LALANDE ON SENTENCING

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TREATING LIKE CASES ALIKE: A PRIMER ON PARITY

INTRODUCTION

On August 12, 2013, US Attorney General Eric Holder delivered a speech to the American Bar Association's annual conference in San Francisco, announcing a sweeping shift in sentencing for low-level drug offenders. Holder stated that the new policy would include, *inter alia,* a focus on avoiding lengthy prison terms for non-violent first-time offenders and the elimination of unwarranted disparities in sentencing. On the latter issue, the Attorney General specifically stated that: ". . .I have today directed a group of U.S. Attorneys to examine sentencing disparities, and to develop recommendations on how we can address them."

For those of us north of the 49th parallel, such a major development in American sentencing policy may naturally raise the question of the importance attributed to parity in the Canadian approach to sentencing. In particular, what is the role of parity in a process that, historically, has been focused on the circumstances of an individual case?

Highlighting the evolution of the court's balanced approach to this issue, this inaugural edition of *Lalande on Sentencing* contains an examination of the parity principle in Canadian criminal law in the context of otherwise individually-oriented sentencing objectives.

LEGISLATION

CRIMINAL CODE

s. 718.2(b): The sentence must be similar to sentences imposed on similar offenders for similar offences in similar circumstances.

YOUTH CRIMINAL JUSTICE ACT

s. 38(2)(b): The sentence must be similar to sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances;

CASELAW

PRINCIPLES OF SENTENCING

R. v. Gladue, 1999 CarswellBC 778, [1999] 1 S.C.R. 688 (S.C.C.):

> The enactment of the new Part XXIII was a watershed, marking the first codification and significant reform of sentencing principles in the history of Canadian criminal law. Each of the provisions of Part XXIII, including s. 718.2(e), must be interpreted in its total context, taking into account its surrounding provisions.

PARITY – GENERAL

Baldhead, Re, 1966 CarswellSask 10, [1966] S.J. No. 200 (Sask. C.A.) at para. 10:

> . . .as a general rule the adequacy of a sentence depends upon all of the relevant circumstances, and that being so, there can be no such thing as a uniform sentence suitable to a particular crime. This rule, however, must be subject to this reservation, that where there is a marked departure from the sentences customarily imposed in the same jurisdiction for the same or similar crimes, the Appellate Court, upon being apprised of the circumstances, should be able to rationalize the reason for such departure. If, after having been made aware of the circumstances, and after having given full effect to the principles governing an Appellate Court in reviewing the sentence imposed upon a convicted person . . . it is unable to do so, then it is incumbent upon the Court to either increase or decrease the sentence as the circumstances require to achieve a rational relationship to sentences imposed for the same or similar crimes.

R. v. M. (T.E.), 1997 CarswellAlta 213, [1997] S.C.J. No. 42 (S.C.C.) at para. 66:

> . . .it affronts common-sense notions of justice if people who have committed the same criminal act receive wildly disparate sentences. It is neither fair nor just that one person languish in prison years after another, who committed a similar act, is released to liberty.

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R. v. M. (C.A.), 1996 CarswellBC 1000, [1996] S.C.J. No. 28 (S.C.C.) at para. 92:

> It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. . .Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction.

JUSTIFIABLE DISPARITY

R. v. M. (L), 2008 CarswellQue 4417, [2008] S.C.J. No. 31 (S.C.C.) at para. 36:

> Owing to the very nature of an individualized sentencing process, sentences imposed for offences of the same type will not always be identical. The principle of parity does not preclude disparity where warranted by the circumstances, because of the principle of proportionality.

R. v. Ipeelee, 2012 CarswellOnt 4376, [2012] S.C.J. No. 13 (S.C.C.) at para. 79:

> In practice, similarity is a matter of degree. No two offenders will come before the courts with the same background and experiences, having committed the same crime in the exact same circumstances. Section 718.2(*b*) simply requires that any disparity between sanctions for different offenders be justified.

