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# CRIMINAL FOCUS

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## Yes, Criminal Focus is Back...

...and yes, it's been a while.

I've had people ask me if they'd done something to offend me, causing me to take them off the mailing list. No, it's not you, it's me. For various reasons, mainly a bout of ill health, I had to cut back my workload over the past year, and clients and their causes always take priority, so some of the little extras—like this newsletter—suffered.

From now on—the Fates willing—I expect to be back at full steam, and getting *Criminal Focus* out on the same schedule as before: once a quarter.

As before, if you are not on the recipients list, and would like to be, drop me a line (contact info. on p. 79). I'll be happy to include you.



## A Question of Quantum: When is a Sentence “Outside the Range”?

*R. v. Bernier*, 2003 BCCA 134

by **Martin F. Allen**

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Poor Mr. Bernier found he had stepped on a veritable land mine when he was sentenced by Mr. Justice Bouck after a conviction for four offences arising out of a so-called “home invasion” ([1999] B.C.J. No. 700 (QL) (S.C.) (“*Bernier*”). On a count of break and enter and commit theft, he was sentenced to fourteen years jail, lesser sentences on the other counts running concurrently. Two co-accused had earlier been sentenced in Provincial Court, after guilty pleas, to terms of nine and twelve months respectively.

Bernier had been convicted as a party, for aiding, and had not been proven to have taken part in the break-in itself, during which some violence had been offered to the victim.

In unanimously reducing the fourteen-year sentence to six years, a five-member panel of the Court provided

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some useful observations and pronouncements on the issue of establishing ranges of sentence, and associated issues, that may be of assistance to counsel in the course of speaking to sentence or conducting sentence appeals.

The learned trial judge in *Bernier* had made reference to the judgments of the Supreme Court of Canada in *R. v. M. (C.A.)* [1996] 1 S.C.R. 500 (“*M. (C.A.)*”) and *R. v. McDonnell*, [1997] 1 S.C.R. 948 (“*McDonnell*”) for the principles (a) that trial judges enjoy a virtually unfettered discretion in sentencing, so long as they respect the statutory range set by Parliament, and (b) that there is really no such thing as a uniform sentence for a particular crime. Consistency in sentencing, he said, was a policy “developed by courts of appeal”. He also noted the fact that, while the policy may tend to encourage consistency within each province, it has less ability to establish consistency Canada-wide, since provincial courts of appeal view each other’s judgments as no more than persuasive, and the Supreme Court of Canada rarely hears sentence appeals.

Bouck J. concluded that authorities such as *M. (C.A.)*, *supra*, espoused “two competing sentencing philosophies”:

One theory states that trial judges have the absolute discretion to give a sentence that falls within the statutory limits set by the *Criminal Code*, providing it reflects “the overall culpability of the offender and the circumstances of the offence”.

The second theory adds a further ingredient. Not only must the sentence comply with the requirements of the first theory, it must also be consistent with similar sentences given in similar cases. Paraphrasing a former Canadian politician of the 1940’s, the law now appears to say this about sentences: consistency if necessary but not necessarily consistency.

Despite his assertion of a “discretionary right” of trial judges to impose any legal sentence, the learned judge went on to cite with apparent approval “another method of sentencing ... that eliminates these conflicts”. The method in question is that in use in other jurisdictions, where sentencing commissions set strict guidelines for each crime, and where appeals are only permitted in cases of sentences falling outside those guidelines.

Bouck J. noted the principles that (a) higher sentences can be a legitimate response to an increased incidence of

## STATUTORY PROVISIONS

### *Criminal Code*, Section 687

(1) Where an appeal is taken against sentence the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,

- (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
- (b) dismiss the appeal.

(2) A judgment of a court of appeal that varies the sentence of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court.

### *Criminal Code*, Section 718

The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, 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 the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

### *Criminal Code*, Section 718.1

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

### *Criminal Code*, Section 718.2

A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account

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for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing:

- (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor, or
- (ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner or child,
- (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
- (iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or
- (v) evidence that the offence was a terrorism offence shall be deemed to be aggravating circumstances;
- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

a particular crime in the community (*R. v. Mikkelson* (1973), 14 C.C.C. (2d) 255 at 256 (Sask. C.A.); *R. v. Wilmott*, [1967] 1 C.C.C. 171 at 179 (Ont. C.A.) ("*Wilmott*")), and that (b) sentencing judges may not take into account the likely availability of early parole (*Wilmott, supra*; *R. v. Heck* (1963), 40 C.R. 142 at 143 (B.C. C.A.)). He then went on to "trump" the latter principle with the former, as had the court in *Wilmott*. Foreshadowing the weighty sentence about to fall on Mr. Bernier's young shoulders, the learned judge cited *Wilmott*, p. 185, as follows: where there has been an "outbreak" of a particular crime in a community,

... it would be proper for a trial court to impose a severe sentence on the offender designed to deter others and it could also do so with the reasonable assurance that with the availability of parole the particular offender would not be incarcerated for a longer period than appropriate, provided always that he shows the necessary qualifications for release.

