principles of sentencing. After a certain point, the utilitarian and normative goals of sentencing will eventually begin to exhaust themselves once a contemplated sentence starts to surpass any reasonable estimation of the offender's remaining natural life span: *R v M (CA)*, 1996 SCC 230, at para. 74; see *R v Premji,* 2021 ONCA 721

A sentence that exceeds the accused's life expectancy is crushing, and may deprive the accused of any hope of release or rehabilitation. Such a sentence may be excessive; see dissenting reasons of Nordheimer in R v Milani, 2021 ONCA 567

L. PUBLICITY

It is an error in principle to rely on pretrial publicity to determine whether the need for general deterrence has been satisfied. . As a sentencing consideration, the adverse effects of publicity are a "collateral consequence" as defined in *R. v. Suter*, 2018 SCC 34: *R v Joseph,* 2021 ONCA 733, at paras 115-118

PAROLE INELIGIBLITY

A. GENERAL PRINCIPLES

Principles of sentencing set out in ss. 718-718.2 of the *Criminal Code* may be applicable to decisions regarding parole ineligibility: *R v Rosen,* 2018 ONCA 246 at para 67

B. CONSIDERATION ON SENTENCING

A sentencing judge should not increase or decrease a sentence based on parole considerations. Nonetheless, a court may consider the opportunity for parole when assessing whether a sentence will crush all hope: *R v Milani*, 2021 ONCA 567, at para 54, but see dissenting reasons of Nordheimer J at para 75

C. INELIGIBILITY FOR CRIMINAL ORGANIZATION AND TERRORISM OFFENCES

Section 743.6(1.2) of the *Criminal Code* provides that, in the case of criminal organization or terrorism offences for which the offender receives a sentence of two years or more, a trial judge shall impose an order of ineligibility for parole for ten years or half the total sentence, whichever is less, unless denunciation and deterrence objectives do not require it.

In imposing an order under s.743.6(1.), the trial judge cannot apply it to a global sentence received for criminal organization/terrorism offences and other offences not captured by s.743.6(1.2). The order must be limited to the sentence imposed for the criminal organization or terrorism offences: *R v Saikaley,* 2017 ONCA 374 at paras 167-174

D. INELIGIBILITY FOR SECOND DEGREE MURDER

See Sentencing ranges, second-degree murder

E. CONSECUTIVE SENTENCES OF PAROLE INELGIBILITY

Section745.51 of the *Criminal Code*, which permits the court to order that periods of parole ineligibility for multiple murders be served consecutively rather than concurrently, does not violate ss.7 or 12 of the Charter: In *Granados-Arana*, 2017 ONSC 6785

F. REDUCING PAROLE INELIBILITY (FAINT HOPE): S.745.6

The application judge's decision to reduce parole ineligibility is a discretionary one. The appellate court will defers to discretionary decisions made at first

instance. As long as the application judge did not materially misapprehend the evidence, and considered the applicable principles, the court of appeal will not interfere, unless that result falls outside of the broad range of reasonableness: *R v Atkins,* 2022 ONCA 709, at para 4

POSTPONING SENTENCE

A sentencing judge has the discretion to postpone sentencing provided the discretion is not exercised for an illegal purpose, for example, to see whether the offender would make restitution, aid in the investigation of others, or help police recover stolen property: *R v Clouthier,* 2016 ONCA 197 at para 34

Any postponement of sentencing beyond a month or two may be taken as prima facie evidence of the exercise of judicial discretion for an improper purpose: *Clouthier* at para 34

An example of an improper purpose arises in *Clouthier.* The trial judge imposed multiple intermittent sentences, totalling more than 90 days, for different counts on the same information. Her Honour did so by postponing sentencing on one of those counts until the accused finished serving the first intermittent sentence of 90 days. The accused then returned for sentencing on the second count and received an additional intermittent sentence of 60 days. The ONCA held that this postponement was improper and illegal as its sole purpose was "to circumvent the restrictions imposed on the length of an intermittent sentence by s.732(1)": *Clouthier* at paras 38-40

PRE-TRIAL CUSTODY

A. CREDIT FOR PRE-TRIAL CUSTODY

The loss of remission alone is a circumstance justifying enhanced credit at a rate of 1.5 to 1 pursuant to s.719(3.1) of the *Criminal Code: R v Summers,* 2014 SCC 26

The "*Summers*" credit is a deduction from what the trial judge determines to be the appropriate sentence for the offence. The "*Summers*" credit is calculated to identify and deduct from the appropriate sentence the amount of the sentence the accused has effectively served by virtue of the pretrial incarceration. The "*Summers*" credit is statutorily capped at 1.5:1. It is wrong to think of the "*Summers*" credit as a mitigating factor. It would be equally wrong to deny or limit the "*Summers*" credit because of some aggravating factor, such as the seriousness of the offence: *R v Marshall,* 2021 ONCA 344, at para 51

For the purpose of s.719(3.1), a person is automatically detained under section 524(8) when their prior release is revoked. Detention following a show cause hearing is unnecessary to qualify for detention under 524 - as is the accused's consent to detention: R v. Akintunde, 2015 ONCA 597

If the fact that an offender is charged with Canadian offences contributes to a decision to detain on other matters in another country, the custody related to those other matters may, in some circumstances, be characterized as being a result of the offences. In those circumstances the court may consider granting the offender credit for time spent in pre trial custody abroad: *R v Zegil,* 2017 ONSC 1459

Ss. 719(3) and (3.1) require that there be some causal connection, a sufficient link or relation between the offence for which the offender is being sentenced and the pre-sentence custody. That relation or link can exist with more than one offence. It is not limited to the offence that directly triggered the detention, but will include offences that contributed to the denial of bail or, in the trial judge's assessment, factored into the offender's decision to not seek bail on the charges that triggered the detention order.

There is no strict rule dictating what constitutes a sufficient link or relationship between the given charge and the pre-sentence custody so as to meet the "as a

result of" standard. The sentencing judge will take into account relevant factors that might include the reasons for bail having been granted on the first set of offences and denied for the second set of offences; whether bail was sought on the later offences; whether there has been revocation of the bail on the first set of offences; the impact if any of the reverse onus provisions of ss. 515(6) or 522(2) of the *Criminal Code*; whether subsequent charges remain outstanding, have been withdrawn or stayed; the amount of pre-sentence custody accumulated; the nature and seriousness of the various charges; and the relationship, if any, that charges have to one another.

The Crown should acknowledge the connection if that connection is clear on a fair assessment of the situation. Defence counsel should also be allowed to advise the court of relevant matters such as the reasons bail was not sought in respect of subsequent charges. In some cases, the defence will have to call evidence to establish the necessary connection. A transcript of the reasons for detention may serve that purpose in some cases. Ultimately, where the connection between the custody and the charge on which the accused is being sentenced cannot be readily inferred from the circumstances, the onus will be on the accused to show that the connection exists and that s. 719(3) applies: *R v Barnett,* 2017 ONCA 897, at paras 30-32

Determining whether any sufficient link exists between the offence for which the offender is being sentenced and the pre-sentence custody is a matter of discretion for the trial judge: *R v Davis,* 2020 ONCA 748, at para 28

In *MV,* the Court of Appeal found that enhanced credit was justified where the appellant served some of his sentence before being successful on an appeal, and then being retried asnd convicted again. The time spent in custody serving the sentence prior to the first appeal should be enhanced in order to compensate for the fact that this time would not count towards eligibility for parole upon being convicted and sentenced the second time: *R v MV,* 2023 ONCA 33

In *Latif*, the appellant was serving time on a prior conviction (Mississauga offences) when he was arrested and detained on new charges (Vaughan Offences). At the sentencing for the Vaughan Offences, the Court subtracted from the pre-trial custody credit time spent serving the sentence on the Mississauga conviction. Subsequently, the Mississauga conviction was vacated by the Court of Appeal and a new trial ordered. The Crown then withdrew the

charges. On a sentence appeal on the Vaughan offences, the appellant sought credit for the time spent in custody serving the Mississauga offences while he was also detained pending resolution of the Vaughan offences. The Court of Appeal rejected that submission, holding that "to give credit for time spent serving a sentence for another offence would distort the sentencing regime…When it comes time to sentence an offender the court can only take into account factors that relate to the particular offence under consideration": *R v Latif,* 2019 ONCA 209, at paras 12-20