PARITY & REGIONAL CONSIDERATIONS

R. v. M. (C.A.), *supra*, at para. 91:

> The sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art . . . taking into account the needs and current conditions of and in the community.

PARITY & COLLATERAL CONSEQUENCES

R. v. Pham, 2013 CarswellAlta 296, 2013 S.C.J. 100 (S.C.C.) at paras. 11, 15:

> The collateral consequences of a sentence may be taken into account in sentencing as personal circumstances of the offender. Their relevance flows from the application of the principles of individualization and parity. The circumstances should not be misused to generate "inappropriate and artificial sentences" designed to circumvent collateral consequences.

PARITY & CO-ACCUSED

R. v. Bannon, 2012 ONCA 557, 2012 CarswellOnt 10404 (Ont. C.A.) at para. 35; see also ***R. v. Courtney,*** 2012 ONCA 478, 2012 CarswellOnt 8467 (Ont. C.A.) at paras. 5-9:

> Varying degrees of participation in a crime, different circumstances of the offenders and different offences relating to the crime will lead to disparity among offenders charged for the same crime.

A BRIEF HISTORY OF SENTENCING PARITY IN CANADA

Parity is defined as the quality or state of being equal or equivalent. In the law sentencing, this concept is described in s. 718.2(b) of the *Criminal Code,* R.S.C. 1985, c. C-46:

> The sentence must be similar to sentences imposed on similar offenders for similar offences in similar circumstances.

Fundamentally, s. 718.2(b) is just plain old common sense. As ably described by Sopinka J. in ***R. v. M. (T.E.),*** *supra*, at para. 66:

> . . .it affronts common-sense notions of justice if people who have committed the same criminal act receive wildly disparate sentences. It is neither fair nor just that one person languish in prison years after another, who committed a similar act, is released to liberty.

It may seem that, on its own, parity is a relatively simple issue. As Aristotle said, "treat like cases alike".[1] But unlike the United Kingdom[2] or the United States,[3] Canada does not have a permanent sentencing commission that issues guidelines or ranges for various offences. Rather, sentencing in Canada is recognized as a task requiring the court to balance various competing principles to achieve a just outcome.

In practice, this approach can create some difficulty. Specifically, efforts to establish uniformity between sentences to achieve parity go against the grain of what has been described as a primarily individualized process with "considerable latitude for disparity".[4] In other words, the sentencing process is traditionally focused on the individual characteristics of each case, naturally producing disparate results, and this is somewhat at odds with a legislated objective mandating similar sentences for similar offenders. Consider, in this respect, the comments of Lamer J., writing for a unanimous nine-member panel of the Supreme Court, in ***R. v. M. (C.A.),*** *supra*, at para. 92:

> It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. . .Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction.

Reconciling the dichotomy between uniform sentences and the individualism of sentencing begins with an understanding of the background behind s. 718.2(b). The story can be traced back to the evening of May 13, 1965 at the Cote Indian Reserve near Kamsack, Saskatchewan, when Baldhead, an inebriated man in his mid-40s, had an argument with his wife, Alice, just outside of their house. The argument soon became violent and their eldest son intervened, having armed himself with a guitar, smashed it over his father to stop the fight. Infuriated, Baldhead scrambled for his gun as his wife was led away from their home by his son. Moments later, a shot rang out in the darkness. And two historical events occurred.

The significance of the first was immediate: Alice's frame fell limp as she was struck by Baldhead's bullet. Tragically, the massive loss of blood that ensued proved fatal. Baldhead was charged and found guilty of manslaughter. He was sentenced to 10 years imprisonment.