### **Southin J.A., Hollinrake J.A. concurring**

Counsel for Mr. Bernier on his sentence appeal had listed eight grounds, the first of which was that Bouck J. had erred "in imposing a sentence outside the range for similar offenders and similar offences".

So what is "the range", and what role does it play in sentencing, and in sentence appeals? Madam Justice Southin made it plain that, whatever it is, it is not binding authority:

[I]ts proper use, in my opinion, is only as a short way of describing what the court has done in previous appeals in which the offence and the offender were similar to those in the case at bar. The reason is this: no division of this Court has the power to bind other divisions on future sentence appeals.

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*"While the past is prelude to the present,  
the past cannot always govern the  
present, nor can what we say now  
determine the future."*

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### **Prowse J.A., Levine J.A. concurring**

As always on a sentence appeal, the general rule of deference to the trial judge was affirmed (*R. v. Shropshire*, [1995] 4 S.C.R. 227 ("*Shropshire*"); *M. (C.A.)*, *supra*; *McDonnell*, *supra*; *R. v. Stone*, [1999] 2 S.C.R. 290 ("*Stone*"); *R. v. W. (G.)*, [1999] 3 S.C.R.

597)—with the usual proviso that such deference is displaced whenever the Court concludes that the trial judge has “erred in law, in principle, or otherwise”. Prowse J.A. then addressed the role of the appellate court in relation to “ranges” of sentence.

Firstly, it should only interfere if it is convinced that the sentence is “unfit”, i.e. “clearly unreasonable”. An unreasonable sentence is one falling outside the “acceptable range” (*Shropshire, supra*). As long as the trial judge considered all relevant facts and applied the correct principles, the sentence is fit if it is not clearly excessive or inadequate (*R. v. Muise* (1994), 94 C.C.C. (3d) 119 at 124 (N.S. C.A.)).

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*“[T]he question of whether a sentence falls within an ‘acceptable range’ is clearly a factor for the trial court to consider in imposing sentence, and for an appellate court to consider on reviewing the fitness of the sentence. It is, however, only one of many factors which the courts must take into account.”*

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In *M. (C.A.)*, *supra*, the Supreme Court provided a rationale for this standard of review: minimization of the disparity of sentences imposed on similar offenders for similar offences, throughout Canada. Minimization, that is, subject to a significant remaining degree of disparity that is the inevitable result of the wide discretion vested in sentencing judges, of the differences between sets of circumstances, and of the differing needs and conditions of various communities. Because of these latter factors, intervention to minimize disparity should only occur where the sentence is “in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes”.

In furtherance of this (circumscribed) duty to minimize disparity, provincial appellate courts “may fix ranges for particular categories of offences as guidelines for lower courts”. Those ranges, though, should not be applied so strictly as to “interfere with sentencing judges’ duty to consider all relevant circumstances in sentencing”. No range will be so precise as to apply to every case (*Stone, supra; McDonnell, supra; R. v. Archibald* (1992), 15 B.C.A.C. 301).

That being so, the learned sentencing judge in *Bernier*

had erred in stating that ranges provided by appellate courts amounted to “minimum” and “maximum” sentences by which lower courts were bound.

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*“[R]anges suggested by this Court are simply that – suggestions. They are guidelines, not rules. They are not, nor could they be, mandatory minimum and maximum sentences which demand compliance by trial judges.”*

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Prowse J.A. also noted that the relevance of “range of sentence” was reflected in the Practice Directive of 1998, by which counsel on sentence appeals are required to put forward formal submissions on the appropriate range.

### **Newbury J.A.**

Madam Justice Newbury’s judgment emphasized the limited role for “ranges”, and the central role enjoyed by the statutory principles of sentencing. The learned trial judge, she wrote,

said he considered the principles of sentencing in Part XXIII of the *Criminal Code* but, with respect, those principles are not reflected in his Reasons or in his disposition of the case.