Note, however, that if a sentencing judge takes the prior conviction into account as a serious aggravating circumstance on other convictions, the fact that the accused was later found to be innocent of that prior offence would be a relevant consideration on a sentence appeal: *Latif* at para 21

In unique circumstances, a sentencing judge has discretion to credit an offender *specifically* due to loss of eligibility towards parole in circumstances where credit for statutory release purposes is not required: *R v Persaud,* 2019 ONCA 477

Even if the sentencing judge erred in principle in calculating the credit ratio for time spent in custody, appellate intervention is only justified where the Court concludes that any error that may have occurred had an impact on the fitness of the sentence ultimately imposed: *R v Newton,* 2018 ONCA 723, at para 3; *R v Hoshal,* 2018 ONCA 914 at para 28-29

Excessive delay which causes prolonged uncertainty for the appellant but does not reach to the level of a section 11(b) violation can be taken into consideration as a factor in mitigation of sentence: *R v Bosley,* [1992] OJ No 2656 (CA)

B. DENIAL OF ENHANCED CREDIT FOR PRE-TRIAL CUSTODY

It is an error of law to deny enhanced credit for pre-trial custody without reasons to justify it: *R v Huang,* 2020 ONCA 341, at para 9

There is no 1:1 limit on credit for pre-trial custody in circumstances where the Crown has not proceeded with an application under s. 524(8): *R v Whitlock*, 2015 ONCA 445

The criminal record exclusions to enhanced credit under s.719(3.1) violates s.7 of the *Charter* due to overbreadth. An accused cannot be denied enhanced credit where the justices' reasons indicate that bail was refused primarily because of a previous conviction: *R v Safarzadeh-Markhali,* 2016 SCC 14

The bail misconduct exclusion to enhanced credit under s.719(3.1) also violates the *Charter* due to overbreadth. An accused cannot be denied enhanced credit where s/he was detained pursuant to s.524 of the *Criminal Code*: *R v Meads, 2018 ONCA 146*

Note, however, that the fact that an offence was committed on bail may be taken into account in determining the appropriate amount of pre-sentence credit. In conducting this analysis, the extent to which the breach has already been punished must also be considered. Where an offender is simultaneously being sentenced for breach charges and the charges that led to the recognizance or court order that was breached, it will ordinarily be preferable for the sentencing judge to deal with the breach by imposing a sentence commensurate with the seriousness of the breach: *R v Hussain*, 2018 ONCA 147 at paras 20-21

In some circumstances, such as where an offender attempts to "game the system" by causing delays in order to accrue additional enhanced pre-sentence credit, the denial of enhanced credit in addition to the sentence imposed for the breach may be justified: *Hussain* at para 22; *R v Codina,* 2019 ONCA 986, at para 3

A trial judge is also entitled to refuse to grant pre-trial credit where an accused is unlikely to be released before warrant expiry. See, for example, *R v McClung,* 2017 ONCA 705; *R v. Abdullahi*, 2015 ONCA 549

It is an error in law to deny enhanced credit to an offender who was a statutory release violator in the federal system where the sentencing judge has no evidence of institutional misconduct which would likely lead to a loss of earned remission under the provincial system. Federal corrections authorities may revoke statutory release given to an offender serving time in a penitentiary for a breach or apprehended breach of a condition of his release, including anything

from being out past curfew and consumption of alcohol to serious additional criminality. In contrast, in the provincial system, inmates are entitled to "earned remission", which is credited at 15 days per month – leading in the majority of cases to inmates being released after serving two thirds of their sentence. It is only where serious institutional misconduct occurs that an inmate may be forced to forfeit remission – and even then, the inmate is subject to forfeit a portion or all of the remissions, and no such forfeiture shall exceed 15 days without the Minister's approval.

Hence, it is wrong to equate re-committal for violation of the terms of statutory release under the federal system with misconduct while serving a sentence within a provincial institution that would lead to a loss of earned remission under the provincial system: *R v Plante,* 2018 ONCA 251; *R v Pitamber,* 2018 ONCA 518

It is wrong to deny or limit the "*Summers*" credit because of some aggravating factor, such as the seriousness of the offence: *R v Marshall,* 2021 ONCA 344, at para 51

The accused's texts that he will repeat his conduct once he gets out of jail is an insufficient basis to deny him enhanced credit for pre-trial custody on the basis that he is unlikely to receive early release or parole: *R v Beckwith*, 2015 ONCA 588

C. DUNCAN CREDIT

In the appropriate circumstances, particularly harsh presentence incarceration conditions can provide mitigation apart from and beyond the 1.5 credit referred to in s. 719(3.1). In considering whether any enhanced credit should be given, the court will consider both the conditions of the presentence incarceration and the impact of those conditions on the accused. There should be evidence of the time the accused spent in lockdown credit and of any adverse on the accused flowing from the locked down conditions: *R v Duncan,* 2016 ONCA 754 at paras 6-7.

While the Court in Duncan advised that there should be evidence of the adverse impact of lockdowns, in Bristol, the Court of Appeal stated that "some impact [of lockdowns] is self-evident. Lockdowns involve lack of showers and loss of

physical activity. They also mean that prisoners are restricted to their cells for long periods of time. Individual evidence is not required to establish those basic effects which go beyond the difficult and restrictive circumstances offenders often encounter during pretrial custody and which are accounted for by the Summers credit:" *R v Bristol,* 2021 ONCA 599, at para 11; see also *R v Kandhai,* 2020 OSC 1611, at paras 7-8; and *R v MW,* 2020 ONSC 3513, at para 43

Hardship arising from lockdowns can qualify as a collateral consequence that warrants consideration during sentencing: *R. v. Morgan*, 2020 ONCA 279, at para. 9; *R v Reddick,* 2020 ONCA 786, at para 11

The "*Duncan*" credit addresses exceptionally punitive conditions which go well beyond the normal restrictions associated with pretrial custody. The very restrictive conditions in the jails and the health risks brought on by COVID-19 are a good example of the kind of circumstance that may give rise to a "*Duncan*" credit: *R v Marshall,* 2021 ONCA 344, at para 50

The issue of whether a particular person should receive enhanced credit due to the effects of COVID-19 is within the discretion of the sentencing judge and is based on the available evidence and the particular circumstances of the individual inmate: *R v McNicholas,* 2022 ONCA 590, at para 15

In *Chumbley*, the Court of Appeal admitted fresh evidence of the harsh conditions of pre-trial custody for the appellant, even though it was available at sentencing. The appellant fired her counsel and represented herself on sentencing. "The interests of justice require that we consider this evidence of intense human suffering:" *R v Chumbley,* 2020 ONCA 474

It is to everyone's advantage if counsel reaches an agreement as to the amount of any "*Duncan*" credit. Doing so avoids adjournments in the sentencing process to compile the necessary information, and avoids lengthy evidentiary hearings, which will often yield results that are less than definitive.

If counsel are able to agree on the "*Duncan*" credit, the trial judge should depart from that agreement, only after careful consideration and after giving counsel a full opportunity to address any concerns the trial judge might have. The trial judge should also provide reasons for departing from the figure agreed upon by counsel: *R v Marshall,* 2021 ONCA 344, at paras 42-43

The "*Duncan*" credit is not a deduction from the otherwise appropriate sentence, but is one of the factors to be taken into account in determining the appropriate

sentence. Particularly punitive pretrial incarceration conditions can be a mitigating factor to be taken into account with the other mitigating and aggravating factors in arriving at the appropriate sentence from which the "*Summers*" credit will be deducted. Because the "*Duncan*" credit is one of the mitigating factors to be taken into account, it cannot justify the imposition of a sentence which is inappropriate, having regard to all of the relevant mitigating or aggravating factors.