The second was the sentence ultimately imposed on Baldhead, once it was reduced by the Saskatchewan Court of Appeal.[5] After reviewing the existing authorities on the issue of parity in sentencing, the court declared the sentencing judge to be in error and reduced Baldhead's sentence from 10 years to three, making it commensurate with similar cases involving Aboriginal offenders in similar circumstances. In doing so, the court stated that:

> . . .as a general rule the adequacy of a sentence depends upon all of the relevant circumstances, and that being so, there can be no such thing as a uniform sentence suitable to a particular crime. This rule, however, must be subject to this reservation, that where there is a marked departure from the sentences customarily imposed in the same jurisdiction for the same or similar crimes, the Appellate Court, upon being apprised of the circumstances, should be able to rationalize the reason for such departure. If, after having been made aware of the circumstances, and after having given full effect to the principles governing an Appellate Court in reviewing the sentence imposed upon a convicted person (see ***R. v. Ashworth*** , 1962 CarswellSask 73, 132, C.C.C. 376 (Sask. C.A.); ***R. v. Switlishoff***, 1950 CarswellBC 41 (B.C.C.A.)), it is unable to do so, then it is incumbent upon the Court to either increase or decrease the sentence as the circumstances require to achieve a rational relationship to sentences imposed for the same or similar crimes.[6]

The approach to parity articulated in ***Baldhead***, *supra,* was a significant departure from the existing model of sentencing in Canada, which had little regard for other comparable cases. Illustrative of this are the following comments, made in 1957 by the Ontario Court of Appeal:

> . . .It is difficult, if not impossible, to reconcile the sentence in one case with the sentences in other cases. ...It serves little useful purpose and affords little assistance to the Court to know what sentences have been imposed in other countries or jurisdictions or by other Courts.[7]

Following ***Baldhead***, *supra,* confronting the issue of disparity in sentencing began to gain momentum. In fact, the findings of the Canadian Sentencing Commission in its 1987 report, *Sentencing Reform – A Canadian Approach* (the '*Archibald Report*') considered ***Baldhead***, *supra,* and identified disparity as a major structural problem in sentencing.[8]

As a result of these events, the parity principle was eventually legislated into s. 718.2(b), and implemented by Bill C-41, *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof,* S.C. 1995, c. 22. Of note, the legislative scheme enacted by Bill C-41, now known as Part XXIII of the *Criminal Code,* is widely recognized as an effort by Parliament to codify many of the recommendations of the Canadian Sentencing Commission. In fact, the current wording of s. 718.2(b) was adopted almost verbatim from the *Archibald Report*, with the exception of the words "similar offenders",[9] which were added prior to the first reading of the Bill at the House of Commons.

While s. 718.2(b) remains in effect for adults, its progeny, housed in s. 38(2)(b) of the *Youth Criminal Justice Act,* S.C. 2002, c. 1 (the *YCJA*), has a slightly more evolved phrasing, reflecting a regional component of parity, and limiting the consideration from a "similar offence" to the "same offence":

> The sentence must be similar to sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances;

Parenthetically, the regional requirement in s. 38.2(b) of the *YCJA* presumably reflects the comments on this issue from the judiciary, post Bill C-41. Specifically, in ***R. v. M. (C.A.)***, *supra*, at para. 91, the Supreme Court mentioned with approval the ability of a trial judge to assess the particular needs of his or her community when balancing the principles of sentencing.[10]

Finally, in order to govern sentencing courts in their application of the parity principle, in the mid-1990s, an appellate standard of review was developed by the Supreme Court to determine whether intervention would be warranted to correct unjust disparaties. Essentially, appellate courts in Canada have been instructed to follow a deferential approach similar to that articulated in ***Baldhead***, *supra*, and are justified to interfere only if a sentencing judge has made a "substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes".[11] This standard can apply if the sentencing judge opts for a disposition below the appropriate range of sentence,[12] or above it.[13]

THE BALANCING ACT: PARITY APPLIED IN SENTENCING

With these developments in place, issues with respect to the subsequent interpretation of parity as a legislated principle of sentencing have been the subject of discussion by the Supreme Court of Canada on more than one occasion. Helpful guidance is found in ***R. v. Gladue***, *supra*, where the Supreme Court instructed that principles of sentencing are to be considered contextually and collectively:

> The enactment of the new Part XXIII was a watershed, marking the first codification and significant reform of sentencing principles in the history of Canadian criminal law. Each of the provisions of Part XXIII, including s. 718.2(e), must be interpreted in its total context, taking into account its surrounding provisions.