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*“Not surprisingly, having allowed general deterrence to overwhelm all the other principles of sentencing and their application to this offender, [the learned trial judge] reached an entirely unfit sentence.”*

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“Ranges”, wrote Newbury J.A., with reference to *R. v. Proulx*, [2000] 1 S.C.R. 61 and *McDonnell, supra*, “are general guidelines, not hard and fast categories”:

They do not preclude lesser or greater sentences, if the circumstances or applicable principles in the particular case warrant.

...

I find it useful to regard a range simply as a continuum within which cases may be placed, depending on their facts and their relationship to the principles of sentencing. At one end of the continuum, a serious offence may have been carried out in a particularly egregious way; defenceless people may have been injured, perhaps cruelly; the perpetrator may have a long record; and none of the usual mitigating circumstances may exist.

Obviously, deterrence, denunciation and protection of the public will be the most important principles

to be considered in such cases. In the middle of the continuum, one would place a "typical" case, where the circumstances are not so serious and the offender not particularly hardened by record or otherwise. At the other extreme, one would place those instances where the offence was not egregious, there is hope the offender may be rehabilitated, he or she does not have a significant record and there are mitigating circumstances, such as the offender's youth, aboriginal status, evidence of remorse, etc. At the time of sentencing, counsel provide the trial court with cases which fit into roughly the same place on the continuum to show what other courts have found to be a reasonable sentence for the type of offence and offender they are concerned with. Depending on how broadly or how narrowly counsel define the salient facts, the "range" of sentence will be broader or narrower. Thus differences in these "ranges" do not necessarily indicate a "conflict". The important point is that there will be cases that are so egregious that they should be placed at the high end or even beyond, just as there will be cases where not even the low end of the range will be an appropriate sentence."

Despite her agreement with the suggestion of Southin J.A., that courts should concentrate on applying the codified principles of sentencing, rather than on "ranges", Newbury J.A. acknowledged that reference by counsel to "ranges" in the course of sentencing submissions is still a "convenient shorthand", and one approved by the Supreme Court of Canada in cases such as *M. (C.A.)*, *supra*.

In the final analysis, the Court agreed that a fourteen-

year sentence in this case was clearly outside the range, and was contrary to the principles of sentencing. It was reduced to six years. Worthy of note is the final paragraph in the reasons of Newbury J.A., in which she states that, in fact, the circumstances of Mr. Bernier and his offence actually placed him "at the low end of the continuum discussed above", and appears to suggest that she would have reduced his sentence further, were it not for the fact that even the six-year disposition favoured by her colleagues would place him past his statutory release date.

Newbury J.A., noting further that Mr. Bernier had only been found to have aided a home invasion, and had not been convicted as a principal participant, confirmed that while the *Criminal Code* states that a party is guilty of the same crime as the principal, his lesser role will still be relevant at sentencing.

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*"The trial judge decided to make a point in this case. He decided to depart from what he called the "standard range of four to nine years" in order to deter others from committing home invasions in the future...His apparent expectation that the sentence would deter others from committing home invasions has obviously not come to fruition given the blight of such crimes that are still continuing to this day."*

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## Also of Note

As mentioned above, Bouck J., in his recitation of sentencing principles, external to the *Code* provisions, cited *Wilmott* for the proposition that an “outbreak” of serious offences in a community can be justification for a higher than usual sentence, since the sentencing judge can take comfort in the assumption that the offender will be afforded early parole.

Southin J.A. pointed out that, at least in the circumstances of Mr. Bernier, that was an error: s. 129 of the *Corrections and Conditional Release Act* empowers the prison authorities to refuse to parole a person jailed for one of a list of offences, including robbery.

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*“[J]udges, in determining a fit sentence, are to put the powers conferred by the Corrections and Conditional Release Act on the National Parole Board out of their minds. Parliament has given certain powers to the judiciary and others to the Board and it is not for the one to trespass into the field of the other.”*

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In any event, as Prowse J.A. pointed out,

to the extent the *Wilmott* decision suggests that the availability of parole is a factor which can be relied upon by a trial judge to increase a sentence, it does not accord with decisions of this Court (see, for example, *R. v. Holden*, [1963] 2 C.C.C. 394 (B.C. C.A.)). Such a view also appears to presuppose that the effect of early parole is to reduce the length of an offender’s sentence. That is not the case... [citing *M. (C.A.)*, *supra*, at para. 62]



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