Often times, a specific number of days or months are given as "*Duncan*" credit. While this quantification is not necessarily inappropriate, it may skew the calculation of the ultimate sentence. By quantifying the "*Duncan*" credit, only one of presumably several relevant factors, there is a risk the "*Duncan*" credit will be improperly treated as a deduction from the appropriate sentence in the same way as the "*Summers*" credit. If treated in that way, the "*Duncan*" credit can take on an unwarranted significance in fixing the ultimate sentence imposed: *R v Marshall,* 2021 ONCA 344, at paras 52-53; see *R v Cunningham,* 2023 ONCA 36, at paras 59-63

For cases awarding lockdown credit, see, for example, *R v Nsiah*, 2017 ONSC 769, *R v Holman*, 2017 ONCJ 727 and *R v Bedward*, 2016 ONSC 939; *R v Ohamu*, 2017 ONCJ 10; *R v Tulloch,* 2014 ONSC 6120, paras 20-21, 25-30; *R v JB,* 2016 ONSC 939, at paras 19, 20, 22-23, 34; *R v DeSousa,* 2016 ONSC 5493, at paras 51-55, 66, 68-69; *R v Gardner,* 2016 ONCJ 45, at paras 121-127; *R v Harquail,* 2016 ONSC 4237, at paras 7-9, 11, 12, 15; *R v Shah,* 2016 ONSC 2651, at paras 59, 61; *R v Hong,* 2016 ONSC 2654, at paras 59-60; *R v Richards,* 2016 ONSC 2940, at paras 25, 28, 31; *R v Doyle,* 2015 ONCJ 492, paras 11, 13, 24, 35-41, 44-46, 49, 53-54, 56; *R v Ward-Jackson,* 2018 ONSC 178; *R v Innis,* 2017 ONSC 2779; *R v Douale,* 2018 ONSC 3658; *R v Jama,* 2018 ONSC 1252

The Crown is not entitled to cross-examine the accused at large at a sentencing hearing where s/he has filed an affidavit about the harsh conditions of pre-sentence custody in order to seek a reduction in sentencing. The Crown is not entitled to use the cross-examination to elicit evidence of aggravating factors on sentencing: *R v. Browne*, 2017 ONSC 5062

There is no one formula or approach to determining credit for harsh conditions. In *Kizir,* the Court of Appeal upheld the trial judge's decision to apply a certain mathematical formula (not detailed in the judgment) to grant a credit of 90 days for 321 days spent in partial or complete lockdown: *R v Kizir,* 2018 ONCA 781, at paras 12-15

A court's decision as to the credit, if any, to be granted to account for harsh presentence custodial conditions is a discretionary one to which deference is owed: *R v Ledinek,* 2018 ONCA 1017, at para 13

The failure to explain the refusal to grant *Duncan* credit is an error of law warranting appellate intervention: *R v Marong,* 2020 ONCA 598, at para 13

In *Deiaco*, the Court of Appeal upheld the trial judge's refusal to give enhanced credit for lockdowns, citing the fact that the trial judge was "left unsure how frequently lockdowns materially affected Mr. Deiaco because he spent so much time in segregation, he made material progress in programming within the institution notwithstanding the lockdowns, and he chose to put himself at risk of further hardship during his incarceration through his unenviable misconduct record:" *R v Deiaco,* 2019 ONCA 12, at para 4

For an excellent commentary on Duncan credit, ese dissenting decision of Lauwers J.A. in *R v Ramjoolie,* 2020 ONCA 791

PRINCIPLES OF SENTENCING

A. COKE PRINCIPLE

The Coke principle holds that subsequent convictions cannot be relied upon to aggravate the sentence imposed for a prior offence. However, this principle does not apply in the context of a dangerous offender proceeding, which focuses on future risk of dangerousness based on patterns of behaviour: *R v Wilson,* 2020 ONCA 3, at paras 60-67; see generally *R v RM,* 2020 ONCA 231, at paras 31-37

B. DENUNCIATION AND DETERRENCE

The courts have very few options other than imprisonment to achieve the objectives of denunciation and general deterrence: *R. v. Lacasse*, 2015 SCC 64 at para. 6; *R v Inksetter,* 2018 ONCA 474 at para 17

Probation has traditionally been viewed as a rehabilitative sentencing tool. It does not seek to serve the need for denunciation or general deterrence: *Inksetter* at para 18

By enacting s. 718.01 of the *Criminal Code*, Parliament made clear that denunciation and general deterrence must be primary considerations for any offence involving the abuse of a child: *Inksetter* at para 16

i. Offences Against Children

Section 718.01, prescribes that denunciation and deterrence are the primary sentencing objectives for offences that involve abuse of children. Section 718.01 confines the sentencing judge's discretion from elevating other sentencing objectives to an equal or higher priority. However, the sentencing judge retains the discretion to assign significant weight to other factors, such as rehabilitation, in giving effect to the fundamental principle of proportionality: *R v Lis,* 2020 ONCA 551, at paras 47-48

C. INDIVIDUALIZATION

The principle of individualization is a tool designed to help calibrate proportionate sentences. Individualization is central to the assessment of proportionality in that it demands focus upon the individual circumstances of each offender: *R v AJK,* 2022 ONCA 487, at para 82

D. PROPORTIONALITY

Pursuant to s.718.1 of the *Criminal Code, t*he fundamental principle of sentencing is that the sentence imposed must be proportionate to the gravity of the offence and the degree of responsibility of the offender: *R v Clouthier,* 2016 ONCA 197 at para 53

Evidence of diminished intelligence can be important in identifying the moral fault and hence the degree of responsibility that should be ascribed to the offender for his acts: *R v Plein,* 2018 ONCA 748 at para 83

It is appropriate to adjust a sentence because the accused committed the offences during a period in which he committed other offences for which he was already punished. The proportionality principle operates having regard to the circumstances of the offences for which an accused person is being sentenced. It is inappropriate to speculate as to the sentence the accused would have received if all of his crimes committed during the relevant period had been before the court when he was sentenced: *R v Stuckless,* 2019 ONCA 504, at paras 71-74

E. PARITY PRINCIPLE:

The principle of parity means that similar offenders who commit similar offences in similar circumstances should receive similar sentences. It is an expression of proportionality: *R v Friesen*, 2020 SCC 9

This guiding principle preserves fairness in sentencing by promoting the equal treatment of offenders according to law. It applies as between co-accused charged with the same crime, and between the offender and others who have committed similar crimes, where those others are similar to the offender in terms of degree of responsibility. Given the principle of individual sentencing, and that comparable circumstances are not apt to be identical, absolute parity is not required and, indeed, may not be appropriate. However, where there is a

substantial and marked disparity in sentence between similar co-accused offenders who have committed similar crimes, an appellate court should intervene: *R v Pearce,* 2021 ONCA 239, at para 17

Parity in the sentencing of similar offenders who have committed similar offences is a recognized principle of sentencing: Criminal Code s. 718.2(b): *R v Hawley,* 2015 ONCA 143 at para 8

The principle of parity means that any disparity between sentences for different offenders in a common venture requires justification. *R v. Sahota*, 2015 ONCA 336

Over time, the operation of the parity principle gives rise to ranges of sentences for similar offences committed by similar offenders. However, there will always be situations that call for a sentence outside a particular range, in light of the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded: *R v Hawley,* 2015 ONCA 143 at para 8

The parity principle is not to be applied in a rigid fashion; it is one of several principles applied in the sentencing of an offender: *R v Kizir,* 2018 ONCA 781, at para 9

It is not inappropriate for a trial judge to consider that a guilty plea in the face of an overwhelming case may not be accorded the same weight as one in which an accused pleads guilty and gives up significant litigable issues. *R v. Sahota*, 2015 ONCA 336

The principle of parity between similarly situated accused does not apply to the accused with respect to the two sentences imposed for his own similar crimes: *R v Caporiccio,* 2017 ONCA 742 at paras 34-35

It is an error in principle to consider the application of the parity principle in relation to a co-accused without details of the co-accused charges, the basic facts, and the reasons for the sentence: *R v Perez-Membreno,* 2019 ONCA 997, at para 13

But when the trial judge does possess this information, s/he is required to apply the principle of parity: *R v Pearce,* 2021 ONCA 239, at paras 18-19