This type of harmonious interpretation of the principles of sentencing allows parity to play a vital role in determining a fit sentence, without compromising its individuality. A good example is found in ***R. v. M. (L.)***, *supra*, at para. 36, where the Supreme Court commented on the consideration of parity and proportionality:

> Owing to the very nature of an individualized sentencing process, sentences imposed for offences of the same type will not always be identical. The principle of parity does not preclude disparity where warranted by the circumstances, because of the principle of proportionality.

This approach also accounts for the fact that no two cases are the same and the concept of similar offences or offenders is often merely a relative hypothetical:

> In practice, similarity is a matter of degree. No two offenders will come before the courts with the same background and experiences, having committed the same crime in the exact same circumstances. Section 718.2(*b*) simply requires that any disparity between sanctions for different offenders be justified.[14]

Finally, interpreting the principles of sentencing collectively represents not only a balanced approach, but a necessary one. It is difficult to imagine an approach to sentencing where its purposes or principles can be applied in isolation. For instance, an argument can be made that parity is inexorably linked to general deterrence or denunciation: in the absence of a rational connection between sentences, no benchmark exists for the court when contemplating the appropriate penalty to reflect the principles of general deterrence or denunciation by the community.[15]

PARITY IN PRACTICE: CO-ACCUSED

In considering parity collectively with other principles of sentencing, a special situation occurs when co-accused are found guilty for the same offence. In these cases, the requirement in s. 718 of the *Criminal Code* of a "similar offence" is obviously met, leaving open the components of a "similar offender" and "similar circumstances". From this perspective, the two most important characteristics when considering parity among co-accused are: (1) the circumstances of the offender and (2) the offender's degree of participation in the crime. Depending on the degree of distinction between these characteristics among the co-accused, an appropriate sentence may be more or less disparate.

A recent example of this situation occurred in ***R. v. Bannon**, supra*. In ***Bannon**, supra,* the Ontario Court of Appeal upheld a trial judge who sentenced an offender to 12 months jail and probation. The offender, then acting police chief of the Anishinabek Police Service, had received some $142,437 between 1999 and 2004, due to his role in a fraud scheme relating to a car dealership. A numbered company representing the fraud dealership had been fined $100,000 for its role in the scheme. In addition, the representative of the dealership, Mr. W., who took an active role in the scheme, had the charges against him withdrawn. At sentencing, the court considered these facts, as well as the recommendation by defence counsel that the accused receive treatment similar to the co-accused numbered company, or Mr. W. The court declined to impose a similar sentence, distinguishing the circumstances of the offender, the nature of the charges, as well as his moral blameworthiness:

> . . .In my view, there is little commonality between Mr. W and Mr. Bannon. Mr. W is a businessman operating Highland Ford, a Ford dealership in the City of Sault Ste. Marie, Ontario. He is not a public official or a public servant. Mr. Bannon was a public official as Chief of Police of the Anishinabek Police Service. He is entrusted with a duty to protect the public and uphold the law. Although count 2 in the indictment relating to Mr. Bannon and count 3 in the indictment relating to Mr. Worth are "similar offences" contemplated by s. 718.2 of the *Criminal Code of Canada,* the charge of breach of trust against Mr. Bannon puts him in a different category of offender than Mr. Worth. This is not a "similar offence" which is a key component in the application of the parity principle in s. 718.2 of the *Criminal Code of Canada*.[16]

Another example of disparate sentences justified between co-accused occurred in ***R. v. Courtney**, supra*. In ***Courtney**, supra*, the offender was sentenced to five years imprisonment for a robbery. His co-accused, W, was convicted of the same robbery and received a sentence of nine months imprisonment. The court dismissed Courtney's sentence appeal, holding that the parity principle did not require the court to impose the same sentences on both co-accused, since Courtney's circumstances lacked parallels with W's – specifically his age, lengthy record, and other offences in connection with the robbery for which only he was convicted.[17]