F. TOTALITY

i. Definition

The totality principle requires that a combined sentence must not be unduly long or harsh in the sense that its impact simply exceeds the gravity of the offences in question or the overall culpability of the offender: *R v Johnson*, 2012 ONCA 39 at paras 15-18; *R v Hannora,* 2020 ONCA 335, at paras 7-9

The Court may being by deciding which sentence to impose for which count, or, alternatively, the Court may begin by determining what global sentence is fit, and then divvying out the appropriate sentence for each charge within that total sentence. In some circumstances where the offences are sufficiently interrelated, a trial judge may determine a global sentence first and then impose concurrent sentences of equal length; however, such an approach is not to be endorsed where the counts are of varying seriousness: *R v JH,* 2018 ONCA 245 at para 49-51

ii. Totality Principle and Consecutive Sentences

The totality principle applies where:

- a single judge must deal with a series of offences, some of which require the imposition of consecutive sentences having regard to the criteria for such sentences.
- a sentencing judge must impose a fit sentence on an offender convicted of one or more offences where that offender is at the same time serving the remainder of a sentence for a previous conviction or convictions.
- the subsequent sentencing judge will determine how much weight to give to the existing remaining sentence by assessing whether the length of the proposed sentence *plus* the existing sentence will result in a "just and appropriate" disposition that reflects as aptly as possible the relevant

principles and goals of sentencing in the circumstances: *R v Johnson,* 2012 ONCA 39; see also *R v Marshall,* 2021 ONCA 28, at para 8

One way to reconcile the overall sentence with the totality principle is to impose concurrent sentences, where otherwise the sentences would be consecutive: *R v Hannora,* 2020 ONCA 335, at para 12

One method of achieving totality is to decide what would be a fit sentence *for each offence* before considering totality. Another method is to start by determining an overall fit sentence and then impose individual sentences adding up to the total: *R v Friesen,* 2022 SCC 9, at para 157

iii. The Totality Principle and Pre-Existing Sentences

The totality principle applies where part of the total term of incarceration includes a pre-existing sentence; in other words, when an offender is being sentenced at a time that s/he is serving a pre-existing sentence: R v. Nwagwu, 2015 ONCA 526; *R v Claros,* 2019 ONCA 626, at para 40

iv. The Totality Principle and Pre-Existing Dead Time

The totality principle applies where an offender is being sentenced at a time that s/he is serving dead timie that is used up on another sentence for another offence: *R v Claros,* 2019 ONCA 626, at para 41

G. JUMP PRINCIPLE

The jump principle recognizes that, although a sentence may be increased for a subsequent similar offence, the sentence should be increased incrementally.

Subsequent sentences passed should not be disproportionate to the prior offence (i.e., a "jump" in sentence.")

The court may also take into account a jump in the length of any previous sentence imposed. For example, in *Colasimone*, the Court of Appeal found it noteworthy that "the subject sentence exceeds any previous sentence imposed by 6 years:" *R v Colasimone,* 2018 ONCA 256 at para 24; see also *R v Bristol,* 2021 ONCA 599, at para 8

That being said, where the circumstances of the case are sufficiently blameworthy, the jump principle may have more limited application: *R v ECVN,* 2018 ONCA 149

Where an offender's crimes were fundamentally different in kind and seriousness than the crimes for which they were previously sentenced, the jump principle is not engaged. The same is true when dealing with multiple convictions for an offender with a lengthy criminal record, or where previous sanctions have been ineffective in deterring the offender: *R v Green,* 2021 ONCA 932, at paras 9-10, 13

In *MF,* the Court of Appeal held that, "having regard to s. 718.3(4)(b)(i), it was appropriate for the trial judge to treat each sexual assault as a separate event given their separation in time. However…. the trial judge erred by then imposing escalating sentences for each sexual assault *again* on the basis they were separated in time without any further justification; for example, a finding that the assaults escalated in gravity:" 2022 ONCA 372, at para 24

H. REHABILITATION

Section 718 of the *Criminal Code* states that, "The fundamental purpose of sentencing is to protect society and to contribute … to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more" of six specified objectives. Deterring the offender and assisting in rehabilitating offenders are two of those objectives – and both must be addressed when crafting a "just sanction" that meets the fundamental purpose enunciated in s. 718: *R v Disher,* 2020 ONCA 710, at paras 22, 27, 60

The objective of rehabilitation has much to say in the determination of the nature and length of sentences to be imposed upon youthful and first offenders to ensure that a sentence of imprisonment is not so lengthy as to extinguish or substantially diminish any realistic rehabilitative prospects: *R v Rosen,* 2018 ONCA 246 at para 68; *R v Williams,* 2018 ONCA 367 at para 9

For more on rehabilitation in the context of young offenders, see Young Offenders

I. FRIST OFFENDERS

It is an error to fail to consider individual deterrence and rehabilitation, especially when sentencing a first offender: *R v Disher,* 2020 ONCA 710, at para 60

J. PRINCIPLE OF RETRAINT

The principle of restraint, as reflected in ss. 718.2(d) and (e) of the *Criminal Code*, directs that a first period of incarceration imposed on a young first offender should be as short as possible, while giving adequate weight to the principles of general deterrence and denunciation. As s. 718.2(e) specifically directs, while the restraint principle should be considered for all offenders, particular attention should be given to the circumstances of Aboriginal offenders. Sentencing judges are to give effect to the principles in s. 718.2(e) even where the offence is serious and the sentence involves imprisonment: *R v Disher,* 2020 ONCA 710, at para 59

The principle of restraint plays a critical role when sentencing a youthful, first-time offender. While the objectives of denunciation and deterrence must be given adequate weight, they should rarely be the sole determinants of the length of a

first penitentiary sentence Where an offender is young and has never served a period of incarceration, the shortest sentence possible ought to be imposed: *R v Francis,* 2022 ONCA 729, at para 80

For more on sentencing youthful first offenders, see Mitigating Factors: Young Offenders and Young First Offenders

PROBATION

A. AVAILABILITY OF A PROBATION ORDER

A probation order cannot be imposed where the sentence ordered is more than two years: see s. 731(1)(b); *R v Labelle,* 2016 ONCA 110 at para 13

B. GENERAL PRINCIPLES OF PROBATION

Probation has traditionally been viewed as a rehabilitative sentencing tool and that conditions imposed to punish rather than rehabilitate the offender have been struck out: *R v Faucher,* 2018 ONCA 815s, at para 4

C. OPTIONAL CONDITIONS OF PROBATION ORDER

It is within the sentencing judge's discretion to order, under section 732.1(3), that the defendant remain in Ontario (unless written permission is obtained). This does not amount to banishment from another province: *R v Corby,* 2016 ONCA 040

A banishment condition in a term of probation is rarely reasonable under section 732.1(3): R v. Menard, 2015 ONCA 512

D. STANDARD OF REVIEW

A probation order under s. 731 fall within the definition of “sentence" in s. 673 of the *Criminal Code*. Appellate intervention in a sentence imposed at trial is limited to cases in which the sentencing judge has:

i. erred in principle;

ii. failed to consider a relevant factor; or

iii. erroneously considered an aggravating or mitigating factor

and the error has had an impact on the sentence imposed or imposed a sentence that is manifestly unfit: *R MC,* 2020 ONCA 519, at para 41

SENTENCING FOR SPECIFIC OFFENCES

A. GENERAL PRINCIPLES

I. SENTENCING RANGES

Although sentencing ranges are used mainly to ensure the parity of sentences, they reflect all the principles and objectives of sentencing. Sentencing ranges are 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*; R v Lacasse,* 2015 SCC 64; *R v Tahir,* 2016 ONCA 136 at para 2

Appellate courts cannot treat the departure from or failure to refer to a sentencing range or starting point as an error in principle. Nor can they intervene simply because the sentence is different from the sentence that would have been reached had the range or starting point been applied. Appellate courts cannot interpret or apply the standard of review to enforce ranges or starting points; to do so would be to usurp the role of Parliament in creating categories of offences: *R v Friesen,* 2020 SCC 9

While sentencing ranges can be helpful in determining the appropriate sentence in a given case, "the ultimate question is not what range does or does not apply, but whether the sentence imposed is appropriate in the specific circumstances of the case:" *R v SMC,* 2017 ONCA 107 at para 7.

That being said, sentencing ranges cannot be arbitrarily ignored, otherwise they become meaningless. It is an error to depart from a sentencing range without explaining the reasons for doing so: *R v Scholz,* 2021 ONCA 506, at para 18

The choice of a sentencing range, or of a category within a sentencing range, falls within the discretion of the sentencing judge and cannot in itself constitute a reviewable error: *R v Sidhu,* 2019 ONCA 880, at para 3

There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. Everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case. Thus, the fact that a judge deviates from a

sentencing range established by the courts does not in itself justify appellate intervention: *R v Lacasse,* 2015 SCC 64; *R v Suter,* 2018 SCC 34; *R v Gill,* 2019 ONCA 902, at para 23; *R v Sidhu,* 2019 ONCA 880 at para 3

It is appropriate for a trial judge to consider a range of sentence for a particular offence committed in particular circumstances from which he or she may deviate after considering the particular facts of the case, including the circumstances of the victim, the particulars of the crime, and the history and circumstances of the offender. Where facts or circumstances exist that distinguish the situation significantly from other cases where sentences were imposed in the range, the trial judge is entitled to impose a sentence that adequately reflects the significance of those facts: R v. Jones-Solomon, 2015 ONCA 654 at para 82

In reviewing a sentence, the court is concerned with fitness and not the accuracy of the range of sentence identified by the trial judge: *R v Dow,* 2017 ONCA 233 at para 1

As a general rule, appellate courts should give sentencing judges the tools to depart from past precedents and craft fit sentences when a body of precedent no longer responds to society's current understanding and awareness of the gravity of a particular offence and blameworthiness of particular offenders or to the legislative initiatives of Parliament: *R v Friesen,* 2020 SCC 9; *R v AJK,* 2022 ONCA 487, at para 71

A sentence at the upper end of the range for a first time offender who was gainfully employed throughout the proceedings may not be warranted: *R v McIntyre,* 2016 ONCA 843 at para 20

Sentences may increase or decrease as societal and judicial knowledge and attitudes about certain offences change: *R. v. Parranto*, 2021 SCC 46, at para. 22; *R v Cunningham,* 2023 ONCA 36, at para 53

B. ASSAULT

In Hudson, the Ontario Court of Appeal upheld a suspended sentence for aggravated assault, referencing that that the appellant was 18 at the time of the offence; he had no prior criminal record; he received a positive pre-sentence report; he was gainfully employed; and he had strong support in his community. The offence was also a "spur of the moment" event that was fueled by the consumption of alcohol and drugs: *R v Hudson,* 2020 ONCA 557, at paras 22-28

C. AGGRAVATED ASSAULT

An offender who is convicted of aggravated assault, when acting in self-defence but exceeding what is reasonable in the circumstances, should be sentenced according to a separate guide for sentencing offenders who acted in self-defence or defence of another person: *R v Randhawa,* 2020 ONCA 668, at paras 36-37

In *Anderson,* the Court oof Appeal found that 38 days of pre-trial custody was a sufficient sentence for an aggravated assault involving self-defence elements arising out of a road rage incident: *R v Anderson,* 2021 ONCA 618

In *Foster,* the Court of Appeal found that a two year sentence for a first offender convicted of aggravated assault following what started as a consensual fight was "grossly excessive." The court reduced the sentence to 12 months: *R v Foster,* 2019 ONCA 282, at paras 20-28

A sentence in the range of 7 to 11 years is fitting for the offence of aggravated assault involving gun violence: *R v Jarvis,* 2022 ONCA 7, at para 6

D. ATTEMPT MURDER

The sentencing range for attempt murder is six years to imprisonment for life. Double digit prison sentences for attempted murder have been imposed in cases of planned executions involving the use of firearms: *R v Forcillo,* 2018 ONCA 402 at paras 131, 132; see also *R v Kormendy,* 2019 ONCA 676, at paras 30-46, 69

Denunciation and deterrence are the primary sentencing objectives for attempted murder in the domestic context: *R v Kormendy,* 2019 ONCA 676, at para 29; *R v Cunningham,* 2023 ONCA 36, at paras 28-29

The moral blameworthiness for attempted murder is the same as for murder, because a conviction of either requires the same *mens rea*. The fact that the victim did not die was not due to any action on the part of the perpetrator who intended her death. The sentence must reflect this gravity. Even though there is no automatic life sentence for attempted murder, "the offence is punishable by life and the usual penalty is severe: *R v Cunningham,* 2023 ONCA 36, at para 25

The range of sentence for an attempt murder in a domestic context is generally nine years to life: *R v Cunningham,* 2023 ONCA 36, at paras 40-56

It is particularly aggravating where the attempt murder involves planning and deliberation: *R v Cunningham,* 2023 ONCA 36, at paras 36-39

E. CHILD LURING

The mandatory minimum sentence of one year incarceration for the offence of child luring was struck down by the Ontario Court of Appeal in *R v Morrison,* 2017 ONCA 582

For general commentary on the range of sentence on child luring, see *R v AH,* 2017 ONCA 677 at paras 46-52

F. CHILD PORNOGRAPHY

Denunciation and general deterrence are the primary principles of sentencing for offences involving child pornography. Courts have been signaling that more

significant sentences for these offences are appropriate: *R v Inksetter,* 2018 ONCA 474 at paras 16, 25; *R v JS,* 2018 ONCA 675 at para 57

A longer sentence on the count of "make available" child pornography than for the count of "possession" is warranted because by making images and videos the accused downloaded available to others via the internet, the accused contributes to the further victimization of the children depicted in the pornographic images: *Inksetter* at para 27

For a review of sentences in a number of cases involving child sexual abuse and making child pornography: *R v JS,* 2018 ONCA 675, at para 106-114

A mandatory minimum sentence of six months' incarceration (increased to one year incarceration since July 17, 2015) for possession of child pornography is grossly disproportionate and violates s.12 of the *Charter*: *R v John,* 2018 ONCA 702 at paras 40-41

The mandatory minimum sentence of 90-days jail for possession of child pornography, where prosecuted summarily, is grossly dispropriate and violates s.12 of the *Charter: R v Swaby,* 2018 BCCA 416, leave to appeal to SCC dismissed

The mandatory minimum sentence of one year for making/printing/publishing/distributing under s.163.1(2) violates s.12, and is therefore unconstitutional and of no force or effect: *R v Joseph,* 2020 ONCA 733, at paras 156-165

In the context of sentencing for child porn, it is not a mitigating circumstance that photos and video sent to the accused did not depict acts perpetrated against infants and very young children, nor is it a mitigating circumstance that the accused was not trolling the internet in search of child pornography: *R v MM,* 2022 ONCA 441, at para 18

G. CONTEMPT OF COURT

The justice system's response to a refusal to testify "must be firm and direct – significant jail terms above and beyond whatever other period of incarceration the individual is, or might be, facing for his own participation in the relevant events must be imposed. The sentence imposed was consistent both with the jurisprudence and the actual sentences imposed for other youthful offenders. In *R. v. McLellan*, 2016 ONSC 3397, sentences of 30 months were imposed on youthful offenders for refusing to testify in a murder trial. In *R v. Omar*, 2017 ONSC 1833, aff'd 2018 ONCA 599, leave to appeal refused, [2018] S.C.C.A. No. 398, a three-year sentence for a youthful offender was upheld by this court. In *R v Elenezi,* the Court upheld a three year sentence for a youthful offender: *R v Elenezi,* 2021 ONCA 834, at para 12

H. CRIMINAL HARASSMENT

Criminal harassment is a serious offence and usually requires the court to send a message to the offender and the public that harassing conduct against innocent and vulnerable victims is not tolerated by society, and that such conduct must be deterred: *R v Sabir,* 2018 ONCA 912, at para 45.