CONCLUSION

Nearly 50 years after the Saskatchewan Court of Appeal's decision in ***Baldhead**, supra,* the parity principle has evolved into an integral part of a legislated framework which is carefully balanced to adjust to the requirements of individual cases as they arise. As the Supreme Court stated in ***R. v. M. (T.E.)**, supra*:

> Baldhead did no more than confer judicial respectability on an emerging general consensus that the law should award similar sentences for similar crimes, subject to adjustment for factors peculiar to each case. Sentences may properly vary somewhat from case to case to reflect factors peculiar to the particular act and offender on trial. . . . Baldhead expressed the growing view that a measure of uniformity, tempered but not obliterated by considerations particular to each case, must stand as a fundamental goal of sentencing law.[18]

It is important to remember that sentencing is also a very human process. There are, have been and will continue to be cases that are difficult, if not impossible, to reconcile with similar sentences imposed on others. Nevertheless, the court must continue to strive with the difficult task of applying an appropriate measure of consistency to sentences, all the while ensuring that a formalistic approach to parity does not undermine the other principles of sentencing.[19]

1 *Nichomachean Ethics*, Book V, Chapter 3, 1131a 10-b15; 1130b-1132b.
2 See the Sentencing Council (http://sentencingcouncil.judiciary.gov.uk/).
3 See the United States Sentencing Commission (http://www.ussc.gov/).
4 ***R. v. Laliberte*** (2000), 143 C.C.C. (3d) 503 at p. 538, 2000 CarswellSask 132 (Sask C.A.).
5 ***Baldhead, Re**, supra*.
6 ***Baldhead, Re**, supra*, at para. 10.
7 ***R. v. Connor***, 1957 CarswellOnt 141, 118 C.C.C. 237 (Ont. C.A.) at para. 2.
8 See the Archibald Report, s. 2.2 'Disparity in Sentencing'.
9 *Ibid,* at 6.2 *Declaration of Purpose and Principles of Sentencing,* s. 4, c), ii)
10 It is worth noting that the incorporation of a regional aspect of parity caused of some debate at Parliament. See for instance the comments of now-Justice Minister Peter MacKay to the House of Commons on May 29th, 2001, on the issue of the *YCJA*'s parity principle:

> . . .I do not feel that the bill will achieve all those things that need to be achieved in our justice system today.
>
> For example, the bill would give unspecified regions power to customize sentences and trends according to area standards, whatever that means. . . . various sentencing alternatives, which might vary by province, by city and by individual judge or court. For example, para. 38(2)(b) states that sentences must be similar to the sentences imposed in other regions "on similar young persons found guilty of the same offence committed in similar circumstances". . .
>
> For example, if young people were to find themselves charged with first degree murder in my home town of New Glasgow, Nova Scotia, and were taken through the process, would they receive the same treatment, the same end result as they would in Vancouver? That is a test that should be met. The purpose of our federal justice system is to have balance and parity. The very symbols of justice must be balanced. My genuine feeling is that it will not happen. There is a great deal of reason to believe, in looking at the various clauses in the bill, that a parity of justice will not exist. There is nothing to mandate that a young person who commits a deadly crime pays with serious time, regardless of the province in which it is committed.

11 ***R. v. M. (C.A.)**, supra*, at para. 92.
12 See ***R. v. W. (J.J.)***, 2012 NSCA 96, 2012 CarswellNS 699 (N.S.C.A.).
13 ***R. v. Peynado***, 2011 BCCA 524, 2011 CarswellBC 3425 (B.C.C.A.).
14 ***R. v. Ipeelee**, supra*, at para. 79.

15 Paul Forsyth, 'Government Orders – Criminal Code', House of Commons, 35th Parliament, Debates (No. 93), (September 20, 1994), p. 1880, Ottawa: Canadian Government Publishing, 1998.
16 ***R. v. Bannon**, supra*, at para. 35.
17 ***R. v. Courtney**, supra*, at paras. 5-9.
18 ***M. (T.E.)**, supra*, at para. 66 (La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. dissenting).
19 ***R. v. Ipeelee**, supra*, at para. 79.

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