The overriding considerations are general and specific deterrence: *R v Nolan,* 2019 ONCA 969, at para 65

Three years is within the range for serial harassers: *R v Myles,* 2017 ONCA 375 at para 9

I. DRIVING OFFENCES

The predominant sentencing objectives in determining a fit sentence for alcohol-driving offences, especially those in which bodily harm is caused to a fellow human being, are general deterrence and denunciation. As a general rule, custodial sentences are required where bodily harm is caused: *R v Clouthier,* 2016 ONCA 197 at para 54

The range of sentence for such offences varies significantly. Within that range are sentences in the mid to upper reformatory and lower end penitentiary range: *Clouthier* at para 56

The range of sentence for dangerous driving causing bodily harm involving drug use is a conditional sentence to two years less a day. Denunciation and deterrence are paramount, even for youthful first time offenders, because such offences are frequently committed by such people, who are otherwise of good character: *R v Currie,* 2018 ONCA 218; *R v Markos,* 2019 ONCA 80, at para 26

The range of sentence for impaired driving causing death is four to six years where the offender does not have a prior criminal or driving record, and a range of between seven and one-half to 12 years where the offender has a prior criminal or driving record: *R v Randhawa,* 2020 ONCA 38, at para 12

The principles of denunciation and deterrence are relevant to dangerous driving offences committed by a first-time offender and otherwise law-abiding citizen: *R v Augustine,* 2019 ONCA 119, at para 11

An offender's level of moral blameworthiness for impaired driving causing death will vary significantly depending on the aggravating and mitigating factors in any given case. As a result, the sentencing range for these offences is quite broad – from low penitentiary sentences of two or three years to more substantial

penitentiary sentences of eight to ten years – because courts recognize that they cover a broad spectrum of offenders and circumstances: *R v Altiman,* 2019 ONCA 511, at para 49; see also paras 50-64

The lack of a criminal record or driving record in such cases is a strong factor militating the sentence: see generally *R v Altiman,* 2019 ONCA 511

J. DRUG OFFENCES

i. General Principles

The quantity of drugs involved is relevant to the sentencing process: *R v Sidhu,* 2009 ONCA 81 at para 14; *R v Kusi,* 2015 ONCA 639 at para 14

The toxic combination of drug and guns poses a pernicious and persisting threat to the safety, welfare and the lives of members of the community. These offences command exemplary sentences. The predominant sentencing objectives are denunciation and deterrence. Substantial jail terms are required even for youthful first offenders: *R. v. Mansingh*, 2017 ONCA 68, at para. 24; *R v Omoragbon,* 2020 ONCA 336, at para 23

Drugs vary in the degree of danger that they represent to those who consume them. Consequently, the more dangerous the drug being trafficked, the higher the penalty that will be imposed. As well, moral culpability rises with the risk of serious harm the trafficker is prepared to expose others to, as well as the risk of societal ills related to the drug in question. *R v Lynch,* 2022 ONCA 109, at paras 15-17

ii. FENTANYL

For a review of some case law on sentencing for possession for the purpose of trafficking in fentanyl, sese *R v Disher,* 2020 ONCA 710, at paras 30-37

Fentanyl should be treated at least as seriously as heroin: *R v Olvedi,* 2021 ONCA 518, at paras 49-50

Because few fentanyl trafficking and importing cases have reached the Court of Appeal, the Court has declined to thus far establish a range of sentence for these offences. That being said, because of its destructive impact, even first offenders who traffic in significant amounts of fentanyl should expect to receive significant pentitentiary sentences: *R v Olvedi,* 2021 ONCA 518, at paras 52-56

In *Lynch,* the Court of Appeal imposed a sentence if six years where the offender sold drugs to an undercover officer on seven occasions, beginning with cocaine and escalating to fentanyl. He accepted responsibility for possessing a total of 965.01 grams of cocaine, 149.28 grams of MDMA and 41.37 grams of fentanyl. He had one, unrelated entry on his record, plead guilty, and was only 29 years old: 2022 ONCA 109

The Court noted that the trial judge correctly identified the sentencing range in the case as being between six to eight years: 2022 ONCA 109, at para 15

iii. HEROIN

First offender couriers who import large amounts of high-grade heroin into Canada for personal gain should expect to receive jail sentences in the 12 to 17-year range. Lesser amounts will often attract similar, if slightly lower, penalties: *R v Sidhu,* 2009 ONCA 81 at paras 14, 20; *R v Deol,* 2017 ONCA 221 at para 48; see generally *R v Murororunkwere,* 2019 ONCA 463

The appropriate range for first time offenders convicted of trafficking one kilogram of heroin is 9-11/12 years: *R v Pannu,* 2015 ONCA 677 at para 192; *R v Kusi*, 2015 ONCA 639 at paras 14-15

The appropriate range for offences involving trafficking of between approximately 0.5 to 1 kilograms of heroin is 6 to 12 years. A sentence of three years in such circumstancs is demonstrably unfit: *R v DiBenedetto*, 2016 ONCA 16 at paras 7-9

Absent exceptional circumstances, the sale of heroin, even in small amounts by first offenders who are addicts, calls for a penitentiary sentence: *R v Lynn,* 2019 ONCA 277, at para 5

iv. KETAMINE

A sentence of between five and eight years would normally be imposed for possession for the purpose of trafficking in ketamine with a slightly higher range, perhaps six to ten years, for production of ketamine: *R v Lin,* 2020 ONCA 768, at para 27

v. COCAINE

For couriers who are first time offenders and smuggle large quantities of cocaine (upwards of 3kg) into Canada, the appropriate sentence falls within the range of six- to eight-years: *R v Jackman,* 2016 ONCA 121 [reference to *Cunningham*] at para 57

While the range for importers of multi-kilograms of cocaine is generally 6-8 years, a sentence for a youthful, first-time offender, convicted of importing close to 2kg of cocaine, of 5 years and 3.9 months, less credit for pre-sentence custody, is not unfit: *R v Zeisig,* 2016 ONCA 845 at para 13

The accepted range for conspiracy to traffic in cocaine for mid-level dealers trafficking in quantities that include the kilogram level is eight to fourteen years, but five years may suffice in appropriate circumstances: *R v McGregor,* 2017 ONCA 399 at para 13

Sentences in the five to eight year range are appropriate for first offenders possessing for the purpose of trafficking slightly more than a pound of cocaine – i.e., mid-level traffickers: *R v Wawrykiewicz,* 2019 ONCA 21, at para 15; *R v Brown,* 2021 ONCA 35, at para 9; *R v Lynch,* 2022 ONCA 109, at para 14

The Woolcock range of 6 months to 2 years for a first offender possessing a small amount of cocaine for the purpose of trafficking is not generally applicable to shared trafficking: *R v Johnson,* 2021 ONCA 257, at paras 34-35

In *Buffone,* the Court of Appeal imposed life sentences for middle-aged offenders who were leaders of a criminal organization that imported, for pure greed, 2,000 kg of cocaine into Ontario over a three year period: 2021 ONCA 825

vi. MARIJUANA

In *R v Vu,* 2018 ONCA 436 the Court of Appeal declared the mandatory minimum sentences for the production of marijuana provisions found in ss. 7(2)(b)(iii), (v), (vi) and 7(3)(c) as unconstitutional

In *Strong,* the Court of Appeal held that the decriminalization of marijuana possession offences did not alter the appropriate range of sentence for production of marijuana, which is still illegal under the new regime: 2019 ONCA 15

In *Kennedy,* the Court of Appeal reduced a three year sentence for the production of marijuana to 14 months (following the abolition of the mandatory minimum in *Vu*). The offender was youthful, with no record, but played an integral role in a large and ongoing marijuana production enterprise, motivated by financial gain: 2019 ONCA 77

K. FAIL TO PROVIDE THE NECESSARIES

The appropriate range for the offence of manslaughter by means of failing to provide the necessaries of life is 7 to 16 tears, with 16 years being the upper end of the range for cases involving ongoing horrendeous and fatal abuse of persons by individuals responsible for their care: *R v Hawley,* 2016 ONCA 143 at para 6-7

However, in a particularly egregious case, a sentence of 20 years may nonetheless be fit: *Hawley* at paras 9-11

In sentencing offenders convicted of failing to provide necessaries under s. 215(2), the duration of the failure is a factor warranting consideration in an assessment of the gravity of the offence and the moral blameworthiness of the offender: *R v Lis,* 2020 ONCA 557, at para 70

L. FRAUD OFFENCES

General deterrence is a core goal of sentencing for a fraud conviction: *R v Henn,* 2022 ONCA 768, at para 27

In cases of large-scale fraud, the range of sentences imposed in circumstances involving a breach of trust is generally three to five years. This range reflects the substantial weight that courts must give to the principles of general deterrence and denunciation. It is well established that, "a penitentiary sentence is the norm, not the exception, in cases of large-scale fraud and in which there are no extraordinary mitigating circumstances: *R v Davatgar-Jafarpour,* 2019 ONCA 353, at paras 34-35; *R v Scholz,* 2021 ONCA 506, at para 18; see also paras 19-22

Factors that may justify a departure from this established range include: a guilty plea; or the repayment of the monies taken; or that the offender played only a

minor role in the fraud itself; or that the offender was at an advanced age; or that the offender had serious health issues: *R v Scholz,* 2021 ONCA 506, at para 23

The fact that the appellant is a first-time offender and that he is of good character are not factors that will operate to reduce the sentence in a fraud case below the usual range. This is because it is those very factors that generally permit the offender to commit the offence: *R v Scholz,* 2021 ONCA 506, at para 24

In *Reeve,* the Ontario Court of Appeal noted that there is a fairly broad range of sentence for large-scale frauds involving significant breaches of trust in the 8- to 12-year range. "Of course, there are all manner of aggravating and mitigating factors that can apply in a case that will land the sentence lower or higher within that range, or that may drive the sentence below or above that range.": *R v Reeve,* 2020 ONCA 381, at paras 40-41

Frauds targeting public funds engage trust-like considerations that are properly viewed as aggravating on sentence: *R v Kazman,* 2020 ONCA 22, at para 111

M. HOME INVASIONS

The sentencing range for home invasions is four to thirteen years' imprisonment, with the high end being applicable for offences involving violence or sexual assaults: *R v Hejazi,* 2018 ONCA 435; *R v Hopwood,* 2020 ONCA 608, at para 14

N. MANSLAUGHTER

Manslaughter captures a wide and disparate range of conduct… As a result, a wide 'range' of sentences have been imposed for this offence: *R v Grandine,* 2022 ONCA 368, at para 78

In *R v NJ,* 2017 ONCA 740, the Court of Appeal upheld a sentence of ten years for manslaughter where a mother brutally beat her three-year-old daughter, resulting in her death.

The range of sentence for aggravated manslaughter is 8 to 10 years: *R v Punia,* 2018 ONCA 1022, at para 2

It is inappropriate to create subcategories of manslaughter, such as aggravated manslaughter: *R v Warner,* 2019 ONCA 1014, at para 10

The appropriate range for the offence of manslaughter by means of failing to provide the necessaries of life is 7 to 16 tears, with 16 years being the upper end of the range for cases involving ongoing horrendeous and fatal abuse of persons by individuals responsible for their care: *R v Hawley,* 2016 ONCA 143 at para 6-7

However, in a particularly egregious case, a sentence of 20 years may nontheless be fit: *Hawley* at paras 9-11

The jurisprudence suggests that 12 or 13 years is generally appropriate for aiders or abettors to manslaughter, where those offenders have a high degree of moral culpability: *R v Warner,* 2019 ONCA 1014, at para 14

O. OBSTRUCT JUSTSICE

Efforts by accused persons (whether directly or through others) to interfere with witnesses strike at the very heart of our justice system. Attempting to interfere with a witness should normally attract a penitentiary term of imprisonment: *R v Hopwood,* 2020 ONCA 608, at paras 24-25

Obstruction requires wilful or intentional conduct. Intention can be inferred from context: *R v Johnston,* 2021 ONCA 331, at para 16

P. SECOND-DEGREE MURDER

Section 745.4 of the Criminal Code provides that a judge may increase parole ineligibility above the normal ten-year period for an offender convicted of second degree murder up to 25 years, having regard to: the character of the offender, the nature of the offence and the circumstances surrounding its commission, and the recommendation of the jury, if any.

To justify such an order, the court may consider the future dangerousness of the offender and denunciation, as well as deterrence: *R v Van Every,* 2016 ONCA 87 at para 86; *R v Sinclair,* 2017 ONCA 338 at para 149

For an extremely comprehensive chart of the period of parole ineligibility set by Canadian appellate and superior courts on second degree murders, see *R v Cabrera,* 2021 ABCA 291

Like other aspects of sentencing, setting parole eligibility periods when sentencing for second degree murder attracts deference on appeal: *R v Ranhorta,* 2022 ONCA 548, at para 44

Appellate intervention should only occur where a party demonstrates the application of an erroneous principle that has resulted in a period of parole ineligibility that is clearly or manifestly excessive or inadequate: *Sinclair,* at para 151

In assessing the fitness of the period of parole ineligibility to be fixed, the court must be mindful of the sentencing objective of assisting the accused's rehabilitation. However, the court also take into account that the mandatory sentence of imprisonment for life and the mandatory ten-year minimum period of parole ineligibility circumscribe the weight that can be accorded to the accused's prospects of rehabilitation: *R v Rosen,* 2018 ONCA 246 at para 68

Pursuant to s.745.4, the Court must have regard to the character of the offender, the nature of the offence, the circumstances surrounding its commission, and any recommendations made by the jury

As a general rule, the sentencing judge shall impose a period of 10 years, unless a determination is made that, according to the criteria in s. 745.4, a longer period

is required. The power to extend the period of parole ineligibility need not be sparingly used.

In imposing a period of parole ineligibility, trial judges are afforded discretion and appellate courts should not interfere lightly: *R v Abdulle,* 2020 ONCA 106, at paras 167-169

The range of parole ineligibility in domestic homicides is 12-15 years: *R v Gale,* 2019 ONCA 519, at para 20; see also *R v Keene,* 2020 ONCA 635, at para 65; see also *R v Borbely,* 2021 ONCA 17, at para 35

The intentional murder of an intimate partner to be a significant aggravating factor, one that justifies an increase in the period of parole ineligibility. The appropriate range is up to 17 years in circumstances where there are no mitigating factors of remorse: *R v Ranhorta,* 2022 ONCA 548, at para 77

Q. ROBBERY OFFENCES

The four year mandatory minimum for Robbery with a firearm and the five year mandatory minimum for robbery with a prohibited or restricted firearm is constitutional: *R v McIntyre,* 2019 ONCA 161

R. SEXUAL OFFENCES

The usual range for sexual assaults committed in circumstances involving sexual intercourse of a sleeping or unconscious victim is between 18 months and three years: *R v Ghadhoni,* 2020 ONCA 24, at para 48

In cases of multi-victim sexual abuse where the offender was engaged in a pattern of conduct over many years with various victims, there may be good reason to impose concurrent sentences of equivalent length, after the court considers an appropriate global sentence: *R v JH,* 2018 ONCA 245 at para 50

Numerous offenders have been sentenced in the three- to five-year range for sexual assault involving forced oral sex in violent circumstances: *R v UA,* 2019 ONCA 946, at para 11

In *AJK,* the Court of Appeal abolished the distinction in sentencing ranges for forced intercourse of a intimate partner (21 months to four years) versus a stranger (three to five years). Going forward, the appropriate range of sentence in cases of sexual assault involving forced intercourse – whether with an intimate partner or a stranger – is three to five years. Absent some highly mitigating factor, the forced penetration of another person will typically attract a sentence of at least three years in the penitentiary. Further, the fact of a pre-existing relationship between the accused and complainant places them in a position of trust that can only be seen as an aggravating factor on sentencing: *R v AJK,* 2022 ONCA 487, at paras 60-79

In that case, the Court upheld as "entirely fit" a five year sentence for an accused who forced penetration on an intimate partner. He ignored her pleas to be released, and instead took her to a secluded area, choked her, penetrated her vaginally from behind, pinned her down, punched her, beat her, and then left her alone in the dark. She had a concussion, bruising, and swelling. When she recovered from those physical injuries, she had a difficult mental recovery: *R v AJK,* 2022 ONCA 487

S. SEXUAL OFFENCES AGAINST CHILDREN

For a review of the sentencing principles that apply to sexual abuse of a child, see *R v Friesen,* 2020 SCC 9; *R v TJ,* 2021 ONCA 392

Mid-single digit penitentiary terms for sexual offences against children are normal: *R v Nathanial-Shilling,* 2021 ONCA 916, at para 27

The range for the regular and persistent sexual abuse by a person in a position of trust of young children over a substantial period of time is mid to upper single digit penitentiary terms: *JH* at para 52

For a review of sentences in a number of cases involving child sexual abuse and making child pornography: *R v JS,* 2018 ONCA 675, at para 106-114

Sexual interference of a child is a very serious offence. The moral blameworthiness on the part of the adult is because it is the adult's role to protect the child, not acquiesce where the child may not appreciate the impropriety of the

proposed action because of its sexual aspect. Nor should the effect of sexual interference on the child be minimized: *R v BJT,* 2019 ONCA 694, at para 83

Conditional sentences for sexual offences against children will only rarely be appropriate. Their availability must be limited to exceptional circumstances that render incarceration inappropriate – for example, where it gives rise to a medical hardship that could not adequately be addressed within the correctional facility: *R v MM,* 2022 ONCA 441, at para 16

A breach of trust is likely to increase the harm to the victim and the gravity of the offence: *R v MM,* 2022 ONCA 441, at para 17

The mandatory minimum sentence of one year for sexual interference is unconstitutional: *R v BJT,* 2019 ONCA 694, at para 75

In respect of sexual offences against a child, the fact that a child consents or even initiates the activity does not remove the trust relationship or the obligation of the adult to decline the invitation. Notwithstanding the consent, desire or wishes of the young person, it is the adult in the position of trust who has the responsibility to decline having any sexual contact whatsoever with that young person: *R v BJT,* 2019 ONCA 694, at para 87; *R v Joseph,* 2020 ONCA 733, at para 9

The fact that the offence of sexual interference is committed in circumstances involving the *de facto* consent of the complainant is not in any way mitigating: *R v EC,* 2019 ONCA 688, at para 13

The parties' relative proximity in age does not detract from the complainant's vulnerability, or from the accused's blameworthiness in taking advantage of that vulnerability. While a greater discrepancy in age can be an aggravating factor, the opposite is not true: *R v EC,* 2019 ONCA 688, at para 14

T. SEXUAL SERVICES OFFENCES

The voluntary participation of complainants in sexual service offences (e.g., procuring, receiving a financial benefit etc.) is not a relevant factor on sentencing and does not mitigate the inherently exploitative nature o these offences. That being said, it can indicate the absence of an aggravating factor, namely, the absence of coercion: *R v Joseph,* 2020 ONCA 733, at paras 94-98

The range for sexual commodification offences may be around 12 months to eight years imprisonment. Although it will be uncommon, in exceptional circumstances even lower sentences may be imposed for sexual commodification offences, such as the eight-month sentence. *R v Joseph,* 2020 ONCA 733, at paras 138-140 [not endorsing this point explicitly but noting that both Crown and defence acede to this range].

The mandatory minimum sentence for material benefit of a person under 18, pursuant to s.286.2(2), violates s.12, and is therefore unconstitutional and of no force or effect: *R v Joseph,* 2020 ONCA 733, at paras 143-155

The mandatory minimum sentence for procuring a person under 18, pursuant to s.286.2(2), violates s.12, and is therefore unconstitutional and of no force or effect: *R v Safieh,* 2021 ONCA 643, at paras 10-20

U. TERRORISM OFFENCES

There is an overriding need to emphasize denunciation and deterrence when sentencing for terrorist crimes: *R v Hersi,* 2019 ONCA 94, at para 51

VICTIM FINE SURCHARGE

The Victim Fine Surcharge violates ss. 7 or 12 of the *Charter: R v Boutillier,* 2018 SCC 58

A court cannot order a victim surcharge to be paid out of funds forfeited to the Crown as proceeds of crime. *R v. Shearer*, 2015 ONCA 355

The *Criminal Code* does not permit the imposition of concurrent victim fine surcharges: *R v Fedele,* 2017 ONCA 554

VICTIM IMPACT STATEMENTS

Victim impact statements are admissible, pursuant to s. 722(1), but their use is subject to the general provisions of s. 724(3). The Crown bears the burden of proving any disputed fact and the offender has the right to cross-examine on the evidence the Crown leads.

The offender has a threshold "air of reality" burden to satisfy the sentencing judge that a fact or facts contained in the victim impact statement are disputable and that the request to cross-examine is not "specious or empty*": R v VW*, 2008 ONCA 55, at paras 27, 29

There is no automatic or open-ended right to insist that victims attend for cross-examination any time the Crown files such a statement: *R v VW*, 2008 ONCA 55, at paras 28-30; see also *R v Cook,* 2020 ONCA 809, at paras 11-13

A trial judge is entitled to factor the impact of the offender's conduct on the victim into her determination of an appropriate sentence. That is one of the purposes behind receiving victim impact statements. It only becomes an error if the trial judge relies on a victim impact statement to impose an unfit sentence: *R v Codina,* 2019 ONCA 986, at para 4

POST-SENTENCING CONSIDERATIONS

In *Ewert v. Canada*, 2018 SCC 30, the Supreme Court of Canada held that Correctional Service Canada (CSC) breached its enabling statute by using actuarial risk-assessment tools to determine the security classification of Indigenous offenders, despite a lack of empirical evidence that the tools were

accurate when applied to Indigenous persons. The remedy was a declaration that the Act had been breached; any particular decisions based on the impugned tools would need to be judicially reviewed.

YOUTH SENTENCING

A. GENERAL PRINCIPLES

A youth sentence must be the least restrictive sentence possible, while still holding the young person accountable: *YCJA*, ss. 38(2) (d), (e). General deterrence is not a relevant factor when sentencing a young person.

Where a term of incarceration must be imposed because of the nature of the offence, for a young first offender, the term should be as short as possible and tailored to the individual circumstances of the accused. Rehabilitation remains an important factor, when sentencing a young first offender on any offence, including manslaughter.

This is particularly important when sentencing a youthful first offender to a first penitentiary sentence: *R v SK,* 2021 ONCA 619, at paras 11-13

A deferred custody order is not available under s.42(5) of the *YCJA* where the offence causes serious bodily harm, including life-altering and profound psychological harm: *R v JRS,* 2019 ONCA 852

B. CUSTODIAL SENTENCES

Section 39(1)(e) provides that a youth justice court judge cannot commit a young person to custody unless, in exceptional cases where the young person has

committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38.

The exceptional case gateway can only be utilized in those very rare cases where the circumstances of the crime are so extreme that anything less than custody would fail to reflect societal values. One example of an example of an exceptional case is when the circumstances of the offence are shocking to the community: *R v JZ,* 2021 ONCA 817, at para 2

C. SENTENCING A YOUTH AS AN ADULT

72 (1) The youth justice court shall order that an adult sentence be imposed if it is satisfied that

(a) the presumption of diminished moral blameworthiness or culpability of the young person is rebutted; and

(b) a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not be of sufficient length to hold the young person accountable for his or her offending behaviour.

In order to rebut the Presumption the Crown must satisfy the court that, at the time of the offence, the evidence supports a finding that the young person demonstrated the level of maturity, moral sophistication and capacity for independent judgment of an adult such that an adult sentence and adult principles of sentencing should apply to him or her: *R v MW,* 2017 ONCA 22, at para 98; *R v RM,* 2020 ONCA 231, at para 25

The seriousness of the offence and the presence of planning and deliberation do not in themselves lead to the conclusion that an offender should be sentenced as an adult. However, the seriousness of the offence must be considered in the analysis. The level of moral judgment or sophistication demonstrated in the

planning and implementation of the offence, and the offender's role in carrying out the offence, are relevant to the analysis: *MW* at para. 112; *RM,* at para 29